SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Dennis*, 2026 NSSC 97

Date: 20260318
Docket: *Syd* No. 527705
Registry: Sydney

Between:

His Majesty the King

v.

Anthanasius Dennis

Judge: The Honourable Justice D. Shane Russell

Heard: March 12, 2026, in Sydney, Nova Scotia

Counsel: Adam Rodgers, for the Accused
Sandee Smordin & Marc Njoh, for the Crown

By the Court:

INTRODUCTION

[1] Mr. Dennis is charged with second degree murder. The offence is alleged to have occurred on August 9, 2021. The information was sworn in Provincial Court on May 5, 2023. The matter is set to proceed to trial on April 1, 2026, and conclude on May 1, 2026.

[2] The presumptive *Jordan* ceiling is 30 months (913 days). The time between the swearing of the information and anticipated conclusion of trial is 35 months and 27 days (1093 days). The presumptive *Jordan* ceiling is exceeded by 180 days.

[3] On December 24, 2025, the Accused filed a motion under Section 11(b) of the *Charter* alleging unreasonable delay. The Accused moves for a stay of proceedings. The motion was heard on March 12, 2026.

TIMELINE

[4] While I have reviewed all dates, I do not intend to recite each one in this summary.

May 5, 2023	The accused is charged with second-degree murder. Information is sworn. The presumptive *Jordan* ceiling is November 5, 2025. Matter adjourned to retain of counsel. Waiver of delay is not explored.

May 8, 2023	Matter adjourned. Additional time required to retain counsel. Waiver of delay is not explored.
June 6, 2023	Counsel (Mr. David Iannetti) confirmed. Adjourned defence request. Waiver of delay is not explored.
July 6, 2023	Preliminary inquiry scheduled for January 3, 2024**.**
August 8, 2023	Consent joinder of preliminary with co-accused. Preliminary rescheduled to September 29, 2023**.**
September 29, 2023	Accused waives preliminary inquiry and is committed to stand trial.
October 25, 2023	Scheduling Coordinator for Supreme Court sends an email to the Crown and Mr. Iannetti requesting trial time estimates. Mr. Iannetti does not respond.
October 30, 2023	First appearance in Supreme Court. Adjourned at request of counsel to review trial time estimates. Mr. Iannetti indicates he has not spoken to the Crown. Waiver of delay is not explored.
November 20, 2023	The Crown sends an email to Mr. Iannetti requesting a meeting to discuss trial time estimates. Mr. Iannetti does not respond.
November 30, 2023	Scheduling Coordinator sends a second email to the Crown and Mr. Iannetti requesting trial time estimates. Mr. Iannetti does not respond.
December 11, 2023	Adjourned one week to allow further scheduling discussions between counsel. Waiver of delay is not explored. The Crown sends Mr. Iannetti an email requesting a meeting to discuss trial time estimates. The Crown and Defence meet, other matters are discussed including bail and resolution, but not trial time estimates.
December 18, 2023	Crown, Court, and Mr. Iannetti present; the accused refuses to attend. Adjourned to January 8, 2024**.**
January 8, 2024	Joint request for adjournment to discuss trial time estimates and other pretrial issues. Waiver of delay is not explored.
January 8-9, 2024	Bail hearing held before Justice Rosinski. Decision reserved to February 2, 2024**.**
January 29, 2024	Trial scheduled for January 27 – February 14, 2025.

February 2, 2024	Bail denied.
February 12, 2024. **April 29, 2024.** **August 7, 2024.** **September 6, 2024.** **October 28, 2024.** **December 19, 2024**	Multiple pre-trial appearances occur. Despite all participants being aware that bail had been denied, there is no discussion of seeking an earlier trial date. The accused does not request an expedited trial nor is the possibility raised by either the Crown or the presiding justice.
January 20, 2025	Seven days before the scheduled start of trial, Mr. Browne, an associate from Mr. Iannetti's office, appears on his behalf. Justice Murray is set to be the trial justice. Mr. Browne advises the court that defence are seeking an adjournment of the trial. Mr. Iannetti's health prevents him from representing the accused at the upcoming trial. The Crown will only consent to the request if the accused expressly waives delay. Mr. Browne advises that the accused has instructed both he and Mr. Iannetti to waive delay. Although Mr. Iannetti was not present, the accused is provided an opportunity at the break to speak with him privately by telephone. When the matter resumes, Justice Murray confirms with the accused that counsel has explained waiver and that he is waiving delay. The accused responds, **"***Yes, that's correct***."** On that basis, the Crown consents to the adjournment. Justice Murray states that earlier trial dates of March 3–21, 2025 have been offered, but Mr. Iannetti is unavailable. Further scheduling is deferred to February 18, when Mr. Iannetti can attend. Before the appearance concludes, the accused requests to appear by video at the next appearance and states: **"***Okay, And also I was wondering if I could get a court package because like they said it's been 21 months, and I haven't got my disclosure*." The Crown advises that disclosure has been provided to Mr. Iannetti, and the accused is directed to raise the matter with him. The accused further states: **"***And that's the thing, My Lord, he, he dropped me, so he's no longer representing me. So how am I going to get disclosure from him when he's not representing me anymore?***"** This is the first indication that Mr. Iannetti may no longer be counsel. Justice Murray is surprised as this is inconsistent with all prior representations, including those made minutes earlier. Mr. Browne advises this issue will be addressed between the accused and Mr. Iannetti.

	Justice Murray again seeks clarification of the accused's position regarding waiver. The accused responds: **"***Well, I went down there (referring to cells that morning) and I wasn't given an option, right? He (Mr. Iannetti) told me either I go to trial in a week all by myself with no lawyer or I'd have to waive my rights to the Jordan application. So, I'm, I,' - I have to waive my right. I, I got no disclosure and I can't go myself into trial next week. How am I going to do that when I never seen a single paper? But I am going to waive my right because I have no choice. I can't go to trial next week all by myself.***"** Justice Murray: **"***You can't be forced to waive your right***."** Accused: **"***I can't go to court all by myself*." Justice Murray: **"***I understand***."** Accused: **"***I never got my disclosure," "I don't know the information.***"** Justice Murray: **"***Mr. Dennis, I'm not going to accept the waiver for today's purposes. Okay?***"** Accused: **"***yeah***."** After a brief recess, Justice Murray summarizes what he describes as **"***troubling***"** circumstances. He notes the initial expression of waiver, the later comments concerning disclosure, and the suggestion that Mr. Iannetti may no longer be counsel. He emphasizes that the Court can not interfere in the solicitor–client relationship but that the comments raise a significant concern. Justice Murray determines that he will not accept any waiver unless and until he hears directly from Mr. Iannetti following full consultation with the accused. Justice Murray reiterates that an accused cannot be compelled to waive rights, particularly where an adjournment request is prompted by counsel's medical or health-related issues. Justice Murray grants the adjournment. The matter is set over to determine whether Mr. Iannetti will continue to act as counsel and, if necessary, receive directions from new counsel. Justice Murray states: **"***My decision will be to allow the adjournment request because it simply cannot proceed on a charge of this nature within the timeframe available. Mr. Dennis is certainly not in a position to defend himself and probably does not want to defend himself. He wants to have counsel naturally. He is*

	*facing a charge of murder pursuant to section 235 of the Criminal Code. So, the adjournment is granted notwithstanding whether there will be waiver or not. These matters will be taken up on the 18th of February, including whether Mr. Iannetti will continue to represent Mr. Dennis at that time. And then depending on whether he is or he isn't, then we have to hear from future counsel with respect to what Mr. Dennis is prepared to do or not do once he's fully informed." I am not suggesting he hasn't been fully informed. I am merely suggesting that the Court has presented with a situation for the reason I have indicated which call for the decision to be made by the court on its own.***"***
January 27, 2025	The matter is before me for the first time in chambers. Mr. Iannetti is present and makes a formal application to withdraw as counsel. He advises that he has spoken with the accused about the application and states that, due to recurring health issues, he is unable to continue. The accused confirms his awareness of the application and the reasons for counsel's withdrawal. Mr. Matt MacNeil, Managing Lawyer for Legal Aid, appears and advises that efforts are actively underway to secure new counsel for the accused. Given the circumstances, Mr. Iannetti's application to withdraw is granted, and the matter is adjourned one week, reflecting the urgency of the situation.
February 3, 2025	The matter returns before me for the second time. New counsel has yet to be secured. There is an indication that Mr. Mark Bailey may represent the accused; however, the accused has not yet met with him. The matter is adjourned for two weeks.
February 18, 2025	The accused advises Justice Murray that he continues to experience difficulty obtaining counsel. Mr. MacNeil confirms that efforts to assist the accused in securing new counsel are ongoing and further time is required. Recognizing the urgency, Justice Murray adjourns the matter for two weeks only.
March 3, 2025	Mr. MacNeil appears and advises that Legal Aid continues its efforts in securing counsel. The Crown stresses the urgency of rescheduling the trial. Justice Murray agrees that new trial dates should be set **"***as quickly as possible***,"** while emphasizing the importance of the accused having counsel in place. The matter is adjourned for a further two weeks.

March 17, 2025	This matter appears before me for the third time. Both the accused and Mr. MacNeil advise that counsel has still not been retained and that securing representation remains challenging. Several local lawyers face conflicts, and others are unable to accept a matter of this nature due to existing commitments. Mr. MacNeil indicates they remain hopeful that counsel can be secured within two weeks and requests a further adjournment. The Crown reiterates that it is ready to set new trial dates and would be urging the Court to do so at the next appearance regardless of whether counsel has been retained. Recognizing the urgency, and agreeing with the Crown, I grant an adjournment of one week only, at which time new trial dates will be scheduled.
March 24, 2025	Mr. MacNeil advises that new counsel is still not secured, despite considerable effort on his part. Approximately two months have now passed since the original trial was adjourned. The anticipated length of trial (three weeks) is discussed. After inquiry with the scheduling coordinator, Justice Murray is advised that the earliest available three-week block for a jury trial is January 11–29, 2027. Other than the Crown expressing concern about trial dates extending into early 2027, there is no suggestion that other matters ought to be reprioritized to accommodate an earlier date. Justice Murray proceeds to schedule the trial for January 11–29, 2027, acknowledging that these dates are outside the presumptive *Jordan* limit. He states: **"***Well, the court's major concern is that this is well beyond the Jordan timeline. But these are the first available dates that we can offer at this time. Okay. I'm going to set this matter down for trial. Mr. Dennis, we have little choice but to set this matter down for trial. It's down the road. You will be able to continue to work with counsel. And depending, and hopefully you will be able to retain counsel. Once that occurs sir, the dates will naturally be discussed with your new counsel, and depending on what the response is it's well in- well down the road unfortunately. Then if they have to be revisited with new counsel so, be it. But to continue to adjourn without more certainty than we have at the moment, as you know, sir, and I say this respectfully, the matter has been appearing and appearing and appearing. Not through lack of effort on your part, but we just can't have it like that anymore, or any longer***."** The matter is adjourned two weeks for further status on counsel.

April 7, 2025	Mr. MacNeil advises that Mr. Adam Rodgers of Nova Scotia Legal Aid has expressed willingness to act for the accused. Mr. Rodgers is unable to attend on this date due to the short notice. Mr. MacNeil indicates that Mr. Rodgers would likely be available for the trial dates as tentatively scheduled. The matter is adjourned one week.
April 14, 2025	The matter appears before me for the fourth time. Mr. Rodgers confirms that he has been retained. He states: **"**I have not yet received disclosure but certainly prepared to go on the record and accept trial dates. I know that there was some proposed trial dates or provisional trial dates set aside.**"** He is asked whether the dates worked for him, and confirms they do. When it is pointed out that the dates are not until 2027, Mr. Rodgers responds: **"**2027, yes**."** Filing deadlines are set for pre-trial memoranda and the pre-trial conference. Mr. Rodgers requests that the pre-trial be put over to the second week of June. He is unavailable for most of May. He is offered June 9, 2025, but is also unavailable. The first pre-trial conference is scheduled for June 16, 2025, the earliest date Mr. Rodgers is available.
June 16, 2025	The pre-trial takes place before Justice Murray. Justice Murray reviews several matters, one of which is confirmation that the accused is not pursuing a section 11(b) *Jordan* application. This is consistent with what was noted by Mr. Rodgers on the pre-trial memorandum. The Crown and defence request additional time to further consider issues raised in their pre-trial memoranda which are identified by Justice Murray. A further pre-trial date of July 9, 2025, is offered; however, Mr. Rodgers is unavailable. Crown counsel suggested, without any objection from defence, that the next pre-trial be set in the fall. The date ultimately settled upon is November 3, 2025.
November 3, 2025	The pre-trial continuation is scheduled before me in chambers. Some contextual background is necessary. Justice Murray retired in the first week of August. From that point until November 28, 2025, I was the sole presiding justice of the Supreme Court (General Division) in Cape Breton. This period required the consolidation of two judicial dockets, my own and Justice Murray's. For approximately 4 months all matters in the Cape Breton region were handled by me with the exception of several visiting justices who graciously covered where their own otherwise busy dockets permitted.

	Before the November 3 pre-trial, it had been noted that the accused's trial date fell beyond the presumptive *Jordan* ceiling of November 5, 2025. Mr. Dennis is an Indigenous Accused, presumed innocent, and on remand. This weighed heavily. Prior to the November 3, 2025, appearance and any formal indication of a pending 11(b) *Jordan* application options were being considered to ensure that this matter could be heard sooner. At this appearance, counsel advised that multiple pre-trial applications would be required, in the areas of hearsay, post-offence conduct, and statements. It was at this conference that Mr. Rodgers first advised that his client had instructed him to pursue a section 11(b) *Jordan* application. Upon learning this, the Crown suggested that the Court examine earlier trial dates and offered to adjust its own schedule to accommodate the same. Crown counsel stated, **"***given that my friend has flagged a live Jordan issue, I feel it is incumbent to request earlier trial dates if possible***."** Knowing that an early trial date could only work if defence counsel was available Mr. Rodgers was asked to provide his scheduling availability from that point to the scheduled trial of January 11, 2027. Mr. Rodgers advised that the earliest he could be available was April 1, 2026, to May 1, 2026. He also offered the following additional dates: • June 22 – July 31, 2026 • August 17 – September 4, 2026 • September 14 – October 2, 2026 • November 2, 2026 – January 8, 2027 I then inquired whether the Crown could be available on any of those same dates. The Crown confirmed it could be with the exception of those in September 2026. I stated that I would consult with scheduling. I also noted that I was prepared to see whether the matter could be scheduled before me or before a visiting justice now that Justice Murray had retired. Although my own availability was extremely limited, I effectively assigned myself to this file and undertook to explore all possibilities including whether I could personally hear the matter sooner.
December 8, 2025	At this pre-trial appearance, Mr. Rodgers advised the Court of a change in his availability. He was no longer available on April 20, 22, 23, 24, and 28, 2026 due to a prior commitment. As a result, a detailed discussion occurred regarding whether a tentative trial date

	could be accommodated between April 1, 2026, and May 1, 2026, excluding the week in which Mr. Rodgers was unavailable. This remained the earliest period in which defence counsel could proceed and was logically the most suitable window for scheduling. Mr. Rodgers advised that since the last appearance his schedule had significantly opened for May 2026. The Crown indicated it would be available during that period as well. Counsel was to consider whether the matter would proceed as a jury trial or be heard by judge alone. Mr. Rodgers was given time before the return date to discuss with his client the possibility of re-election to judge alone. It was emphasized repeatedly that the decision rested solely with the accused, and that the Court would continue to seek the earliest possible date regardless of mode of trial. A robust on the record discussion followed, with participation from the scheduling coordinator. This matter was tentatively double booked with another homicide trial that I was scheduled to hear between March 30, 2026, and May 1, 2026. There were indications that the other homicide might resolve, and if not, there remained the possibility of Halifax scheduling freeing up a visiting justice to hear this case. The details of these discussions are fully reflected in the transcript and need not be repeated here. At this stage, a formal *Jordan* application had still not been filed. Nevertheless, I proactively set filing and hearing dates. The matter was adjourned for one week to permit updates on trial scheduling.
December 15, 2025	It is confirmed that the trial remains tentatively double-booked for March 30, 2026, to May 1, 2026. Due to a mix-up regarding the accused's placement, Mr. Rodgers was unable to meet with his client following the last pre-trial. A further pre-trial date is set, and given the urgency of the matter, it is scheduled to return later the same week.
December 18, 2025	The accused advises that he is re-electing to trial by judge alone, with the Crown's consent. Following further scheduling discussions, the trial is confirmed for March 30, 2026, to May 1, 2026, excluding April 20, 22, 23, and 28, when defence counsel was unavailable.
December 24, 2025	The accused formally files the section 11(b) *Jordan* application with the Court.
January 14, 2026	Further discussions occur regarding the double-booked trial dates. The Court advises that the other homicide had not yet formally resolved and that, if it does not, the Court is still awaiting

	confirmation on which visiting justice will be appointed for this trial. Counsel is reminded to proceed on the basis that the trial will move forward on the scheduled dates. The trial dates are further refined to accommodate Mr. Rodgers' availability. The trial is set between April 1, 2026, and May 1, 2026, excluding April 20, 22, 23, and 24. A detailed pre-trial is conducted addressing the various identified pre-trial issues.
February 11, 2026	The section 11(b) *Jordan* application is scheduled to proceed. Counsel is advised that although the double-booked homicide matter has not resolved, Justice Norton is confirmed to be the trial Justice. Upon hearing this update, Mr. Rodgers requests a brief recess to consult with his client. When the matter resumes, he requests an adjournment of the *Jordan* application. The application is adjourned to March 11, 2026.
March 12, 2026	The application does not proceed on March 11,2026 but rather takes place a day later in order to accommodate Mr. Rodgers' schedule.

THE LAW

The *Jordan* Framework

[5] *R. v. Jordan*, 2016 SCC 27, and *R. v. Cody*, 2017 SCC 31, remain the leading authorities on trial delay. In this province, the most recent appellate guidance is found in *R. v. Zaki*, 2025 NSCA 63, and *R. v. Wetmore*, 2025 NSCA 82. The key principles of the *Jordan* framework are well established. However, given the seemingly limitless variables in any case, an evolving body of nuanced caselaw has developed. As a result, the analysis remains contextual and fact-specific.

[6] In *Jordan*, the Supreme Court of Canada wished to address what they referred to as a "culture of complacency towards delay": *Jordan,* at paras. 4, 40-41. Things had to change:

> 107... The ceiling will not permit the parties or the courts to operate business as usual. The ceiling is designed to encourage conduct and the allocation of resources that promote timely trials. The jurisprudence from the past decade demonstrates that the current approach to s. 11(*b*) does not encourage good behaviour…

[7] The Court made clear that preventing delay is a shared responsibility between the Crown, defence, and the court: *Jordan,* at paras. 86, 137-139. All participants must be proactive and efficient in maximizing scarce resources. Trial delay is not merely an inconvenience it is contrary to the *Charter*.

[8] The *Jordan* framework can be summarized in the following steps:

A. Calculate the total delay. The court must calculate the total delay, which extends from the laying of the charge to the actual or anticipated end of the trial.

B. Calculate the net delay. Net delay is calculated by subtracting defence delay from the total delay. There are two types of defence delay, each of which must be considered and, if present, subtracted.

i. Subtract delay that is waived by the defence. Delay that is clearly and unequivocally waived by the defence, either explicitly or implicitly, must be subtracted from the total delay.

ii. Subtract delay that lies at the feet of the defence. This is delay that is caused solely or directly by the defences' conduct.

C. Compare the net delay to the applicable presumptive ceiling. The applicable presumptive ceiling is 30 months for cases tried in the Supreme Court. If the net delay is above the ceiling, the delay is presumptively unreasonable, and the Crown bears the burden of rebutting this presumption by demonstrating that there are exceptional circumstances, which include discrete, unforeseen events and particularly complex cases.

D. Consider exceptional circumstances. These circumstances do not need to be rare or uncommon; rather, they must lie beyond the Crown's control, in that they are reasonably unforeseen or reasonably unavoidable and, in either case, result in delay that cannot be reasonably remedied by the Crown. In general, the Crown may satisfy its onus by relying on two categories of exceptional circumstances, being discrete events and particularly complex cases.

i. Consider discrete exceptional circumstances. Discrete exceptional circumstances are unexpected and uncontrollable happenings which lead to delay. Where the remaining delay continues to exceed the presumptive ceiling, even after accounting for discrete events that could not be reasonably mitigated by the Crown and the justice system, a stay will be entered unless the Crown can demonstrate that the remaining delay is justified in light of the particular complexity of the case.

ii. Consider complexity. The remaining delay may be justified by the Crown where the case is "particularly complex". If the remaining delay cannot be justified based on the particular complexity of the case, a stay will be entered.

E. If the net delay is below the ceiling, the delay is presumptively reasonable unless the defence can show that it took meaningful steps demonstrating a sustained effort to expedite the proceedings and that the case took markedly longer than it reasonably should have *Jordan,* at paras. 82-91.

[9] I will later apply each of these steps to the case before me. Before doing so, I wish to examine in greater detail the legal principles underlying specific aspects of

the framework. Specifically, defence delay, waiver, apportionment, obligations of counsel, obligations of the court, exceptional circumstances, discrete events, and case complexity.

Defence Delay

[10] As stated in *Jordan*:

> [61] Defence delay has two components. The first is delay waived by the defence. [...] Waiver can be explicit or implicit, but in either case, it must be clear and unequivocal. The accused must have full knowledge of his or her rights, as well as the effect waiver will have on those rights. [...] It must be remembered that it is not the right itself, which is being waived, but merely the inclusion of specific periods in the overall assessment of reasonableness [...]

[11] In *Cody*, the Court explained the second component of what amounts to defence delay:

> 28 In broad terms, the second component is concerned with defence conduct and is intended to prevent the defence from benefitting from "its own delay-causing action or inaction" (*Jordan*, at para. 113). It applies to any situation where the defence conduct has "solely or directly" caused the delay (*Jordan*, at para. 66).
>
> 29 However, not all delay caused by defence conduct should be deducted under this component. In setting the presumptive ceilings, this Court recognized that an accused person's right to make full answer and defence requires that the defence be permitted time to prepare and present its case. To this end, the presumptive ceilings of 30 months and 18 months have "already accounted for [the] procedural requirements" of an accused person's case (*Jordan*, at para. 65; see also paras. 53 and 83). For this reason, "defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay" and should not be deducted (*Jordan*, at para. 65).
>
> 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).

[12] It should be noted, however, 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 paras. 63-64. In addition, defence delay does not include defence actions taken in response to negligent Crown conduct, such as late disclosure, even where such conduct is not deliberate.

Waiver

[13] Waiver implies a choice and waiver can not be inferred. The following passage from *Wetmore*, illustrates this point:

> [20] In *Jordan*, Justice Cromwell observed that waiver implies a choice. No waiver can be inferred simply because an accused accepts the only trial dates offered:
>
> > [191] I conclude that, ***when the accused consents to a date for trial offered by the court or to an adjournment sought by the Crown, that consent, without more, does not amount to waiver***. The onus is on the Crown to demonstrate that this period is waived, that is, that the accused's conduct reveals something more than "mere acquiescence in the inevitable" and that it meets the high bar of being clear, unequivocal, and informed acceptance that the period of time will not count against the state.

[Emphasis added]

[14] A waiver of delay may be "explicit or implicit, but in either case it must be clear and unequivocal": *Wetmore at* para. 18.

[15] Furthermore, waiver cannot be inferred solely from an accused's silence or failure to act *R. v. J.F.*, 2022 SCC 17, para. 52. The Crown bears the burden of proving waiver: *J.F.*, paras. 45 – 48. Furthermore, the Supreme Court of Canada in *R. v. Askov* [1990] 2 S.C.R. stated:

> [106] The term "waiver" indicates that a choice has been made between available options. When the entire record of the proceedings on the occasion when the last trial date was fixed is read, it becomes crystal clear that the appellants had no choice as to the date of the trial. The first available dates were given and allotted to these appellants. Unless some real option is available, there can be no choice exercised and as a result waiver is impossible.

[16] In *Wetmore*, when the adjournment was granted, neither the Crown nor the accused knew when new trial dates would become available. Consequently, the accused's later acceptance of the proposed dates did not constitute a waiver; the Court characterized this as "yielding to the inevitable." "It would have been an error of law to find Mr. Wetmore waived time by acquiescing in the only trial dates offered" (para. 23).

Apportionment of Delay and Rejection of the Bright-Line Rule

[17] Recently, our Court of Appeal in *Wetmore* adopted the apportionment of delay framework as outlined in *R. v. Bowen-Wright*, 2024 ONSC 293:

> **46** In *Bowen-Wright*, the Ontario Superior Court summarized the principles applicable to attribution of delay flowing from an adjournment:
>
> > [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. 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.
> >
> > [...]
> >
> > [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***."
> >
> > [45]In *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3, at para. 23, the court stated: ***"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." The respondent submits that *Godin*, which was decided before *Jordan*, no longer represents the law. I do not agree. Nordheimer J.A. relied on *Godin* at para.136 of his dissent in *Hanan* and the Supreme Court of Canada specifically adopted that paragraph: *Hanan* (S.C.C.), at para. 9. See also *R. v. Safdar*, 2021 ONCA 207, 469 D.L.R. (4th) 447, at paras. 49-50; *R. v. Cohen*, 2023 ONSC 5713, at paras. 30-33; *R. v. Joseph*, 2023 ONSC 2833, at para. 33, *R. v. Aden*, 2023 ONSC 766, 523 C.R.R. (2d) 28, at para. 99; *Barrett*, at paras. 52-53.
> >
> > [Emphasis added]

[18] The Court in *Wetmore* further stated:

> 48 Bowen-*Wright* described some of the considerations relevant to deciding whether delay should be ascribed to the defence:
>
> > [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:
> >
> > - 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.

[19] In addition, Courts have refined the seemingly absolute rule that delay arising from counsel's unavailability is always defence delay. In *R. v. Boulanger*, 2022 SCC 2, the Court held that "in some cases, the circumstances may justify apportioning responsibility for delay among these participants rather than attributing the entire delay to the defence" (para. 8). This point was further developed in *R. v. Hanan*, [2023] S.C.J. No. 101, where the Court rejected the "bright-line" rule proposed by the Crown:

> 9 […] 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. […] <u>All relevant circumstances should be considered to determine how delay should be apportioned among the participants</u> (*R. v. Boulanger*, <u>2022 SCC 2</u>, at para. 8) […]
>
> [Emphasis added]

[20] The Nova Scotia Court of Appeal has also recently confirmed the rejection of the "bright line" rule in *Wetmore*.

[21] The qualification in *Hanan* has not been interpreted as relieving the defence of all responsibility regarding availability. As the Ontario Court of Appeal has observed, "while *Hanan* rejects a bright-line rule apportioning the defence with all of the delay after it rejects an available date, it did not adopt an inverse bright-line rule apportioning the defence with none of the delay. Instead, it directs courts to consider "all relevant circumstances' to apportion the delay among the parties": *R. v. Jones*, [2025] OJ No 625, at para. 32. Applying *Hanan*'s instruction to assess all relevant circumstances, the Court in *Jones* stated:

> 36 On the one hand, defence counsel's unavailability contributed to the delay until November 2. On the other hand, the court offered only three consecutive days in a single week, followed by no availability for 40 days for a JPT. Defence counsel are not required to hold themselves in a state of perpetual availability: *Godin*, at para. 23. These are the totality of circumstances whose consideration *Hanan* requires. In my view, on the particular facts in this case, a fair and reasonable apportionment of the delay is to attribute 21 days of this period to the defence, and 22 days as institutional delay which is factored in as part of the total delay in the *Jordan* framework.

[22] The Ontario Court of Appeal again considered apportionment of delay in *R v KD*, [2025] OJ No 4061 and added the following:

> 46 […] nothing in *Hanan* limits the principle that "'all relevant circumstances should be considered to determine how delay should be apportioned among the participants" (*Hanan*, at para. 9). To be clear, it is not that the apportionment of delay is warranted in every case, but rather that the circumstances of every case must be considered to determine *whether* apportionment is warranted: see also *R. v. Boulanger*, 2022 SCC 2, at para. 8.

Apportionment and Crown Inaction

[23] Most recently, in *R v Qureshi*, 2026 ONCA 20 the Ontario Court of Appeal considered the Crown's inaction in the *Jordan* matrix. The Court commented on the Crown's handling of trial dates as the *Jordan* ceiling approached:

> 33 The trial judge recognized that the operation of a bright-line rule as set out in *Jordan* had been reconsidered. But he then found that the Crown's inaction was not relevant to assessing whether the period should be characterized as defence delay.
>
> 34 Respectfully, the Crown's inaction was a relevant circumstance. The Crown only offered the earlier dates on December 13, 2022. By that point, the trial dates that far exceeded the appellant's presumptive ceiling had been set for nearly five months. The Crown did not offer the seven other blocks of dates (all of which still exceeded the presumptive ceiling) until one week after the defence had scheduled a s. 11(b) hearing. Contrary to the respondent's submissions, this was not "proactive" on the Crown's part, and it did not demonstrate "initiative". On this record, the Crown sat on its hands for months and, to use the language of the Supreme Court, only "kick[ed] into gear" when the appellant's *Jordan* ceiling was coming into view: *R. v. K.J.M.*, 2019 SCC 55, [2019] 4 S.C.R. 39, at para. 81 […]
>
> 35 In sum, the Crown's inaction for months […] was one of the circumstances to consider in determining how to apportion this period of delay. Moreover, ignoring the Crown inaction […]is inconsistent with encouraging criminal justice system participants to take a proactive and cooperative approach with a view to fulfilling s. 11(b)'s important objectives. It is also inconsistent with the principle that the presumptive ceiling dates are not aspirational dates: *Jordan*, at para. 56. The Crown should not wait until the 18-month mark is within eyesight before becoming "proactive" to alleviate delay. This type of behaviour "is precisely the sort of normalized indifference towards delay that prompted Jordan": *K.J.M.*, at para. 81.

Defence Obligation of Timely Notice

[24] Defence counsel is expected to raise any section 11(b) concerns when trial dates are set. Silence at that stage deprives the Crown and the court of a meaningful

opportunity to mitigate delay, including by seeking earlier dates or by prioritizing or stacking the matter where scheduling practice permits.

[25] Courts have recognized that where trial dates are set above the *Jordan* ceiling and defence remains silent, a portion of the period from the date set to the anticipated end of trial may be attributed to defence delay: *R. v. Nigro*, 2023 ONCJ 41 at paras. 34-38; *R. v. Kullab*, 2023 ONCJ 458 at paras. 19-32; *R. v. Robins*, 2024 ONCJ 12 at paras. 17-35; *R. v. Lokubalasuriya*, 2024 ONCJ 46 supra at paras. 12-23; *R. v. Alsouki*, 2024 ONCJ 9 at paras. 13- 35; *R. v. Wang*, 2024 ONCJ 177 at paras. 19-29; *R. v. Wright*, 2024 ONSC 1893 at paras. 22-34 and *R. v. Andrew*, 2024 ONSC 607 at para. 18.

[26] The duty imposed on defence is not optional. It creates a positive obligation to raise issues in a timely manner so mitigative steps can take place: *R. v. Vallotton*, 2024 ONCA 492 at paras. 29-31; *R. v. Mengistu*, 2024 ONCA 575 at paras. 38-44.

[27] The obligations of defence counsel were well articulated in *R. v. Norton*, [2019] BCJ no 1262:

> 38 The lack of earlier notice by defence counsel is also important to the assessment of the potential for reasonable mitigation of delay by the Crown and the system, particularly when a case is still below the presumptive ceiling. As noted in *R. v. Carter*, 2018 ABQB 657 at para. 27, "[e]arly complaints or applications about unreasonable delay allow all participants, including the court, to investigate options to mitigate the delay." Similarly, the Court indicated as follows

in *Jordan* at para. 85 in the context of considering whether the defence has taken meaningful and sustained steps:

> [85] To satisfy this criterion, it is not enough for the defence to make token efforts such as to simply put on the record that it wanted an earlier trial date. Since the defence benefits from a strong presumption in favour of a stay once the ceiling is exceeded, it is incumbent on the defence, in order to justify a stay below the ceiling, to demonstrate having taken meaningful and sustained steps to be tried quickly. While the defence might not be able to resolve the Crown's or the trial court's challenges, it falls to the defence to show that it attempted to set the earliest possible hearing dates, was cooperative with and responsive to the Crown and the court, put the Crown on timely notice when delay was becoming a problem, and conducted all applications (including the s. 11 (b) application) reasonably and expeditiously. At the same time, trial judges should not take this opportunity, with the benefit of hindsight, to question every decision made by the defence. The defence is required to act reasonably, not perfectly.
>
> [Emphasis added.]

39 Jordan thus supports a requirement for reasonably advanced notice of concerns over delay. As suggested in *Carter*, if delay is expressed as a concern in a timely way, the court can reprioritize the scheduling of cases, counsel and professional witnesses can attempt to shuffle their competing commitments to give the case priority, and accommodations for unavailable witnesses such as video testimony or irregular sitting hours can be considered. It is thus critical to express such concerns early on in the date-fixing process. Without timely notice, an argument that the Crown or court ought to have done more to mitigate delay rings hollow, and the inference that the accused is content with the pace of litigation is likely to be drawn.

Obligations of New Defence Counsel

[28] I wish to highlight the following instructive comments of S. Robichaud J.in *R. v. Khosa*, [2025] O.J. No. 5730:

> 68 It is worthwhile to turn my attention to the issue relating to the transfer of a file from one lawyer to another and how that can contribute to delay if obligations are not fulfilled.

> 69 When counsel is retained partway through a matter, whether from a self-represented accused or from previous counsel, the obligation to advance the case promptly is heightened.
>
> 70 It is not acceptable to reset the file and proceed at the same pace as if proceeding from early stages in the criminal file. Counsel must promptly review disclosure, identify and request any outstanding items, connect with the assigned Crown, and acquaint themselves with any existing s. 11(b) considerations.
>
> 71 A change of counsel does not justify attributing any resulting delay to the Crown or the Court. Generally, there should be no gap in the pace of the proceeding; to the extent a gap arises from a change of counsel, that gap is presumptively attributable to the defence.
>
> 72 Exceptions may exist. For example, where substantive disclosure was not provided despite reasonable diligence of previous counsel, but such instances are rare and fact-specific and must be assessed in the context of the transition. Put simply, counsel who assume carriage of a file should do everything reasonably possible to achieve the same state of knowledge and pace as diligent prior counsel. Counsel must "hit the ground running" and not go back to the starter blocks.
>
> 73 Deliberate efforts to defer the inevitable, into a sword in a section 11(b) application. Not only is this not permitted under *Jordan, Cody, J.F.*, etc., applications brought under this tactic undermine efficient case management by discouraging good-faith resolution efforts in other matters where counsel properly seek short adjournments with clear waivers. It places the Crown and Court into unnecessary defensive positions when they can no longer rely on representations that delay is not in issue only to be sprung with threats of 24(1) relief on the eve of trial.

[29] I also wish to highlight the following comments of Carter J.in *R. v. Osman*, [2026] O.J. No.100:

> 22 The weight of the authorities supports the view that regardless of why it became necessary for an accused to change counsel, the delay that the change causes is not to be counted toward the presumptive ceiling. It will either be characterized as defence delay or as delay attributable to a discrete exceptional event. The party who causes an adjournment is responsible for the entire delay until the matter can be re-scheduled, unless the other party is unavailable for an unreasonable length of time: *R. v. Browne*, *2020 ONSC 5244* at paras. 60 and 61.

Obligations of the Court

[30] The following was stated in *Wetmore*:

> [63] Certainly it is clear that since *Jordan*, all participants in the judicial system have an obligation to cooperate to mitigate delay. That includes the court.
>
> [64] Absent from the judge's discussion of delay is the role of the court. In *Cody,* the Supreme Court emphasized the importance of trial management which rests with judges:
>
> > [37] We reiterate the important role trial judges play in curtailing unnecessary delay and "changing courtroom culture" (*Jordan*, at para. 114). As this Court observed in *Jordan*, the role of the courts in effecting real change involves implementing more efficient procedures, including scheduling practices. Trial courts may wish to review their case management regimes to ensure that they provide the tools for parties to collaborate and conduct cases efficiently. Trial judges should make reasonable efforts to control and manage the conduct of trials. […]
> >
> > In scheduling, for example, a court may deny an adjournment request on the basis that it would result in unacceptably long delay, even where it would be deductible as defence delay.
>
> […]
>
> 66 Notwithstanding the obligation of the defence to cooperate in mitigating delay, the court and Crown necessarily control the process because the court through the scheduler knows its docket, and the Crown knows the state of prosecutions under its control, of which the defence would be ignorant. Accordingly, the Crown has far greater access to scheduling information than the defence […]

[31] The Nova Scotia Court of Appeal in *Wetmore* emphasized the need for a proactive trial judge. When an adjournment is sought, the Court should advise counsel of any *Jordan* timeline implications. This requires the trial judge to be aware of the court's docket and to identify the next available trial dates. Doing so informs counsel and assists the Court by enabling effective monitoring and case management

of the matter. Knowing the new trial date and the corresponding *Jordan* implications ensures that an accused's request for an adjournment is made as an informed decision.

[32] On an earlier occasion, the Nova Scotia Court of Appeal in *Zaki* succinctly underscored the court's obligation in proactively minimizing delay:

> 54 At this point, neither the trial judge, nor the Crown initiated a discussion about the state of delay in the proceeding. Neither responded in any way to the defence raising concern about delay or the declaration that it was then already at 20 months since Mr. Zaki was charged.
>
> 55 The status of the matter called for an inquiry into measures to minimize delay, but none was undertaken. No submissions were invited or offered on the *Jordan* ceiling or possible steps to mitigate further delay. There was no trial management undertaken to clear an earlier half-day of trial time, nor any consideration of breaking the trial time down into shorter segments in order to conclude sooner than February 26, 2024. Had any inquiry been made, the urgency of the situation would have been apparent. As of December 18, 2023, the total delay was 615 days, with no period of defence delay waived or conceded.
>
> 56 The importance of a proactive approach to delay was emphasized in *Cody*:
>
> > [36] To effect real change, it is necessary to do more than engage in a retrospective accounting of delay. It is not enough to pick up the pieces once the delay has transpired" (*Jordan*, at para. 35). A proactive approach is required that prevents unnecessary delay by targeting its root causes. All participants in the criminal justice system share this responsibility (*Jordan*, at para. 137).
> >
> > [37] We reiterate the important role trial judges play in curtailing unnecessary delay and "changing courtroom culture". (*Jordan*, at para. 114). As this Court observed in *Jordan*, the role of the courts in effecting real change involves implementing more efficient procedures, including scheduling practices. Trial courts may wish to review their case management regimes to ensure that they provide the tools for parties to

> collaborate and conduct cases efficiently. Trial judges should make reasonable efforts to control and manage the conduct of trials. [...]
>
> [...]
>
> [38] In addition, trial judges should use their case management powers to minimize delay. [...]

57 The failure to take any steps to mitigate the delay in this case falls below the standard required by both *Jordan* and *Cody*.

Exceptional Circumstances

[33] In general, exceptional circumstances fall under two categories: discrete events and particularly complex cases: *Jordan*, at para. 71.

Discrete Events

[34] Delay arising from discrete events or circumstances that are reasonably unforeseeable or unavoidable is deducted to the extent it could not have been reasonably mitigated by the Crown or the justice system: *Cody* at para. 48. Such discrete events include medical emergencies or illness involving criminal justice participants, recanting witnesses, and trials that exceed estimated time despite good-faith scheduling.

Withdrawal of Counsel

[35] The case of *R. v. Parent*, [2021] A.J. No. 247 is particularly relevant to the matter before me. In *Parent*, the accused was charged with second-degree murder

and was represented by three different counsel over the course of the proceedings. The trial was adjourned twice: the first adjournment resulted from the Covid-19 pandemic, and the second occurred when the Mr. Parent's lawyer withdrew shortly before trial.

[36] Approximately six weeks before the trial and twenty-four days before pre-trial applications counsel advised the Crown that he would be seeking to withdraw due to a breakdown in the solicitor-client relationship. Replacement counsel needed to be identified, approved by Legal Aid, and once retained, would require time to review the extensive disclosure.

[37] Six weeks away from trial Mr. Parent had no lawyer. The matter was adjourned one week for a status. At that appearance, potential replacement counsel had been identified and attended to assist the Court, though had not yet been fully retained and would not be in a position to represent Mr. Parent on the scheduled trial date. Prospective counsel had hoped to meet with the accused later that day.

[38] The presiding chambers Justice heard submissions from the Crown and Mr. Parent on scheduling. The Justice advised Mr. Parent that he had two options: to proceed with the trial as scheduled and represent himself, or to seek an adjournment to retain new counsel. Mr. Parent replied that he needed a lawyer but did not

expressly request an adjournment for that purpose. There was no waiver and no specific request from the accused regarding adjournment. Nevertheless, the trial was adjourned to allow Mr. Parent to obtain counsel, with the trial dates to be revisited once counsel was retained. As a result, the conclusion of the trial was delayed by an additional ten months and ten days.

[39] In grappling with how to treat these circumstances under the *Jordan* framework Neufeld J. stated:

> 6 […] The second adjournment was caused by defence delay, or in the alternative another discrete exceptional event -- the withdrawal of defence counsel shortly before the trial was to commence in October 2020 -- which accounts for a further ten months, ten days.
>
> 29 In argument before me, neither counsel engaged the issue of how this delay should be characterized for *Jordan* purposes. That is, whether it was caused by defence delay or by a discrete exceptional circumstance.
>
> 30 The Crown argued that in the circumstances of this case, the result is the same irrespective of how the delay is characterized per *Jordan*: it must be deducted. The Accused took a different approach. He argued that the delay was not due to anything done by the Accused, nor was it due to a discrete exceptional circumstance. Rather, he said, it was due to a precipitous decision by the presiding Justice in CAC to vacate the trial date, in order for a new date to be set following engagement of replacement counsel.
>
> 31 In my view the second adjournment was caused by the fact that the Accused was not prepared to proceed to trial. He clearly and correctly stated in CAC on October 9, 2020, that he needed a lawyer to properly defend the murder charge against him. I agree with the Accused that the presiding justice could have adjourned the matter for another week to allow the Accused to finalize the engagement of counsel, or to further consider the option of defending himself. However, to do so would have been an exercise in postponing the inevitable or worse, an invitation to the Accused to make yet another blunder by representing himself at trial, with even less time to properly prepare.

> […]
>
> 33 While the presiding Justice in CAC might have afforded the Accused a bit more time to consider his options, the inescapable fact remains that because of the withdrawal of his counsel the scheduled trial date was lost and a new one had to be found. The defence was not ready to proceed. […] The delay associated with the adjournment is therefore deductible as delay caused by defence conduct.
>
> 34 In the alternative, it could also be characterized as delay due to a discrete exceptional circumstance […]
>
> 35 In *Cody*, the loss of defence counsel due to withdrawal before or during trial was accepted as a discrete exceptional circumstance, where defence counsel had been appointed to the Bench: para 49. The delay caused by the withdrawal was therefore deductible, after taking into consideration reasonably available measures for the Crown and the system to prioritize the matter and reduce the impact of the event on the Accused: *R v Berard*, 2020 ABQB at para 35.

[40] Similarly in *R v Ali Ismail*, [2020] BCJ No 1228 the Accused's first counsel had to withdraw due to accepting a new job with the Crown. The court held that this was a discrete event and stated:

> 119 I am satisfied that the Crown has met its onus to establish that Mr. Albrecher's withdrawal was a discrete event. Mr. Albrecher's decision to stop practicing defence work was neither expected nor foreseeable by the Crown with conduct of the Ali Ismail matter before the court and was out of its control.

[41] In *R v McNamara*, [2017] AJ No 1236, the court held that several delay periods arising from changes of defence counsel were defence delay:

> 54 But what is apparent are the difficulties faced by the Crown by the fact that the Applicant has had 5 different defence counsel over the course of the proceeding. Every new defence counsel has a busy calendar. Each time defence counsel changes, the calendar of the new counsel has to be consulted, and the calendar of previous counsel is abandoned.
>
> 55 I am satisfied that this exceptional circumstance accounts for more than the very slight period by which net delay in this case exceeds the presumptive ceiling.

> I find the Crown has satisfied its onus to show that the delay in this case was reasonable.

[42] In *R v Rahi*, [2023] OJ No 580, the accused had two trials scheduled. Defence counsel applied to withdraw from the record for ethical reasons a month before the first trial date, and both trials were adjourned. The court stated:

> 19 This delay was attributable to the defence even though the accused did not want his lawyer removed from the record. I reject the applicant's argument that this time period should not be considered defence delay because it was defence counsel's decision to get off the record, not the accused. In our criminal justice system an accused's lawyer is an extension of the accused. I am supported in this conclusion by the fact that the jurisprudence regarding defence delay refers to "the defence", not simply "the accused". These two terms are interchangeable in the s. 11(b) framework.
>
> 20 This period of time also qualifies as a discrete exceptional circumstance, which will be discussed further below, because it was a reasonably unforeseen development that was completely outside the Crown's control.
>
> [Emphasis Added]

[43] In *R. v. Burkhardt*, [2023] NSJ No 6, the relationship between the accused and defence counsel broke down on the eve of trial when counsel realized he had not received full disclosure and advised against proceeding, while the accused insisted on moving forward. Counsel withdrew, resulting in a delay of nearly seven months. In the totality of the circumstances the court found that this was defence delay:

> 87 In my view, this is defence delay that must be deducted from the total delay. Defence counsel was aware that he did not have complete disclosure and did not take steps he agreed to take on the record to remedy this situation. The Crown relied on the agreement of defence counsel to a disclosure process. I deduct a further seven months from the total delay for a net delay of just over 40 months.

[44] In *R v PM*, [2024] BCJ No 1618, defence counsel withdrew after discovering a conflict of interest. The trial was adjourned and rescheduled. The court held that "the time from counsel's withdrawal to the time when new counsel was ready to proceed qualifies as a discrete event."

[45] In classifying this as a discrete event, the court said:

> 42 I find that the adjournment of the second trial set in August of 2023 was a discrete event under exceptional circumstances in the *Jordan* framework. Mr. Dick found himself in a conflict of interest and had to withdraw, and this circumstance is similar to that in *R. v. Reinbrecht*, 2019 BCCA 28, where a lawyer had to withdraw for ethical reasons. The resulting adjournment was said to be a discrete event […]
>
> […]
>
> 43 The withdrawal of defence counsel certainly could not have been reasonably foreseen by the Crown, and for some time, the Crown could not reasonably remedy the delay emanating from the withdrawal. The *Jordan* case does require me to subtract from the delay any portion that the Crown or the court system could reasonably have mitigated.
>
> […]
>
> 48 Newly retained defence counsel did have availability for trial as early as October 10-12, 2023, but the court could not provide trial dates until December 6-8, 2023. The Crown indicated that the trial could be set to any prosecutor's calendar. I do not think the court should be viewed as a McDonald's restaurant, with instant availability to any litigant seeking a trial date. Adjournments also have a cascading effect on the entire litigation. However, I agree that had the court been made aware of the *Jordan* issues in this case, it could have better endeavoured to secure an earlier trial.

Withdrawal of Counsel Due To Illness

[46] Delays attributable to counsel's illness will generally be treated as an exceptional circumstance or discrete event. In some situations, however, such delay may properly be characterized as defence delay.

[47] In *Norton*, the Crown appealed a stay ordered by the trial judge after finding that defence had established that the net delay was unreasonable. The Appeal Court in overturning the trial judge confirmed that "there is no dispute that the illness of counsel constitutes an exceptional circumstance" (para 24). The court reasoned as follows:

> 29 The Crown points to several authorities which hold that where the delay attributable to the illness of counsel is not limited to the days counsel is physically sick, and the resulting or "cascading delay" must also be subtracted from the total delay: *R. v. Giles*, 2017 BCSC 73 at para. 185; [*R. v. Nazarek*, 2017 BCSC 2340] at para. 135; *R. v. Baron*, 2017 ONCA 772 at para. 50; *R. v. Safdar*, 2018 ONSC 7067 at paras. 140, 144-145.
>
> 30 In *Giles*, counsel was ill for two months and it took three months for the hearing to resume. The court deducted the full five months as exceptional circumstances.
>
> 31 In *Nazarek*, the Court deducted the entire period of defence delay including cascading delay resulting from the illness of two defence counsel.
>
> […]
>
> 36 The general proposition I extract from the foregoing authorities is that the entire cascading delay due to an adjournment caused by the illness of counsel ought to be subtracted from the total delay in the absence of a finding that the Crown or the system could reasonably have mitigated a portion of the delay occasioned by the discrete exceptional event.

[48] In *R v Beboning*, [2025] OJ No 3799, defence counsel became ill shortly before a scheduled preliminary hearing. This forced an adjournment as new counsel had to be appointed. The Court stated:

> 38 Unexpected medical emergencies are a prime example of a discrete event. The parties reasonably concede that the illness of defence counsel in this case amounts to a discrete event. The issue is how much time should be attributed to this discrete event.
>
> […]
>
> 45 What distinguishes *Boulanger* and *Hanan* from this case, is that the delay resulting from the cancellation of the original preliminary hearing in this case was solely due to the illness of counsel. There is no suggestion that the Crown or the court contributed to the need to adjourn the preliminary hearing, as was the case in *Boulanger* and *Hanan*. But for counsel's illness, the original preliminary hearing reasonably would have concluded on March 12, 2024, and the matter then sent to the Superior Court.
>
> 46 This approach was followed in *R. v. Baron*, where the Court of Appeal deducted the entire period from the second preliminary hearing date to the third preliminary hearing date where the second preliminary hearing could not proceed due to the illness of a co-accused which was a discrete event: *R. v. Baron*, 2017 ONCA 772, at para. 50.

Case Complexity

[49] The Supreme Court of Canada in *Cody* summarized case complexity and how it interfaces with the *Jordan* framework:

> **63** The second category of exceptional circumstances is concerned with particularly complex cases. The presumptive ceilings set in *Jordan* already reflect the "increased complexity of criminal cases since *Morin*", including the emergence of "[n]ew offences, procedures, obligations on the Crown and police, and legal tests" (*Jordan*, at paras. 42 and 53). However, particularly complex cases may still justifiably exceed the presumptive ceilings.

> **64** Unlike defence delay and discrete events, case complexity requires a qualitative, not quantitative, assessment. Complexity is an exceptional circumstance only where the case as a whole is particularly complex. Complexity cannot be used to deduct specific periods of delay. Instead, once any applicable quantitative deductions are made, and where the net delay still exceeds the presumptive ceiling, the case's complexity as a whole may be relied upon to justify the time that the case has taken and rebut the presumption that the delay was unreasonable (*Jordan*, at para. 80). A particularly complex case is one that "because of the nature of the evidence or the nature of the issues, require[s] an inordinate amount of trial or preparation time" (*Jordan*, at para. 77 (emphasis deleted)). When determining whether a case's complexity is sufficient to justify its length, trial judges should consider whether the net delay is reasonable in view of the case's overall complexity. This is a determination that falls well within the expertise of a trial judge (*Jordan*, at para. 79).

ANALYSIS

[50] As outlined in *Jordan*, timely trials are essential to maintaining public confidence in the administration of justice. Extended delays undermine that confidence. Furthermore, the presumptive *Jordan* ceiling “is not an aspirational target. Rather, it is the point at which delay becomes presumptively unreasonable” *Jordan*, at paras. 56-57.

[51] Although the *Jordan* framework provides clearly defined steps, several sub-issues have evolved over the past decade. Accordingly, in addressing these issues my analysis may not be strictly linear.

[52] Finally, I would note that the accused has conceded that if the court finds that the net delay is below the presumptive ceiling this ends the matter. The

accused is not pursuing the residual argument available to the defence relating to meaningful steps and the case taking markedly longer than it reasonably should have.

The Accused's Circumstances

The circumstances of the accused must inform the analysis. First, Mr. Dennis has been continuously on remand for over three years while awaiting trial. His bail was denied more than two years ago. Second, Mr. Dennis is Indigenous. When the presumption of innocence is coupled with prolonged pre-trial detention and Mr. Dennis' circumstances, the urgency of bringing the matter to trial is significantly heightened. It must therefore be examined whether this heightened urgency has been adequately reflected in the actions of all participants, throughout the life of this proceeding.

Total Delay calculation

[53] The time from the date of charge (May 5, 2023) to the anticipated scheduled end of the trial (May 1, 2026) is 35 months and 27 days (1093 days).

The presumptive Jordan Limit

[54] This is an indictable matter being tried in Supreme Court. The presumptive *Jordan* limit is 30 months (913 days) (November 5, 2025). On its face, this matter exceeds the presumptive *Jordan* ceiling by 180 days.

[55] For clarity of narrative, I will address the distinct periods during which this matter has been before the court.

Time Period #1 - Provincial Court (May 5, 2023, to September 29, 2023)

[56] This period is not in dispute. Both Crown and accused agree that nothing unusual occurred between the swearing of the information, waiver of preliminary inquiry, and committal to Supreme Court. No portion of this interval constitutes waived delay, defence delay, or exceptional circumstances.

Time Period #2 – Supreme Court Intake Period (September 29, 2023, to January 29, 2024)

[57] This period of time captures the first appearance in Supreme Court up until the scheduling of the original trial date. It accounts for 4 months and 3 days (123 days).

[58] The Crown submits that the defence “failed to collaborate with the Crown on scheduling matters that could have facilitated earlier trial dates.” The Crown relies

on Mr. Iannetti's lack of response to emails from the court's scheduling coordinator and to correspondence from the Crown. According to the Crown, this lack of timely engagement led to several unnecessary appearances before a trial date could be set and demonstrated a marked indifference to delay, as well as a failure to take substantial, meaningful, and sustained steps to proactively advance the matter.

[59] In contrast, the accused initially argued that only the 21-day period between December 18, 2023, and January 8, 2024, should be attributed to the defence, as it reflects the accused's refusal to participate. However, this position evolved during submissions. It was suggested that because a trial date was still not ready to be set at the following appearance on January 8, 2024, there is no certainty it would have been set even if the accused had participated as required on December 18, 2023.

[60] Furthermore, it is argued that all other appearances between September 29, 2023, and January 29, 2024, were joint Crown and defence requests. The accused accepts that Mr. Iannetti took no active steps to collaborate with the Crown for the purpose of scheduling trial dates. However, he argues that there were no impediments preventing the Crown from securing trial dates during this period.

[61] I accept the accused's position in part, and I reject the Crown's global position. Only the 21 days between December 18, 2023, and January 8, 2024, will be treated as defence delay.

[62] My review of the running record reveals no reference to any waiver of delay at these appearances, and none can be presumed. On several occasions, it was the Crown who primarily addressed the record regarding the adjournments sought. In submissions, the Crown acknowledged that, upon reviewing the transcripts, the adjournment requests were presented with a high degree of collegiality and pleasantries, however there was a lack of precision and clarity. The Crown further accepted that, in hindsight, the specifics ought to have been placed on the record.

[63] The Crown did not raise its scheduling concerns, stemming from Mr. Iannetti's lack of responsiveness, with Justice Murray, nor did it express any urgency at these appearances. Although Mr. Iannetti failed to respond to the scheduling coordinator on two occasions and to the Crown on one, these issues were never brought before the court. The Crown consistently chose to proceed at the pace set by defence counsel. If defence counsel contributed to a culture of complacency regarding delay, the Crown participated in it. As the Supreme Court of Canada has repeatedly emphasized, such conduct must be discouraged and cannot remain an accepted mode of practice.

[64] It is also unreasonable to assert that the absence of scheduling discussions during counsel's joint December 11, 2023, meeting is solely attributable to Mr. Iannetti. The Crown has a voice and is not a passive participant. Any concerns should have been brought forward when the parties returned before the Court on December 18, 2023, and January 8, 2024. The record gives no indication that the Crown considered scheduling difficulties to be a defence created problem. To the contrary, the record reflects an ongoing, mutual effort by both sides to work through trial time estimates. In the future the Crown would be wise to make sure there is clarity of the recorded record.

[65] I again emphasize that there was no waiver of delay, explicit, implicit, clear, or unequivocal, on any of these dates. Nor do these adjournments fall within the category of exceptional circumstances.

[66] Furthermore, the accused's conduct was unacceptable and cannot be condoned. It is the Court, not the accused, who controls the proceeding. An accused who refuses, without valid reason, to appear or participate cannot be rewarded for such conduct. The fact remains that meaningful scheduling discussions could not occur on December 18, 2023, because the accused refused to participate. The 21-day period between December 18, 2023, and January 8, 2024, was caused solely and

directly by the accused's actions. Accordingly, this 21-day period must be deducted from the total delay.

Time Period #3 - Adjournment of the Original Trial Date and Setting of the Second Trial Date (January 27, 2025, to March 24, 2025)

[67] This 56-day period is not in dispute. Both the Crown and the accused agree that Mr. Iannetti's withdrawal was a discrete event within the meaning of the relevant authorities (*Parent*, *Ali Ismail*, *Rahi*, *McNamara*, *Burkhardt*, *P.M.*, *Norton*, *Beboning*). I reach the same conclusion. As noted at page 13, paragraph 50 of the accused's brief, "Mr. Dennis accepts that he is responsible for the delay between January 20, 2025 and March 24, 2025 (two months and four days), representing the time between when his counsel advised he was too ill to conduct the trial and when new dates were set."

[68] In fairness to the accused, the Crown adopts the position that the delay should properly be calculated from the later date of January 27, 2025, rather than January 20, 2025. The Crown submits that the relevant period should begin when Mr. Iannetti formally withdrew as counsel, which coincided with what was to have been the first day of the original trial. I agree.

[69] In short, the record is clear that on January 27, 2025, the Crown and the Court were prepared to proceed to trial. The accused, due to circumstances beyond the control of both the Crown and the Court, was not. I accept that the accused did not waive delay at any point, Justice Murray reached the same conclusion when he granted the adjournment on January 20, 2025. Nonetheless, despite the absence of waiver, the adjournment was the result of exceptional circumstances. These circumstances necessitated four subsequent adjournments before the Court, at the Crown's urging, proactively fixed new trial dates of January 11-29, 2027, rather than repeatedly adjourning for the appointment of new counsel. Accordingly, 56 days will be deducted as exceptional circumstances.

Time Period #4- Setting of the Second Trial Date to the Anticipated Conclusion of the Current Trial (March 24, 2025, to May 1, 2026)

[70] This 402-day period between Justice Murray's rescheduling of the original trial (March 24, 2025) and the anticipated conclusion of the currently scheduled trial set by me (May 1, 2026) is a point of contest between the Crown and accused.

Position of the Accused

[71] The accused submits that although the original trial date was lost due to a discrete event, the entire period between the original and current trial date should

not automatically be attributed to the defence. They correctly argue that apportionment of delay is contextual and must be conducted on a case-by-case basis. In *Bowen-Wright*, later adopted by our Court of Appeal in *Wetmore*, the bright-line rule was expressly rejected. This approach is consistent with the Ontario Court of Appeal's recent reasoning in *Qureshi*. The governing principle is that the party causing the adjournment is not necessarily responsible for the full cascading delay. To assume otherwise would disregard the Crown's and the Court's shared obligation to take reasonable steps to mitigate delay.

[72] The accused relies on the following passage from *Norton*.

> **36** The general proposition I extract from the foregoing authorities is that the entire cascading delay due to an adjournment caused by the illness of counsel ought to be subtracted from the total delay in the absence of a finding that the Crown or the system could reasonably have mitigated a portion of the delay occasioned by the discrete exceptional event.
>
> [Emphasis Added]

[73] The argument advanced is that, if the Court finds that the Crown or the system could have, but did not, mitigate the delay arising from the discrete exceptional event, I retain residual discretion to attribute part of that delay to a source other than the defence.

[74] Apportionment requires consideration of all relevant circumstances, including the conduct of *all* participants (see *Boulanger* at para. 8; *Hanan* at para. 9; *K.D.* at para. 46). The accused argues that, applying this framework, only a small portion of the 402 days between March 24, 2025, to May 1, 2026, should be attributed to the defence.

[75] I will reconstruct various keys aspects of the accused's argument with specific reference to the principles found in the case law. The accused's argument rests on the following considerations:

1. Lack of meaningful input when the second trial date was set: When Justice Murray granted the adjournment on January 20, 2025, and subsequently rescheduled the trial for January 11–29, 2027, the self-represented accused had no meaningful ability to influence the dates selected. He simply had to accept the date offered (see *Wetmore* at paras. 22–23). There was no waiver of delay.
2. When Justice Murray set the second trial date it was significantly past the presumptive *Jordan* ceiling: Despite this awareness, no discussion occurred regarding the state of delay in the proceeding (see *Zaki* at para. 54).

3. Failure by the Crown and court to proactively mitigate delay: Although both were aware that the trial had been rescheduled well beyond the presumptive ceiling, neither the Crown nor the Court took timely proactive steps to mitigate delay (see *Zaki* at paras. 55–57). Crown efforts did not begin until the pre-trial appearance on November 3, 2025, almost nine months after the original trial date was adjourned (see *Qureshi* at paras. 34–35).

4. Defence counsel is not required to maintain perpetual availability: Although defence counsel was unavailable on some dates, the defence is not required to hold itself in a state of continuous readiness or to be available for every date the Court proposes (see *Wetmore* at para. 46, citing *Bowen-Wright* at para. 45).

[76] The accused acknowledges that, when the matter appeared before me on November 3, 2025, fair and reasonable efforts were made by the court at that stage to mitigate delay. The previously scheduled trial dates of January 11–29, 2027 were replaced with significantly earlier dates of April 1 to May 1, 2026. Although the revised dates still exceeded the presumptive *Jordan* ceiling by 180 days, this represented a substantial reduction. Had the trial proceeded as originally

rescheduled, the presumptive ceiling would have been exceeded by approximately 450 days.

[77] The accused also acknowledges that the defence has a parallel obligation to raise delay concerns promptly and that new counsel must take timely steps to become familiar with the file, prepare, liaise with the Crown, and identify any existing section 11(b) considerations (see *Khosa* at paras. 68–73).

[78] Accordingly, the accused accepts that some portion of the delay between March 24, 2025, and May 1, 2026, should be attributed to the defence. They submit, however, that a reasonable apportionment should be limited to 30–40 days, representing the time required for new counsel to prepare. The accused states that the remainder of the delay between March 24, 2025, and May 1, 2026, "is either systemic or attributed to the Crown".

[79] What I just outlined reflects the accused's revised position. The proposed apportionment of only 30 to 40 days beyond March 24, 2025, differs significantly from the original position. The original position, as set out in the accused's brief, was as follows:

> Mr. Dennis accepts that he is responsible for the delay between January 20, 2025 - March 24, 2025 (two months, four days) for the time between when his counsel identified that he was too ill to conduct the trial and when new dates were set, and up to a further three months due to the natural delay in setting a trial and allowing new counsel to prepare. That would be a total of just over five months. If the time

> between December 18, 2023 - January 8, 2024 (21 days) for his non-appearance on December 18, 2023 is included, it would be just under six months.
>
> [Emphasis added]

[80] During submissions, the accused acknowledged that his refined estimate of only 30 to 40 days is somewhat arbitrary, as it is difficult to determine with precision how long counsel reasonably requires to become trial-ready.

[81] Nonetheless, the accused argues that only 30–40 days should be deducted due to exceptional circumstances for the time period between March 24, 2025, and May 1, 2026. On this basis, he submits that after deducting 56 days for the time required to reset the original trial date (as outlined earlier) and a further 30–40 days for new counsel to prepare, the net delay still exceeds the presumptive *Jordan* ceiling by 84–94 days:

- **180 – 86 = 94 days**, or
- **180 – 96 = 84 days**.

Position of the Crown

[82] The Crown submits that the accused's position is flawed. The Crown reiterates that illness of defence counsel is generally treated as an "exceptional circumstance" for the purposes of a *Jordan* analysis, a point that is not in dispute.

[83] The Crown acknowledges, however, that subtracting the entire cascading delay would be unfair in this case. It is argued that where the defence raises section 11(b) concerns late in the process, and where both parties bear some responsibility for failing to meet the obligations described in *Jordan* and *Cody*, courts have adopted an equitable approach to apportionment. In such circumstances, delay attributable to exceptional events is often divided on a 50/50 basis. The Crown argues that this reflects the dual obligations: the Crown must consistently take active steps to mitigate delay, while the defence must raise delay concerns in a timely manner. Where both fall short of these expectations, apportionment should proceed in a fair, reasonable, equitable, and principled manner.

[84] The Crown notes that this approach has led to 50/50 apportionment for defined periods in numerous recent cases, including *Nigro* at paras. 31–37; *Kullab* at paras. 8, 19–21, and 34; *Robins* at paras. 10 and 18; and *Wang* at para. 20. The Crown further observes that courts have recently determined that such apportionment should run from the date the new trial is set through to the anticipated completion of the new trial (see *Boulanger* and *Hanan*).

[85] The Crown puts forward the following considerations in support of their position:

1. The original trial did not proceed on January 27, 2025, as a result of an exceptional event entirely outside of the control of the Crown and the court.

2. When Mr. Rodgers first appeared on record as counsel on April 14, 2025, he accepted the trial dates of January 11-29, 2027, without raising any issue or concern.

3. On the first date as new counsel Mr. Rodgers needed time to obtain disclosure, meet with his new client, and familiarize himself with the file. The matter was adjourned to June 16, 2025, to accommodate his schedule.

4. At the June 16, 2025, pre-trial Mr. Rodgers specifically indicated in the pretrial memorandum that the accused was not raising a section 11(b) issue. The Crown relied on this representation.

5. On November 3, 2025, when the issue of delay was brought to the forefront by the accused both the Crown and the Court immediately engaged in extensive mitigative efforts to secure the much earlier trial date of April 1, 2026, to May 1, 2026.

[86] The Crown submits that if the Court elects to exercise residual discretion and declines to attribute the entire cascading delay to the defence, at least 50 percent of the period between March 25, 2025, and May 1, 2026, should be allocated to the defence, amounting to 201 days. This apportionment alone would bring the matter below the *Jordan* ceiling.

Analysis Time Period between March 25, 2025, and May 1, 2026

[87] I am satisfied that Mr. Iannetti's illness constitutes a discrete exceptional circumstance. But for this event, the Crown and the court, both prepared to proceed on January 27, 2025, could have concluded the trial well before the presumptive ceiling, which remained nearly ten months away (November 5, 2025).

[88] The record further shows that Mr. Rodgers did not appear until April 14, 2025, at which point the accused was not yet ready to proceed. Mr. Rodgers had not obtained disclosure, assessed the issues, met with the Crown, or prepared the pre-trial memorandum. His schedule also made him effectively unavailable for most of May. At the earliest, the accused might have been able to proceed to trial on June 16, 2025. Notably, June 16, 2025, was the date of the first pre-trial with Mr. Rodgers as counsel. The accused's lawyer is an extension of the accused.

[89] Even if Justice Murray and the Crown had begun efforts to secure early trial dates sooner, the accused would not, in any event, have been in a position to proceed before June 16, 2025. This does not excuse the lack of proactive steps by the Court or the Crown at the earliest opportunity, but it provides important practical context.

[90] Aside from a short first appearance on April 14, 2025, Mr. Rodgers had not yet had an opportunity to meaningfully engage with the Crown or the Court. On this short appearance he confirmed his retainer, accepted the January 11-29, 2027, dates and requested time to obtain disclosure, meet with his new client, and prepare for the pre-trial. It was made clear at that point that the trial had been scheduled as far out as January 2027. Counsel did not engage as he required additional time to familiarize himself with both the file and his client's circumstances. As a result, no substantive discussion occurred during Mr. Rodgers first appearance as counsel.

[91] It would be unreasonable to attribute full responsibility, or even a substantial portion, of this delay to the Crown or the Court. First, the accused merely asserts the existence of systemic delay, suggesting in his brief that "some aspect of institutional resource shortage may have played a part." No concrete evidence supports this claim; it rests on speculation alone. Accordingly, I dismiss this argument.

[92] Second, the accused was still not in a position to proceed to trial until at least June 14, 2025, at the earliest. Assuming this was the case, following the British Columbia Court of Appeal's ruling in *Reinbrecht*, the time from counsel's withdrawal to the time when new counsel was ready to proceed qualifies as a discrete event. As a result, and before turning to the remaining period of time, I am prepared to conclude that an additional 84 days qualifies as a continuation of this discrete event. This is the time period between March 25, 2025, to June 16, 2025.

[93] Third, despite having two clear opportunities to raise delay concerns, on April 14, 2025, and again at the June 16, 2025, pre-trial, the defence remained silent. Indeed, Justice Murray specifically referenced the pre-trial memorandum and noted that no section 11(b) argument was being advanced. While the Crown and the Court share obligations to be proactive in mitigating delay, they cannot be expected to read the mind of the accused or counsel. The record before Justice Murray as of the June 14, 2025, pre-trial reflects that the accused raised no objection to the January 11–29, 2027 trial dates. Had the defence raised the issue, I am confident it would not have been ignored.

[94] I agree with the accused that the existence of an exceptional circumstance does not automatically justify subtracting the entire cascading delay without examining whether the Crown or the Court could reasonably have mitigated some

of the delay arising from the discrete event. This approach is consistent with the jurisprudence, including *Wetmore*, *Boulanger*, *Hanan*, *Qureshi*, *Norton*, and *Cody*.

[95] Our Court of Appeal in *Wetmore* places an element of responsibility on the Court and the Crown to seek solutions to delays even when they are not the cause of the same. The Court in *Wetmore* specifically refers to "all participants in the judicial system" for a reason.

[96] Despite knowing that Justice Murray had rescheduled the trial for January 2027, the Crown took no active steps to mitigate delay until it was put on notice that a *Jordan* application was forthcoming. It was only at the November 3, 2025, appearance, two days before the presumptive ceiling, that the Crown first indicated a willingness to explore whether other matters could be moved to accommodate an earlier trial. The Crown has shown no evidence that up until November 3, 2025, it acted with reasonable diligence in moving the case forward other than expressing on several occasions that they were ready for trial and that there was some urgency in having it proceed as early as possible.

[97] I am mindful that the Crown does not need to exhaust every conceivable option for mitigating delay once a discrete event derails the original trial date, however, some level of reasonable diligence other than sporadically expressing a

sense of urgency is required. There were some appearances (April 14, 2025, and June 16, 2024) where the Crown was silent on the issue of delay. Very recently the court in *R. v. Donovan*, 2025 NBKB 90, stated:

> 34 Again, the burden on the Crown is minimal. The Crown is not required to show that its efforts were (or would have been) successful in actually reducing the delay occasioned by the closure of the courts. The burden is simply to show they tried. The burden is to demonstrate that the Crown was not complacent.

[98] While the Crown had previously expressed concern about losing the original January 27, 2025, trial date, it did not actively engage in efforts to mitigate delay or propose solutions when Justice Murray set the second trial date. This trial date was nearly two years down the road, set without a meaningful engagement with the accused, and well over the presumptive *Jordan* ceiling. Approximately nine months passed after the loss of the original date before the Crown took the initiative in coordinating an earlier trial.

[99] The Crown is correct that defence counsel had an obligation to raise *Jordan* concerns in a timely manner and that new counsel was expected to "hit the ground running," including familiarizing himself with the state of potential delay. I also accept that the Crown relied upon the pre-trial memorandum where Mr. Rodgers expressly noted that there was to be no section 11 (b) application. However, this did not relieve the Crown of its own responsibilities under *Jordan* and *Cody*. Courts

have consistently expressed that the obligation to proactively mitigate delay exists independently of presumptive *Jordan* ceilings or crystallization of a section 11(b) application.

[100] The Crown's failure to act until confronted with the prospect of a formal *Jordan* application cannot be ignored. There was some level of Crown inaction here. There was a lack of initiative at the initial stages when the Indigenous accused was without counsel and denied bail. There was further complacency when Mr. Rodgers was first retained.

[101] I find that the actions of both the Crown and the defence between March 24, 2025, and November 3, 2025, fell below the standard called for in *Jordan* and *Cody*. This deprived the court of a meaningful opportunity to step in and mitigate delay in the first half of 2025. Neither spoke up except for when Mr. Rodgers specifically endorsed the pre-trial memorandum indicating that section 11 (b) was not being pursued.

[102] This brings me to the question of what steps the Court took to discharge its own responsibility in mitigating delay. As noted earlier, Justice Murray retired at the beginning of August 2025.

[103] Given that this matter had been scheduled beyond the presumptive *Jordan* ceiling, work had already begun to explore whether earlier trial dates could be accommodated. I note this not to deflect any criticism regarding my involvement in the proceeding, but to clarify that, the Court was actively considering how to advance this matter at a time when neither the Crown nor the defence had raised any concern.

[104] A plan was developed to double-book this trial for April 1, 2026, to May 1, 2026, alongside another homicide matter, which counsel had indicated might resolve. As part of this plan, central scheduling began exploring whether a visiting justice could be made available should both trials proceed simultaneously.

[105] At the first pre-trial appearance before me on November 3, 2025, I asked Mr. Rodgers to provide the Court with his full availability between then and the trial date which had been scheduled for January 11–29, 2027. He identified several available periods, the earliest being April 1 to May 1, 2026. What followed is significant. In short order, the matter was rescheduled to the earliest dates where defence counsel was available, and the Crown adjusted its schedule to accommodate those dates.

[106] Short of offering and confirming the earliest trial dates for which defence counsel was available, which the Court did, it is unclear what more the Court could reasonably have done from that point onward.

[107] A close examination of the specific facts of this case is instructive. Between January 27, 2025, the original trial date, and June 16, 2025, the first pre-trial with Mr. Rodgers as counsel, the accused was not in a position to proceed to trial. Likewise, from November 3, 2025, to April 1, 2026, the accused was unable to proceed because Mr. Rodgers expressly advised the Court that he was unavailable. This only left a narrow window of 140 days between June 16, 2025, and November 3, 2025, during which the accused, with Mr. Rodgers as counsel, would have been in a position to proceed. It must be recognized that the Court, like defence counsel can not hold itself in a state of perpetual availability either. When lawyers do not proactively engage in a solution it limits the court's ability to craft one in a timely manner.

[108] As noted earlier, both the Crown and the defence displayed a degree of complacency in advancing the matter and alerting the Court to the need for a trial date earlier than January 11–29, 2027. Even if efforts begun sooner, the available window in which new defence counsel could accommodate a trial earlier than April 1–May 1, 2026, was extremely limited.

[109] The original *Charter* compliant trial date was lost due to an exceptional event. With the exception of the narrow 140-day period, the court offered and ultimately secured the earliest dates on which new counsel was available. While the Court

might, in retrospect, have pressed the issue sooner, the evidence demonstrates that significant efforts were made to mitigate delay and those efforts were effective.

[110] In summary, after a detailed review I find that that a reasonable principled, and equitable approach must be taken in assessing the time period, which was between March 25, 2025, and May 1, 2026. It would be unreasonable to hold the defence accountable for the entirety of the cascading delay. This would be inconsistent with current state of the law which rejects the "bright line rule" in cases where the Crown has to some extent lacked initiative. It would be equally unreasonable to arbitrarily attribute only 30 to 40 days to the defence as suggested by the accused.

[111] Applying a contextual approach, I find that at a minimum one half of the cascading 402 days between March 24, 2025, to May 1, 2026, ought to be apportioned evenly between the crown and defence.

CONCLUSION

[112] Viewed holistically, and taking all relevant circumstances into account, this case remains under the *Jordan* ceiling. More specifically the breakdown would be as follows:

Total Delay: 1093 days

[113] This is the time from the date of the charge (May 5, 2023) to the anticipated end of the trial (May 1, 2026).

Net Delay after Deducting Defence Delay: 1072 days.

[114] I find that 21 days between December 18, 2023, and January 8, 2024, were caused solely and directly by the accused's actions. When deducted from the total delay this amounts to a net delay of 1072 days.

Resulting Net Delay: 159 days

[115] The presumptive ceiling is 30 months (913 days). The Net Delay of 1072 days less 913 days results in 159 days above the presumptive ceiling.

Exceptional Circumstances: 257 days

[116] I find that 56 days between January 27, 2025, when the original trial date was adjourned and March 24, 2025, when the second trial date was set is an exceptional circumstance. Additionally, I find 201 days out of the total 402 days between March 25, 2025, and May 1, 2026, are also exceptional circumstances after accounting for the role played by all participants.

Result:

[117] The resulting net delay of 159 days less 257 days attributable to exceptional circumstances results in this matter being 98 days below the *Jordan* ceiling. I conclude that the delay is presumptively reasonable with the accused forgoing any argument that they took meaningful steps demonstrating a sustained effort to expedite the proceedings and that the case would take markedly longer than it reasonably should.

Mathematical Summary

- Total Delay (1093 days) – Defence Delay (21 days) = Net Delay (1072 days)
- Net Delay (1072) – Presumptive Ceiling (913 days) =Resulting Net Delay (159 days)
- Resulting Net Delay (159 days) - Exceptional Circumstances (257 days) = 98 days below the presumptive ceiling.

[118] The accused's section 11(b) *Jordan* application is dismissed.

Russell, J.