Court of Queen's Bench of Alberta

Citation: R v Clifford, 2022 ABQB 509

Date: 20220726
Docket: 171225923Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown/Respondent

- and -

Robert Dean Clifford

Accused/Applicant

Reasons for Judgment
on Section 11(b) Application
of the
Honourable Mr. Justice N.E. Devlin

Overview

[1] Robert Clifford is charged with second degree murder in the death of his estranged wife, Nichole Clifford. She was found stabbed to death, in the couple's former matrimonial home, on February 24, 2017. Mr Clifford was tried and convicted of this offence in February 2021. On June 10, 2021, a mistrial was declared prior to sentencing.

[2] Mr. Clifford's second trial began before me on Monday, July 18, 2022, with this application for a stay of the proceeding on the basis of unreasonable delay. For the following reasons, the application is denied.

Timeline

[3] Mr. Clifford was arrested and charged with second degree murder on October 19, 2017. Disclosure was provided in December 2017, and the Crown was prepared to set a date for preliminary inquiry by January 17, 2018. The defence was not prepared to do so. After numerous defence adjournments, a five-day preliminary inquiry was ultimately scheduled on June 7, 2018, to run December 10-14, 2018. It concluded on time with a committal for trial on second degree murder.

[4] The matter was spoken to in Queens Bench Arraignment Court in St. Paul on January 14, 2019, by which time counsel had prearranged dates for a judge and jury trial to run February 3 to 21, 2020. Mr. Clifford changed counsel on June 8, 2019, resulting in the trial being moved to new dates of April 8-24, 2020, with a re-election to trial by judge alone on consent. The COVID-19 pandemic resulted in the cancellation of the trial, and it was rescheduled to a two-week special sitting from February 8-18, 2021.

[5] The trial proceeded as scheduled before Whittling J. on February 19, 2021. Mr. Clifford was found guilty of second-degree murder and the matter was ultimately set to June 10, 2021, for sentencing. On that day the defence brought a mistrial application, which was granted.

[6] Retrial dates were offered as early as October 2021, but the defence was unavailable. The present trial dates were set on July 26, 2021.

[7] The total elapsed time from the date of charge to the anticipated conclusion of this trial amounts to 1744 days, or two days shy of 57 months. It is common ground that this length of time between charge and conclusion of the proceedings warrants an inquiry under section 11b of the *Charter*.

The Governing Legal Principles

[8] The principles and methodology for assessing claims of unreasonable delay brought under section 11b, as articulated by the Supreme Court in ***R v Jordan***, 2016 SCC 27 and ***R v Cody***, 2017 SCC 31, are well known and uncontentious. For two-stage proceedings, with a trial in the superior court, any delay from charge to the conclusion of trial exceeding 30 months is presumptively unreasonable: ***Jordan*** at para 105. The Crown bears the onus of justifying any delay surpassing the presumptive ceiling: *ibid*.

[9] From the total delay, a number of deductions may be made. Periods of time consumed due to defence delay do not count towards the 30- month ceiling: ***Jordan*** at paras 60-66. Similarly, delays occasioned by discrete events which constitute “exceptional circumstances” are also properly deducted from the total delay under examination: ***Jordan*** at para 69.

Defence Delay

[10] The defence is responsible for a number of periods of delay in this matter. Two of these are not in dispute. The Crown was ready to set a preliminary inquiry date on January 18, 2018, less than three months after the charge was laid. The defence, however, was not ready for considerably longer. This was primarily the product of a change of counsel. Defence was ready to set the preliminary inquiry dates on June 7, 2018.

[11] The Crown urges the Court to view the entire length of time from January 18 to the commencement of the preliminary inquiry in December as defence delay. Respectfully, the period from August onwards does not lie at the feet of the defence. Some period of wait would have been inevitable to reach a five-day preliminary inquiry, irrespective of whether it was set in January or June. What is relevant is the defence contribution to this delay. That equals the period by which the position or actions of the defence *extended* the overall length of time consumed by this step in the trial process. Here, that is difference in time between when the Crown was ready to set the date and when the defence joined them in that readiness. That totalled 140 days.

[12] The second period of undisputed defence delay comprises the two months between the original trial date, for which new counsel was unavailable, and the April 8, 2020, date for which he was. This delay amounted to 65 days.

[13] A third period of delay is alleged against the defence, from October 18, 2021. This is the period between the first trial date offered for the retrial and the commencement of this trial on July 18, 2022. The defence strenuously opposes characterizing this period as their delay. I will deal with this period later in these reasons.

The COVID-19 Pandemic as an Exceptional Circumstance

[14] Two discrete exceptional events impacted the length of time it will have taken to conclude this case. The first of these is the COVID-19 pandemic. This unforeseen and dramatic event struck in the interregnum between the originally scheduled February 2020 trial dates and the rescheduled April 2020 dates.

[15] There is no question that the pandemic was an exceptional discrete event within the meaning of ***Jordan***. Courts across the country are unanimous on this obvious proposition: see ***R v Pettitt***, 2021 ABQB 84; ***R v Harker***, 2020 ABQB 603; ***R v Cathcart***, 2020 SKQB 270; ***R v Laplante***, 2021 SKQB 5 at para 43; ***R v Drummond***, 2020 ONSC 5495; ***R v Ali***, 2021 ONSC 1230 at paras 38-39; and ***R v Ford***, 2021 NUCJ 7.

[16] A fast moving, novel, and potentially lethal contagion spread across the globe with breathtaking speed. This resulted in an unprecedented shutdown of society. That shutdown included the courts, which suspended operations by virtue of Master Order Number One on March 14, 2020. The courts were totally closed to trial and other matters to the end of June 2020. Judge and jury trials were re-commenced in September 2020, but by that point an enormous backlog had to be accommodated.

[17] As Justice Renke aptly held in ***Pettitt*** at para 20:

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

[18] The impacts of the pandemic were aggressively mitigated by the institutions of justice. Dilts J. summarized these efforts in ***Kalashnikoff v Her Majesty the Queen***, 2021 ABQB 327 at paras 17-18:

> By experience, there was limited uptake on the Court's offer to conduct criminal trials over the summer, with the result that the Court made the time available for family matters, civil matters and judicial dispute resolution. In the meantime, the Court aggressively undertook pretrial conferences on criminal matters in an effort to get its arms around the backlog and its current bookings. In addition, the Court established priorities for the rescheduling of adjourned matters.
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> The Court resumed criminal appearance court province wide on June 5, 2020. Its public announcement on June 4, 2020 was that "booking priority will be given on CAC lists in June to September 4, 2020 to in-custody matters, trials that were ***Jordan***-threatened prior to the pandemic and trial adjournments from March 16, 2020 to June 26, 2020."

[19] Importantly, our Court of Appeal recently affirmed that, while the COVID-19 pandemic is a discrete exceptional circumstance, this did not excuse the Court and Crown from specifically addressing what, if anything, can be done to expedite cases that were particularly at risk of unreasonable delay because of it: ***R v Ghraizi***, 2022 ABCA 96. In this case, the parties scheduled the new trial on June 12, 2020, well before the pandemic closure was over. A special sitting was set in St. Paul to accommodate the trial and both counsel expressed satisfaction with this.

[20] The Court's fall 2020 schedule would have been fully booked with pre-pandemic cases by this point. This matter was given a two-week block of court time, via a special sitting, just over a month into the new year. Unlike ***Ghraizi***, this is not a case in which unique urgency and manifest delay problems were treated as inalterable. Rather, I find that the Court and Crown discharged their obligation to respond in as timely a fashion as possible to the exceptional circumstances posed by the pandemic.

[21] The next question is what portion of the 10-month delay between the 2020 and 2021 trial dates should be deducted from the overall time on the basis of the exceptional circumstance. At a minimum, the period of total closure of the Court should be deducted. However, the pandemic did not take place in the context of empty forward-going court calendars. As Nakatsuru J outlined in ***R v Simmons***, 2020 ONSC 7209 at paras 70 and 72:

> ...the impact of the COVID-19 pandemic on the criminal justice system is not limited to those periods of time when the court had to adjourn scheduled cases or when jury trials were suspended. It has had numerous and far-reaching impacts upon how we do things, and, on the people, who do them. Not the least has been the necessity to take measures to protect the health and safety of justice participants and the public. The way trials are conducted needed to be transformed. Physical courtrooms had to be changed… This in turn, has had a significant impact on scheduling. Scheduling new trials and rescheduling existing trials have become more complex and difficult. A backlog of cases has ensued. A lack of resources was not the cause. Rather, COVID-19 was. It has had a system-wide impact of unprecedented proportions, never seen before in our lifetime.
>
> ...

> Similarly, the discrete exceptional event caused by the COVID-19 public health crisis does not end the moment the courts are again hearing jury trials. The trial takes place in the reality of the courthouse the case is being heard in. That reality must be recognized when calculating the appropriate time period and in assessing what the Crown and the court can reasonably do in mitigating the delay.

[22] In ***R v Fischer***, 2021 ABQB 345, this court rejected an argument that only the period of full court closure impacting the case at hand is properly deducted under the exceptional circumstance rubric. Holding that the impact of the pandemic continued to manifest as an exceptional circumstance well after the resumption of trials, Germain J. concluded that a proper application of the exceptional circumstance doctrine required him to "unequivocally reject(ed) the narrow timeline proposed by defence for the COVID-19 delay. He found instead that, "the COVID-19 delay commenced on the date the June trial was to have ended and continues up to and including the end of the currently scheduled trial on May 21, 2021"; ***Fischer*** at para 17.

[23] This Court reached the same conclusion in ***Kalashnikoff*** at para 35, and in ***R v Parent***, 2021 ABQB 66, where Neufeld J. held as followed at paras 18-20:

> I do not accept that *Jordan* can be interpreted to impose a duty on government, and by extension, the judicial system to foresee the unforeseeable. Nor does it mean that for the purpose of *Jordan*, the Courts should sit in judgment of the general state of emergency preparedness by government. Rather, the Crown and the justice system are called on to take reasonable measures to prioritize cases that have faltered due to unforeseen circumstances of all kinds as and when they occur.
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> That is exactly what happened in this case. All of those involved, including defence counsel, the Crown and the Court took advantage of the steps available to reduce the delay caused by the first adjournment. The case was properly prioritized so that it could proceed as soon as reasonably possible while maintaining the health and safety of those involved and complying with public health directives…
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> Accordingly, the entirety of the delay due to the adjournment must be deducted from the total period of delay for the purpose of determining whether the *Jordan* ceiling has been exceeded.

[24] I agree with and apply the reasoning in these cases. This trial, which was not a short one, was accorded sufficient priority to be rescheduled within five months of the Court's reopening to trials after the first wave of COVID-19. It was then run successfully to conclusion while our society, and the court system with it, were still mired in the pre-vaccine period of the pandemic. This delay was a discrete exceptional event. The institutions of justice rose to the task of reasonably mitigating it. The period from April 8, 2020 to February 8, 2021, totaling 306 days, is properly deducted in its entirety from the ***Jordan*** calculation in this case.

The Mistrial

[25] The second discrete exceptional circumstance impacting this case is the mistrial. Our Court of Appeal recently provided guidance on how mistrials should be treated within the ***Jordan*** framework: ***R v Way***, 2022 ABCA 1 [***Way***]. As a starting point, the Court of Appeal

accepted that most mistrials qualify as exceptional circumstances: ***Way*** at para 38. It sounded a caution, however, that mistrials come in many flavours, not all of which will fall into this category: ***Way*** at paras 35-40:

> A jury's inability to reach a verdict invariably results in a continuation of the same proceedings, including a restart of the trial. It is a sui generis circumstance. Here, it cannot reasonably be argued the mistrial was either a foreseeable occurrence or the result of either party's action or inaction, and was beyond either party's control or ability to remedy. As explained in ***Jordan*** at para 69:
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> > Exceptional circumstances lie outside the Crown's control in the sense that (1) they are rea-sonably unforeseen or reasonably unavoidable, and (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise. So long as they meet this definition, they will be considered exceptional. They need not meet a further hurdle of being rare or entirely uncom-mon. [Emphasis in original]
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> While ***Jordan*** (and ***KGK***) do not explicitly deal with the issue of a mistrial from a hung jury, what may be considered "exceptional" is not a closed list. At paras 71 and 73:
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> > It is obviously impossible to identify in advance all circumstances that may qualify as "exceptional" for the purposes of adjudicating a s 11(b) application. Ultimately, the determination of whether circumstances are "exceptional" will depend on the trial judge's good sense and experience. The list is not closed. However, in general, exceptional circumstances fall under two categories: discrete events and particularly complex cases.
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> > ...
> >
> > Discrete, exceptional events that arise at trial may also qualify and require some elaboration. Trials are not well-oiled machines. Unforeseeable or unavoidable developments can cause cases to quickly go awry, leading to delay. . . In addition, if the trial goes longer than reasonably expected — even where the parties have made a good faith effort to establish realistic time estimates — then it is likely the delay was unavoidable and may therefore amount to an exceptional circumstance. [Emphasis added]
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> As stated in ***Jordan*** at para 74:
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> > Trial judges should be alive to the practical realities of trials, especially when the trial was scheduled to conclude below the ceiling but, in the end, exceeded it. In such cases, the focus should be on whether the Crown made reasonable efforts to respond and to conclude the trial under the ceiling. Trial judges should also bear in mind that when an issue arises at trial close to the ceiling, it will be more difficult for the Crown and the court to respond with a timely solution. For this reason, it is likely that unforeseeable or unavoidable delays occurring during trials that are scheduled to wrap up close to the ceiling will qualify as presenting exceptional circumstances.

> In this case, a mistrial was declared in the 28th month of the proceedings, after the evidence had been heard, argument made and the jury charged; there was no solution but to schedule and pursue a second trial expeditiously. The trial judge's finding that the mistrial in this case qualified as exceptional circumstances was correct.
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> However, it must be made perfectly clear that not every mistrial will justify a deduction of delay as an exceptional circumstance between the end of the first trial and the start of the second trial. Such a broad pronouncement would permit automatic deductions in favour of the Crown, and consign accused to almost certain failure in s 11(b) applications, a consequence which does not align with the constitutional principles laid down in ***Jordan***.
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> More specifically, we foresee situations involving prosecutorial misconduct leading to mistrial which could not meet the parameters of exceptional circumstances beyond the Crown's control. Both ***Wu*** at para 79 and ***Beckett*** at para 163, discuss a mistrial resulting from an inflammatory closing address made by the Crown that could not be neutralized by an instruction to the jury. In ***R v JHT***, 2016 BCSC 2382, prejudicial statements made by a Crown witness in front of the jury were found to be under the control of the Crown.
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> Needless to say, these examples do not form an exhaustive list. Many other situations might result in mistrial, including something done by defence counsel, or comments or actions of a trial judge culminating in a successful application for a mistrial based on a reasonable apprehension of bias. We emphasize that each case is to be assessed on its own facts. Deduction of the gap between a mistrial and a retrial must never to be treated as invariable, or inevitable.
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> [emphasis added]

[26] The mistrial in this case engages elements across the spectrum of situations described by in ***Way***. The defence believed certain evidence available in disclosure had been led through the Crown's case when it had not been. This point of confusion led the trial judge to ask Crown counsel certain questions in argument that extended into what evidence *could* have been led and what factual conclusions or inferences would have been available from it. The trial judge then relied on the Crown submissions in making certain findings of fact that he believed were key to conviction. The evidence brought forward on the mistrial application satisfied the trial judge that he had been misled as to the state of the evidence, not as it had been called, but as it *would* have been available in the disclosure. He concluded that this rendered his verdict unsafe.

[27] It is helpful to quote the trial judge's reasons on the mistrial to situate the facts in this case on the spectrum described by the Court of Appeal in ***Way***:

> Quite aside from the *Palmer* test, the defence also argues that a mistrial was necessary since I was misled by the Crown's submissions. The defence does not suggest and I do not find that Crown counsel intentionally misled the court. It may even be said that the Crown's representation was not strictly inaccurate, that is the Crown did not know with certainty that the beer can in the trailer was purchased by Mr. Clifford on the day of Ms. Clifford's death, and he did deny being in the trailer on that day. The fact remains, however that the Crown was in

> possession of evidence which strongly suggested this exculpatory fact and which was very capable of establishing this fact at trial. Despite this, Crown counsel responded to my inquiry "no, not at all". I recognize that the Crown is permitted to enter its evidence and bring its case forward in the manner that it sees fit. However, given the potential importance of this evidence, it is my view that as a minister of justice the Crown ought to put this evidence before the court so that it could be considered in this most serious matter. In any event, whether intentional or not I was in fact misled by the Crown's submissions, whoever might be to blame I was under the mistaken impression that there was no reason to believe that the beer can in the trailer was purchased on the day of Ms. Clifford's death.
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> Returning to the Court of Appeal's decision in *Ibrahim*, the *Palmer* factors are to be considered but the ultimate question is whether or not to exist the danger of a miscarriage of justice. I find that there is a danger of a miscarriage of justice in the present case. I am concerned that if the evidence respecting the beer can have been placed before me or fight otherwise been made aware of it I might have rendered a different verdict.
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> [emphasis added]

[28] The reasons for the mistrial in this case cut both ways. At root, the source of the problem was an honest misapprehension by defence counsel of what evidence had been called. Strictly applying ***Palmer***, this evidence had been available at trial and its absence was the result of a defence error. This suggests that the mistrial should be treated as a discrete exceptional event and the resultant delay deducted from the ***Jordan*** calculation.

[29] On the other hand, the trial judge found that the Crown had erred in its exercise of tactical judgment about what evidence it ought to have called and the subsequent limits on its description of the inferences available on the record. This suggests that the mistrial was avoidable through different Crown choices.

[30] I agree with H. McArthur J.'s conclusion in ***R v JT***, 2021 ONSC 365 at para 30 that:

> There may be instances where the Crown, having caused a mistrial, would be hard-pressed to claim exceptional circumstances. In the same vein, if the defence has caused the mistrial, it may be more appropriate to view the attending delay as defence delay.

[31] In this case, both sides bear responsibility for the mistrial. Two realities lead me to conclude, however, that the Crown's role takes the resulting delay outside the scope of exceptional circumstances as defined in ***Way***. First, while the defence was found to have made a mistake in good faith, both the Crown's decision not to lead the evidence at issue and its subsequent choice to aggressively characterize that unheard evidence, were volitional, tactical acts. Accepting without adopting the original trial judge's criticisms of the Crown's conduct, its role in the mistrial was not, to use the words of ***Jordan***, "reasonably unavoidable".

[32] Second, the Crown and defence do not stand on an equal, reciprocal footing in a trial. As noted by the original trial judge, the Crown has supervening duties to fairness and the administration of justice that constrain the ambit of its tactical decision making: ***R v McNeil***, 2009 SCC 3 at para 49. At the intersection of ***Jordan*** and the Crown's minister of justice

obligations one finds the principle that the Crown should err on the side of more conservative tactical choices when to do otherwise might jeopardize the timely outcome of the trial.

[33] For these reasons, and governed by the decision in ***Way***, I find that the mistrial, while a discrete exceptional event in the abstract, was avoidable by different, considered Crown choices and should not be excluded from the calculation of delay under ***Jordan***.

Time Between Conviction and Mistrial

[34] The time elapsing between conviction and sentencing does not count towards the ***Jordan*** presumptive ceiling. This was settled by the Supreme Court in ***R v KGK***, 2020 SCC 7 at para 33:

> While *Jordan* states that the presumptive ceilings apply "from the charge to the actual or anticipated end of trial", the Court did not explicitly define the phrase "end of trial". It has been suggested that this phrase permits of four possible interpretations: (1) the end of the evidence and argument; (2) the date the verdict is delivered, excluding post-trial motions; (3) the conclusion of post-trial motions; or (4) the date of sentencing (see A.F., at para. 131). On close analysis, it is the first interpretation that accurately reflects the reasoning underlying *Jordan* and the mischief it sought to address. To be precise, the *Jordan* ceilings apply from the charge to the end of the evidence and argument, and no further.
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> [emphasis added]

[35] The defence argues that, had the Crown acted in conformity with what the trial judge found to be their obligations in the mistrial reasons, there may not have been any need to adjourn the trial for sentencing (i.e.: the accused might have been acquitted). Accordingly, it submits that the delay between the end of argument and the mistrial should count against the Crown and be included in the ***Jordan*** ceiling calculation.

[36] Respectfully, I find that ***KGK***, as recently re-affirmed in ***R v JF***, 2022 SCC 17 [***JF***] at para 27, is dispositive of this issue. The Supreme Court has clearly stated that the presumptive ***Jordan*** ceilings do not take into account events after the trial evidence and argument are finished. The Court expressly calibrated those ceilings to the ordinary trial process up to that point. Moreover, this argument is too speculative and premised on a hypothetical acquittal that did not occur.

[37] Therefore, the period from the close of the trial on February 18, 2021, to the declaration of the mistrial on June 21, 2021, is subtracted from the ***Jordan*** calculation. The period during which the ***Jordan*** clock stopped on this basis is 122 days.

[38] To be clear, this delay must be considered in the overall claim of unreasonable delay: ***KGK***, at paras 26-27, citing ***R v MacDougall***, [1998] 3 SCR 45, 1998 CanLII 763 (SCC) at para 19. It does not, however, count against the 30-month presumptive ceiling, which is simply a shortcut to finding an infringement of s.11(b).

Delay to the Retrial Dates

[39] The period of greatest dispute in this application is between the mistrial declaration on June 10, 2021, and the commencement of this trial on July 18, 2022. The defence contends that this entire period counts against the presumptive ceiling, whereas the Crown suggests that none

of it should. Having already concluded that the Court of Appeal's decision in ***Way*** compels me to find that the mistral was not an exceptional circumstance, the ordinary period of time necessary to reach the retrial is part of the ***Jordan*** calculation.

[40] Shortly after the mistrial, the court coordinator emailed both parties to indicate that the Court and Crown could accommodate the retrial as early as October 18, 2021. This was just over four months after the mistrial and represents an exceptional step to expedite the process. In response to the court coordinator's e-mail proposing a retrial starting October 18th, 2021, defence counsels' assistant responded as follows:

> Unfortunately Mr. Dunlap will not be available during that period. Not only that he has trials scheduled in Edmonton an areas between October 18 to 2022, he also has a trial booked for the following week in Yukon [sic].
>
> He doesn't have two consecutive weeks available till next August but I will check with him and see if he could have some trials adjourned to accommodate this.
>
> [emphasis added]

[41] Three days later, a case management conference was held before the Chief Justice, at which time she approved a change of venue to Edmonton and reserved the present trial dates. The defence urges me to find that the Crown failed in its obligation to canvas and pursue earlier dates. Respectfully, I cannot accede to that characterization of events for four reasons.

[42] First, the e-mail from defence counsel's office did not invite suggestions of earlier dates but rather stated categorical unavailability, indicating *they* would advise if other possibilities materialized. Second, in submissions, Mr. Dunlap emphasized the scheduling difficulties his sizeable practice faced in the summer of 2021. He told the Court that many of the matters in his large practice, both old and new, remained impacted by the COVID-19 court closures and subsequent COVID-19 complications, placing his availability at a premium. I accept and appreciate this submission. If anything, it eloquently illustrates that the impact of COVID-19 on the criminal justice system carried on far beyond the fall of 2020. It is also consistent with the contents of the July 11th e-mail, which offered little hope for earlier defence availability.

[43] Third, subsequent to hearing the s.11(b) argument, I listened to the proceeding before the Chief Justice on July 14, 2021. The transcript for this appearance had not been secured prior to the hearing. In the course of arguing for a change of venue to Edmonton, defence counsel made the following submission:[1]

> So what I can tell you - and again I put this on record before - the earliest dates that I could offer as a 30 plus year lawyer practicing criminal law is - - would be the last two weeks July of next year.

[44] Finally, I find by inference that the Chief Justice would scarcely have permitted the retrial of a second-degree murder to drift wordlessly passed the ***Jordan*** deadline if anyone in the room was under the impression that defence counsel had other unaddressed availability.

[45] I accept that the Crown and Court had an enhanced obligation to mitigate the delay caused by the retrial: ***Ghraizi*** at para 12. That obligation was discharged when a two-week block

[1] I ordered that this transcript be produced and invited further submission on it. I directed that it be placed on the Court file as part of the record on this application.

of trial time was produced less than four months hence, and again when the Court provided a special sitting to accommodate defence counsel's earliest date. This is not a case where the defence was penalized for not having "perpetual availability" to accept early dates. Rather, the defence here expressed, and indeed suffered, a total absence of availability: ***R v Godin***, 2009 SCC 26 at para 23. This is not a matter of blame but simple reality.

[46] The record demonstrates that the present two-week block of trial time was the first available to the defence. It is trite that "the defence will have directly caused the delay if the court and the Crown are ready to proceed, but the defence is not": ***Jordan*** at para 64. This elongation of the trial process is properly considered defence delay and amounts to 273 days.

The *Jordan* Math

[47] The total anticipated delay to the conclusion of argument in this second trial is 1744 days. From this, the following deductions must be made:

- 140 days defence delay in setting the preliminary inquiry (18 January 2018 to 8 August 2018);
- 65 days defence delay from the first trial date being adjourned to accommodate new counsel (3 February 2020 to 8 April 2020);
- 306 days caused by the exceptional circumstances of the COVID-19 pandemic and resulting court closures (8 April 2020 to 8 February 2021);
- 111 days between the end of argument on the first trial to the declaration of the mistrial, time which does not count towards the ***Jordan*** ceiling per ***KGK*** (19 February 2021 to 10 June 2021); and
- 273 days from the beginning to Court and Crown availability for the retrial through the first date available to the defence (18 October 2021 to 18 July 2022).

[48] From the total anticipated time of 1744 days from charge to conclusion of this trial, a total of 926 days must be deducted. This calculation yields a net delay of 849 days in respect of the ***Jordan*** ceiling presumptive ceiling which is 912 days.[2] The Crown has succeeded in demonstrating that the presumptive ceiling was not exceeded in this case.

Overall Unreasonable Delay Analysis

[49] Both ***Jordan*** and ***KGK*** make it clear that the section 11(b) analysis does not terminate with the finding that the presumptive ceiling has not been breached. Rather, the presumptive ceiling is meant as a marker meant to promote efficiency and universality in determining whether most proceedings have been conducted consistently with section 11(b). It remains open to the accused to assert that his right to trial within a reasonable time has been infringed irrespective of the ***Jordan*** calculations in his specific case. As the Supreme Court outlined in ***Jordan*** at para 105:

[2] Assuming a 365-day year, 365/12 X 30 = 912.5. If adjusted for leap-years, the number comes to 913.125. Given the nature of the right at stake, it seems reasonable to use the round figure of 912 days as the ceiling.

> Below the presumptive ceiling, in clear cases, the defence may show that the delay is unreasonable. To do so, the defence must establish two things: (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings; and (2) the case took markedly longer than it reasonably should have.

[50] Beginning with the latter factor, the concept of a case "taking markedly longer" than is reasonable, when the presumptive ceiling is not breached, involves applying the Supreme Court's repeated calls for an end to the "culture of complacency" together with the values and traditional considerations informing the section 11(b) analysis.

[51] I begin by noting the obvious: this case will have taken a very long time to reach a final result. Mr. Clifford was in pre-trial for much of those 57 months. The presumption of innocence has attached for all but 111 days of that period. Mr. Clifford served that pre-sentence custody under the very difficult conditions of the COVID-19 pandemic, which unquestionably had a severe impact on the carceral environment.

[52] That said, there is virtually no Crown delay in this case. The Crown moved with alacrity at all stages. It provided disclosure promptly, was ready to set dates early on, and did not seek or cause any adjournments. The Crown also consented to the accused re-electing trial by judge alone, which shortened the trial time required by a week.

[53] For their part, the Courts provided a week of preliminary inquiry time within six months. The 13-month wait to the initial trial date in the Queen's Bench is not well explained on this record, but I have no evidence of earlier defence availability and this was not a seriously unreasonable delay for a three-week jury trial. The Court was able to accommodate new counsel's dates with only a two-month delay. Most significantly, the Court made trial time available within four months of the mistrial and provided a special summer sitting to accommodate the defence's earliest dates after the mistrial.

[54] I find that there is no evidence of the "culture of complacency" manifesting in this case. The state actors discharged their obligation to move this matter to conclusion in a timely fashion. While this is dispositive, I also find that, while the defence did nothing wrong, its conduct of this case did not "demonstrate a sustained effort to expedite the proceedings" as required to establish a sub-ceiling infringement of section11(b): ***Jordan*** at paras 84-85. Almost every delay was to accommodate the defence, which never expressed urgency.

[55] In the final analysis, this case has simply taken a very long time to be concluded because of understandable steps taken by the defence, which intersected unfortunately with the most exceptional circumstances of the COVID-19 pandemic and constrained defence availability. Applying the principles underwriting section 11(b), I find that the delay in this case, while long, is satisfactorily explained and is not unreasonable. The applicant has thus failed to establish that his rights under section 11(b) have been infringed.

A Postscript on Post-Mistrial *versus* Post-Appeal Retrials

[56] The Court of Appeal's decision in ***Way*** dealt with a mistrial precipitated by a hung jury. This brought the exceptional circumstances doctrine into play. Therefore, the Court of Appeal understandably felt that it would be unnecessary to reset the ***Jordan*** clock for the retrial, as the contingencies brought about by the mistrial were otherwise accommodated in the assessment of a *prima facie* reasonable time to trial.

[57] In this case, however, the majority's *obiter* discussion of 'at fault' mistrial situations compel this Court to find that the ***Jordan*** clock keeps running but that no accommodation can be made for the fact that a full retrial is required. In other cases, where the first trial ran closer to the ***Jordan*** ceiling, this could lead to anomalous results.

[58] In ***Way***, the Court of Appeal noted that the operation of ***Jordan*** on retrials was concurrently before the Supreme Court. Since the release of ***Way***, the Supreme Court reversed the Quebec Court of Appeal in ***JF*** and stated that the ***Jordan*** clock fully resets when a retrial is ordered. This conclusion was expressed and explained at para 76 of its decision.

> Only the delay since the order for a new trial is counted. The trial judge therefore erred in combining the delays for the two trials in assessing whether the s. 11(b) right had been infringed. Such an approach in fact leads to an absurd result, because adding the delays together makes ordering a new trial pointless. While the Court of Appeal correctly recognized that combining the delays for the two trials was inconsistent with the new framework established in *Jordan*, the two-step approach it proposed is also wrong, because it allows an accused to raise first-trial delay after a retrial has been ordered.
>
> [emphasis added]

[59] The absurdity the Supreme Court was pointing out is that applying a single ***Jordan*** ceiling to two trials is utterly unrealistic in most instances. Specifically, imposing a single ***Jordan*** ceiling to a multi-trial scenario risk transforming the guarantee of a trial within a reasonable time into an automatic stay by imposing an often-impossible obligation to provide two trials within the period of time the Supreme Court has expressly stated is intended to cover only a single trial.

[60] This unintended result would be far removed from the principles and purposes of section 11(b). The Supreme Court's decisions in ***KGK*** and ***JF*** unequivocally establish that section 11(b) must not become a *de facto* stay remedy for reversible mistakes or misconduct that are unrelated to the timely administration of justice. Rather, the Court has made clear that section 11(b) is confined to securing, robustly, a timely trial *each time a* trial is need.

[61] Applying the *obiter* in ***Way*** as written, an "at fault" mistrial, where no exceptional circumstances accommodation is to be made, effectively leaves the Crown in the position of having to produce two trials within a single presumptive ceiling. This will often instantly doom the proceeding to a stay.

[62] That outcome could yield perverse results. The mistrial process and analysis undertaken by the trial judge in this case very closely resembled what a defence appeal on the same grounds would have looked like. Under ***JF***, a successful appeal would reset the ***Jordan*** clock, irrespective of how severe the findings of Crown misconduct on appeal may have been. By contrast, under ***Way***, the very same facts, operating under the rubric of a mistrial application process, could leave the Crown with little or no days left to retry the matter under a single presumptive ceiling.

[63] It surely cannot be the case that a homicide prosecution would end in a stay for unreasonable delay under a mistrial process, versus proceeding to trial comfortably within ***Jordan*** parameters after an appeal, when the order necessitating the retrial would turn on the same factual and legal basis in both instances. While mistrials and successful appeals do engage

certain different considerations, the law must to some extent harmonize the impact of each on expectations for retrial timing.

[64] While this concern does not arise in the present case, guidance from the higher Courts on how ***Way*** should be applied in 'at fault' mistrials, considering the Supreme Court's subsequent ruling in ***JF***, would be welcome.

[65] For the reasons expressed above, the stay application is dismissed.

Heard on the 18th day of July, 2022.
Dated at the City of Edmonton, Alberta this day of 26th day of July, 2022.

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J.C.Q.B.A.

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