Court of Appeal for Saskatchewan **Citation: *R v Kennedy*, 2026 SKCA 49**

Docket: CACR3863 **Date: 2026-04-10**

Between:

His Majesty the King

Appellant

And

Taylor Kennedy

Respondent

Before:	Leurer C.J.S., McCreary and Bardai JJ.A.
Disposition:	Appeal dismissed
Written reasons by:	The Court
On appeal from: Appeal heard:	Provincial Court, Saskatoon (SK) November 5, 2025
Counsel:	Erin Bartsch for the Appellant Thomas Hynes and Taylor Schlamp for the Respondent

The Court

I. INTRODUCTION

[1] The *Canadian Charter of Rights and Freedoms* guarantees to every person charged with an offence the right "to be tried within a reasonable time" (at s. 11(b)). The Supreme Court of Canada has interpreted this to mean that a trial in the Provincial Court must presumptively conclude no later than 18 months after the day charges are laid (*R v Jordan*, 2016 SCC 27 at para 5; and *R v Laird*, 2024 SKCA 61 at para 69).

[2] In certain circumstances, periods of delay beyond the presumptive ceiling must be subtracted from the total period of delay for the purpose of determining whether the allowable ceiling has been exceeded. These are: when a case is unusually complex; or, when the delay is waived or caused by the defence, when delay arises from exceptional circumstances emerging from discrete events, or when it is caused by reasonable judicial deliberation time (see *Jordan* at paras 46-49, 69 and 105; *R v K.G.K.*, 2020 SCC 7; *R v Boehmer*, 2019 SKCA 74 at para 29; and *Laird* at para 69).

[3] Nevertheless, even in an especially serious case like this one, when the delay exceeds the adjusted ceiling and the accused's right to a trial in a reasonable time is breached, only a stay of proceedings can remedy that breach "since any lesser remedy would allow the trial to continue and thus increase the unreasonable delay" (*R v Varennes*, 2025 SCC 22 at para 82).

[4] Taylor Kennedy was charged on March 15, 2022, with driving a motor vehicle while under the influence of marijuana and causing the death of a child contrary to s. 320.14(3) of the *Criminal Code*. From the date the charge was laid against her, it took 899 days — just shy of 30 months — for her trial to reach its conclusion in the Provincial Court of Saskatchewan. The trial judge found that some of this delay was attributable to the defence or should otherwise be excused. However, even after accounting for these factors, she found that the trial would not conclude within a reasonable time. For this reason, the judge ordered a stay of the charge.

[5] The Crown appeals against the judge's finding. In doing so, it accepts that the judge identified the correct legal principles that can exempt delay from counting against the *Jordan* time

requirement. It also agrees that, if Ms. Kennedy's right to a trial in a reasonable time was violated, the charge against her was properly stayed. The Crown's sole contention is that the judge erred by not finding that there were additional reasons to extend the *Jordan* time limit.

[6] We agree with the Crown that the judge erred by not extending the reasonable time to trial on account of the COVID-19 pandemic. However, even adjusting for this and one other matter, Ms. Kennedy was still not tried within a reasonable time. For this reason, the Crown's appeal must be dismissed.

II. ISSUES

[7] This Court recently summarized the calculation of a reasonable time for a trial to conclude in Provincial Court, in *Laird*:

> [69] …For matters tried in Provincial Court, the presumptive ceiling for a reasonable time from charge until the actual or anticipated end of trial is 18 months. In determining whether that time in a given case exceeds the presumptive ceiling, any delay that is waived by or otherwise attributable to the defence is subtracted from the total period under consideration, likewise for delay attributable to exceptional circumstances that arise from discrete events (*Jordan* at paras 46–49, 69 and 105) and for delay attributable to reasonable judicial deliberation time (*R v K.G.K.*, 2020 SCC 7, [2020] 1 SCR 364). If, after appropriate deductions are made for delay falling into the foregoing categories, the remaining time exceeds the *Jordan* ceiling, it is presumed to be unreasonable and in violation of s. 11(b), unless the Crown can demonstrate that the complexity of the case renders the time to the end of trial reasonable (*Jordan* at para 105). The remedy for a violation of s. 11(b) is a stay of proceedings.

[8] As has been noted, 899 days, or almost 30 months, elapsed from when Ms. Kennedy was charged until the trial reached its conclusion. The judge followed the methodology for calculating the *Jordan* delay as endorsed by this Court in *Boehmer*. She then found that 158 days of the time between the charge and the trial's conclusion did not count towards the presumptive ceiling of 18 months. This was made up of 109 days of defence delay, 94 of which were admitted by the defence and 15 of which related to a 29-day period where defence counsel was not available for trial dates proposed by the Court and for which the Crown was available. The judge also concluded that the 49 days she had taken to render a significant interim decision should not be counted against the *Jordan* ceiling. Even with these adjustments, the total time to trial remained well in excess of what would be reasonable under the *Jordan* framework.

[9] The Crown contends, though, that further adjustments should have been made by the judge, as follows:

(a) 120 days because of the COVID-19 pandemic;

(b) 60 days for an exceptional circumstance arising from the service of a defence *Charter* application; and

(c) 45 additional days for defence delay.

[10] The Crown argues that, when these delays are accounted for, Ms. Kennedy *was* tried within a reasonable time. For the Crown to succeed on this appeal, it must be successful on each of the issues it raises.

[11] Ms. Kennedy describes the Crown's approach to the case as "lackadaisical", which is why, according to her, the trial process took so long. She takes the position that, if anything, the judge was overly generous in the calculation of defence delay. In this regard, she asserts that the 49 days required to make an interim judicial decision should not have been excluded from the delay calculation. In all other respects, Ms. Kennedy maintains that the judge's analysis ought to be left undisturbed.

III. ANALYSIS

A. COVID-19 delay

[12] One of the adjustments that can be made to what is a reasonable time for a trial to conclude is delay attributable to exceptional circumstances. These types of delays fall into two categories, discrete events and cases which are particularly complex. See: *Jordan* at paras 69-71; and *Laird* at paras 70-73. An exceptional circumstance is one that falls outside of the Crown's control. For a discrete event to constitute an exceptional circumstance, it must be an event or situation that is reasonably unavoidable or unforeseen. A delay caused by this sort of circumstance cannot be remedied by the Crown and, therefore, is not held against the Crown. The first issue in this appeal is if the judge erred by failing to recognize that the COVID-19 pandemic was a discrete event that should not have counted against the *Jordan* time-to-trial ceiling.

[13] The COVID-19 pandemic declared in early 2020 affected all facets of life. It impacted schools, health care, trade, and the judicial system. With respect to the latter, one of the unfortunate consequences of the pandemic was the creation of a substantial backlog of cases, as courts were shut down and had to pivot, going online for a period. Courts have repeatedly acknowledged that the pandemic resulted in delays and that those delays should not be treated as the fault of the Crown or as institutional delay for the purposes of determining the applicable *Jordan* date. See: *R v Agpoon*, 2023 ONCA 449 at para 19; *R v LeRoy*, 2024 NSCA 30 at para 63; *R v Loiacono*, 2023 ABCA 157 at para 19; and *R v D'Souza*, 2024 ABCA 77 at para 8.

[14] The judge in this case identified the pandemic as a discrete event constituting an exceptional circumstance but found she was unable to quantify the delay that was attributable to it. For this reason, she concluded that it could not be used to justify an extension of the presumptive *Jordan* time limit:

> With all of this said, I have concluded that, yes, I can conclude that a backlog of cases likely developed in the aftermath of COVID increasing time to trial, but what I cannot do in this case is conclude a particular period of delay or length of delay is attributable to that finding. Yes, I have the time to trial logs appended to the Crown's brief, but I have no evidence upon which to establish any particular length of delay that I might attribute to the aftermath of COVID.
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> Accordingly, I find I am unable to attribute any delay to COVID backlog on the basis of characterization of it as a discrete event. …

[15] In reaching this conclusion, the judge referred to *Laird.*

[16] The judge's reliance on *Laird* was misplaced. She was correct to observe that, in that case, this Court held that evidence was required to quantify the delay that was attributable to the pandemic. However, she failed to recognize that, in contrast to the situation in *Laird*, in this case the Crown had filed a record that allowed for the quantification of the delay that was attributable to the pandemic.

[17] To fully explain this statement, it is necessary to review why this Court determined in *Laird* that it could not make an adjustment to what would be a reasonable time to trial on account of the pandemic. In *Laird*, this Court held as follows:

> [96] In my view, the trial judge in this case was entitled to take judicial notice of the fact that the COVID-19 pandemic had affected the operation of the court. That is the type of fact that is properly seen as being so notorious or generally accepted as to not be the subject of debate among reasonable persons. In other words, it fits within the judicial notice

> framework set out in *R v Find*, 2001 SCC 32, [2001] 1 SCR 836 at para 48. There is also much support in the jurisprudence for the proposition that a Provincial Court judge who sits in a small judicial centre, like the trial judge here, is well-positioned to take judicial notice of whether an event such as the COVID-19 pandemic has affected the overall operation and scheduling of matters in their own court house (see, for example: *R v L.L.*, 2023 ONCA 52 at paras 20–23, 166 OR (3d) 561).
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> [97] Nevertheless, in my opinion, by going a step further and quantifying that delay in the absence of any evidence relevant to such a quantification, the trial judge made a legal error. The trial judge had already deducted a portion of the delay attributable to the COVID-19 pandemic, namely, the delay caused by the adjournment of the first trial dates. He was correct to do so, as there was evidence that the discrete exceptional circumstance of the pandemic had caused an identifiable period of 114 days of delay in that instance. However, beyond that, while it may have been possible to infer that the COVID-19 pandemic had slowed the operation of the court generally, such an inference does not and cannot properly transform into the articulation of a specific period of delay without being grounded in some evidence.
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> [98] In this case, it was obvious that much of the trial coincided with an active stage of the pandemic. However, apart from the 114-day adjournment that was specifically accounted for, there was no evidence before the trial judge that the COVID-19 pandemic had caused any other identifiable period of delay, and nothing that would have assisted in quantifying the period of delay that could be attributed to a general COVID-19-related slowdown in any other way. Accordingly, in my view, there was no evidentiary basis for the trial judge to have attributed 180 days of delay to the "overall" effects of COVID-19.

[18] Two conclusions can be drawn from this passage. First, a trial judge is entitled to take judicial notice of the fact that the COVID-19 pandemic had affected the operation of the court. Second, a judge cannot take judicial notice of the extent to which court proceedings were delayed. In other words, *Laird* stands for the principle that to attribute delay to the pandemic, the judge must have a foundation on which to quantify the extent of delay that was attributable to the pandemic. In that case, no material was put before the Court that would allow the Court to determine the length of delay occasioned by COVID, either in the form of uncontested logs, testimony from a participant as to their efforts to secure trial dates, court staff or other evidence.

[19] In this case, the crash occurred on September 9, 2021, and the charge was laid on March 15, 2022. In contrast to *Laird*, in which no evidence was filed to quantify COVID-related delay, here, the Crown filed logs setting out the average time to trial, before, during and after the pandemic. The defence did not put in issue the accuracy of the logs or object to their admission.

[20] The logs showed that, as of December of 2019 (being just before the pandemic was declared), it took on average 160 days for a case that required two or more days of trial time to get

to trial. By December of 2022, the time to trial had risen to 280 days and by December of 2023, that time had decreased to 204 days.

[21] Summing all of this up, when charges were laid in this case, the backlog caused by COVID-19 meant that it took, on average, 120 days longer to get a case to trial than prior to the pandemic. This was readily apparent from the uncontested information before the judge. Since this matter was prosecuted right in the middle of this period, it is difficult to conceive of what better evidence could have been provided to show the delay occasioned by COVID-19 on the time that Ms. Kennedy's case took to proceed to trial.

[22] A judge's decision on the length of a delay is entitled to deference. However, in this case, the judge can be said to have either erred in law, by misinterpreting *Laird*, or she palpably erred in finding she could not determine the impact of COVID on the scheduling of the trial given the trial logs.

[23] In summary, the judge erred by not finding that the delay occasioned by the discrete event of the pandemic was 120 days.

B. Trial continuation on account of s. 24(2) application

1. The issue

[24] On September 26, 2023, two weeks before the trial was set to begin, Ms. Kennedy filed a *Charter* application asserting that her ss. 8, 9 and 10(b) *Charter* rights had been violated. These sections protect everyone from unreasonable search and arbitrary detention. They also ensure certain rights upon arrest. Among other things, Ms. Kennedy alleged that she had been detained by the police without being given her right to counsel, that oral fluids were unlawfully seized from her and that the police had taken blood samples without complying with the provisions of the *Criminal Code*.

[25] Based on this, and more, Ms. Kennedy asserted that her *Charter* rights had been breached and that the violation of her rights warranted the exclusion of her blood sample under s. 24(2) of the *Charter*.

[26] According to the Crown, the service of Ms. Kennedy's application on September 26, 2023, caused cascading delays, which should be laid at the feet of the defence. In this regard, the Crown says that, because of the timing of the service of the application, it could not complete the trial in October of 2023 as had been planned. When the trial resumed in early February of 2024, it was adjourned again to April of 2024, because the defence insisted that it needed more time to absorb the disclosure that the Crown had served only days prior.

[27] The judge made no adjustment to the *Jordan* calculation to account for the defence *Charter* challenge, and she expressly rejected that it should be characterized as defence delay. In this appeal, the Crown invites this Court to conclude that "at least" 60 days of additional delay should be counted as a discrete event that should be deducted from the period of delay under consideration. It contends that, if what occurred cannot be labeled as defence delay, it amounts to a discrete event that justified an extension of a reasonable time to trial. In advancing this argument, it relies on the following passage from *Jordan*:

> [73] 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. For example, a complainant might unexpectedly recant while testifying, requiring the Crown to change its case. 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.
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> [74] 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.

[28] The issue in this appeal is, therefore, if the judge erred by not treating the timing of the service of the defence application to exclude evidence under s. 24(2) as a discrete event justifying an additional delay of the trial.

2. Further background

[29] The defence first alerted the Crown of its intention to bring a *Charter* application alleging that Ms. Kennedy's ss. 8 to 10 rights were violated on November 29, 2022. The trial was initially expected to proceed in two stages. The first stage was to have occurred in August of 2023 when

one day was set aside to hear argument in connection with a question that Ms. Kennedy had raised concerning the constitutionality of s. 320.31(9) of the *Criminal Code*. The second stage, to hear evidence, was to occur over three days starting on October 10, 2023. This trial plan later changed when the single day that had been set aside to hear the question as to the constitutionality of s. 320.31(9) was vacated.

[30] The trial started, as scheduled, on October 10, 2023. At the request of the parties, the judge entered into a blended trial and *Charter* voir dire to determine the admissibility of certain evidence, including Ms. Kennedy's blood sample and the toxicology reports that flowed from it. In this context, the Crown sought to bifurcate the proceedings, so the judge would determine if there was a *Charter* breach before receiving submissions on whether evidence should be excluded based on what was then simply an allegation of a *Charter* violation. The judge refused this request. The Crown does not base its appeal on an allegation of error by the judge in making this procedural ruling.

[31] On the afternoon of the third day of the trial, the Crown asked for an adjournment to allow it to consider what additional evidence it wished to call on the s. 24(2) issue. It was later agreed that the trial would resume on Monday, February 5, 2024.

[32] On the afternoon of Friday, February 2, 2024, the Crown provided the defence with additional disclosure, relating to the testimony of S/Sgt. Devon Racicot in connection with the s. 24(2) issue. On Sunday, February 4, 2024, the defence emailed the Crown and requested further and better disclosure respecting S/Sgt. Racicot's evidence. Before court resumed the next day, Ms. Kennedy filed an application alleging a *Charter* breach based on the timing of the Crown's disclosure. On the Monday morning, the Crown also handed additional disclosure to the defence.

[33] When court opened, the Crown renewed its request to bifurcate the proceedings. For its part, the defence asked for an adjournment of the trial based on the timing of the Crown's additional disclosure. The judge dismissed the Crown's request but granted the defence's request for an adjournment. Once again, the Crown does not allege error by the judge in either procedural ruling. In the result, the trial was adjourned to resume on April 17, 2024.

3. The defence application did not justify additional delay

[34] At the outset, it must be noted that the Crown's position has shifted in connection with the delay of the trial between February 5, 2024, and April 17, 2024. When the adjournment was first requested, the Crown's trial counsel accepted that the responsibility for it rested with the Crown. In this regard, on February 5, 2024, the Crown advised the Court:

> MR. PILÓN: Yes, I certainly understand if the matter is adjourned for defence to review these records. I don't know how much time they would need. It seems pretty straightforward to the Crown, but if there is an adjournment past today as a result of the late disclosure of this material, I understand that would fall to the Crown.
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> (Emphasis added)

[35] Nonetheless, in the context of opposing Ms. Kennedy's s. 11(b) *Charter* application, the Crown took the position that the delay was attributable to events that had preceded the February 5, 2024 adjournment request, albeit it did so with less clarity than the Crown brings to its argument in this appeal. More specifically, the Crown sought to lay the responsibility for the adjournment on February 5, 2024, at the feet of the defence since it had only served the application under s. 24(2) of the *Charter* on September 26, 2023.

[36] The judge dealt with this contention over several pages in her reasons. Specifically, she found:

(a) as of the November 29, 2022, case management, the Crown was aware that *Charter* applications would be forthcoming and that Ms. Kennedy alleged ss. 8, 9 and 10 violations had occurred, though the formal notice of application did not come until later;

(b) the Crown did not need to have the formal *Charter* notice to set the appropriate number of trial dates, and "it is not surprising that a number of *Charter* issues populated the trial";

(c) the parts of the trial held on October 10-12, 2023, "proceeded relatively uneventfully … until such time as discussions were had about whether the Crown would be expected to call its Section 24(2) evidence before a decision was provided on the *Charter* issues" and, after hearing arguments, she "concluded that the Crown

would be required to call the evidence if it wished to do so on this issue before the defence began its case";

(d) the further disclosure made by the Crown on February 2, 2024, was a result of a decision by the Crown to call S/Sgt. Racicot, related to the s. 24(2) matters;

(e) the Crown did not receive information from S/Sgt. Racicot until shortly before February 5, 2024, and provided the necessary disclosure promptly to the defence;

(f) when the trial resumed on February 5, 2024, Ms. Kennedy could not proceed with cross-examination of the police officer having not had sufficient time to review the new disclosure from the Crown;

(g) trial fairness required that Ms. Kennedy be given an opportunity to review the disclosure to prepare for the Crown's witness. In this regard, the judge rejected the argument of the Crown that, given that the evidence of S/Sgt. Racicot was not particularly lengthy, the defence should have been able to proceed in February. The judge found that the Court could not look at S/Sgt. Racicot's evidence with the benefit of hindsight because Ms. Kennedy could not have known how this evidence might unfold; and

(h) the trial was adjourned to resume on April 17, 2024, being the first date offered by the Court to counsel.

[37] The judge concluded her analysis on this issue as follows:

> All of this is to say that I have concluded there's no basis upon which I find that any of the delay attributed to this period should be characterized as defence delay. On a different note, I note that during the time frame, on March 5th of 2024, Mr. Hynes served and filed the Section 11(b) *Charter* notice. I'll simply add that I find that the *Charter* notice was served in an appropriately timed manner, defence did not wait in the weeds, so to speak, leaving the application to the conclusion of argument or later yet. The application is, I find, not frivolous.

[38] In this appeal, the Crown does not seriously suggest that the judge erred by refusing to characterize the service of the s. 24(2) application itself, or the adjournments that followed from it, as defence delay within the *Jordan* framework. In this regard, there is no suggestion that the

defence application was in any way improper or illegitimate, rendering applicable the following guidance given in *Jordan*:

> [65] To be clear, defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay. For example, the defence must be allowed preparation time, even where the court and the Crown are ready to proceed. In addition, defence applications and requests that are not frivolous will also generally not count against the defence. We have already accounted for procedural requirements in setting the ceiling. And such a deduction would run contrary to the accused's right to make full answer and defence. While this is by no means an exact science, first instance judges are uniquely positioned to gauge the legitimacy of defence actions.

[39] To the extent that the Crown's argument has force it is tied to the idea that the judge erred by not recognizing that the adjournment between February to April was a delay attributable to exceptional circumstances that arise from a discrete event, in this case, the fact that the defence's s. 24(2) *Charter* application was served only 14 days before the start of the trial. In other words, the Crown has a point if there is something surrounding the *timing* of the service of the defence's s. 24(2) *Charter* application that caused Ms. Kennedy's trial to be delayed.

[40] An appellate court must take a deferential approach when reviewing a trial judge's decision as to whether an event or factor constitutes a discrete exceptional circumstance justifying a modification to the presumptive *Jordan* time limit. This was described in *Laird* as follows:

> [75] The Supreme Court has said that trial-level judges are uniquely positioned to assess the legitimacy of litigation conduct and to determine whether matters of trial management amount to exceptional circumstances (*Jordan* at paras 65 and 79). This means, as stated in *Cody*, that "appellate courts must show a correspondingly high level of deference" to decisions of that nature (at para 31, see also: *Spencer* at paras 35 and 62; *R v MS*, 2023 MBCA 90 at para 17; *R v Loiacono*, 2023 ABCA 157 at para 20; and *R v D.A.*, 2020 ONCA 738 at para 40, 396 CCC (3d) 151). In the end, if a trial judge turns their mind to the questions of whether a discrete event was reasonably unforeseeable or reasonably unavoidable, and whether the Crown took reasonable steps to redress the delay, the factual determinations they make in that respect are entitled to deference from an appellate court, absent a palpable and overriding error (*Jordan* at para 79; *Cody* at paras 31 and 61; see also: *R v Vassell*, 2016 SCC 26 at para 5, [2016] 1 SCR 625). However, if a trial judge makes a clear legal error in this assessment, appellate interference is justified (*Pastuch* at para 141; *R v Picard*, 2017 ONCA 692 at para 137, 137 OR (3d) 401, leave to appeal to SCC refused, 2018 CanLII 73612.
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> (Emphasis added)

[41] In this case, the judge carefully reviewed the circumstances surrounding the service of the s. 24(2) *Charter* application and what events flowed from it, before refusing to attribute any delay to it. However, she did not expressly do so through the lens of whether the timing or content of the

defence's *Charter* application constituted a discrete event justifying a longer time to trial. This may be because of the unfocused approach that the Crown took at trial when presenting its position in relation to the delay application.

[42] The fact that the judge did not consider the issue of the delay (if any) flowing from the timing of the service of the defence application through the lens of what constitutes an exceptional circumstance justifying delay muddies the approach this Court should take in its review of the judge's decision on this point. However, and in any event, it does not affect the outcome of this appeal. The reason for this is that, even when the matter is looked at afresh, there is no basis to conclude that the reasonable time to trial in this case should be adjusted because of the timing of the service of the defence's *Charter* application. This is so for two reasons.

[43] First, the judge's reasons reveal her view that the *Charter* issues advanced in the s. 24(2) application were not, or at least should not have been, a "surprise" to the Crown. This finding can only be displaced if it is palpably wrong.

[44] Ms. Kennedy supports the judge's conclusion on this point by observing that the Crown had notice of her intention to bring a *Charter* application as early as November 29, 2022. She notes also that, when trial dates were set, the trial sheet confirmed there would be issues relating to ss. 8, 9, and 10(b) of the *Charter* and that three months before the trial the defence observed that it would be bringing a *Charter* application. Ms. Kennedy adds that, even without the service of a formal notice, given the nature of the charge, it would have been readily apparent that the blood sample seized by the police would be the single most critical piece of evidence and should have been understood by the Crown to be a focus of the application. She writes in her factum that "any reasonable Crown would have turned their mind to what evidence it would call on s. 24(2) to help justify what the police did on scene about the oral fluid demand and why they did it". Finally, Ms. Kennedy argues that, in any event, the service of her s. 24(2) *Charter* application was done in accordance with Provincial Court Practice Directive VIII, which states, in part:

> 1. Where Counsel is aware that a *Charter* application or an application under s. 52 of the *Constitution Act, 1982* will be made at trial, notice of that application in the attached form shall be given to each interested party at least 14 days prior to hearing or at such earlier time as is directed by the Court. For greater certainty, such notice shall be given to the Court, the Crown, and to co-accused(s). In the event that relief other than exclusion of evidence is being sought (i.e.: seeking *Charter*, s.24(1) relief or relief under s. 52 of the *Constitution Act, 1982*) notice must also be given to the Constitutional Law Branch of the

> Ministry of Justice of Saskatchewan and to the Department of Justice (Canada) in order to comply with *The Constitutional Questions Act, 2012*.
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> (Emphasis added)

[45] Although said in the context of assessing the legitimacy of defence actions for the purposes of evaluating defence delay, the comment in *Jordan* that trial judges are "uniquely positioned to gauge the legitimacy of defence actions" is apropos (at para 65). Here, the judge found as a fact that the defence did not "wait in the weeds". Based on the judge's conclusion on this point, it is difficult to give credence to the Crown's argument that the service of the *Charter* application should be considered a discrete event because it is something that could not have been foreseen.

[46] Nonetheless, the Crown observes that Provincial Court Practice Directive VIII describes a minimum period of notice (directing that notice be given "at least" 14 days prior to a hearing) and that more can be required in some circumstances, this being one of them. It also responds by saying that the generality of the references to an application asserting a breach of Ms. Kennedy's *Charter* rights was not sufficient to alert it to the need to call evidence of the type that caused it to seek an adjournment of the trial on October 12, 2023, and then make the additional disclosure that it provided to the defence in February of 2024.

[47] Ultimately, it is unnecessary to decide if the Crown should have foreseen the application. There is also no need to determine if or when more than 14 days' notice of such an application may be required. The reason for this is that, before delay can be attributable to an exceptional circumstance, the Crown must show that the delay itself could not have been avoided with the exercise of reasonable diligence on the Crown's part. In this regard, *Jordan* instructs as follows:

> [69] Exceptional circumstances lie *outside the Crown's control* in the sense that (1) they are reasonably unforeseen *or* reasonably unavoidable, *and* (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise. So long as they meet this definition, they will be considered exceptional. They need not meet a further hurdle of being rare or entirely uncommon.
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> …
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> [75] The period of delay caused by any discrete exceptional events must be subtracted from the total period of delay for the purpose of determining whether the ceiling has been exceeded. Of course, the Crown must always be prepared to mitigate the delay resulting from a discrete exceptional circumstance. So too must the justice system. Within reason, the Crown and the justice system should be capable of prioritizing cases that have faltered due to unforeseen events (see *R. v. Vassell*, 2016 SCC 26, [2016] 1 S.C.R. 625). Thus, any portion of the delay that the Crown and the system could reasonably have mitigated may

> not be subtracted (i.e. it may not be appropriate to subtract the entire period of delay occasioned by discrete exceptional events).
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> (Italic emphasis in original, underline emphasis added)

[48] In *R v Cody*, 2017 SCC 31 at para 48, the Supreme Court emphasized that the "delay caused by discrete exceptional events or circumstances that are reasonably unforeseeable or unavoidable is deducted to the extent it could not be reasonably mitigated by the Crown and the justice system" (emphasis added, see also *Laird* at para 88). In this case, the Crown has not shown that, even if it was caught off guard by the timing and contents of the service of the defence application on September 26, 2023, there were no "reasonable available steps" it could have taken to avoid the adjournment of the trial many months later, on February 5, 2024 (*Jordan* at para 70).

[49] We begin by reiterating that the defence requested, and was granted, an adjournment on February 5, 2024, because the Crown had only provided its additional disclosure on February 2, 2024, and the morning of February 5, 2024. It is also important, in this context, to review the very limited evidence the Crown called to justify the fact that this additional disclosure was only provided on the very eve of the recommencement of the trial on February 5, 2024.

[50] On January 8, 2024, defence counsel wrote to Crown counsel asking for the Crown's anticipated witness list for the continuation of the trial on February 5, 2024. The Crown's response simply confirmed that neither side had completed their cases, and implied that it may be seeking to split its case but made no mention of additional witnesses or disclosure.

[51] On January 17, 2024, defence counsel reiterated the position it had taken in October in opposition to a bifurcation of the Crown's case. Defence counsel also observed that the Crown had requested the adjournment of the trial in October so it "could potentially call more evidence" and asked what other evidence the Crown was intending to call on the voir dire.

[52] Defence counsel repeated its request for a Crown witness list on January 29, 2024. The next day, Crown counsel wrote that "I'm working on some things and will get back to you when I have made a final decision". This statement is devoid of any detail and is the earliest indication in the record that Crown counsel was actively pursuing the matter of disclosure required by the Crown to respond to Ms. Kennedy's s. 24(2) *Charter* application.

[53] On the afternoon of February 2, 2024, Crown counsel advised defence counsel that he had "requested that [the Saskatoon Police Service] review some of their records and compile some figures and information so that someone would come testify on Monday". Some further detail about this is provided, but there is no indication as to when Crown counsel first made this request to the police.

[54] Later that same afternoon, Crown counsel received an email from S/Sgt. Racicot providing information that was promptly disclosed to the defence. This disclosure prompted defence counsel to request further disclosure. Crown counsel passed this request on to his police contact with the statement that "as expected, defence are seeking disclosure of the records you reviewed in order to obtain this information". Once again, nothing in this exchange reveals when Crown counsel, or the police, first began the task of assembling the disclosure that gave rise to the February 2 and February 5, 2024 disclosure.

[55] We have taken the time to review the detail of this correspondence to make clear the point that the Crown has offered no meaningful evidence to support the conclusion that with the exercise of reasonable diligence, it could not have provided the disclosure in a timely way to prevent the need for the further adjournment on February 5, 2024. We will expand upon the reasons for this conclusion.

[56] In this case, the Crown does not appeal the judge's decision to adjourn the trial yet again on February 5, 2024, caused by the timing of the service of its additional disclosure. While it emphasizes that Crown counsel provided that disclosure to the defence as soon as it was available to it, the judge correctly observed that this was, at best, a partial reply only. She said, on this, as follows:

> At this juncture, I underscore that in this context, the police service and the Crown are indivisible. Even as Mr. Pilón himself received the disclosure late in the day on February 2nd, the delay in providing the disclosure is the Crown's delay. I've considered the Crown's argument to the contrary and its materials and I've concluded this is not a scenario whereby I can treat this issue in any other fashion.

[57] In the context of the record provided by the Crown, the judge's conclusion is unassailable on any standard of review. Even if, given its timing and contents, the service of the *Charter* application in September of 2023 might be characterized as giving rise to delay attributable to exceptional circumstances that arise from a discrete event (a finding that we do not make), there

is nothing on the record to allow for the conclusion that the Crown could not, through the exercise of reasonable diligence, have provided its additional disclosure before the resumption of the trial in February of 2024 and thereby have avoided that delay.

[58] It was solely the timing of the service of this additional disclosure that prompted the need for the further adjournment to April, which in turn pushed the case over the *Jordan* threshold. At least on the record as provided by the Crown, the responsibility for this lies squarely at the feet of the Crown.

[59] We reach this conclusion without considering other replies that Ms. Kennedy makes to the Crown's argument under this head. These include that the adjournment required in October of 2023 should not be seen as a product of the timing of the service of the s. 24(2) *Charter* application, but instead other factors. In this regard, the defence argues that the delay occurred because of the Crown's decision to abandon the additional day for the argument challenging the constitutionality of s. 320.31(9) of the *Criminal Code* and because the Crown had not adequately planned for the possibility that the judge would reject its request to bifurcate proceedings.

[60] For these reasons, the Crown's argument that "at least" 60 days of additional delay should be counted as an exceptional circumstance arising from a discrete event being the timing of the service of this application must be rejected.

C. Defence delay

[61] There are two aspects to the claim of defence delay advanced by the Crown in this appeal. The first challenges a decision by the judge to apportion a 29-day delay between the Crown and defence where the defence was unavailable on the earliest trial dates proposed, but the Court and the Crown were available. The second aspect relates to a delay in the presentation of final arguments, which the Crown contends was defence delay.

1. Defence counsel unavailability

[62] The march of this case to trial was delayed by 29 days when the defence rejected trial dates of September 10-12, which is why the trial did not start until October 10, 2023.

[63] The judge gave the following reasons for attributing only 15 days of delay to the defence on account of defence counsel's unavailability:

> The August 10th, 2023 date scheduled for the constitutional question issue was vacated and it was determined this issue would be heard during the trial dates scheduled for October 10th, 11th, and 12th of 2023. [Counsel for the parties and the Attorney General] were in attendance when this decision was made.
>
> September 11th through the 13th: those dates were offered but, as I noted, the Court file was not endorsed with the reason for that. I've since come to have briefs from the parties whereby it's been indicated that the defence was unavailable during that time frame.
>
> …
>
> Allocation of the period of time from September 10th, 2023 to October 10th, 2023 as defence delay is not a given simply because defence was unavailable for the first set of trial dates offered. Rather, thoughtful consideration must be given as to how to allocate this delay in the context of all relevant circumstances. In this analysis, I am guided in part by *R. v Hanan*, a 2023 Supreme Court case as well as *R. v Boulanger*, a 2022 Supreme Court case and the concept of reasonable availability.
>
> I have concluded it's appropriate to apportion this block of time such that one half of the delay comprised by the September 10th, 2023 to October 10, 2023 time frame shall be allocated as defence delay, so, that's 15 days.

[64] We agree with the Crown that the judge committed a palpable error in concluding that the circumstances merited a deduction of only 15 of these 29 days as defence delay.

[65] In *Jordan*, the majority considered the issue of delay based on defence availability and found:

> [64] As another example, the defence will have directly caused the delay if the court and the Crown are ready to proceed, but the defence is not. The period of delay resulting from that unavailability will be attributed to the defence. However, periods of time during which the court and the Crown are unavailable will not constitute defence delay, even if defence counsel is also unavailable. This should discourage unnecessary inquiries into defence counsel availability at each appearance. Beyond defence unavailability, it will of course be open to trial judges to find that other defence actions or conduct have caused delay (see, e.g., *R. v. Elliott* (2003), 2003 CanLII 24447 (ON CA), 114 C.R.R. (2d) 1 (Ont. C.A.), at paras. 175-82).

[66] While the judge said she was applying the contextual approach to determining defence delay that is contemplated in *R v Boulanger*, 2022 SCC 2, and *R v Hanan*, 2023 SCC 12, she offered no explanation for why this case should not follow the general principle that an accused is responsible for delay when their counsel is not available for trial.

[67] In *Boulanger*, the delay in finding trial dates was divided among the parties because of the particular facts involved. The trial was scheduled for January, but it became clear, in part because

of a change in the Crown's strategy, that additional dates would be needed. Institutional delay, lack of initiative by the trial judge in finding trial dates, the availability of counsel and the change in strategy on the part of the Crown all contributed to the delay. Accordingly, it could not be said that the delay in *Boulanger* was simply due to defence availability. As a result, the period of delay was apportioned between the Crown and the defence in that case.

[68] A similar situation occurred in *Hanan*, where delays arose not solely because of defence counsel's availability but, rather, because of changes to the Crown's case. This led to a delay with new dates being offered, but the defence was not available on the new dates. In that case, the Court held that in such circumstances it would be unfair and unreasonable to characterize the entire period (from June to October) as defence delay.

[69] Here, there is nothing to suggest that the Crown did anything that resulted in this delay or contributed to it. Rather, the record indicates that the reason for the delay was solely on account of defence counsel availability. In this situation, the delay should have been entirely attributed to the defence. We are left to conclude that the judge made a palpable error, being an obvious error, in apportioning the 29-day delay between the Crown and the defence. This adds an additional 14 days to the defence delay calculation.

2. Delay relating to final arguments

[70] The second period, which the Crown suggests should be attributed to the defence, is a 43-day period from July 18, 2024, to August 30, 2024.

[71] The evidence portion of the trial was concluded on April 17, 2024. On April 19, 2024, the Court heard submissions on whether Ms. Kennedy's statement to police had been compelled. The Crown, in addition to arguing about the statement to police, wanted to proceed with argument on the alleged delay claim brought under s. 11(b) of the *Charter*. The defence, for its part, argued that a decision should first be made on the question of the statement. The transcript from April 19, 2024, includes the following:

> MR. PILÓN: In that respect, yes. I'm also prepared today to argue portions of the *Charter* challenge because they have absolutely nothing to do with the compellability issue and there's no point delaying them any further.
>
> THE COURT: Mr. Hynes?

> MR. HYNES: I disagree entirely. As I've said before, the Constitutional challenge will very much impact the *Charter* challenge and what breaches we can establish or not. So our position is the Section 24(2) motion necessarily needs to be heard at the conclusion of any Constitutional issue or that Constitutional issue being resolved in whichever way it's going to, before we turn to 24(2).
>
> …
>
> THE COURT: … The record will clearly show though that Mr. Pilón was prepared to argue on the 10(b) decision -- the detention decision -- the drug testing issue, the *Charter* issues, I guess.

[72] On June 7, 2024, the judge rendered her decision on the question of the statement, finding that it had not been compelled by police. The proceedings were then adjourned to July 18, 2024. On July 18, 2024, the Crown sought to argue all remaining issues, including the question of delay. Ms. Kennedy, however, sought to adjourn the delay application to another date and to instead argue the balance of the *Charter* arguments. The transcript from the July 18, 2024, attendance includes the following exchange:

> THE COURT: So, what are your thoughts? So, if -- if you file that, then, of course, we can deal with 11(b) on the 30th, if we can use that date. What are your thoughts about 24(2) argument and when that might happen? I know you've made some already.
>
> MR. PILÓN: Since we received the delay application, we've proceeded with an expectation that we will do everything we can to conclude this file immediately.
>
> THE COURT: A hundred percent.
>
> MR. PILÓN: And not a single thing has happened to do that. So, in our view, it should have been argued today…
>
> THE COURT: So, you would be prepared to make any additional 24(2) submissions on the next return date?
>
> MR. PILÓN: Absolutely.
>
> THE COURT: All right.
>
> And, Mr. Hynes, from your perspective, you are not prepared to make the 24(2) submissions on the return date?
>
> MR. HYNES: No. Just to say that it would be more complicated, but if that was the Court's direction, we would accommodate that.

[73] The Crown seeks that the period from July 18 to August 30, 2024, being 43 days be categorized as defence delay. The judge found that this period should not be considered as defence delay. Her decision states:

> So, the period from June 8th to August 30th was comprised of two appearances: July 18th of 2024, which involved arguments on the *Charter* applications, and August 30th, which was comprised of submissions by counsel and the Section 11(b) argument and Section 24(2), as well as submissions on Mr. Hynes amended notice of constitutional

> question in light of the *Zacharias* decision, and finally an application to have Ms. Kennedy appear by video on August 30th of 2024, rather than in-person. That application was heard and decided such that Ms. Kennedy was permitted to appear remotely on August 30th. For that time frame, I allocate no delay.

[74] The judge found no fault on the part of the defence in the delays that resulted from the period of June 8, 2024, to August 30, 2024. Trial judges are uniquely placed to determine who is at fault for a period of delay of this sort. The judge heard the evidence and was situated in a way to appreciate the nuances of the parties' positions and postures through the trial. We accept that another trial judge might have found differently. However, the standard of review applicable to an issue of this sort precludes this Court from intervening absent a palpable and overriding error on the part of the judge. No such error has been identified.

D. Interim reserve time

[75] As has been mentioned, Ms. Kennedy argues that the judge erred in deducting 49 days taken by the judge to render a decision on the question of whether her statement to police was compelled. The defence says that this period should not have been excluded from the 18-month presumptive ceiling, on the basis that, while the *Jordan* clock generally does not run during judicial deliberation time taken after all evidence is concluded and final arguments have been made, this approach does not apply to decisions on interim or interlocutory matters.

[76] The law is settled that the time taken for judicial determinations after the evidence phase of a trial has concluded does not count against the *Jordan* clock (see *K.G.K.*). However, the treatment of deliberation time associated with decisions on interim or interlocutory matters has not been settled by the Supreme Court.

[77] Some provincial appellate courts have held that generally no allowance should be made within the *Jordan* time limits, while others have taken the opposite view (see *R v Flett*, 2024 MBCA 99 at para 53; *R v Chang*, 2019 ABCA 315 at para 62; *D.M.S. v R*, 2016 NBCA 71; *Lecompte v R*, 2018 NBCA 33; *R v Mamouni*, 2017 ABCA 347; *R v Brown*, 2018 NSCA 62; *R v K.B.*, 2025 MBCA 73; *R c Rice*, 2018 QCCA 198 at para 86; and *St-Pierre c R*, 2024 QCCA 341 at para 28). In *Laird*, this Court treated deliberation time on an interim matter the same as deliberation time taken by a judge to render a final decision as set out in *K.G.K.*

[78] There is no need to consider the defence's argument on this issue. Our findings on the Crown's appeal render the question moot.

IV. CONCLUSION

[79] The judge made two errors in her calculation of what was a reasonable time for Ms. Kennedy's trial to conclude. The judge should have made an allowance of 120 days, to account for the COVID-19 pandemic. The judge should also have attributed an additional 14 days as defence delay because of counsel unavailability.

[80] However, even accounting for these matters which would remove a further 134 days from the period of delay under consideration, the total time to conclude Ms. Kennedy's trial still significantly exceeded what is allowable under the *Charter*. As has been noted, the Crown agrees that, if Ms. Kennedy's right to be tried within a reasonable time was breached, the charge against her was properly stayed. Accordingly, the Crown's appeal must be dismissed.

"Leurer C.J.S."

Leurer C.J.S.

"McCreary J.A."

McCreary J.A.

"Bardai J.A."

Bardai J.A.