Translated from the original French

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| Tukkiapik c. R. | | | | | | 2023 QCCQ 4758 |
| COURT OF QUÉBEC | | | | | | |
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| CANADA | | | | | | |
| PROVINCE OF QUÉBEC | | | | | | |
| DISTRICT OF | | | ABITIBI | | | |
| LOCATION OF | | | KANGIRSUK | | | |
| Criminal Division | | | | | | |
| N° : | | 635-01-020425-212 | | | | |
|  | | | | | | |
| DATE: | June 19, 2023**[[1]](#footnote-1)** | | | | | |
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| BY THE HONOURABLE | | | |  | NATHALIE SAMSON, J.C.Q. | |
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| Johnny Tukkiapik | | | | | | |
| Applicant-Accused | | | | | | |
| v. | | | | | | |
| HIS MAJESTY THE KING | | | | | | |
| Respondent-Prosecutor | | | | | | |
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| **JUDGMENT ON AN APPLICATION TO STAY PROCEEDINGS FOR UNREASONABLE DELAY** | | | | | | |
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#### OVERVIEW

1. The Court must rule on an application for a stay of proceedings filed by the applicant-accused (the accused), who alleges unreasonable delays.
2. The accused lives in Kangirsuk, a small community on Ungava Bay, where the itinerant court travels about three times a year. Generally, the court travels to Kuujjuaq, and one or two days a week are selected to travel to a community.
3. On June 16, 2021, a charge of sexual assault was filed against the accused, and his trial was set for August 15, 2023.
4. The respondent-prosecutor (the prosecution) argues that several delays are attributable to the defence, due to actions or inaction on its part. In addition, it alleges that a certain number of days should be deducted from the total because of the existence of a distinct event.
5. On the morning of the hearing, the prosecution withdrew its motion for summary dismissal of the motion for a stay of proceedings on the grounds that the file was now complete and that the parties were ready to proceed on the motion for unreasonable delay.

**THE FACTS ADMITTED BY THE PARTIES**

1. The ceiling applicable in this case is 18 months since the accused opted quickly for a trial before a provincial court judge.
2. The time between the filing of the indictment and the scheduled trial date is 790 days, or about 26 months.
3. This is not a particularly complex issue.
4. The accused has been represented by three different lawyers in this case, the second having to withdraw due to a conflict of interest. His current lawyer officially appeared in the case at the end of September 2022.
5. On October 26, 2021, an expert report confirming male DNA was sent to the accused's first lawyer.
6. The accused was detained from June 16, 2021 to March 1, 2022.
7. On March 1, 2022, the accused was released with conditions because the forensic kit was not available. The case was therefore postponed until June 6, 2022. The period between March 1 and June 6, 2022, is accepted as an institutional delay.
8. The accused was remanded in custody on September 28, 2022, and he will remain in custody at least until his trial date of August 15, 2023.
9. On October 13, 2022, an expert report confirming the accused's DNA was emailed to his current counsel, but without prior notice under section 657.3 of the *Criminal Code*.
10. The results of the forensic kit were sent to the accused’s counsel on December 15, 2022.

#### Period of detention of the accused

1. By August 15, 2023, the total remand period will be 579 days, or 19.04 months.

#### The framework[[2]](#footnote-2)

1. First, the Court must determine the total delay, and then deduct delays attributable to the defence from that period.
2. Net delay is used to calculate reasonable delay. If net delay exceeds the ceiling set by the Supreme Court, it is presumed unreasonable. If it is less than the ceiling, the defence must demonstrate that it is unreasonable.
3. If the delay exceeds the ceiling, it falls to the prosecution to establish that the delay is reasonable. To succeed, the prosecution must establish exceptional circumstances, either by proving discrete events or by demonstrating that the case is complex.
4. Transitional exceptional circumstances do not apply in this case, since the charges were filed several years after *Jordan*[[3]](#footnote-3).

#### Issues in dispute

1. **What delays are attributable to the defence?**
2. **Did the prosecution prove a discrete event?**
3. The Court concludes that the delays are unreasonable since they exceed the 18‑month ceiling, and here is why :

#### ANALYSIS

1. **What delays are attributable to the defence?**
2. Delays attributable to the defence are divided into two categories:
   1. those which the defence explicitly or implicitly waives in a clear, informed, express, and unequivocal manner[[4]](#footnote-4);
   2. those that are solely or directly caused by the conduct of the defence or an action illegitimately taken by it[[5]](#footnote-5).
3. An analysis of the periods on which the parties disagree follows.

**Period from June 21, 2021, to June 29, 2021 (8 days)**

1. The prosecution alleges that the accused is responsible for the delay in handing over the file, from June 21 to June 29, 2021.
2. The defence argues that this is normal case preparation time.
3. The accused’s bail hearing was postponed from June 16 to June 29, 2021. On that date, the accused was kept in custody.
4. The case was then adjourned to the first available court date, July 13, 2021. On that date, the accused's counsel immediately entered a plea of not guilty and opted for a trial before a provincial court judge. The case was set down for trial on the first available date, October 19, 2021.
5. This was not illegitimate conduct on the part of the defence. On the contrary, it acted promptly. The fact that the bail hearing was postponed several times has no impact on the overall delay.
6. This is the period of time that the accused was entitled to have in order to properly prepare his trial.
7. This delay is therefore not attributable to the defence.
8. No discrete event is claimed for this period.

**Period from June 6, 2022, to January 10, 2023 (218 days)**

1. On June 6, 2022, the case was set down for a three-hour trial on January 10, 2023, in the community of Kangirsuk.
2. In its written answer, the prosecution alleges that the defence did not request the first available trial date and that this constitutes an implicit waiver on its part.
3. At the hearing, the prosecution conceded that January 10, 2023, was the first available date for a three-hour trial in Kangirsuk.
4. The prosecution therefore modified its request and indicated that the period attributable to the defence should be the period between October 3, 2022, and January 10, 2023.
5. On March 1, 2022, the accused was released with conditions, as the prosecution stated that it was awaiting the results of the forensic kit and was unable to provide them to the accused.
6. On September 26, 2022, the accused was arrested again and, on September 28, 2022, he was detained in the present case. The defence then asked to postpone the case until October 3, 2022. On that date, the defence maintained the trial date of January 10, 2023.
7. The prosecution alleges that the defence should have verified whether an earlier date was available and that this constitutes an implicit waiver on its part.
8. The defence alleges that it is judicial knowledge that it was inconceivable that a time slot would be available on that date.
9. In *Béliveau v.* *The Queen*[[6]](#footnote-6), the Court of Appeal confirmed that the prosecution has the burden of establishing, on a balance of probabilities, that the specific acts of the defence constitute an implied waiver. We must therefore analyze the context.
10. First of all, it is important to mention that the matter does not concern setting a case down for trial at the earliest available date, but rather keeping a date that was chosen in June 2022. This is six months later, and the prosecution is criticizing the defence for not having checked for an earlier available date.
11. There is no doubt in the Court's mind that advancing the case to October 3, 2022, was a proactive move on the part of the defence. This gave the accused’s counsel the opportunity to verify his options with the accused, who was still in custody, and to modify the direction of the case according to his mandate. The defence could simply have kept the trial date of January 10, 2023, and not requested a *pro forma* on October 3, 2022.
12. It would have been surprising, if not impossible, for an earlier date to have been available for a three-hour trial.
13. First, it must be a date dedicated to the community of Kangirsuk. According to the 2022-2023 judicial calendar, the Court would travel to this community in the week of October 24, 2022, and the next time would be on January 10, 2023.
14. Second, it is common knowledge that the trial calendar in Nunavik is full, with fifteen (15) to forty-five (45) hours of trials a day[[7]](#footnote-7). The community of Kangirsuk is not spared, especially since the Court travels to the village only three times a year.
15. Finally, the prosecution was better placed than anyone else to know the status of the docket on that date, and it was its constitutional obligation to inform the parties in the event that, miraculously, a time slot was available.
16. The Court wishes to point out here that the evidence in relation to the charge in this file was still not complete as of October 3, 2022. The accused's DNA results were forwarded to the accused on October 13, 2022.
17. The Court therefore concludes that defence counsel acquiesced to the inevitable and that the quickest option was to keep the date of January 10, 2023. At this point, the accused is still in detention, and it is implausible to think that he would not wish to have his trial at the earliest possible date, which is also his constitutional right.
18. This is not a time limit the defence has implicitly waived, since the prosecution has not met its burden.

#### Period from January 10, 2023 to April 11, 2023 (91 days)

1. The trial began on January 10, 2023. On that date, the prosecution intended to file the second expert report on the accused's DNA evidence.
2. The defence objected, arguing that the prosecution had not given the notice required under section 657.3(b) of the *Criminal Code*. A postponement was granted as a remedy under section 657.3(4) of the *Criminal Code*.
3. The prosecution alleges that this delay should be attributable to the defence.
4. The defence argues that the prosecution should have fulfilled its duty to disclose evidence and complied with its obligations under the *Criminal Code*.
5. The prosecution alleges that it had already given notice of the first expert report concerning male DNA on October 26, 2021, and that when it sent the second expert report on October 13, 2022, the defence should have realized that the prosecution wished to file this second report in evidence.
6. It is important to remember that the accused's current counsel took on the case at the end of September 2022.
7. The prosecution should have been doubly cautious and given notice, as required by the *Criminal Code*. The prosecution should also have ensured that the accused’s lawyer was in possession of the October 2021 notice. The argument that the accused’s counsel must have realized that the prosecution wanted to file this second report is unconvincing.
8. Moreover, in his motion for a stay of proceedings, the accused’s counsel alleged that he did not have the results of the October 2021 test in his possession. The prosecution could not assume that the accused’s counsel had them in his possession.
9. The *Criminal Code* is clear. The prosecution must give this notice to the defence to allow the latter the opportunity to request the expert witness's presence for cross-examination and to prepare its defence. This conduct is completely contrary to the prosecution’s proactive obligations laid down in *Jordan*[[8]](#footnote-8).
10. On the other hand, defence counsel received the report, but not the notice. This report is the expert report confirming the accused's DNA.
11. It is surprising that the accused's counsel did not think that there might have been an oversight or error and that the prosecution would want to introduce this report into evidence. It would have been easy for the accused's counsel to call the prosecution and ascertain its intention. He could then have requested the expert's presence for cross-examination, if that was his intention.
12. The Court deplores the situation and blames both parties. In the *Jordan* era, we cannot allow mistakes as simple as not sending a notice of intent to file an expert report. This is a gross error, and the delays would have been imputed to the defence had it failed to send such a notice[[9]](#footnote-9). The prosecution has a duty to ensure that its case is ready and complete before a trial.
13. The defence also has a responsibility to minimize delays and avoid causing them[[10]](#footnote-10). It cannot wait until the morning of the trial to oppose the filing of an expert report when it is likely that the prosecution needed it to complete its case.
14. The Court believes that it is important to denounce the inertia of both parties in respect of this delay, and for this reason, it divides it between the two parties. The Court therefore finds a delay of 45.5 days to be attributable to the accused.

#### Period from May 25, 2023, to August 15, 2023 (82 days)

1. The motion for unreasonable delay was presentable on April 11, 2023, but due to a clogged docket, the case was postponed. However, on April 12, 2023, since the Court was unable to travel to another community, the parties asked to proceed on this application.
2. The case was then postponed until June 19, 2023, for a decision on the *Jordan* application.
3. The prosecution asks to set the trial on May 25, 2023. Since the accused refused to proceed on May 25, 2023, it argues that the period from May 25 to August 15, 2023 should be attributable to the defence.
4. The defence, for his part, argues that the accused has already settled another case on May 25, 2023. To avoid placing the judge of that day in a conflict of interest, the accused prefers to set the present case down for another date.
5. This delay should not be attributable to the defence for the following reasons.
6. First, the accused's choice not to proceed in two different cases before the same judge is entirely justifiable, since this would be contrary to his right to make full answer and defence and to the presumption of innocence.
7. Second, proceeding while the accused is awaiting judgment on a motion for unreasonable delay would be a totally counterproductive course of action.
8. Finally, on May 25, 2023, there are more than twenty-seven (27) hours earmarked for trials. With air transportation from Kuujjuaq to Kangirsuk, setting up the court, and keeping the pilots on schedule, there are just over four hours available to call all the files on the docket, hear the settlements, and finally proceed.
9. It is therefore illusory to think that this case had any chance of proceeding on May 25, 2023.
10. The Court therefore rejects the prosecution's argument. The delay is not attributable to the defence.

#### Conclusion on delays attributable to the defence

1. The total time, before deductions attributable to the defence, is 790 days.
2. Considering the foregoing reasons, the Court finds that the only delays to be deducted from this total delay are 45.5 days resulting from the defence’s inaction in failing to verify the intention of the prosecution when it sent the second DNA test concerning the accused.
3. The current net lead time is therefore 744.5 days, or about 24.5 months.

#### Did the prosecution prove a discrete event?

**Period from October 19, 2021 to March 1, 2022 (133 days)**

1. The accused was on the list of detainees scheduled to travel to Kuujjuaq for his trial set for October 19, 2021.
2. Pandemic-related restrictions limited the number of detainees who could travel on the itinerant court flight for the court week of October 19, 2021.
3. During a management session for all the files scheduled to proceed during the week of October 18, 2021, the parties were informed that it was impossible to transport more than three detainees to Kuujjuaq.
4. Several email exchanges submitted as evidence also confirm that the accused had to travel with the itinerant court, and that only three detainees could travel to Kuujjuaq.
5. The accused's file was apparently de-assigned during the management session, as it was not a priority for the prosecution.
6. The accused did not travel during that week.
7. When listening to the audio recording of October 19, 2021, we hear the prosecution request a postponement of the trial on the grounds that a DNA report is missing from the file. The prosecution tells the judge that, should the request for a postponement be denied, they are prepared to proceed without the report.
8. On the same recording, we later hear the prosecution explains that this case was not one of their priorities for the day, so the accused did not travel. The prosecution explains that they tried to find alternative transportation for the accused, but that the commercial flights available were too long, from 17 to 23 hours.
9. The prosecution argues that these delays were caused by the restrictions imposed by the pandemic and were therefore a discrete event. The prosecution invites the Court to draw inspiration from a decision by the Honourable Marie-Chantal Brassard[[11]](#footnote-11), referring to the backlog of cases in Nunavik during the pandemic.
10. The defence, for its part, argues that disclosure was incomplete and that this delay should not be recognized as a discrete event.
11. The Court understands that the accused's counsel was not ready to proceed. First, his client was not present and he cannot proceed in his absence. Second, it is inconceivable for the defence to proceed when it has just been informed that there is existing DNA evidence that has not been transmitted to it. The defence is entitled to demand to see this extremely important evidence in the record. The defence has been presented with a *fait accompli*, having been told that there is new evidence.
12. Even if the prosecution declares itself ready to proceed, the accused is entitled to receive this evidence. Inaction on the part of the police and prosecution unduly delays the trial. It is therefore false to claim that the prosecution is ready to proceed, since it would do so to the detriment of the accused's right to full disclosure of the evidence, as well as his right to a fair trial.
13. The Court understands from this situation that this file was not the priority of the prosecution since it did not have the DNA result.
14. The evidence shows that on October 26, 2021, the accused received an initial expert report confirming the presence of male DNA.
15. A second expert report was subsequently sent to the accused on October 13, 2022. This evidence had been available since April 2022. This second report was given to the accused more than 16 months after his appearance.
16. It is also important to underline the following facts.
17. Following receipt of additional evidence on October 13, 2022, the accused's counsel realized that several documents were missing from the evidence. On more than one occasion, he requested the following documents from the prosecution by email:

* the forensic kit;
* the victim's blood and urine test results;
* information required to verify the validity of DNA search warrants.

1. As there was still no response, the accused's counsel was obliged to file an application for a stay of proceedings for failure to disclose.
2. On December 15, 2022, the accused's counsel received all these documents by email, and the prosecution asked him if he agreed to withdraw his application for failure to disclose.
3. Despite the fact that he received this information less than 30 days before the trial, the accused’s counsel declared he was ready to proceed on January 10, 2023, and withdrew his motion for failure to disclose. No further motions were filed.
4. The usefulness of this missing evidence for the accused, with regard to the charge against him and also with regard to his defence strategies, is an important element to consider in the present analysis[[12]](#footnote-12).
5. The prosecution had a constitutional duty of disclosure, and these delays are inexcusable. *Jordan*[[13]](#footnote-13) and *Cody*[[14]](#footnote-14) refer to a change in culture that requires parties, including the prosecution, to be proactive in order to reduce delays. In the present case, the Court understands that neither the prosecution nor the police were proactive. These practices must not be tolerated.
6. The inertia of the police and the prosecution with regard to the disclosure of evidence and the progress of the investigation while the accused is being held in preventive custody is unacceptable.
7. The Court concludes that the prosecution has not discharged its burden of establishing, on a balance of probabilities, that the delays are reasonable since they arise from a distinct event.
8. These delays are caused primarily by the inaction of state representatives.

#### STAY OF proceedings

1. The current net lead time is therefore 744.5 days, or about 24.5 months. This exceeds the 18-month ceiling.
2. According to the *Jordan* framework, once a time limit has been exceeded, delays are presumed to be unreasonable. These *Jordan* ceilings[[15]](#footnote-15) are already quite lenient, and the majority of cases should be resolved before they are reached[[16]](#footnote-16). This presumptive ceiling was deemed necessary by the Supreme Court to give clear guidance to the State on how to comply with its constitutional obligations, but also to those who play an important role in ensuring that trials are held within a reasonable time. These actors include court administration officials, police officers, the crown prosecutors, defendants and their counsel, as well as judges[[17]](#footnote-17).
3. The State must comply with constitutional requirements by ensuring that the criminal justice system in Nunavik is adequately resourced to avoid delays.
4. In the present case, it cannot be ruled out that the accused may have suffered prejudice before reaching 18 months, since he has been in preventive detention for about 19 months. Calculated at time and a half, this amounts to approximately 28.5 months[[18]](#footnote-18).
5. Pre-trial detention conditions are difficult for an accused, especially one living in Nunavik. As stated by the Human Rights Commission and catalogued by the Viens Commission, detention conditions for Nunavimiut are particularly difficult[[19]](#footnote-19).
6. In the eyes of the Court, this detention period alone is unreasonable.
7. The historical argument of mass volume and a dysfunctional system in Nunavik does not justify exceeding the 18-month threshold. Nor can chronic institutional and systemic delays serve as a basis for exceeding the celling[[20]](#footnote-20).
8. Citizens' confidence in the justice system is undermined by extended delays. This trust is essential to the system's survival. Without community support, the system loses its equilibrium[[21]](#footnote-21).
9. Moreover, unreasonable delays amplify victims' suffering and prevent them from moving on[[22]](#footnote-22).
10. The *Jordan* ruling does not distinguish between regions, and the right to a trial within a reasonable time is a right for all citizens.
11. In this case, the Court has no choice but to declare a stay of proceedings. This step must be taken in order to promote a functional justice system for the benefit of the community, the victim, and the accused.

#### For these reasons, the Court :

1. **DECLARES** that the right of the accused to be judge in a reasonable delay, as stated in section 11b) of the *Canadian Charter of Rights and Freedoms*,was violated.
2. **ORDERS** a stay of proceedings pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms*.

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| Mtre Franceline Lamoureux-Auclair | | |
| Director of Criminal and Penal Prosecutions | | |
| Counsel for the respondent-prosecutor | | |
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| Mtre Simon Gosselin  Kuujjuaq Legal Aid Office | | |
| Counsel for the applicant-accused | | |
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| Hearing date: | April 12, 2023 | |

1. Judgment was delivered orally on this date as provided for in *Kellogg's v. P.G.Q.*, a 1978 decision of the Court of Appeal of Quebec (SOQUIJ AZ-78011031), and the Court reserves the right to redraft this judgment, while making no substantial changes in content or structure. [↑](#footnote-ref-1)
2. *R. v.* *Jordan*, 2016 SCC 27 at paras. 46-48; *R. v.* *Rice*, 2018 QCCA 198, at paras. 36–38. [↑](#footnote-ref-2)
3. *R. v.* *Jordan*, supra, note 2. [↑](#footnote-ref-3)
4. *R. v.* *Jordan*, supra, note 2, at para. 61. [↑](#footnote-ref-4)
5. *R. v.* *Jordan*, supra, note 2, at paras. 63 and 66. [↑](#footnote-ref-5)
6. 2016 QCCA 1549. [↑](#footnote-ref-6)
7. Only one judge travels with the itinerant court during a court week. [↑](#footnote-ref-7)
8. *R. v.* *Jordan*, supra, note 2, at para. 50. [↑](#footnote-ref-8)
9. *R. v.* *Rice*, supra, note 2, at para. 66. [↑](#footnote-ref-9)
10. *R. v.* *Rice*, supra, note 2, at para. 58. [↑](#footnote-ref-10)
11. *Kooktook v.* *R.,* 2022 QCCQ 9413 at paras. 11–15. [↑](#footnote-ref-11)
12. *R. v.* *Rice*, supra, note 2, *at paras. 143-144; Richard* v. *R.,* 2022 QCCQ 10228, at para. 40; *R. v. Taillefer; R*. v*. Duguay*, [2003] 3 S.C.R. 307, at paras. 92–93, Martin Vauclair, *Traité général de preuve et de procédure pénale*, 29th ed. (Montreal: Yvon Blais, 2022) at para. 21.68. [↑](#footnote-ref-12)
13. *R. v.* *Jordan*, supra, note 2, at paras. 50 and 137. [↑](#footnote-ref-13)
14. *R. v*. *Cody*, 2017 SCC 31, at para. 36. [↑](#footnote-ref-14)
15. *R. v.* *Jordan*, supra, note 2, at paras. 50-52. [↑](#footnote-ref-15)
16. *R. v.* *Jordan*, supra, note 2, at paras. 56 and 83. [↑](#footnote-ref-16)
17. *R. v.* *Jordan*, supra, note 2, at para. 50. [↑](#footnote-ref-17)
18. *Criminal Code*, R.S.C., (1985), c. C-46, section 719(3.1). [↑](#footnote-ref-18)
19. www.cerp.gouv.qc.ca/fileadmin/Fichiers\_clients/Rapport/Rapport\_final.pdf at 169–181. [↑](#footnote-ref-19)
20. *R. v.* *Jordan*, supra, note 2, at paras. 81 and 131. [↑](#footnote-ref-20)
21. *R. v.* *Jordan*, supra, note 2, at paras. 26 and 50. [↑](#footnote-ref-21)
22. *R. v.* *Jordan*, supra, note 2, at para. 23. [↑](#footnote-ref-22)