R. v. Brooks

Ontario Judgments

Ontario Superior Court of Justice

J.M. Copeland J.

Heard: December 20, 2021.

Judgment: January 11, 2022.

Court File No.: CR-19-50000324-0000

[2022] O.J. No. 243 | 2022 ONSC 115

Between Her Majesty the Queen, and Barrington Brooks

(60 paras.)

Case Summary

Criminal law û Constitutional issues û Canadian Charter of Rights and Freedoms û Legal rights û Life, liberty and security of person û Procedural rights û Trial within a reasonable time û Delay attributable to accused or waived û Application by Crown for summary dismissal of two motions brought by accused allowed û Accused brought motions for Charter relief for abuse of process and for stay of proceedings for breach of right to trial within reasonable time û Accused's abuse of process motion had no reasonable chance of success as it related to previous conviction and not to current proceeding û Total delay in bringing matter to trial was reduced by 28 months due to defence delay and exceptional circumstances û Net delay of 21 months was well below 30-month presumptive ceiling.

Application by the Crown to summarily dismiss the accused's motions for abuse of process and for a stay of proceedings based on unreasonable delay. The accused was facing charges of attempted murder, criminal harassment and breach of probation. The accused had discharged his counsel on two occasions. The trial had also been adjourned due to the COVID-19 pandemic. The accused filed a motion seeking a Charter remedy for abuse of process. He filed a second motion seeking a stay of proceedings based on breach of his s. 11(b) Charter right to be tried within a reasonable time. The Crown took the position that both motions should be summarily dismissed as having no reasonable prospect of success, pursuant to the court's case management powers and inherent jurisdiction to control its process.
HELD: Application allowed.

The accused's abuse of process motion had no reasonable prospect of success. Even if the factual basis accused asserted for alleged abuse were proven, his theory of what constituted abuse of process was not capable of constituting abuse of process, nor of forming the basis for a stay of proceedings or any other remedy. Allegations raised by the accused regarding the conduct of proceeding that led to convictions in 2017 were not capable of constituting abuse of

process in the current proceeding. An appeal from his earlier convictions would have been an appropriate forum to raise the allegations he now brought forward. There was no evidence to support the accused's assertion that in the previous matter where he pleaded guilty, the Crown brought imposters to the courtroom in place of the complainants. The total delay was 49 months. There was defence delay of four months related to the preliminary inquiry. There was significant period of delay attributable to defence due to the accused discharging his counsel less than one month before trial. A period of 10 months from when the accused discharged his counsel until the earliest date that new counsel was available was attributed to defence. A further delay of seven months due to the pandemic constituted exceptional circumstances. There was a further seven-month delay attributed to the defence and exceptional circumstances. A delay of 28 months due to either defence or exceptional circumstances brought the net delay of 21 months well under the 30-month presumptive ceiling.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 7, s. 11(b), s. 12, s. 24(1)

Counsel

Michael Coristine, for the Crown.

Mitchell Chernovsky, for Mr. Brooks, *Gabriel Gross Stein, amicus curiae* (excused and not present for hearing of motions).

RULING ON SUMMARY DISMISSAL OF MOTIONS

J.M. COPELAND J.

Overview

1 Mr. Brooks brings two pre-trial motions. One alleges abuse of process, and seeks a remedy under ss. 7, 12, and 24(1) of the *Canadian Charter of Rights and Freedoms*. The other motion alleges that his right to be tried within a reasonable time, as guaranteed by s. 11(b), has been infringed.

2 Crown counsel took the position that both motions should be summarily dismissed as having no reasonable prospect of success, pursuant to the court's case management powers and inherent jurisdiction to control its process, as set out in *R. v. Cody*, *2017 SCC 31*, *[2017] 1 S.C.R. 659*, at para. 38.

3 I heard submissions at the outset from both parties on whether either or both motions should be summarily dismissed. Following those submissions, I dismissed both motions summarily, with brief oral reasons, and written reasons to follow. These are my reasons for dismissing both motions.

4 Trial judges are encouraged to use their case management powers to minimize delay and

ensure efficient use of court resources. In *Cody*, the Supreme Court of Canada held that before permitting an application to proceed, the trial judge should consider whether an application has a reasonable prospect of success, and, in appropriate circumstances, exercise their discretion to summarily dismiss the application: *Cody* at para. 38.

5 I explain my reasons for dismissing both motions as briefly as possible. I do so because the concern in *Cody* about effective and efficient use of court resources is not limited to time spent in the courtroom. It extends to judicial time spent writing reserve judgments, which is also a limited resource, given the many cases heard by the court, and the finite number of judges to hear them.

Abuse of Process Motion

6 I will not re-summarize the basis of this motion. It is concisely summarized in the November 9, 2021 ruling of Justice Davies dismissing Mr. Brooks' application for three subpoenas: *R. v. Brooks*, *2021 ONSC 7418* at paras. 15-21.

7 I want to underline that Mr. Brooks represented himself on this motion, with leave of the court granted by Justice Davies on September 27, 2021. Mr. Chernovsky, as an officer of the court, assisted Mr. Brooks to prepare the paperwork required for the motion. But he was not prepared to argue the motion as counsel.

8 I find that Mr. Brooks' abuse of process motion has no reasonable prospect of success for two reasons. First, even if the factual basis he asserts for the alleged abuse were proven (which I do not accept), his theory of what constitutes the alleged abuse of process is not capable of constituting an abuse of process in the case currently before this court. Nor is it capable of forming the basis for a stay of proceedings or any other remedy. Second, there is no evidence to support Mr. Brooks' claim of an abuse of process. His claim is based on fanciful speculation. I explain my reasoning on each of these points below.

9 First, Mr. Brooks' allegations are not capable of constituting an abuse of process in the present case. Even if what Mr. Brooks alleges were true, and the two women in court on December 18, 2017 were not the complainants, this case is not the appropriate forum for raising those concerns. Mr. Brooks did not appeal his 2017 convictions. An appeal of those convictions would have been the appropriate forum to raise the allegations he now brings forward. The charges currently before this court are a separate and unrelated proceeding from the 2017 convictions. The allegations Mr. Brooks raises regarding the conduct of the proceeding that led to the December 2017 convictions is not capable of constituting an abuse of process in the current proceeding.

10 I acknowledge that the breach of probation count that Mr. Brooks is currently facing is based on the probation order imposed in the previous matter in December 2017. However, I agree with the conclusion reached by Justice Davies that Mr. Brooks cannot launch a collateral attack on the validity of the 2017 probation order in the context of his current charges. He did not appeal his conviction or sentence in relation to the 2017 guilty pleas. It is not open to him to now raise concerns about the validity of the probation order through an abuse of process motion.

11 This brings me to my second reason for summarily dismissing Mr. Brooks' abuse of process motion. There is no evidence to support Mr. Brooks' allegations of abuse of process. I acknowledge that the lack of evidence is in part due to the fact that Justice Davies did not allow Mr. Brooks to subpoena the three witnesses he wanted to testify at his abuse of process application. However, Justice Davies refused to issue the subpoenas because she was not satisfied that the three individuals had material evidence to give on the abuse of process application: *Brooks* at para. 25. There is no evidence to support Mr. Brooks' assertion that in the December 2017 matter where he pled guilty, the Crown brought imposters to the courtroom in the place of the complainants. His theory of abuse of process has no merit, and is based on fanciful speculation about what happened in the courtroom on December 18, 2017.

Section 11(b) Motion

12 Because I dismissed the s. 11(b) motion summarily, these reasons do not address every time frame within the 49 months between the laying of the charges and the anticipated end of the trial. I will address three time periods of either defence delay or exceptional circumstances that, in my view, even based on rough estimates made favourably to the defence, bring the elapsed time below the 30-month Jordan ceiling.

13 In *R. v. Jordan*, the Supreme Court of Canada laid out a new framework for assessing whether the right to be tried within a reasonable time has been infringed: *2016 SCC 27*, *[2016] 1 S.C.R. 631*. There is a presumptive ceiling of 30 months for cases in the Superior Court, beyond which delay is presumed to be unreasonable. This period runs from the date a charge is laid to the actual or anticipated end of trial. However, delay attributable to or waived by the defence does not count towards the 30-month presumptive ceiling.

14 Once the presumptive ceiling is exceeded, the Crown bears the burden to establish the presence of exceptional circumstances to rebut the presumption of unreasonableness. Exceptional circumstances include discrete events and particularly complex cases. If the Crown cannot rebut the presumption, a stay will follow. If the delay is below the presumptive ceiling, the burden is on the defence to show that the delay is unreasonable.

15 I appreciate the shifting burdens in *Jordan*. Once the court assesses the quantum of total delay minus periods of defence delay, if the resulting delay exceeds the presumptive 30-month ceiling, the burden shifts to the Crown to rebut the presumption of unreasonable delay on the basis of exceptional circumstances. Because of the interplay in this case between defence delay and exceptional circumstances caused by the pandemic during the time the case has been in the Superior Court (in particular during the time period October 2020 to March 2022), I explain my analysis in chronological order. However, I bear in mind the Crown's burden to establish any delay claimed as exceptional circumstances.

16 As I am considering these time periods in the context of determining whether the s. 11(b) motion should be summarily dismissed, I use approximate monthly time periods in assessing the periods of delay, not exact numbers of days.

i. January 2019 to May 2019 - From scheduled preliminary inquiry to first appearance in Superior Court

17 I find that on any reasonable reading of the record, the delay from the scheduled start of the preliminary inquiry (January 28, 2019) to the first appearance in Superior Court (May 23, 2019) is defence delay. Without going into great detail, the preliminary inquiry was derailed and unable to proceed because of conduct attributable to the defence. This occurred because of a combination of counsel not being prepared at the beginning of the preliminary inquiry on January 28 and 29, followed by Mr. Brooks discharging his counsel, and engaging in disruptive conduct in court on February 1. On any reasonable analysis, this is delay solely attributable to the defence.

18 Counsel for Mr. Brooks submits that no actual delay was occasioned by the defendant firing his counsel and the preliminary inquiry not proceeding, because, he submits, it would have taken the same amount of time for the case to get to Superior Court had the preliminary inquiry proceeded as scheduled. I acknowledge that had the preliminary inquiry proceeded, there would have been some period of time up to the first appearance in Superior Court (although, not likely as long as 4 months). However, in my view it is not appropriate to engage in a hypothetical alternative version of events in the *Jordan* analysis.

19 For purposes of the summary judgment motion, the defence delay in this period is reasonably assessed as 4 months.

ii. March 2020 to October 2020 - Exceptional circumstances due to the pandemic

20 I find that the delay from March 2020 to October 2020 constitutes exceptional circumstances caused by the COVID-19 pandemic.

21 Mr. Brooks' jury trial was originally scheduled for May 2020 (the first trial date) but was adjourned due to the COVID-19 pandemic. On March 15, 2020, Chief Justice Morawetz made an order adjourning all but urgent criminal matters in the Superior Court of Justice due to the public health crisis. In July 2020, in-person matters started to be heard throughout Ontario, and the court worked to improve infrastructure for remote hearings, including for criminal trials. By the fall of 2020, trials were proceeding in person and remotely, including in-person jury trials in September and early October 2020: see e.g., *R. v. MacKinnon*, 2021 ONSC 2749 at paras. 14-16. As a result of the pandemic and the March 2020 shut down of in-person matters, Mr. Brooks' trial was eventually rescheduled to October 13, 2020 (the second trial date): *Transcript of June 3, 2020*. This 7-month period was delay caused by the pandemic.

22 Recent cases have recognized that delay caused by the adjournment of trials due to COVID-19 is a discrete exceptional event, a conclusion I agree with: see *R. v. Simmons*, 2020 ONSC 7209 at para. 60; *R. v. Khattra*, 2020 ONSC 7894 at para. 56; *R. v. Henry* 2021 ONSC 3303 at paras. 13-14. The COVID-19 pandemic has had and continues to have a dramatic and unprecedented effect on the criminal justice system, including the shutdown of in-person courts initially, and the suspension of jury trials for several periods of time. The Superior Court has engaged in substantial efforts to continue hearing cases during the pandemic in a manner that is safe for all participants: see *MacKinnon*, at paras.

23 I note that the parties disagree as to whether this period should be counted from the date the courts shut down in mid-March 2020, or from the first scheduled trial date in May 2020. I find that it should start from the date the courts shut down in mid-March 2020. I acknowledge that there is contrary authority at the Superior Court level: *Khattra* at para. 70. There are two reasons that I reach the conclusion that the delay should be counted from mid-March 2020 when the courts shut down.

24 First, although Mr. Brooks' first trial date was scheduled in May 2020, and thus, absent the pandemic, the time between March and May 2020 would have been counted within the *Jordan* ceiling, that is not what happened. The pandemic shutdown of the courts intervened. I find that the *Jordan* analysis should be based on the actual intervening event of the pandemic shutdown, not on what was scheduled prior to the shutdown.

25 Second, starting the COVID-19 delay time period in May 2020 rather than March 2020 has the effect of artificially excluding as pandemic delay periods of time where delay was <u>caused by</u> the pandemic and contributed to the pandemic backlog. Just by way of example, from mid-March 2020 until early July 2020, essentially no trials were taking place in the Superior Court (apart from some trials in progress, and a few tests of remote proceedings, the latter of which, as is difficult to remember now, were a sea change for the courts). Additionally, jury trials did not recommence until the fall of 2020. To exclude the period of mid-March 2020 to May 2020 has the effect of excluding from the calculation the delay impacting the entire court system during this period and the impacting the resetting of trial dates of all of the trials which could not proceed in that time period.

26 In any event, even if I am wrong in this conclusion, and if a further 2 months were not counted as exceptional pandemic delay (March 2020 to May 2020), the ultimate total calculation of net delay in this case would still be below the 30-month *Jordan* ceiling.

27 The parties also disagree about whether the end date of this time period should be July 2020 when trials resumed, or the October 2020 second trial date. I agree with the analysis of Justice Nakatsuru in *Simmons* that the exceptional pandemic delay in this time period should extend to rescheduled trial date, in this cases, October 2020: *Simmons* at paras. 67-72; see also *Khattra* at para. 84. Mr. Brooks' election is a jury trial. Jury trials were not yet proceeding in the summer of 2020 due to the pandemic. Further, in the context of the length of the shut down and court restrictions beginning in March 2020 due to the pandemic, it is not a realistic and contextual analysis of the impact of the pandemic to cut off the time period in July 2020.

28 Further, the record supports that the Crown and the court reasonably mitigated the delay in this case after the adjournment of the first trial date due to the initial pandemic restrictions. It is clear that that Mr. Brooks' trial was given priority in its rescheduling for October 2020. As a result, the delay caused by the first court shut down and loss of the May 2020 trial dates was minimized. 5 months after his original trial date, and 7 months after the shutdown was a very short delay to a new trial date when all the circumstances are considered, particularly given that no trials at all commenced from mid-March to July 6, 2020, and no jury trials until September 2020.

29 I find that the delay due to the exceptional circumstances of the pandemic in this period is 7 months.

iii. October 2020 to March 2022 - Second scheduled trial date to projected end of trial

30 The time period from October 2020 to March 2022 is a combination of defence delay and exceptional circumstances.

31 On September 21, 2020, the defence counsel advised Crown counsel by email that Mr. Brooks had discharged counsel and counsel would be seeking to be removed from the record. Counsel was removed, and the October 13, 2020 trial dated was adjourned.

32 Mr. Brooks took some time to retain new counsel after he discharged his counsel in September 2020. At Mr. Brooks' court appearances on October 9, 23, and November 6, he said he was contacting Legal Aid Ontario to obtain new counsel. Eventually, Mr. Brooks retained Mr. Chernovsky through the *Rowbotham* pilot project by early February 2021.

33 On February 5, 2021, the first court appearance where Mr. Chernovsky was counsel of record, through a communication sent to Crown counsel, who put the request on the record, Mr. Chernovsky asked for four weeks to get up to speed on the file. The defence was not ready to set a new trial date until the court appearance of March 26, 2021. The third trial date was scheduled for February 28, 2022 with an anticipated conclusion on March 25, 2022.

34 I find that on any reasonable analysis, there is a significant period of delay attributable to the defence due to Mr. Brooks discharging his counsel in September 2020. The October 2020 trial could not proceed as Mr. Brooks had discharged his counsel just weeks before, and said he required time to find a new counsel. This was the second time that Mr. Brooks had caused delay by firing his counsel. He had discharged the same counsel on February 1, 2019, during the time scheduled for his preliminary hearing (and then subsequently re-engaged her). New counsel, Mr. Chernovsky, was not prepared to set the third trial date until March 26, 2021.

35 But the defence delay caused by Mr. Brooks discharging his counsel in September 2020 does not end in March 2021, when Mr. Chernovsky was prepared to set trial dates. There is no evidence in the record on the s. 11(b) motion that defence counsel was actually ready to conduct a trial (as opposed to set dates) in March 2021. Indeed, the evidence is that Mr. Chernovsky was not available to conduct the trial until August 2021. In email correspondences with the Crown and trial coordinator on March 26, 2021, Mr. Chernovsky advised that he could be ready for trial earlier that February 2022. He advised that he was free all of August 2021 and available in the fall of 2021. However, February 28, 2022 was the earliest available date from the trial coordinator for a 4-week trial.

36 Further, setting a new trial date must take into account the availability court time, counsel, and witnesses. Rescheduling occurs within the reality of the courthouse: *Simmons*, at para. 72. That reality must be recognized when calculating the appropriate time period and when assessing what the Crown and court can reasonably do to mitigate the delay: *Simmons*, at paras. 71-72. In my view, the comments of the Supreme Court in the pre-*Jordan* decision of *R.*

v. Godin referring to defence counsel are apposite in this context in recognizing the reality that new trial dates cannot be available immediately. Scheduling requires reasonable availability and reasonable cooperation, but it does not require the court to hold itself in a state of perpetual availability: *Godin* *2009 SCC 26*, *[2009] 2 S.C.R. 3* at para. 23.

37 Given that defence counsel was not available to conduct a trial until August 2021, I find that the delay caused by Mr. Brooks discharging counsel in September 2020 runs from the lost second trial date in October 2020 until August 2021, the earliest date that Mr. Brooks' new counsel was available to conduct the trial. This is a period of 10 months.

38 The defence submits that Mr. Brooks' trial would inevitably have been delayed due to the pandemic, whether or not he fired counsel. This submission is based on the Chief Justice's order of October 9, 2020, which suspended jury selection for 28 days (and subsequently was further extended until spring 2021). Following from this submission, the defence submits that none of the delay after October 2020 is caused by Mr. Brooks' decision to fire counsel. On this basis, the defence submits that this period should not be counted as defence delay.

39 I reject this submission by the defence. As I have already indicated, in my view the court should conduct the *Jordan* analysis based on what actually occurred, not based on a hypothetical alternative version of events. But for the sake of argument, if one considers the hypothetical that Mr. Brooks had not fired his counsel in September 2020, it makes clear that at least some of the delay between the second and third trial dates was due to Mr. Brooks firing his counsel in September 2020.

40 If Mr. Brooks had not fired his counsel in September 2020, and his trial in October 2020 had not proceeded only because of the suspension of jury trials due to the pandemic, he would have been able to set new trial dates right away (since he would still have had counsel), rather than waiting until his new counsel was ready to set trial dates in March 2021. Had Mr. Brooks set new trial dates in, say, November 2020, I expect he could have had his trial set and heard in the fall of 2021, when jury trials proceeded on a consistent basis.

41 Turning away from the hypothetical and back to actual events, Mr. Brooks was not able to set new trial dates in November 2020 because he had fired his counsel in September 2020, and because of the time for him to find new counsel, to have counsel appointed pursuant to *Rowbotham*, and for new counsel to get up to speed on the file. Thus, it is clear that the delay between October 2020 and March 2022 is a combination of defence delay and exceptional delay due to the pandemic.

42 However, I do not agree with Crown counsel that all of the delay from October 2020 until March 2022 (the projected end of the trial) should be characterized as defence delay. As I have outlined, I find that a period of 10 months, from October 2020 until August 2021 is properly characterized as defence delay. Realistically, where counsel was ready to set trial dates in March 2021, and available for trial in August 2021, absent the pandemic, one would expect that in-custody trial dates would have been available in August 2021, or at least in the fall of 2021. For this reason, I find that the delay from August 2021 to the projected end of trial in March 2022

should be considered under the heading of exceptional circumstances due to the pandemic, and not as defence delay.

43 I find that delay after August 2021 is delay caused by the pandemic. The issue is, can all of this delay be called exceptional due to the pandemic, or is some of it no longer justifiably exceptional and due to a lack of sufficient resources committed to the courts by government to address the pandemic?

44 The defence makes the submission that there must be a limit to the amount of delay that is justified by the pandemic as exceptional circumstances. Although I accept that submission as a matter of principle, I am not persuaded that there is a reasonable prospect that the pandemic delay in this case up to the projected end of the trial in March 2022 would be found to be unjustified.

45 The unprecedented nature of the pandemic has wreaked havoc around the world, and with the court system, for close to two years now. The impact of the pandemic on the courts must be considered from a systemic perspective. It is not just Mr. Brooks' case that has been affected by the pandemic. COVID-19 has caused "a system-wide impact of unprecedented proportions, never seen before in our lifetime": *Simmons* at para. 70. The backlog of cases was not caused by a lack of resources, but by the effects of the pandemic. The unfortunate reality of repeated waves of the COVID-19 pandemic is that when case counts are high, given the airborne nature of the virus, public health requirements are incompatible with conducting of jury trials.

46 I acknowledge and accept that the pandemic is not a justification for limitless delay. At some point, and depending on the record before the court, it would be open to a court to find that insufficient resources were devoted by the government to keeping the courts running during the pandemic. On the record before the court now, I do not see any prospect of such a finding being made in this case, at this point.

47 However, for the sake of argument, when I assess the net delay below, I assess it using two different calculations. The first considers all of the delay from August 2021 to March 2022 as exceptional circumstances due to the pandemic. The second only counts 3 months of that time period.

48 I find that on any reasonable assessment the delay in the period from the second trial date (October 2020) to the projected end of the third trial date (March 2022) is 10 months defence delay, and 7 months exceptional circumstances due to the pandemic. Even if calculated more favourably towards the defence (by not counting all of the pandemic delay as justified), any reasonable analysis would allocate at least 3 months to exceptional delay caused by the pandemic.

iv. Conclusion regarding the 30-month ceiling after subtraction of defence delay and exceptional circumstances

49 The calculations of net delay that follows from the above analysis are as follows (looking at two versions, one of which does not include all of the delay after August 2021 as justified exceptional circumstances due to the pandemic).

50 On the first analysis, including all of the time from August 2021 to the end of the projected trial in March 2022, the net delay is well under the 30-month *Jordan* ceiling. I calculate this as follows:

4 months (January 2019 to May 2019 defence delay)

+ 7 months (March 2020 to October 2020 exceptional circumstances due to the pandemic)

+ 10 months (defence delay due to firing of counsel - October 2020 to August 2021)

+ 7 months (exceptional circumstances due to the pandemic after August 2021)

= 28 months, which should be subtracted from the *Jordan* ceiling as either defence delay or exceptional circumstances.

51 Using this calculation, the 49-month delay from date of charge to projected end of trial less 28 months equals 21 months net delay, which is under the *Jordan* ceiling.

52 Even on a view more favourable to the defence, where not all of the delay after August 2021 is counted as justified exceptional circumstances due to the pandemic, if one were to find that insufficient resources were devoted to maintaining the court system in the face of the pandemic (which I do not accept, but consider for the sake of argument), the total net delay is still under the 30-month ceiling. I calculate this as follows:

4 months (January 2019 to May 2019 defence delay)

+ 7 months (March 2020 to October 2020 exceptional circumstances due to the pandemic)

+ 10 months (defence delay due to firing of counsel - October 2020 to August 2021)

+ 3 months (exceptional circumstances due to the pandemic after August 2021)

= 24 months.

53 Using this calculation, the 49-month delay from date of charge to projected end of trial less 24 months equals 25 months net delay, which is under the *Jordan* ceiling.

54 I note that these calculations do not consider any of the time periods between the laying of the charges and the date scheduled for the preliminary inquiry (January 2018 to January 2019). Crown counsel made submissions about defence delay during that time period. These submissions related to then-defence-counsel refusing to set a Crown pretrial when substantial disclosure had been provided, but not every single piece of disclosure; Mr. Brooks repeatedly changing his mind about his election, which arguably delayed the pretrial process in the Ontario Court of Justice; and at least one period when then-counsel requested a delay in a pretrial to accommodate his schedule.

55 I find that the nature of the alleged defence delay in the time period between January 2018 and January 2019 is more factually nuanced than in the later time periods. For this reason, I find that it is not amenable to consideration on a request for summary dismissal. This should not be

taken as a finding that Crown counsel's submissions for that time period do not have merit. I simply do not consider that time period at all. Thus, my analysis of the various time periods is erring on the side of being more favourable to the defence because I have not considered any potential defence delay within the time period from January 2018 to January 2019.

56 For these reasons, I find that on any reasonable assessment of the delay from January 2019 to the projected end of the trial in March 2022, the total delay falls under the 30-month *Jordan* ceiling.

v. Consideration of unreasonable delay under the 30-month ceiling

57 The factum filed on behalf of Mr. Brooks on the s. 11(b) motion did contain any submissions that if the net delay was under 30 months, it was nonetheless unreasonable. However, defence counsel raised the issue in oral submissions on the summary dismissal.

58 A delay may be unreasonable even if it falls below the 30-month presumptive ceiling: *Jordan* at para. 82. The onus is on the defence to show that the delay is unreasonable by establishing two things: (1) that it took meaningful steps that demonstrate a sustained effort to expedite the proceedings; and (2) that the case took markedly longer than it reasonably should have. Absent these two factors, the s. 11(b) application must fail.

59 The defence has no reasonable prospect of meeting either requirement. First, apart from Mr. Chernovsky being available for trial beginning in August 2021, which I have already factored in, the record does not reasonably support a finding that the defence took meaningful steps to expedite the proceedings. Second, the Crown moved expeditiously to move the matter forward. The case did not take markedly longer than it reasonably should have given the COVID-19 pandemic. Delay caused by COVID was exceptional and unavoidable in the circumstances.

60 For these reasons, I find that the abuse of process motion and the s. 11(b) motion have no reasonable prospect of success. The abuse of process and the s. 11(b) motion are dismissed.

J.M. COPELAND J.

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