

CANADA / JUDGMENT

R. v. Woolsey

2021 BCCA 253

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 253 R. v. Woolsey

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Woolsey,

2021 BCCA 253

Date: 20210629

Docket: CA45280

Between:

Regina

Respondent

And

Robert James Woolsey

Appellant

Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Provincial Court of British Columbia, dated April 5, 2018 (R. v. Woolsey, 2018 BCPC 75, Abbotsford Docket 84714).

The Appellant, appearing in person:

R.J. Woolsey

Counsel for the Respondent:

S.K. Steele

Place and Date of Hearing:

Vancouver, British Columbia

September 15, 2020

Place and Date of Judgment:

Vancouver, British Columbia

June 29, 2021

Written Reasons by:

The Honourable Madam Justice Dickson

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Abrioux

Summary:

The appellant operated a store that sold marihuana products for medical purposes. He was convicted of unlawfully trafficking in cannabis after selling marihuana products to undercover police officers who did not provide valid medical authorization to possess them. He was self-represented at trial and appeals on the basis that the trial judge did not provide him with adequate assistance when he dismissed his counsel, abandoned various defences, and exhibited confusion over when to cross-examine witnesses, and when the trial was adjourned, causing delay that exceeded the presumptive ceiling. Held: Appeal dismissed. While a trial judge has a duty to assist a self-represented accused to ensure trial fairness, the duty is circumscribed and a judge should not step into the role of counsel or advise on tactical decisions. In this case, the accused clearly communicated that he wished to dismiss his counsel and to abandon various defences. Both those decisions were the accused's to make, and the judge clarified and confirmed both decisions directly with the accused. When the accused exhibited confusion about cross-examination, the judge reminded him of the proper procedure and indicated that witnesses could be recalled if necessary. This assistance ensured the accused's defence was brought out with its full force and effect. Finally, although the judge and the Crown should have raised the issue of delay, there is no reasonable possibility that an application for a stay based on a s. 11(b) Charter breach could have succeeded so no miscarriage of justice occurred.

Reasons for Judgment of the Honourable Madam Justice Dickson:

Introduction

- [1] The appellant, Robert Woolsey, is a passionate believer in the right to reasonable access to marihuana for medical purposes. In 2015, he operated a branch of the B.C. Pain Society, known as a "Compassion Club", where he sold marihuana and derivative products to customers permitted to possess them pursuant to a valid medical authorization. In 2016, he was charged with five counts of unlawfully trafficking in cannabis, contrary to s. 5(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA], for selling his cannabis products to undercover police officers who did not produce documentation allowing them to possess what he sold. On April 5, 2018, he was convicted of all five counts of trafficking following a trial in the Provincial Court of British Columbia.
- [2] Mr. Woolsey represented himself at the trial on the charges. He appeals his convictions primarily on the basis that the trial judge failed to provide him with the assistance he required and to which he was entitled as a self-represented accused. In his submission, the judge's failure to provide him with sufficient assistance to enable him to present his case properly compromised the trial's fairness and gave rise to a miscarriage of justice. I do not agree and would dismiss the appeal.

Background

- [3] In February 2015, Mr. Woolsey opened a Compassion Club dispensary in Deroche, B.C. He sold marihuana and derivative products there to customers permitted to possess them pursuant to a valid medical authorization, as provided for in the Marihuana for Medical Purposes Regulations, SOR/2013-119 [MMPR]. According to Mr. Woolsey, before opening the dispensary he consulted with Staff Sergeant Rob Dixon of the Mission RCMP, who led him to believe he could operate it without police interference so long as he sold his products only to persons with a verified medical need for cannabis.
- [4] On September 24, 2015, September 25, 2015, November 19, 2015 and November 21, 2015, Mr. Woolsey sold cannabis at the dispensary to undercover officers who did not produce documentation showing they were authorized to possess it for medical reasons. On November 25, 2015, police arrested him for trafficking and searched the dispensary and his residence, where they seized various items, including cannabis plants and video recordings.
- [5] On August 10, 2016, Mr. Woolsey was charged with five counts of unlawfully trafficking in cannabis in an amount not exceeding three kilograms, contrary to s. 5(1) of the CDSA.

Pre-Trial Proceedings

- [6] John Conroy, Q.C. initially represented Mr. Woolsey on the charges. On November 10, 2016, he attended the Provincial Court as Mr. Woolsey's agent and advised the judge that he intended to raise several issues, including officially induced error, entrapment and abuse of process. Mr. Conroy also advised that he intended to argue the CDSA and the MMPR, as applied to Mr. Woolsey, were inconsistent with s. 7 of the Charter because Mr. Woolsey was providing reasonable access to medical marihuana.
- [7] On December 8, 2016, Mr. Conroy returned to court, this time with Mr. Woolsey. At that appearance, Mr. Conroy and Crown counsel disagreed on the best procedure for addressing the issues that Mr. Conroy had raised. Most significantly, they disagreed on whether the court should deal with the constitutional challenge before or after the case was determined on its merits. Mr. Conroy argued the constitutional issue should be addressed first; Crown counsel argued it should only be addressed following a merits determination, if necessary. To resolve the dispute, the court scheduled a pre-trial conference before the assigned trial judge.
- [8] On February 10, 2017, the trial judge presided at the pre-trial conference. Its purpose was two-fold: for counsel to explain the issues and proposed procedural approaches and for the court to establish a trial schedule. After hearing submissions, the judge decided that two separate five-day blocks were required for trial, but that he needed to consider further how to divide up the issues for determination. At his direction, counsel attended at the office of a judicial case manager, who scheduled the weeks of November 20, 2017 and January 15, 2018 for the trial.
- [9] On October 12, 2017, Mr. Conroy and Mr. Woolsey returned to court, this time to advise the judge that Mr. Woolsey had terminated Mr. Conroy's retainer. At the outset, Mr. Conroy told the judge that he had been dismissed and was attending court to facilitate the transition:

THE COURT: I just want to ask [Crown counsel] and Mr. Conroy what's happening with their matter today. ... What do you expect to happen with your matter today?

MR. CONROY: It's no longer my matter, I have been terminated, and so I'm just here to facilitate --

THE COURT: Oh, I see.

MR. CONROY: -- the transition.

THE COURT: Oh, thank you, Mr. Conroy. I appreciate you attending here.

MR. CONROY: -- Woolsey's going to act on his own behalf.

THE COURT: Okay.

MR. CONROY: So I've told the Crown I will assist him in terms of his notice of constitutional challenge, but if you have time, there is an issue that maybe should be clarified after the last pretrial conference where you set out what you thought the procedure should be.

[10] Mr. Conroy went on to remind the judge of his disagreement with Crown counsel on whether the court should address Mr. Woolsey's constitutional challenge before or after making a determination on the merits. After hearing briefly from Crown counsel, the judge turned to Mr. Woolsey to confirm his wishes and intentions with respect to legal representation:

THE COURT: Okay, well, let's canvass that issue first of all. So Mr. -- Mr. Woolsey, is -- is that correct, you -- don't -- you no longer want Mr. Conroy to represent you?

THE ACCUSED: That's right.

THE COURT: Okay. Will you be getting new counsel to --

THE ACCUSED: I won't.

THE COURT: -- represent you --

THE ACCUSED: No.

THE COURT: -- at trial?

THE ACCUSED: I'm going to defend myself.

THE COURT: I see, okay. All right. So in terms of today, are we simply confirming the trial dates or was there some other issue that you wanted to address?

[11] At that point, Crown counsel embarked on a discussion of trial procedure and, in doing so, asked that Mr. Woolsey serve a notice under the Constitutional Question Act, R.S.B.C. 1996, c. 68. In response, Mr. Conroy advised the judge that he had already provided a draft notice to the Crown and that he would assist Mr. Woolsey in completing a final version.

[12] On October 25, 2017, Mr. Woolsey filed a Notice of Constitutional Question and Application in which he sought an order declaring the CDSA and the MMPR, as applied to him, to be inconsistent with s. 7 of the Charter, or, alternatively, findings of officially induced error and entrapment. He also sought orders that the searches of the dispensary and his residence violated s. 8 of the Charter and that the conduct of the police, Crown and court amounted to an abuse of process. As to the alleged abuse of process, he asserted that: the police destroyed his cannabis plants and caused the death of his cat; the pre- and post-charge delay violated s. 11(b) of the Charter; the police swore "false oaths" and failed to comply with s. 25.1 of the Criminal Code; and video recordings seized at the dispensary were destroyed. Finally, he sought orders under s. 24 of the Charter excluding evidence, staying proceedings or dismissing the charges, together with costs.

[13] On October 27, 2017, Mr. Woolsey and Crown counsel attended another pre-trial conference before the trial judge. Crown counsel told the judge that the trial would commence on November 20, 2017, with the defence applications to follow, depending on the outcome of the trial. Following a discussion regarding scheduling, Mr. Woolsey provided Crown counsel with a list of the witnesses he wished to call and expressed concern regarding pre-charge delay, the destruction of evidence and the proposed trial procedure. As to the latter, he and the judge had this exchange:

THE ACCUSED: And why we can't hear the constitutional challenge as part of the trial or -- I've got to be able to question on this during the trial.

THE COURT: Absolutely.

THE ACCUSED: Okay, so that is permissible.

THE COURT: The -- I mean, the evidence will cover all -- will cover all the issues but -- but we will do the trial in the stages that's --

THE ACCUSED: Okay.

THE COURT: -- been decided --

THE ACCUSED: Okay.

Trial Proceedings

Stage One

[14] The trial commenced on November 20, 2017. Messrs. Fast and Bick represented the Crown. Mr. Woolsey was self-represented.

[15] The judge began by reviewing the way in which the trial would proceed, confirming that, first, the Crown would present evidence on the actus reus of the offence and Mr. Woolsey would present evidence on the defences of officially induced error and entrapment. If there was an acquittal, he stated, that would end the matter. However, if the Crown had proven its case, "we'll next proceed to whether the entrapment argument succeeds and any further evidence on that issue," and, unless there was an acquittal or a stay, "we'll next proceed to the stage of the constitutionality and the issue of abuse of process."

[16] The judge also provided Mr. Woolsey with an explanation of the trial process. For example, he explained that the Crown bears the burden of proving the charges beyond a reasonable doubt, the meaning of reasonable doubt and the processes of direct examination and cross-examination. He explained further that both parties could object to questions, Mr. Woolsey could choose whether to testify or present other evidence and both parties could make submissions after the evidence was presented. When he finished his explanation, the judge asked Mr. Woolsey if he had any questions of a procedural nature. Mr. Woolsey responded, "I don't think so", and the judge replied, "All right. If, as they arise, you have them, I'll be happy to take them."

- [17] Next, Mr. Fast raised some housekeeping matters, including a concern that Mr. Woolsey might wish to call him as a witness. Mr. Fast told the judge that Mr. Woolsey intended to argue there was unreasonable delay, contrary to s. 11(b) of the Charter, "which is I think in the eventual abuse of process application after a constitutional challenge." The judge discussed the possibility of Mr. Fast testifying with Mr. Woolsey, noting that an agreement on relevant dates might be possible, that there would be a record of all court appearances and that charge approval issues might be addressed in submissions. Mr. Fast also advised the judge that the Crown intended to apply later in the trial under s. 601 of the Criminal Code to amend the Information to conform with the evidence in the certificates of analysis.
- [18] After addressing these preliminary matters, Mr. Fast began to call witnesses. From that point forward, the trial proceeded very quickly. On the first day, seven witnesses testified, including three of the undercover officers, and Mr. Woolsey cross-examined them. By the end of the day, there was only one Crown witness left to testify on stage one of the trial.
- [19] Shortly before the lunchbreak on the first day of the trial, it became obvious that Mr. Woolsey did not realize he should be questioning the witnesses on issues related to stages two and three, as well as on the merits. In an exchange with the judge, Mr. Woolsey stated, "I accept all of this as fact" and explained that the trial was proceeding so quickly because "I only dispute the circumstances under which it all took place." The judge asked Mr. Woolsey if his witnesses would be available to testify early, encouraged him to ask all of his questions when the witnesses were on the stand and acknowledged that some witnesses might have to return for further questioning. At the end of the first day, Mr. Woolsey told the judge his witnesses could likely testify ahead of schedule and he would probably call his wife the next day.
- [20] When the trial resumed on November 21, 2017, Mr. Woolsey brought an application under s. 601 of the Criminal Code to quash the Information on the basis that it did not disclose a valid offence because, at the relevant time, his actions were not illegal. The judge deferred his ruling and continued with stage one of the trial. After the remaining Crown witness testified, the Crown closed its case, subject to its motion to amend the Information, and the judge asked Mr. Woolsey if he would be calling any defence evidence. Mr. Woolsey replied that he could not call his witnesses until the next day and stated, "I'd like to come back after lunch and give you a decision on whether I can testify this afternoon." He also listed several defence witnesses, most of whose testimony related to the abuse of process and officially induced error issues.
- [21] When the trial resumed that afternoon, Mr. Woolsey told the judge he was not ready to proceed because he wanted to testify as the last defence witness, not the first defence witness. As a result, the trial was adjourned for the day.

Mr. Woolsey Changes His Approach

[22] On November 22, 2017, the judge began by asking Mr. Woolsey if he was ready to call his first witness. Mr. Woolsey responded that he had decided to take a "different approach", that he wished to offer no defence and that he wished to abandon his "minor motions", namely, those related to entrapment, officially induced error and abuse of process. Instead, he stated, he wished to proceed with only the constitutional challenge and the s. 601 motion:

THE ACCUSED: Actually, Your Honour, I'm going to take a little different approach this morning. I would like to firstly drop all my minor motions that I have made.

THE COURT: Okay.

THE ACCUSED: The only motion I wish to keep, of course, is the constitutional challenge and the most recent quash.

THE COURT: Okay.

THE ACCUSED: I also will be offering no defence, so we can move quickly --

THE COURT: You're calling no -- no witnesses?

THE ACCUSED: No defence witnesses whatsoever, Your Honour. In fact, I would like the court to know that on -- as early as March of 2016, I appealed to John Conroy to allow me to basically accept the information in the indictments, because they are true, but the extenuating circumstances of those indictments created a situation where I felt I needed to be able to explain the circumstances of the actions.

[23] Mr. Woolsey also asked the judge for an immediate answer on his s. 601 motion. When the judge replied that the motion depended on much of the same evidence as the constitutional challenge, Mr. Woolsey disagreed, stating:

to be perfectly honest with you after two years of waiting for my opportunity to stand before you I want to move this as quickly as possible to the real meat of this problem. It has been proven unconstitutional in several occasions, Your Honour, and those are all in your factum that I -- I brought yesterday to court. At this point I'd like to sit down and everything in that motion yesterday to quash is what I have to offer at this stage.

[24] The judge reminded Mr. Woolsey of the three-stage trial procedure he had directed. Then, he sought to clarify which of his arguments Mr. Woolsey wished to abandon:

THE COURT: So, what is it exactly you're abandoning? You're not -- you're not making the constitutional challenge anymore?

THE ACCUSED: Oh, no, the constitutional challenge stays if I need it.

THE COURT: All right, so -- so we are still going to proceed to that stage. What about entrapment?

THE ACCUSED: We're striking that, Your Honour. That's one of the minor motions that I'm -- I'm dropping today.

THE COURT: Really.

THE ACCUSED: Yes.

THE COURT: Okay. What about officially induced error?

THE ACCUSED: I'm dropping that today as well, Your Honour.

THE COURT: You're not proceeding with that defence either.

THE ACCUSED: No, not proceeding with that. And I'm also not proceeding with the abuse of process.

THE COURT: All right, so -- so at this stage then --

THE ACCUSED: I wish to proceed with the quash motion.

THE COURT: With the quash motion. And if you're not successful then we proceed with the constitutional challenge, is that right?

THE ACCUSED: Yes, yes, that would be the -- the procedure.

[25] Next, the judge asked Mr. Fast for his position. Mr. Fast replied that he was "taken a bit unawares but obviously Mr. Woolsey is in control of his own defence and what he wishes to argue". He suggested adjourning for the day to allow his colleague, Mr. Bick, time to respond to Mr. Woolsey's s. 601 motion, which Mr. Woolsey agreed was acceptable. Shortly before the trial adjourned, Mr. Bick confirmed that, due to Mr. Fast's other commitments, he would be "responsible for everything from tomorrow onwards."

[26] On November 23, 2017, Mr. Bick presented the Crown's argument on Mr. Woolsey's s. 601 motion. When he finished, Mr. Woolsey asked for time to prepare a reply. The judge acceded to this request and the trial adjourned to December 12, 2017, when Mr. Woolsey presented his reply argument, after which the judge adjourned it to January 15, 2018 for his ruling on the motion. Prior to the trial adjourning, a discussion took place regarding the witnesses Mr. Woolsey wished to call on his constitutional challenge. In the course of that discussion, Mr. Woolsey remarked that, from his point of view, the abuse of process was part of the constitutional question, not a separate motion:

THE COURT: So -- so let's talk about that a bit. So what -- what is it -- what is the evidence you're helping to get out of the police officers?

THE ACCUSED: I think -- I think actually on -- on the 22nd when I stood up and offered no defence I then said I wanted to drop my minor motions. The abuse of process I don't believe was a separate motion, it was part of the constitutional question. These law officers abused the situation, myself, my wife, our home and I want to question them on that.

THE COURT: Okay. As -- as part of supporting the Charter challenge?

THE ACCUSED: Yes, exactly. Yeah.

[27] On January 15, 2018, Mr. Woolsey returned to court for the judge's ruling on the s. 601 motion to quash the Information and, if necessary, the trial's continuation. Unfortunately, however, Mr. Bick was absent because his father had suddenly fallen ill. His colleague from the Crown office sought a brief adjournment until Mr. Bick's availability could be clarified. Mr. Woolsey readily agreed to this proposal. Before adjourning for the day, however, the judge delivered his ruling on Mr. Woolsey's s. 601 motion.

Ruling on Mr. Woolsey's s. 601 Motion to Quash the Information

- [28] The judge held that s. 5 of the CDSA created a valid offence at the time of the impugned transactions. As a result, he denied Mr. Woolsey's s. 601 motion to quash the Information. In doing so, he reviewed the doctrine of stare decisis and several authorities relied upon by the parties, including *R. v. Parker* (2000), 146 C.C.C. (3d) 193 (Ont. C.A.); *Hitzig v. Canada* (2003), 177 C.C.C. (3d) 449 (Ont. C.A.); and *Kubby v. H.M.T.Q.*, 2005 BCCA 640.
- [29] In *Parker*, the court held that the CDSA prohibition on the possession of marihuana was of no force or effect due to the absence of valid regulations allowing for medical exemptions. Shortly after it was released, Canada sought to remedy the problem identified in *Parker* by passing the Marihuana Medical Access Regulations, SOR/2001-227. In *Hitzig*, the court found the newly enacted regulations were constitutionally inadequate, although it also declined to declare the prohibition on possession in the CDSA unconstitutional due to that inadequacy. In *Kubby*, this Court followed the approach adopted in *Hitzig* and held that defects in medical marihuana regulations did not invalidate the prohibitions in the CDSA.
- [30] The judge went on to review other relevant authorities, including *Allard v. Canada*, 2016 FC 236. In *Allard*, the court struck down the MMPR on the basis that a person who could not access a licensed producer but had a genuine medical need for marihuana did not have access to it without breaking the law, which unjustifiably infringed s. 7 of the Charter. The judge noted that, in *Allard*, Justice Phelan declared the regulations invalid for this reason and gave Canada six months to enact a new or parallel medical marihuana regime before the declaration became operative. He also noted that, despite having made this declaration, Justice Phelan did not strike down any sections of the CDSA because he considered doing so would be an unduly drastic remedy.
- [31] Taking into account the foregoing, the judge rejected Mr. Woolsey's submission that s. 5 of the CDSA was not in force on the dates of his alleged offences because the regulations were unconstitutional. More specifically, the judge rejected Mr. Woolsey's submission that he should adopt the *Parker* approach that CDSA prohibitions are inoperative in the absence of constitutionally valid regulations and reject the approach taken in *Hitzig* and *Kubby*. He went on to dismiss Mr. Woolsey's s. 601 motion because it was based on the proposition that he was charged with doing something that was not against the law when he was alleged to

have done it. In explaining his conclusion, the judge stated that "[t]he failure of regulations to meet the needs of those who validly require a controlled substance should not result in excusing possession or trafficking by those who don't."

The Trial Continues

- [32] After delivering his ruling, the judge adjourned the trial to January 17, 2018 due to Mr. Bick's unavailability caused by his father's illness. On January 17, 2018, Crown counsel requested a second adjournment for the same reason. Again, Mr. Woolsey readily agreed. The parties attended at the office of the case manager to set another date for the trial's continuation. The date selected was February 28, 2018.
- [33] On February 28, 2018, Mr. Woolsey and Mr. Bick returned to court to continue the trial as scheduled. However, on this occasion the judge was absent because he was sitting elsewhere in the province due to "some rescheduling". As a result, a second continuation date was scheduled. This time, the date selected was April 5, 2018.
- [34] It appears from the record that no one raised or discussed s. 11(b) of the Charter and the presumptive 18-month ceiling established in *R. v. Jordan*, 2016 SCC 27, at either the January 17, 2018 or the February 28, 2018 court appearances. As the Information was laid on August 10, 2016, the presumptive 18-month ceiling was reached on February 10, 2018. By April 5, 2018, the ceiling had been exceeded by one month and 26 days. As noted, the 81-day delay from January 15, 2018 to April 5, 2018 was caused by the two adjournments related to Mr. Bick's unavailability due to his father's sudden illness.
- [35] On April 5, 2018, the trial resumed with all parties present and ready to proceed with the trial on the charges. At the outset, Mr. Fast sought to recap "where we are and where we're going from here":

MR. FAST: Before that, in November after hearing Mr. Woolsey's argument, you indicated that if it wasn't successful, Mr. Woolsey should be prepared to bring his constitutional challenge. But before that, the court indicated that it would have to consider whether there was enough evidence to convict Mr. Woolsey, whether there was sufficient evidence to find that he did commit the offences without entering, of course, the finding of guilt. So I think there needs to be -- that that has to occur before we move on.

THE COURT: Yeah, and if I understood Mr. Woolsey correctly, he's -- he's conceding that portion of it but the issue is, is this a valid offence and is this a constitutionally valid offence. That's really what -- where we're at.

MR. FAST: Yes.

THE COURT: Am I correct, Mr. Woolsey?

THE ACCUSED: Yes, you are, exactly.

THE COURT: That's what I understood you to tell me last day.

THE ACCUSED: Yeah, yeah.

- [36] Next, Mr. Fast applied to amend the Information to conform with the evidence. The judge allowed the application and changed the words "cannabis (marihuana)" to "cannabis resin" and "tetrahydrocannabinol" in counts 2 and 4 respectively.
- [37] Having previously notified Mr. Woolsey of his intention to do so, Mr. Bick then applied for a summary dismissal of the constitutional challenge on the basis that it could not succeed even if the evidence came out exactly as Mr. Woolsey expected. He submitted the remedy Mr. Woolsey was seeking was not available because a provincial court judge is not empowered to make declarations of constitutional invalidity under s. 52(1) of the Constitution Act, 1982 and because Mr. Woolsey was not entitled to a judicial stay based on the facts and the judge's prior analysis on Mr. Woolsey's s. 601 application. As to the latter, Mr. Bick emphasized that the charges against Mr. Woolsey concerned sales of marihuana to undercover officers who expressed no medical need or difficulties. In these circumstances, he argued, the result of the constitutional challenge was inevitable and it would not be a good use of court time for the judge to hear the proposed evidence.
- [38] The judge agreed to hear the Crown's application for a summary dismissal of the constitutional challenge. Before doing so, he asked Mr. Woolsey to outline the evidence he proposed to call to prove the regulations were unconstitutional. Mr. Woolsey responded that he intended to call several patients regarding problems they had experienced in accessing and using cannabis for medical purposes under the regulatory scheme at issue. He also stated that he intended to testify.
- [39] In opposing the Crown's application for a summary dismissal of the constitutional challenge, Mr. Woolsey focused on alleged flaws in the regulations and the difficulties he contended they create for individuals seeking to access cannabis for medical purposes. In the course of his submissions, he also remarked that "[a]s far as the -- the Crown's [assertion] that the four undercover officers presented no medical need, I would certainly, having offered no defence at the time, I -- I didn't fully have a chance to go into that but they most certainly did, all four of them. So we can work on that later." Then he returned to discussing the regulations, stating, "[m]y challenge is based upon life, liberty and health, being able to take care of our health." After hearing the submissions of Crown counsel and Mr. Woolsey, the judge granted the Crown's application to dismiss the constitutional challenge summarily.
- [40] Again, it appears from the record that no one raised or discussed s. 11(b) of the Charter and the presumptive 18-month Jordan ceiling.

Ruling on the Crown's Application to Dismiss the Constitutional Challenge Summarily

- [41] The judge reviewed the history of the proceedings and stated that, at this point, he was satisfied the Crown had proven the elements of each offence beyond a reasonable doubt. As a result, he said, it was necessary to deal with the constitutional challenge. He described the Crown's summary dismissal application and cited leading authorities in which courts are directed to curtail unnecessary delay by declining to embark on lengthy applications that have no reasonable prospect of succeeding: *R. v. Cody*, 2017 SCC 31 at paras. 37-38; *R. v. Frederickson*, 2018 BCCA 2 at para. 26. He also outlined the parties' respective positions.
- [42] Turning to his analysis, the judge expressed concern that Mr. Woolsey not be denied the right to be heard. However, he stated, Mr. Woolsey would only be denied the right to be "fully heard" should he grant the Crown's application. He noted that Mr. Woolsey had "capably articulated his reasons why he submits that the relevant sections of the CDSA are unconstitutional and has also set out in detail the evidence he wishes to call in support of those submissions." He also commented on the strain on court resources caused by Jordan and the need for trial judges in criminal cases to act as gatekeepers on summary dismissal applications. In doing so, he remarked that if, on appeal, this Court should send the matter back for a rehearing, "I suspect that all of the alarm bells regarding Jordan concerns would be loudly clanging and the Crown would be confronted with the issue of unreasonable delay."
- [43] The judge concluded that Mr. Woolsey's constitutional challenge should be summarily dismissed because he did not have the power to grant the relief sought, he was bound to uphold the CDSA sections and the additional court time required to hear the application was not justified:
- [18] The law directs that I grant the application by the Crown if I am satisfied that the Application for a Constitutional Challenge does not have a reasonable prospect of success. I am satisfied that the Crown should succeed in its application. I reach this conclusion for three reasons:
1. The Supreme Court of Canada has clearly stated that I do not have the power to grant the relief requested in the Notice of Application for Constitutional Relief. More specifically, I do not have the power to strike down or suspend the operation of those sections of the CDSA which I am being asked to strike down.
 2. Assuming I am wrong about the previous conclusion, I am bound to follow those decisions of Superior Courts of this Province and of the Supreme Court of Canada, which have upheld those sections and convicted individuals for violating them, notwithstanding the existence of invalid or unconstitutional regulations.
 3. The use of additional court time to hear this application under these circumstances is not justified, especially at the expense of other matters awaiting trial. It is in everyone's best interest, especially the interests of those whose cause Mr. Woolsey seeks to advance, that

these issues be heard and decided by a Superior Court having the authority to grant the relief that Mr. Woolsey seeks, if such relief is proven to be justified as Mr. Woolsey clearly asserts it to be. It makes no sense to spend further time arguing the issue if it is now clear that at the end of the day such relief will not be found in this court.

- [19] For the foregoing reasons, the Crown's application to dismiss Mr. Woolsey's Constitutional Challenge is granted.

Conviction and Sentence

- [44] After dismissing the constitutional challenge, the judge found Mr. Woolsey guilty on all five counts set out in the Information and sentenced him to one day's imprisonment, concurrent, on each count, to be applied against the time served, together with a \$250 fine on each count and ancillary orders. After he was convicted, Mr. Woolsey told the judge, "obviously, I'm going to appeal the conviction on the basis of both entrapment and the abuse of process" and "I'd love nothing, Your Honour, than for you to bring down a sentence today that demonstrates exactly how the courts feel about these -- yes, I'm going to call it frivolous -- absolutely frivolous."

On Appeal

- [45] As he was below, Mr. Woolsey was self-represented in this Court. As he did below, he presented his arguments in a thorough, thoughtful and respectful way. Due to his lack of legal training, however, Mr. Woolsey raised several grounds of appeal in his factum that were untenable given the way in which the trial unfolded and the resulting state of the record. For example, as outlined above, Mr. Woolsey did not pursue his arguments on entrapment and officially induced error at trial, so there was no evidentiary foundation for these arguments. Nevertheless, at the hearing of the appeal the core issue that emerged for determination was whether the judge failed to provide Mr. Woolsey with reasonable assistance and, if so, whether that failure gave rise to a miscarriage of justice.
- [46] According to Mr. Woolsey, the trial unfolded in a procedurally complex manner that obviously confused and seriously prejudiced him. As a result, he submits, the judge should have sought clarification on certain matters and provided more extensive guidance than he did. Mr. Woolsey identifies four points at which he says further assistance was required to ensure trial fairness, namely, when he discharged his counsel, when he abandoned some of his defences, when he exhibited confusion about calling witnesses and when the presumptive 18-month Jordan ceiling was exceeded. He acknowledges that the judge was otherwise helpful, but says his failure to ask more questions about why he made the choices he did and to explain their implications, risks and consequences in more detail meant that his defence was not fully brought out and thus that there was a miscarriage of justice. Consequently, he submits, the convictions should be overturned.

[47] Crown counsel responds that the judge provided Mr. Woolsey with sufficient assistance to permit him to bring out the defences he wanted to pursue and to render the trial fair in all of the circumstances. In her submission, for the most part, Mr. Woolsey was a confident litigant who was able to direct his own defence, articulate his positions clearly and make tactical choices that reflected his litigation priorities. She emphasizes that Mr. Woolsey expressed no concerns about terminating Mr. Conroy's retainer and says it was reasonable for the judge to accept the termination and proceed to trial with Mr. Woolsey representing himself. She also says that nothing in the evidence so obviously suggested a Charter breach that the judge was obliged to inquire further into any potential infringement and its possible consequences. Accordingly, she submits, there was no miscarriage of justice and the appeal should be dismissed.

Analysis

Trial Judge's Duty to Assist Self-Represented Accused

Scope of the Duty

- [48] A trial judge is obliged to provide a self-represented accused in a criminal case with sufficient assistance to ensure trial fairness. Described in *R. v. Darlyn* (1946), [1947] 3 D.L.R. 480 at 482 (B.C.C.A.) as a "helping hand to guide [the accused] throughout the trial", such assistance is required to aid the accused in the proper conduct of the defence so that the defence is "brought out with its full force and effect": *R. v. Richards*, 2017 ONCA 424 at para. 110; *R. v. Moghaddam*, 2006 BCCA 136 at para. 54. Where a self-represented accused contends that a judge failed to provide needed assistance, two questions arise for determination: whether there was such a failure and, if so, whether that failure gave rise to a miscarriage of justice within the meaning of s. 686(1)(a)(iii) of the Criminal Code: *R. v. Leno*, 2021 BCCA 200 at para. 69, citing *R. v. Neidig*, 2018 BCCA 485.
- [49] The onus on a trial judge to assist a self-represented accused is a heavy one, rooted in concerns with trial fairness and not with the ultimate verdict. However, the duty owed by the judge is circumscribed. For example, the duty is limited to what is reasonable in the circumstances and the assistance provided need not enable the accused to present the case "as effectively as a competent lawyer". Rather, trial fairness requires that a self-represented accused "be given a fair opportunity to present their case to the best of their ability": *Neidig* at para. 93; *Richards* at paras. 111-12.
- [50] In addition, the judge shares the burden of assisting a self-represented accused, to some extent, with Crown counsel. In particular, Crown counsel should be alert to potential problems in a self-represented accused's understanding of the process and should make suggestions as to where the court might provide assistance if it appears to be required: *R. v. Wyatt*, 2018 BCCA 162 at para. 14.

- [51] Moreover, in assisting a self-represented accused the judge must take care not to overstep the role of impartial arbiter and become an advocate: *R. v. Martin*, 2010 BCCA 526 at para. 15. As Justice Griffin explained in *Wyatt*, "[a] judge presiding over a criminal trial with a self-represented accused must remain neutral and cannot become the lawyer for the accused": at para. 12. To that end, the judge should not assist the self-represented accused with trial tactics or provide the accused with advice on tactical decisions: *R. v. Kim*, 2004 BCCA 57 at para. 66, leave to appeal ref'd [2004] 2 S.C.R. vi; *R. v. Klyne*, 1999 BCCA 649 at para. 8. On the contrary, when providing assistance in a criminal trial proceeding the judge must "respect an unrepresented accused's strategy in conducting [the] defence": *R. v. Phillips*, 2003 ABCA 4 at para. 24, aff'd 2003 SCC 57.
- [52] In determining the extent of the duty owed in a given case, the judge must balance the need to assist, on the one hand, with the need to remain neutral, on the other. As stated in *R. v. Sullivan*, 2013 BCCA 32 at para. 40, "[h]ow far a trial judge should go in assisting an accused is a matter of judicial discretion" and the nature of the assistance required "will vary with each trial, depending on factors such as the offence charged, the facts, the defences raised and the sophistication of the accused". In *Neidig*, Justice Frankel cited the guidance of the Canadian Judicial Council in its Statement of Principles on Self-represented Litigants and Accused Persons, which has been endorsed by the Supreme Court of Canada, on how judges should meet their obligations to self-represented litigants:
- [91] The Statement of Principles on Self-represented Litigants and Accused Persons issued by the Canadian Judicial Council in 2006 provides advice to judges on how to meet their obligations to self-represented litigants in the courtroom. The following appears under the heading "For the Judiciary":
1. Judges have a responsibility to inquire whether self-represented persons are aware of their procedural options, and to direct them to available information if they are not. Depending on the circumstances and nature of the case, judges may explain the relevant law in the case and its implications, before the self-represented person makes critical choices.
 2. In appropriate circumstances, judges should consider providing self-represented persons with information to assist them in understanding and asserting their rights, or to raise arguments before the court.
 3. Judges should ensure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented persons.

The Statement of Principles has been endorsed by the Supreme Court of Canada: *Pintea v. Jones*, 2017 SCC 23 at para. 4, [2017] 1 S.C.R. 470; *Mazraani v. Industrial Alliance Insurance and Financial Services Inc.*, 2018 SCC 50 at para. 39.

Duty to Advise of the Right to Trial Counsel

- [53] Where representation by counsel is essential to a fair trial, an accused has a constitutional right to the provision of counsel at state expense if the accused lacks the means to employ one. On the other hand, accused persons also have the right to represent themselves, if that is their wish, and the right to discharge their counsel at any time, for any reason. A judge may not interfere with the decision of an accused to discharge counsel or force representation upon an accused who is unwilling: *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 at 58-70 (Ont. C.A.); *R. v. Cunningham*, 2010 SCC 10 at para. 9.
- [54] Nevertheless, an accused is at a distinct disadvantage when proceeding in a criminal case without competent counsel. For this reason, a trial judge is generally obliged to point out that disadvantage and advise a self-represented accused to consider seeking legal representation for the trial in order to ensure trial fairness: *R. v. McGibbon* (1988), 45 C.C.C. (3d) 334 at 346 (Ont. C.A.). For the same reason, at least in part, on rare occasions when counsel applies to withdraw representation from an accused the judge may exercise the discretionary power to refuse the application because allowing counsel to withdraw at that point would harm the administration of justice: *Cunningham* at para. 50.
- [55] However, the judge's duty to advise a self-represented accused of the right to trial counsel is not absolute. A failure to provide such advice does not automatically result in an unfair trial. While representation by counsel affects trial fairness, it is not determinative. Rather, the significance of a failure by the judge to advise the accused of the right to trial counsel will vary from case to case: *R. v. Rejzek*, 2009 ABCA 393 at paras. 15-29, leave to appeal ref'd [2010] 1 S.C.R. xiv.
- [56] The determination of trial fairness requires a holistic and contextual analysis that accounts for any failure by the judge to provide advice on the right to trial counsel considered in combination with all other relevant factors. Such factors include the capacities of the accused, the complexities of the case, the likely penalty faced and the manner in which the trial unfolded, including the nature of the assistance provided by the judge throughout the trial. For example, in *Rejzek* the trial of a self-represented accused with a good command of English who faced a simple charge that was unlikely to lead to imprisonment was not rendered unfair by the judge's failure to tell the accused he would be at a distinct disadvantage without legal representation. Similarly, in *McGibbon* the trial of a self-represented accused whose counsel withdrew at the preliminary hearing was not rendered unfair by the judge's failure to provide such advice because it was patent on the record that the accused wished to defend himself. In these circumstances, despite the seriousness of the charges that he faced, the court held on appeal that the trial judge was not obliged to inquire whether the accused wished to retain counsel or urge him to do so.

Duty to Assist with Charter Issues

- [57] In some cases, a trial judge's duty to assist a self-represented accused might also include raising Charter issues on the judge's own motion: Neidig at para. 100; *R. v. Travers*, 2001 NSCA 71 at para. 36. However, this duty does not arise "on the mere scent or intimation of a possible Charter infringement." Rather, as Justice Watt explained in *Richards*, "where there is admissible uncontradicted evidence of a relevant Charter breach, the trial judge has an obligation to raise the issue, invite submissions and enter upon an inquiry into the infringement and its consequences" (emphasis in original): Neidig at para. 100, citing *Richards* at para. 113; *R. v. Bialski*, 2018 SKCA 71 at para. 73.
- [58] Where the judge has a duty to raise a Charter issue, the judge should raise it "when it first becomes clear the evidence of a breach will be uncontradicted": *Bialski* at para. 74. In the context of an apparent s. 11(b) Charter breach, the judge should raise the issue when it becomes clear that the presumptive ceiling established in *Jordan* has been reached: *R. v. Gauthier*, 2019 QCCQ 3884 at para. 74. Where a Charter issue arises, the judge should not resolve the issue proprio motu, without first providing the parties with an opportunity to make submissions and, if necessary, entering upon an inquiry into the Charter breach and its consequences: *R. v. Fraillon* (1990), 62 C.C.C. (3d) 474 at 476 (Que. C.A.); *Gauthier* at para. 77. Where the apparent breach relates to s. 11(b) of the Charter, it is particularly important for the judge to assess the issue based on the full record of proceedings, bearing in mind the salient positions and submissions of the parties in connection with the delay: Neidig at paras. 108-111.

Appellate Review of the Sufficiency of Assistance Provided

- [59] A trial judge's decision on how to assist a self-represented accused is entitled to appellate deference because it involves the exercise of discretion. This Court will only intervene on appeal if the judge "proceeded on a wrong principle or if a miscarriage of justice resulted": *Wyatt* at para. 13. Further, as stated in Neidig, a failure on the part of the judge to provide sufficient assistance is not a free-standing ground of appeal. As previously noted, where a failure is demonstrated the question is whether that failure gave rise to a miscarriage of justice within the meaning of s. 686(1)(a)(iii) of the Criminal Code: Neidig at para. 90.
- [60] As also noted, when an appellate court assesses trial fairness, the question is whether the judge provided sufficient assistance to enable the accused "to bring out [their] defence 'with full force and effect'": *Moghaddam* at para. 54. In making this determination, this Court considers the entire trial, examines the record in detail and evaluates the advice provided in light of the circumstances of the case, bearing in mind the accused is entitled to a fair trial, not a perfect trial: *Martin* at para. 30; Neidig at para. 94; *Leno* at para. 88. In order to meet the requirements of trial fairness, "[t]he judge's advice must be interactive, [and] tailored to the circumstances of the offence and the offender, with appropriate instruction at each stage of a trial": *Phillips* at para. 22.

- [61] Where an allegation of insufficient assistance is based on the judge's failure to raise a Charter issue, to succeed on appeal the appellant must demonstrate a reasonable possibility that the Charter application could have succeeded below, had it been raised: *Neidig* at para. 103.

Did the Judge Fulfill His Duty to Assist Mr. Woolsey?

- [62] Mr. Woolsey's first complaint is that the judge did not "properly interrogate" him when he dismissed Mr. Conroy on October 12, 2017. In particular, he says, the judge failed to inquire into the circumstances surrounding the termination of the retainer and failed to urge him not to proceed to trial without counsel, although he had a duty to do both. Mr. Woolsey did not file new evidence on appeal, but stated in submissions that he had rejected Mr. Conroy's recommendation to accept a plea bargain and could not comply with his demand to provide further funds to cover trial fees. He also stated that Mr. Conroy told him not to say anything to the court about their conversations and that it was too late for him to withdraw, so he felt bound to follow Mr. Conroy's instructions and "was forced to terminate his [counsel] before the court."
- [63] According to Mr. Woolsey, the situation in which he found himself with respect to legal representation stressed, confused and dismayed him. He contends that he would not have terminated Mr. Conroy's retainer had he realized Mr. Conroy might not be permitted to withdraw given the impending trial date. He also contends that he might have sought further time to prepare the case or explored the possibility of retaining court-appointed counsel had the judge emphasized the disadvantages of proceeding without legal representation. While Mr. Woolsey acknowledged at the hearing that the judge "did all he could" based on what he knew, he nevertheless submits that the judge failed to provide him with sufficient assistance in connection with his right to trial counsel.
- [64] I am not persuaded by these submissions. In my view, the judge did not fail to provide Mr. Woolsey with sufficient assistance when he dismissed Mr. Conroy and chose to represent himself at the trial.
- [65] As the record reveals, after Mr. Conroy advised the judge that he had been dismissed the judge asked Mr. Woolsey directly if he no longer wanted Mr. Conroy to represent him. Mr. Woolsey responded, unambiguously and unequivocally, "[t]hat's right". Nothing suggested that Mr. Woolsey might have been confused or hesitant about dismissing Mr. Conroy or that further questioning on the surrounding circumstances might be necessary or appropriate. On the contrary, in my view, it was incumbent on the judge to accept what Mr. Conroy and Mr. Woolsey were telling him at face value. Indeed, further questioning might have risked violating solicitor-client privilege on confidential matters such as counsel's advice on any possible plea bargain that the Crown might have proposed: *Cunningham* at paras. 25--34, 50.

- [66] The judge also asked Mr. Woolsey directly if he would be retaining new counsel to represent him at trial on the charges. Mr. Woolsey responded, "I won't. I'm going to defend myself". Again, his response was unambiguous and unequivocal, and it expressed a choice that was Mr. Woolsey's to make.
- [67] Mr. Woolsey obviously knew he had the right to be represented by trial counsel given that Mr. Conroy represented him until his retainer was terminated. In my view, the judge was not required to recommend that he bring a Rowbotham application after he dismissed Mr. Conroy and announced his intention to represent himself. Even if the judge had such a duty, whether Mr. Woolsey might have been eligible for the provision of counsel at state expense is a matter of speculation. Like the appellant in *Neidig*, Mr. Woolsey has not demonstrated a reasonable possibility that such an application could have succeeded and, therefore, a miscarriage of justice has not been established. Similarly, the prospect that Mr. Conroy might not have been allowed to withdraw had he been required to bring a withdrawal application is speculative, particularly given that the court exercises its jurisdiction to refuse withdrawal applications "exceedingly sparingly": *Cunningham* at para. 59.
- [68] Although the judge did not tell Mr. Woolsey that he would be at a disadvantage without counsel, as recommended in *McGibbon*, such a warning, while desirable, was also not required to ensure trial fairness. Mr. Woolsey was an articulate and confident advocate for the right to access medical marihuana who had enjoyed the benefit of legal assistance on substantive and procedural matters until shortly before the trial began. This included assistance in articulating the constitutional challenge, which was the centerpiece of his defence. He was also entitled to (and received) ongoing assistance from the judge to guide him through each stage of the trial proceeding. As Justice Frankel explained in *Neidig*, the fact that competent counsel would have been better able than Mr. Woolsey to bring out the defence did not mean that the trial would be unfair.
- [69] Mr. Woolsey's second and third complaints are connected. In his submission, the judge failed to provide him with sufficient assistance when he exhibited confusion, particularly when he abandoned his defences of entrapment, officially induced error and abuse of process on the third day of the trial. In support of this submission, Mr. Woolsey argues that the trial was procedurally complex, he was obviously floundering and he used words like "abandon", "strike" and "drop" without realizing that they meant he could not raise those issues again at a different level. He says his confusion was often obvious, including, for example, when he "went right by" the undercover officers in cross-examination believing that he could bring them back later to testify.
- [70] According to Mr. Woolsey, the judge should have clarified the process more fully as the trial unfolded and should have advised him about the risks and consequences of abandoning any motions when he announced his intention to take that step. I cannot agree.

- [71] I accept that Mr. Woolsey was confused at some points in the trial and that his confusion was sometimes obvious. For example, as he notes, he did not address his entrapment defence when cross-examining several police witnesses on the first day of the trial despite the prior directions given by the judge that he should do so. However, the judge dealt with Mr. Woolsey's confusion on this point as soon as it became apparent by reminding him to question Crown witnesses on all issues at stage one of the trial. He also agreed to make allowances based on Mr. Woolsey's status as a self-represented accused and assured him that he could recall Crown witnesses at stages two and three for further questioning, if necessary.
- [72] In other words, the judge extended a "helping hand" to guide and aid Mr. Woolsey in bringing out his defence, as contemplated in authorities such as Darlyn, Richards and Moghaddam. He provided this assistance in an ongoing and interactive manner, sometimes at Mr. Woolsey's request, at other times on his own initiative. In my view, the assistance that he provided was sufficient to protect trial fairness up to and including this stage of the trial.
- [73] The judge also provided sufficient assistance when Mr. Woolsey announced later in the trial that he was abandoning his "minor motions", namely, entrapment, officially induced error and abuse of process. As outlined above, on the third day of trial Mr. Woolsey announced that he had decided to take a "different approach" to the case. He went on to tell the judge that he wished to proceed with only the constitutional challenge and his s. 601 motion to quash the Information and that he would call no witnesses and offer no defence.
- [74] Mr. Woolsey exhibited no obvious confusion about his decision to abandon the "minor motions" when he announced that he had made it. In response to Mr. Woolsey's announcement, the judge clarified the nature of his decision and confirmed that he understood the trial would proceed directly to the constitutional challenge if he did not succeed on the s. 601 motion. He replied, "Yes, yes, that would be the procedure."
- [75] Mr. Woolsey was entitled to decide how best to defend himself from a tactical perspective. His decision to abandon certain aspects of his defence and focus on the constitutional challenge and his motion to quash was a tactical choice that was his and his alone to make. It also aligned with his strongly held beliefs regarding the constitutional right to reasonable access to medical marihuana and it was not the apparent product of confusion or misunderstanding. As Mr. Woolsey put it, he wanted "to move this as quickly as possible to the real meat of this problem". As Mr. Fast observed in response, Mr. Woolsey was "in control of his defence and what he wishes to argue."
- [76] In my view, in these circumstances, it was not for the judge to second guess Mr. Woolsey, take on the role of counsel and advise him on the tactical choices he should be making: Wyatt; Kim; Phillips. That said, the judge could have explored Mr. Woolsey's decision with him more extensively to ensure that he fully appreciated all of its possible implications. However, in the absence of an error in principle or a miscarriage of justice, his discretionary decision on how best to guide and assist Mr. Woolsey is entitled to appellate deference:

Wyatt. I see no such error or miscarriage of justice with respect to the assistance the judge provided when Mr. Woolsey announced his decision to abandon his "minor motions."

- [77] Importantly, there was no admissible uncontradicted evidence of an apparent Charter breach associated with the "minor motions" that should have prompted the judge to inquire further and invite submissions on his own initiative at the point when Mr. Woolsey announced his intention to abandon them: Neidig; Bialski. Further, while it is true that Mr. Woolsey had previously failed to cross-examine some police witnesses on matters related to the abandoned motions, the judge made it clear that those witnesses could be recalled for further questioning, if necessary. To the extent that Mr. Woolsey suffered from confusion in connection with the proper parameters of his early cross-examinations, when he chose later to abandon the "minor motions" that early confusion became irrelevant to the ongoing fairness of the trial.
- [78] Moreover, at no point did Mr. Woolsey indicate that he had reconsidered, regretted or misunderstood his decision to abandon the "minor motions" as the trial was unfolding. On December 12, 2017, he did indicate that he understood the abuse of process motion was part of his constitutional challenge, but the judge later dismissed the constitutional challenge on the basis that it was doomed to fail even if the evidence upon which Mr. Woolsey relied came out exactly as he expected that it would. In addition, on April 5, 2018, Mr. Woolsey remarked that he intended to appeal on the basis of both entrapment and abuse of process, which also suggested some confusion from a procedural perspective. However, he made that remark only after he was convicted, and, at that stage, the judge had no duty to advise him on the scope of future appellate review.
- [79] Mr. Woolsey's final complaint is that the judge failed to recommend that he apply for a judicial stay based on a breach of his s. 11(b) Charter right to be tried within a reasonable time because the presumptive 18-month ceiling established in *Jordan* was exceeded. As I have explained, by the time the judge convicted Mr. Woolsey on April 5, 2018, 19 months and 26 days had passed since the Information was laid. As I have also explained, the presumptive ceiling was reached on February 10, 2018, and the delay associated with Mr. Bick's unavailability due to the sudden illness of his father and consequent continuation of the trial was 81 days.
- [80] In *Jordan*, the Supreme Court of Canada established a new framework for the application of s. 11(b) of the Charter. At the center of the *Jordan* framework is a ceiling beyond which a period of delay from the time of the charge to the actual or anticipated end of the trial, minus defence delay, is presumptively unreasonable. For cases going to trial in the provincial court, the presumptive ceiling is 18 months: *Jordan* at paras. 5, 46.
- [81] Delays attributable to the defence are deducted from the total delay for purposes of the presumptive ceiling. As the Court explained in *Jordan*, defence delays have only two components: delays waived by the defence and delays caused by the conduct of the defence. A waiver by the defence can be explicit or implicit, so long as it is clear and unequivocal. In

addition, to waive a specific period of delay for purposes of the presumptive ceiling the accused must have full knowledge of their rights and the effect of the waiver on those rights. Further, as the Court noted in *Jordan*, when expressing a defence waiver, whether expressly or implicitly, the accused is waiving the inclusion of specific periods in the overall assessment of reasonableness, not the right to be tried within a reasonable time: *Jordan* at paras. 61, 66.

- [82] If the total delay, minus defence delay, exceeds the presumptive ceiling, the Crown must rebut the presumption of unreasonableness by establishing the presence of exceptional circumstances. Exceptional circumstances are circumstances that lie outside the Crown's control in that they are reasonably unforeseen or reasonably unavoidable and the Crown cannot reasonably remedy the delays emanating from the circumstances once they arise. Where delay becomes an issue, the Crown must show that it took reasonable steps in an attempt to avoid and address the delay in question. If the Crown fails to establish exceptional circumstances that take the total period of delay below the presumptive ceiling, the delay is treated as unreasonable and the remedy that follows is a judicial stay: *Jordan* at paras. 47, 68, 70, 81, 105.
- [83] Among other things, medical or family emergencies generally qualify as exceptional circumstances that will justify a period of delay where the presumptive ceiling is exceeded: *Jordan* at para. 72; *R. v. Rai*, 2019 BCCA 377 at para. 134. In addition, as the Court explained in *Jordan*, judges must be alive to the practical realities of trials, especially where, as here, the trial was scheduled to conclude below but close to the presumptive ceiling but, in the end, exceeded it. In such circumstances:
- [74] 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.
- [84] Bearing in mind the *Jordan* principles, I begin by noting that Mr. Woolsey initially raised the issue of unreasonable delay and s. 11(b) of the Charter in his Notice of Constitutional Question, asserting that pre- and post-charge delay in violation of s. 11(b) formed part of his abuse of process allegation. He also raised the issue of unreasonable delay at the pre-trial conference on October 27, 2017 and on the first day of the trial on November 20, 2017. However, on the third day of the trial, November 22, 2017, Mr. Woolsey expressly abandoned his "minor motions", which, at that time, he stated included "the abuse of process." Although he commented on December 12, 2017 that the abuse of process allegation was "part of the constitutional question", he explained "[t]hese law officers abused the situation, myself, my wife, our home and I want to question them on that" and did not argue delay in responding to the Crown's application for a summary dismissal of the constitutional challenge.

- [85] In my view, it is apparent from the foregoing that until at least December 12, 2017 Mr. Woolsey considered the unreasonable delay issue to be part of the "minor motions" which he had chosen to abandon. Taking into account the fact that the presumptive ceiling had not been reached at that point, this was an unsurprising approach. However, from February 10, 2018 onward, the presumptive ceiling was exceeded, which potentially altered the nature and implications of the total delay in a significant way and, in any event, was not covered by Mr. Woolsey's prior abandonment of his "minor motion" regarding delay. Nor did Mr. Woolsey's acceptance of the Crown's adjournment proposals on January 15 and 17, 2018 constitute a valid waiver of the delay associated with the rescheduled trial on April 5, 2018 in the absence of a clear indication that he was fully aware the presumptive ceiling was imminent or exceeded and of the effect of such a waiver. The same is true of Mr. Woolsey's failure to raise the unreasonable delay issue again on April 5, 2018 after the judge ruled on the Crown's summary dismissal application to dismiss the constitutional challenge.
- [86] It appears from the record that the judge did not participate in the process of rescheduling the trial on January 15, 2017 or thereafter. However, it is curious that neither he nor Crown counsel drew to Mr. Woolsey's attention the fact that the 18-month presumptive ceiling was exceeded when the trial resumed on April 5, 2018, particularly as the judge referred to the Jordan decision when he summarily dismissed the constitutional challenge that day. At that point, there was an apparent breach under s. 11(b) of the Charter because the presumptive ceiling established in Jordan had passed, which meant the Crown was obliged to show exceptional circumstances, failing which Mr. Woolsey was entitled to a judicial stay of proceedings. In these circumstances, it was incumbent on both the judge and Crown counsel to raise the issue and invite Mr. Woolsey to form and articulate a position on the apparent Charter breach.
- [87] Nevertheless, in my view, this error did not give rise to a miscarriage of justice within the meaning of s. 686(1)(a)(iii) of the Criminal Code. Although the judge could not resolve the issue without alerting Mr. Woolsey to its existence and inviting his submissions, there is no reasonable possibility that, had he done so, an application brought by Mr. Woolsey for a judicial stay based on s. 11(b) of the Charter could have succeeded. The unexpected illness of the father of Crown counsel with conduct of the prosecution considered together with its close proximity to the expiry of the presumptive ceiling plainly amounted to exceptional circumstances, as contemplated in Jordan. The related period of delay led the total delay to extend beyond January 15, 2018, which was below the presumptive ceiling. Accordingly, had it been called upon to do so, the Crown could have met its burden to rebut the presumption of unreasonableness by establishing exceptional circumstances and thus justified the total period of delay.
- [88] In sum, in my view, a detailed examination of the record reveals that the judge gave Mr. Woolsey the opportunity to present his case to the best of his ability in his capacity as a self-represented accused. With the benefit of the ongoing and interactive assistance he received from the judge throughout, Mr. Woolsey was able to participate meaningfully and effectively

in the trial and to bring out his defence "with its full force and effect". To the extent the judge erred by failing to alert Mr. Woolsey to the fact that the presumptive ceiling established in Jordan had been exceeded by February 10, 2018, prior to the trial's conclusion, in the context of this trial that error was minor and it did not give rise to a miscarriage of justice.

Conclusion

[89] For all of these reasons, I would dismiss the appeal.

"The Honourable Madam Justice Dickson"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Mr. Justice Abrioux"

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