

CANADA / JUDGMENT

R. v. Toole

2026 ONCA 99

COURT

Court of Appeal for Ontario

DECIDED

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R. v. Toole

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Rouleau, Paul S.; Huscroft, Grant; Trotter, Gary T.; Paciocco, David M.; Copeland, Jill M.

Subject

Criminal

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Toole, 2026 ONCA 99[1]

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Rouleau, Huscroft, Trotter, Paciocco and Copeland JJ.A.

BETWEEN

His Majesty the King

Appellant

and

Timothy Carl Toole

Respondent

Tracy Kozlowski, for the appellant

Lindsay Board and Samantha Bondoux, for the respondent

Heard: September 17, 2025

On appeal from the stay entered by Justice Erika Chozik of the Superior Court of Justice, on December 22, 2023, with reasons reported at 2023 ONSC 7243.

Rouleau J.A.:

- [1] The Crown appeals the application judge's order staying the proceedings against the respondent based on a breach of his right to be tried within a reasonable time, guaranteed by s. 11(b) of the Canadian Charter of Rights and Freedoms. After the jury returned a verdict of guilty on one count of sexual assault, the application judge (who also presided over the trial) heard the respondent's s. 11(b) application. The application judge concluded that, after deducting 99 days for defence delay and four months of delay due to discrete exceptional circumstances, there remained well over 30 months of delay. As a result, the application judge determined that a stay ought to issue.
- [2] The Crown argues that the application judge erred in her analysis of the delay. Specifically, the Crown maintains that the delay caused by the court's decision to vacate scheduled trial dates was attributable to a discrete exceptional event. The trial was adjourned to await the decision of the Supreme Court of Canada in *R. v. J.J.*, 2022 SCC 28, [2022] 2 S.C.R. 3. J.J. concerned a constitutional challenge to the same legislative provisions the respondent challenged in his own case. Had this adjournment delay been deducted, the s. 11(b) application would have been dismissed as the net delay would be below the 30-month ceiling set in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631.
- [3] Prior to the hearing of the appeal, the parties were asked for submissions on the question of whether the application judge had jurisdiction to stay the proceedings following a jury verdict of guilt, or whether the application judge was, at that point, *functus officio*.
- [4] As I will explain, I am of the view that the application judge was not *functus officio* and committed no error in entering the stay. The adjournment of the trial to await the Supreme Court's decision in J.J. did not constitute a discrete exceptional event. As a result, I would dismiss the appeal.

A. BACKGROUND 1. The offence and trials [5] The respondent was charged with sexual assault. On June 3, 2020, the respondent visited the complainant at her home. They drank alcohol and later engaged in sexual activity. The issue at trial was whether the complainant consented to this sexual activity, specifically whether she lacked the capacity to consent due to intoxication. The jury found the respondent guilty of sexual assault.

- [6] The respondent's first trial was delayed to await the Supreme Court's decision in J.J. The first trial eventually went ahead but resulted in a mistrial. I will discuss these events in greater detail below. Shortly before the second trial commenced, the respondent brought an application claiming a breach of his s. 11(b) right. The application judge determined that hearing the application at that time would require adjourning the trial that was about to begin. She was not prepared to further delay the trial. She indicated she could hear the application after the trial was completed and a verdict was rendered. No one raised the issue as to whether she would be functus officio after the jury's verdict.
- [7] At the conclusion of the second trial, the jury returned a verdict of guilty. The application judge then heard the s. 11(b) application.
2. The s. 11(b) application [8] The information was sworn on June 10, 2020, and the jury verdict was returned on September 27, 2023. The prosecution thus lasted 39 months and 17 days.
- [9] Before the application judge, the respondent conceded that 3 months and 9 days should be deducted as defence delay. This was due to the defence having declined the first available dates for two procedural steps in the course of the prosecution. The remaining net delay, therefore, was 36 months and 8 days.
- [10] The Crown argued that two periods should be further deducted: (a) the delay caused by the adjournment of the first trial, decided in May 2022 (the "adjournment delay"), and (b) the delay caused by the mistrial declared in December 2022 (the "mistrial delay"). If these delays were deducted from the overall delay, the Jordan ceiling would not be exceeded.
- a. The adjournment delay [11] The first period of delay that the Crown sought to deduct resulted from vacating dates for the first trial. The first trial was originally scheduled to begin on June 13, 2022, but was rescheduled to November 28, 2022. That delay totalled 5 months and 15 days.
- [12] On April 5, 2022, the defence served and filed a challenge to the constitutionality of ss. 276(2) and 278.92 to 278.94 of the Criminal Code, R.S.C. 1985, c. C-46. Parliament introduced or amended these provisions in 2018 to better protect complainants in sexual offence trials in two ways. First, the impugned provisions created a two-stage process to determine the admissibility of records about a complainant that are in the possession of the accused. Second, Parliament increased the participatory rights of complainants in the pre-existing regime to screen evidence of a complainant's prior sexual history.

- [13] On April 8, 2022, the Crown sought to have the constitutional challenge dismissed summarily. The Crown argued that the court ought simply not to hear the constitutional challenge because it had not been served with the required 30-day notice and risked disrupting the pre-trial schedule. The court dismissed the Crown's summary dismissal motion.
- [14] When the matter returned for hearing on May 20, 2022, the judge scheduled to hear the application determined that it should be adjourned because the issues were the same as those to be addressed by the Supreme Court of Canada in J.J. That appeal was heard in October 2021 and remained under reserve. The judge vacated the trial dates scheduled in June 2022 to await the Supreme Court's decision. As a result, new trial dates were set commencing November 28, 2022. The first trial was thus delayed by 5 months and 13 days.
- [15] On the s. 11(b) application, the Crown argued that this whole period of delay should be considered defence delay as it was caused by the respondent's last-minute constitutional challenge. The Crown submitted that the late filing made the first trial's adjournment inevitable because there was insufficient time to hear the challenge and deal with other pre-trial issues prior to the June trial dates.
- [16] The application judge disagreed. She found that the respondent's challenge was not frivolous, as the constitutionality of the impugned provisions was a live issue across the country. Despite not having complied with the 30-day notice requirement, it was the application judge's view that the challenge could have been dealt with, along with the other pre-trial matters, without losing the scheduled trial dates. The application judge added that the respondent reasonably waited "as long as possible" for the decision in J.J., which would have obviated the need to bring the challenge.
- [17] The application judge noted that the judge who vacated the June 2022 trial dates determined that the constitutional challenge should be adjourned to await the Supreme Court's decision in J.J. The application judge therefore concluded that the delay resulting from the adjournment of the first trial should not be deducted as defence delay because it was not caused by the late filing of the constitutional challenge.
- [18] It is this delay that, on appeal, the Crown seeks to have deducted from the overall delay. It does so, however, on a different basis. The Crown no longer argues that it is defence delay but rather that it constitutes a discrete exceptional event.
- b. The mistrial delay [19] The second period of delay the Crown sought to deduct was caused by the declaration of a mistrial on December 5, 2022, during the respondent's first trial. The application judge's conclusions on this period of delay are not at issue on appeal. I will nevertheless set out the background for the mistrial delay because it was a troubling contributor to the s. 11(b) violation in this case.

- [20] The mistrial resulted in a delay of 9 months and 26 days. Mandhane J. presided over the first trial, which began on November 28, 2022, and was scheduled to last five or six days. On November 30, partway through the cross-examination of the complainant, the Crown advised that it might apply for a mistrial because of what it considered improper questioning by defence counsel. In response, the defence re-elected to be tried by judge alone. The Crown consented. As a result, the jury was dismissed, and the trial was adjourned to continue the next day.
- [21] The next day, however, the trial did not proceed because the Crown became ill. It was therefore adjourned to the following Monday, December 5. On that day, the trial again could not proceed, this time because defence counsel took ill. The trial judge then initiated a discussion about the possibility of declaring a mistrial. In the course of discussion, the following concerns emerged:
- (a) Courtroom availability. Starting on December 12, the trial would have to move to a courtroom in Orangeville instead of Milton;
 - (b) Prejudice to the complainant. The complainant might have trouble recalling her testimony-in-chief because of the delay in completing cross-examination;
 - (c) Witness availability. One witness would soon no longer be under subpoena and other witnesses might have to testify by Zoom;
 - (d) Availability of the judge. The trial judge had a “hard stop” as of December 16 because she was taking a flight the following day;
 - (e) Crown availability. Crown counsel was scheduled to make submissions on different matters for two hours on December 13 and a further two hours on December 16;
 - (f) Defence counsel’s availability. Defence counsel advised that she would be terminating her legal practice as of December 31 for health reasons. Because her client was anxious to complete the trial, defence counsel indicated that she would be prepared to resume cross-examination of the complainant the next day and would “even be willing to go on Zoom today just to start this complainant”.
- [22] When discussing the consequences of a mistrial, the trial judge indicated that “the Jordan date is September 2023. So from the court’s perspective, it will be prioritized that this be heard prior to that.” In reality, however, the 30-month mark was to be reached a bare five days later, on December 10, 2022. No one corrected the trial judge’s misapprehension, and she declared a mistrial.
- [23] After the mistrial, the parties accepted the first available trial dates, beginning on September 18, 2023.
- [24] On the s. 11(b) application, the Crown argued that the mistrial delay was a discrete exceptional event and the whole period ought to be deducted from the total delay.

- [25] The application judge found that the mistrial constituted a discrete exceptional event because it was reasonably unforeseen and both parties had done what they could to avoid it. She expressed concern, however, as to whether the entire period between the mistrial and the second trial should be deducted from the overall delay.
- [26] The application judge concluded that not all of the delay was reasonably attributable to the mistrial. While both parties accepted the first trial dates offered for the new trial, the application judge found that the Crown had not taken all reasonable steps to mitigate the delay. Had the Crown alerted the trial coordinator that the matter should be prioritized, earlier dates would have been secured for the second trial. The application judge therefore determined that part of the delay should be attributed to systemic shortfalls. Based on her experience as a judge in that jurisdiction, she found that “at most 4 months” could reasonably be attributed to the mistrial.
- [27] The application judge also expressed concern about the first trial judge’s decision to declare a mistrial. The application judge explained that the mistrial was “strenuously resisted by both the defence and the Crown” and that “both the Crown and the defence did what they could to avert the mistrial”, including offering to “go to Orangeville to complete the trial, or to do it by [Z]oom if courtroom space was an issue.” It was not clear to the application judge why the first trial judge would, on her own motion, declare a mistrial when there were still eight juridical days within which to complete the trial. I share that concern.
- [28] After subtracting four months from the net delay of 36 months and 8 days, the remaining delay was still above the presumptive ceiling. The application judge thus entered a stay of proceedings.

B. Issues [29] The appeal raises two issues:

- (1) Was the trial judge functus officio after the jury’s verdict for purposes of a s. 11(b) application?
- (2) Did the application judge err in failing to deduct the delay caused by the adjournment of the first trial?

C. Discussion 1. The application judge was not functus officio [30] The first issue requires the court to consider whether two of its prior decisions are binding precedents in the context of s. 11(b) applications: *R. v. Gostick* (1991), 62 C.C.C. (3d) 276 (Ont. C.A.); *R. v. Henderson* (2004), 189 C.C.C. (3d) 447 (Ont. C.A.), leave to appeal refused, [2005] S.C.C.A. No. 12. After setting out the parties’ joint position and summarizing *Gostick* and *Henderson*, I explain why neither decision holds that a trial judge is functus officio following the jury’s verdict for purposes of a s. 11(b) application. Prior to sentencing, trial judges are not functus officio to hear and decide such applications.

Position of the parties [31] In response to this court's request for submissions, both the Crown and the respondent took the position that the application judge was not *functus officio*. They argued that Gostick and Henderson are distinguishable. Gostick and Henderson held that the trial judge was *functus officio* following the jury's verdict, but these decisions involved stay applications outside the s. 11(b) context. In these cases, had the applications been heard before the jury's verdict, the court would have been able to consider remedies short of a stay.

[32] In the parties' submission, s. 11(b) applications are different from the situations addressed in Gostick and Henderson because the only remedy available for a breach of s. 11(b) is a stay.

[33] In support of their position, the parties referenced the Quebec Court of Appeal's decision in *Drouin c. R.*, 2020 QCCA 1378, leave to appeal refused, [2020] S.C.C.A. No. 465 (Lafortune), and [2020] S.C.C.A. No. 468 (Amato). In that case, the court held that infringement of s. 11(b) is a matter entirely independent of the jury's verdict. The court therefore found that the trial judge was not *functus officio* in respect of a s. 11(b) application filed after the jury's guilty verdict, but prior to sentencing.

Gostick [34] Gostick was an appeal from a stay of proceedings issued after the jury's verdict of guilt. The defence had argued that courtroom conditions amounted to an abuse of process. Letters from the jury attested that unbearable heat impaired its ability to judge the case. The jury also said that it was at times difficult to hear witnesses because of noise from the fans. The trial judge determined that despite the jury having rendered its verdict, a stay of proceedings was warranted.

[35] This court allowed the appeal. It distinguished the situation before it from the procedure adopted where entrapment is alleged. In entrapment cases, the decision as to whether a stay ought to be granted is made after the jury's finding of guilt. This procedure is meant to protect the right of the accused to an acquittal if the Crown fails to prove the essential elements of the offence before the issue of entrapment is considered: *R. v. Mack*, [1988] 2 S.C.R. 903, at p. 972. The court in Gostick explained, at p. 284, that the abuse of process application at issue was different:

There is no reason for an issue of this nature to await the jury's determination of the accused's guilt or innocence. If it is alleged that conditions in the courtroom are so oppressive as to prevent the jury from properly performing its function and thereby denying the respondent a fair trial ... the jury ought not to be charged and called on to assess the respondent's guilt or innocence.

[36] It followed, therefore, that the trial judge "was not empowered ... to reopen the trial proceedings and, by staying the charges, effectively quash the jury's verdict": at p. 284. After the verdict, the abuse of process claim could only be properly raised on appeal.

Henderson [37] Henderson was a Crown appeal from a mistrial order. The defence had applied for a stay after the jury's verdict because the Crown had failed to preserve and disclose records that had been requested before the trial commenced. The trial judge concluded he had jurisdiction to consider the application, either based on s. 7 of the Charter or the doctrine of abuse of process. He determined that the appropriate remedy was a mistrial.

- [38] This court allowed the appeal holding that, after a jury's verdict, trial judges have an extremely limited jurisdiction to alter the verdict, order a stay, or declare a mistrial. It cited two limited exceptions: (i) cases in which the jury does not render the verdict it intended: *R. v. Burke*, 2002 SCC 55, [2002] 2 S.C.R. 857, and (ii) entrapment: *Mack*.
- [39] The court, relying on *Burke* and *Gostick*, held that following the recording of a jury's verdict of guilt, the trial judge did not have jurisdiction to declare a mistrial "for pre-trial non-disclosure by the Crown which was known to the defence": at para. 35. The court emphasized that the Crown's failure to disclose was a live issue before the start of the trial. The court therefore determined, at para. 46, that "counsel cannot save such motions to be brought only if the accused is convicted. Once the jury has delivered its verdict, matters that involve the conduct of the trial and that could have affected the jury's verdict can only be raised on appeal".

Analysis [40] I agree with the parties' submission. The jury's verdict of guilty does not render a trial judge *functus officio* for purposes of a s. 11(b) application. I reach this conclusion for two reasons.

- [41] First, it is settled law that the right "to be tried within a reasonable time" extends beyond the determination of guilt or innocence "up to and including the date upon which sentence is imposed": *R. v. K.G.K.*, 2020 SCC 7, [2020] 1 S.C.R. 364, at para. 3. It follows that an accused person can claim a breach of s. 11(b) at any point before sentencing. The jury's verdict of guilt does not terminate the trial judge's jurisdiction to hear such an application. It makes no difference that the s. 11(b) application in this case was filed on the eve of the trial and not after the verdict. Either way, it is only at the end of sentencing that the trial judge becomes *functus officio* for purposes of a s. 11(b) application: *R. v. Kazman*, 2020 ONCA 22, 452 C.R.R. (2d) 185, at para. 91, leave to appeal refused, [2020] S.C.C.A. No. 58. This conclusion aligns with the temporal scope of s. 11(b).
- [42] Second, properly interpreted, the doctrine of *functus officio* has no application where, as here, the application and remedy sought are unrelated to the jury's verdict and deliberations. As explained in *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33, [2021] 2 S.C.R. 785, at para. 33, the doctrine of *functus officio* "indicates that a final decision of a court that is susceptible of appeal cannot, as a general rule, be reconsidered by the court that rendered that decision" (emphasis added). As a result, in determining whether the trial judge was *functus officio* in the present case, the question to ask is whether a s. 11(b) application seeks to "reconsider" the jury's verdict of guilt. Clearly, it does not.

- [43] Seeking a stay as a remedy for a s. 11(b) breach is unrelated to the merits of the prosecution. It neither seeks to reconsider nor alter a jury's finding of guilt. A s. 11(b) application, whatever its timing, could never lead to a remedy capable of affecting the outcome of a jury's deliberations. As a result, with respect to such applications, the trial judge will become *functus officio* only at the end of the trial which, in this context, is the end of sentencing: *K.G.K.*, at para. 27, citing *R. v. MacDougall*, [1998] 3 S.C.R. 45, at para. 19.
- [44] This court's rulings in *Gostick* and *Henderson* can thus be distinguished from the present context. In both cases, the post-verdict stay applications involved matters that could have had an impact on the jury's decision. Unlike s. 11(b) applications, the courtroom conditions in *Gostick* and the disclosure issue in *Henderson* pertained to the conduct of the trial. On these facts, our court properly concluded that the trial judges were *functus officio* and lacked jurisdiction to cast a cloud over the verdict of guilt by remedying a trial fairness issue after the fact. The post-verdict applications sought, in effect, to "reconsider" the jury's final decision. Such reconsideration would violate the doctrine of *functus officio* as defined in *Canadian Broadcasting*.
- [45] My conclusion that *Gostick* and *Henderson* are distinguishable is also consistent with the view expressed by the Quebec Court of Appeal in *Drouin*. There, the court held that the trial judge erred in declining to rule on a s. 11(b) application brought after the jury's verdict. Citing *Henderson*, among other authorities, the trial judge had found she was *functus officio*. The Quebec Court of Appeal disagreed and, for reasons similar to those set out herein, distinguished *Henderson*. As that court explained, the jury's verdict does not exhaust the trial judge's jurisdiction in respect of "une question totalement indépendante du verdict prononcé par le jury" [unofficial translation: "a matter entirely independent of the verdict delivered by the jury"]: *Drouin*, at para. 318.
- [46] However, I should not be taken as condoning what occurred in this case. Once trial dates are set, any s. 11(b) application an accused person may wish to bring should be brought and decided on a timely basis. In Superior Court proceedings, subject to the trial judge's discretion, such applications must be scheduled at the latest 60 days before the first day of trial, as required by Part VI of the Consolidated Provincial Practice Direction Regarding Criminal Proceedings.[2] In this case, compliance with the practice direction would likely have resulted in the application being decided well before the scheduled trial dates, thereby obviating the need for a trial.
- [47] Instead, an unnecessary six-day trial was held because the application was filed late, on the eve of the trial, and the trial judge decided that she would nonetheless hear it, but only after the trial was completed. In my view, this outcome is contrary to the efficiencies required by *Jordan*: see e.g., at paras. 40-43, 45, 116-117. The result was a complainant having to testify and undergo cross-examination unnecessarily, in this case for a second time, and a jury being required to hear and come to a difficult decision of guilt only to see the case stayed by the later ruling. Court time as well as the witnesses' and jury's time were, in effect, wasted. Such an outcome does not put the justice system in the best light. It was avoidable and

should have been avoided.

- [48] In sum, this court's rulings in *Gostick* and *Henderson* have no bearing on the post-verdict jurisdiction of trial judges to hear and decide s. 11(b) applications. Having concluded that the application judge in this case was not functus officio, I now turn to the ground of appeal raised by the Crown.
2. The application judge did not err in failing to deduct the delay caused by the adjournment of the first trial. Position of the parties [49] When the s. 11(b) application was argued before the application judge, the Crown took the position that the "adjournment delay" was caused by the respondent's late constitutional challenge and ought therefore to be deducted as defence delay. On appeal, the Crown takes a different position, arguing the decision to wait for the release of the Supreme Court of Canada's decision in *J.J.* was a discrete exceptional event.
- [50] The Crown explains that, in essence, the June 2022 dates for the first trial were vacated in order to await the Supreme Court of Canada's judgment in *J.J.* Because that decision would in effect finally determine the constitutional issues the respondent was raising, it would obviate the need for the judge seized of the challenge to rule on it. It would also avoid any possibility that the trial would proceed based on an erroneous ruling, should the court decide the constitutional challenge without awaiting the Supreme Court's guidance. The Crown argues that it had no control over the court's decision to await the ruling in *J.J.* and no ability to mitigate the ensuing delay. Accordingly, the adjournment decision should be classified as a discrete exceptional event and the resulting delay should be deducted in the s. 11(b) analysis.
- [51] In support of its position, the Crown relies on *R. v. Corner*, 2023 ONCA 509, 167 O.R. (3d) 641. In *Corner*, a third-party records holder, Crime Stoppers, brought an interlocutory appeal to the Supreme Court from the trial judge's decision to permit disclosure of the identity of a Crime Stoppers tipster. The Supreme Court granted leave to appeal to Crime Stoppers. The appeal was heard but the decision remained on reserve when the accused's trial was scheduled to proceed. The trial judge determined that the trial should be adjourned pending the outcome of the appeal to the Supreme Court. Eventually, the defence brought an unsuccessful s. 11(b) application and appealed the dismissal to this court. The court in *Corner* determined that the period of delay caused by the decision to wait for the Supreme Court's decision ought to be characterized as a discrete exceptional event for the purpose of the Jordan calculation. In the Crown's submission, the present case is analogous and should be treated no differently.
- [52] The respondent, for his part, argues that the delay waiting for the Supreme Court of Canada's decision in *J.J.* does not constitute a discrete exceptional event and should not be deducted from the total delay. The respondent submits that a trial court is required to apply the law as it exists when the trial is held. Adjourning a case to await guidance from a higher court in a different matter is inconsistent with an accused person's right to be tried within a reasonable time, especially given the uncertainty as to how long the decision of a higher

court will remain under reserve.

- [53] In the respondent's submission, Corner is distinguishable and of no assistance to the Crown. In that case, disclosure of the tipster's identity was an issue specific to that trial and needed to be resolved before the trial could proceed. Because the Supreme Court had not rendered its decision when the trial was scheduled to begin there was, in the circumstances, no choice but to adjourn the trial pending the outcome of the appeal. That, however, is simply not the situation in the present case.
- [54] The respondent argues that his challenge to the provisions also at issue in J.J. should not have resulted in his having to await the Supreme Court's decision before his trial could proceed. Because J.J. remained on reserve, the respondent says the court ought to have ruled on his own challenge instead of delaying his trial. Accused persons would be put in an impossible position if courts were to adjourn trials to await all pending higher court decisions that might have an impact on their case. In the respondent's submission, the Crown therefore has not discharged its burden of showing that the adjournment delay should be deducted as a discrete exceptional event.

Standard of review and principles [55] On a s. 11(b) application, this court owes deference to a trial judge's findings of fact. The characterization of periods of delay and the ultimate decision as to whether there has been a breach of s. 11(b) are questions of law, reviewable on a standard of correctness: *R. v. Pauls*, 2020 ONCA 220, 149 O.R. (3d) 609, at para. 40, *aff'd* *R. v. Yusuf*, 2021 SCC 2, [2021] 1 S.C.R. 5; *R. v. Jurkus*, 2018 ONCA 489, 363 C.C.C. (3d) 246, at para. 25, leave to appeal refused, [2018] S.C.C.A. No. 325.

- [56] As previously stated, the Crown does not advance defence delay as a ground of appeal. Instead, it now argues the adjournment delay should be subtracted from the total delay because it was caused by exceptional circumstances. 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" (emphasis in original): *Jordan*, at para. 69. There are two general categories of exceptional circumstances set out in *Jordan*, at para. 71: discrete events and particularly complex cases. The Crown submits the adjournment delay is attributable to a discrete event. This court described such events as "unexpected and uncontrollable happenings which lead to delay", including for example "medical emergency or illness of criminal justice participants, recanting witnesses, and elongated trials despite good faith timeline estimates": *R. v. Zahor*, 2022 ONCA 449, at paras. 70-71, citing *Jordan*, at paras. 72-73.

Analysis [57] As I will explain, the decision to vacate the June trial dates to await the Supreme Court of Canada's decision in J.J. does not constitute a discrete exceptional event. It follows that the ensuing delay ought not to be deducted from the total delay.

- [58] The Crown has not discharged its burden of showing that the adjournment delay was reasonably unforeseen or reasonably unavoidable. As I will explain, it was not reasonable to halt the case's progress until the Supreme Court released its judgment in a different matter. To avoid similar delays in the future, I will set out what is in my view the proper approach when considering whether to adjourn a trial to wait for appellate guidance.
- [59] The Supreme Court of Canada has repeatedly instructed all actors in the justice system to be proactive in avoiding unnecessary delays: *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, at para. 36; *Jordan*, at para. 137; and *R. v. Thanabalasingham*, 2020 SCC 18, [2020] 2 S.C.R. 413, at para. 9.
- [60] Courts are to apply the law as it stands without regard to uncertain future changes. Delaying trials any time there is an appeal pending in a higher court involving a relevant legal issue would risk bringing the judicial system to a halt. Waiting for the final resolution of such issues is simply not a reasonable way to achieve timely and effective justice. The harm of delay is certain, but the benefit of delay is rarely more than speculative.
- [61] This is not to say that, in fixing trial dates, the parties and the court would not take into account the potential impact of a pending decision on the conduct of the trial. Nor, once a trial date is set, could a judge never reasonably determine that awaiting guidance from a higher court justifies an adjournment. Adjournment decisions are discretionary and enable the trial judge to manage cases fairly and effectively: *R. v. Ke*, 2021 ONCA 179, at para. 57; *R. v. Hazout* (2005), 199 C.C.C. (3d) 474 (Ont. C.A.), at para. 31, leave to appeal refused, [2005] S.C.C.A. No. 412, and [2005] S.C.C.A. No. 501. Appellate courts thus owe deference to the case management choices made by trial judges: *Jordan*, at para. 139.
- [62] I would think, however, that decisions to delay a case's progress while awaiting the outcome of an appeal would be the exception. Each situation must be resolved on its particular facts, weighing factors such as the anticipated delay, the position taken by the parties, the significance of the issue to be resolved and the potential impact on the trial and the accused should the adjournment request not be granted. A judge considering whether a delay or adjournment is appropriate and warranted will also weigh the risk that the appellate court's ruling will result in a miscarriage of justice, impairment to trial fairness or need for a retrial should the trial proceed as scheduled.
- [63] A judge may, for example, consider it appropriate to grant an adjournment where a pending appellate decision is reasonably believed to be imminent, will likely impact whether a jury is properly constituted and all parties agree that a short delay is warranted. In such a case, the prospect of having to redo a trial depending on the outcome of the pending appeal will weigh heavily in the balance. Similar concerns may arise where the constitutionality of the very offence the accused is charged with is pending in the higher court.
- [64] The present case, however, did not display any such extraordinary features and there was no consensus among the parties that an adjournment was warranted. At the time of the adjournment decision, the respondent's constitutional challenge had been ruled on in at

least nine different cases throughout the province. The court did so in those cases without waiting for definitive guidance from the Supreme Court of Canada. Indeed, if the trial proceeded based on a ruling contrary to the Supreme Court's later decision in J.J., it is far from certain that it would require a retrial.[3]

- [65] I am not persuaded that the lengthy adjournment which occurred in this case would have been appropriate even if the defence had offered to waive delay pending the appellate decision. Defence waiver would be only one factor for the judge to take into account. It would not and should not, standing alone, constitute a proper basis to adjourn a trial: Cody, at para. 37. While defence delay resulting from a waiver does not count towards the ceiling, timely trials engage interests beyond the accused's s. 11(b) rights. All delay, deductible or not, still affects the courts, victims of crime and public confidence in the justice system: Jordan, at paras. 22-27. Had the expectation been that the Supreme Court's decision in J.J. was imminent, a short adjournment with the parties' agreement may have been reasonable. What occurred in this case, an adjournment of 5 months and 15 days decided almost one month before the trial was scheduled to start, is in my view unjustified. In fact, as it turns out, delaying the start of the trial by just one month, to July 13, 2022, would have been sufficient as the decision in J.J. was issued on June 30, 2022.
- [66] To be clear, my conclusion that the adjournment delay to await guidance from the Supreme Court regarding the respondent's constitutional challenge was not attributable to a discrete exceptional event does not solely depend on the reasonableness of the adjournment decision. Even in those rare cases where a decision to await guidance from a higher court is reasonably taken, I would not view the delay as falling within the discrete events category of exceptional circumstances. What the Supreme Court understood "events" to be is apparent from the examples given in Jordan, at paras. 72-73: illness, family emergencies, extradition, trial complications. In other words, events in the ordinary sense.
- [67] By contrast, a constitutional question raised by a party is not an "event". It is a legal issue to be addressed in the course of a trial process. Defence applications, such as the Charter challenge brought by the respondent, are procedural steps which the Supreme Court of Canada accounted for when setting the presumptive ceilings: Jordan at para. 65; see also R. v. Mengistu, 2024 ONCA 575, at paras. 28-29. Responding to the issues raised in such applications is part of the trial process.
- [68] Adjourning a trial to await the guidance of a higher court is simply a way the court may respond to an application. It does not constitute a discrete exceptional event. The issues raised by the application will however be relevant in assessing a case's complexity. In some cases, particularly complex issues will justify a net delay above the ceiling. That is because the case complexity category of exceptional circumstances involves, among other things, "novel or complicated legal issues": Jordan, at para. 77. Therefore, the steps required to adjudicate a legitimate constitutional challenge brought by the defence are proper factors in assessing whether the case as a whole was "particularly complex". This holds true whether the challenge is resolved by hearing and deciding the application or by an adjournment to

await the higher court's decision.

- [69] Finally, I agree with the respondent that this court's decision in *Corner* is of little assistance to the Crown. In *Corner*, a third party obtained leave to appeal to the Supreme Court of Canada from an interlocutory decision in that prosecution. This interlocutory appeal was a true discrete exceptional event. The pending Supreme Court decision unavoidably brought the proceedings to a halt because it was an appeal from a ruling in the case and would determine which evidence could be heard at trial. These were quite different circumstances than those in the present case. Here, the decision made was to wait for the Supreme Court's decision in *J.J.*, a totally different proceeding, in the expectation that it would obviate the need to rule on a constitutional issue raised in a defence application. As I have explained, such issues are not discrete events but rather factors to weigh in the assessment of case complexity.
- [70] In this appeal, the Crown did not take the position that the case's complexity rebuts the presumption of unreasonable delay. The application judge, for her part, noted there was "no question that this was not a complex case." I see no reason to doubt her assessment.
- [71] Before concluding, I would emphasize that it is not appropriate for the defence to delay applications as was done in the present case. I do not agree with the application judge's statement that it was reasonable for the respondent to wait "as long as possible" before bringing his constitutional challenge. He had given no indication of his intention to challenge any legislative provisions and, as a result, the application was not accounted for in the pre-trial schedule. He served and filed the application close to 22 months after the information was laid, without providing the required 30-day notice. In the circumstances, this delay was not justified. Nevertheless, despite the short notice, the constitutional challenge could and should have been resolved without waiting for the Supreme Court of Canada to issue its ruling in *J.J.* This is what happened in other cases being prosecuted across the country and is what ought to have been done here.

D. Disposition [72] As a result, I see no error in the application judge's conclusion that the net delay in this case was above the ceiling. I would dismiss the appeal.

Released: February 12, 2026 "P.R."

"Paul Rouleau J.A."

"I agree. Grant Huscroft J.A."

"I agree. Gary Trotter J.A."

"I agree. David M. Paciocco J.A."

"I agree. J. Copeland J.A."

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- [1] This appeal is subject to a publication ban pursuant to s. 486.4 of the Criminal Code, R.S.C. 1985, c. C-46.
- [2] In the Ontario Court of Justice, the current province-wide practice direction provides that “Unless the Court directs otherwise, section 11(b) applications shall be heard at least four months before trial”: Ontario Court of Justice Practice Direction: Section 11(b) Charter Applications (issued November 1, 2023).
- [3] I express no view as to whether, in that scenario, delay reasonably caused by the need for a new trial could be deducted as attributable to a discrete exceptional event.
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