

CANADA / JUDGMENT

R. v. A.B.

2020 BCSC 1708

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1708 R. v. A.B. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. A.B., 2020 BCSC 1708 Date: 20201103 Docket: [Redacted] Registry: [Redacted] Regina v. A.B. Further Corrected Judgment: These reasons have been redacted for publication purposes on November 25, 2021. Corrected Judgment: The front page of the judgment was corrected on November 26, 2020. Restriction on publication: A publication ban has been ordered under s. 486.4(2) of the Criminal Code prohibiting publication, broadcast or transmission in any way of information that could identify the complainant or a witness. This publication ban applies indefinitely. Before: The Honourable Mr. Justice Verhoeven Oral Reasons for Judgment re: s. 11(b) and 24(1) Charter Application Counsel for the Crown: T. Morgan Counsel for the Accused: I. Donaldson, Q.C. and C. Armitage Place and Date of Hearing: New Westminster, B.C. October 14, 2020 Place and Date of Judgment: New Westminster, B.C. November 3, 2020 Table of Contents I. Introduction. 3 II. Legal Framework and Principles. 4 III. Factual Overview.. 4 IV. Defence Delay. 7 V. Exceptional Circumstances. 10

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[1] The accused applies for a judicial stay of proceedings pursuant to sections 24(1) and 11(b) of the Charter, alleging that his right to be tried within a reasonable time has been or will inevitably be breached.

[2] The applicant was charged on December 29, 2016 with one count of sexual assault, alleged to have occurred on or about April 12, 2016 at [Town B].

[3] The applicant's trial was first scheduled to take place in the Provincial Court, commencing April 18, 2018. He re-elected to a Supreme Court trial with a jury on March 29, 2018. A Supreme Court trial was scheduled to commence April 1, 2019, but was adjourned on that date, for reasons that will be discussed.

- [4] The applicant's trial was re-scheduled to commence May 4, 2020, but was adjourned due to the Covid-19 pandemic. The trial is now scheduled to commence Monday, December 7, 2020, although, due to Covid-19 concerns, the jury selection procedures are scheduled to take place Friday and Saturday, December 4 and 5, 2020.
- [5] The applicant's position is that the net delay, after adjusting for defence delay, and allowing for the delay caused by the pandemic as a discrete exceptional circumstance, is at least 34 months, thus well over the 30 month ceiling established by the Supreme Court of Canada in *R. v. Jordan*, 2016 SCC 27 [Jordan]. The applicant contends that the delay is unreasonable, and a stay of proceedings is required.
- [6] The Crown contends that after properly taking into account defence delay, and discrete exceptional circumstances, the delay is well under the 30 month ceiling, and therefore the application should be dismissed. II. Legal Framework and Principles
- [7] The applicable legal framework under *Jordan* is concisely summarized in the subsequent Supreme Court of Canada decision *R. v. Cody*, 2017 SCC 31, [Cody] at paras. 20-24, as follows: 20 The new framework established in *Jordan* for analyzing whether an accused person's right to a trial within a reasonable time has been breached centres on two presumptive ceilings: 18 months for cases tried in provincial courts and 30 months for cases tried in superior courts (*Jordan*, at para. 46). 21 The first step under this framework entails "calculating the total delay from the charge to the actual or anticipated end of trial" (*Jordan*, at para. 60). In this case, an information was sworn against Mr. Cody on January 12, 2010, and his trial was scheduled to conclude on January 30, 2015. This makes the total delay approximately 60.5 months. 22 After the total delay is calculated, "delay attributable to the defence must be subtracted" (*Jordan*, at para. 60). The result, or net delay, must then be compared to the applicable presumptive ceiling. The analysis then "depends upon whether the remaining delay - that is, the delay which was not caused by the defence - is above or below the presumptive ceiling" (*Jordan*, at para. 67 (emphasis in original)). 23 If the net delay falls below the ceiling, then the onus is on the defence to show that the delay is unreasonable. To do so, the defence must establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, and (2) the case took markedly longer than it reasonably should have. [Emphasis in original.] (*Jordan*, at para. 48) 24 If the net delay exceeds the ceiling, then the delay is presumptively unreasonable. To rebut this presumption, the Crown must establish the presence of exceptional circumstances. If it cannot, the delay is unreasonable and a stay will follow. (*Jordan*, at para. 47)
- [8] The applicant was charged after the release of *Jordan* on July 8, 2016, therefore transitional exceptional circumstances are not applicable in this case. III. Factual Overview
- [9] The parties agreed upon a very helpful Case Chronology, setting out various events, and applicable time periods, precisely, from the date the information was sworn to the anticipated end of trial. The Case Chronology is attached as Schedule "A" to these reasons for judgment. I accept the facts as stated in the Case Chronology for purposes of this

application.

[10] An overview of the key relevant events is as follows:

1. The Information was sworn, charging the applicant, on December 29, 2016. There is a single charge, of sexual assault of C.D. ("C.D." are not the actual initials of the complainant), allegedly occurring on or about April 12, 2016, at [Town B].
2. On May 1, 2017, the applicant elected for a Provincial Court trial. A five-day trial was scheduled for April 18-26, 2018.
3. On March 29, 2018, 20 days prior to the scheduled commencement of the Provincial Court trial, the applicant re-elected for a trial by judge and jury in the Supreme Court. As the re-election was made more than 14 days prior to the commencement of the trial, the applicant was entitled to re-elect, and the Crown's consent was not required: Criminal Code, s. 561(2) [the Code].
4. A one-day preliminary inquiry took place April 26, 2018, on one of the days that had been reserved for the Provincial Court trial. The applicant was committed to stand trial.
5. On June 15, 2018, the parties appeared before Justice Baird. A 10-day trial was scheduled to commence April 1, 2019. Defence counsel advised that trial dates beginning September 24, and November 26, 2017, were unavailable due to defence counsel's schedule.
6. The complainant, C.D. attended at the emergency department of [Town B] on April 15, 2016, approximately three days after the alleged sexual assault. She was seen and examined by a Sexual Assault Nurse Examiner ("SANE"), Ms. F. However she also saw a physician at the emergency department, and spoke with at least one other member of the hospital staff.
7. On March 7, 2019, in preparing for trial, Crown counsel interviewed Ms. F., who informed Crown counsel that Crown counsel was missing the emergency department records. Crown counsel immediately requested the police to obtain the records from the hospital emergency department. However, the Crown did not receive the emergency department records until March 27. The records were provided to defence counsel on Friday, March 29. On Monday, April 1, 2019, the first day of the scheduled trial, the defence successfully applied to the trial judge, Justice Young, for an adjournment of the trial.
8. On May 16, 2019, at a pre-trial conference before Justice MacNaughton, the trial was rescheduled to commence May 4, 2020. The Crown suggested that the trial be moved to [Town A] from [Town B]. Ten-day trial dates for a jury trial in [Town A] had previously been available commencing June, July, September or November 2019. July and November, 2019 dates remained available. The position of the defence was that a change of venue application would be required.

9. On March 17, 2020, the Provincial Government declared a state of emergency in response to the Covid-19 pandemic. On March 19, Chief Justice Hinkson ordered the suspension of regular court operations due to Covid-19, resulting in the adjournment of the trial scheduled for May 4, 2020.
10. On July 16 and July 31, 2020, Associate Chief Justice Holmes conducted pre-trial conferences in order to address re-scheduling of the trial, in the context of the Covid-19 pandemic. The Court advised the parties that the trial could be heard within the same judicial district in [Town A] as early as September 14, 21 or 28, 2020, without a change of venue application. The first available date in [Town B] would be December 7, 2020. Defence counsel reiterated the applicant's position that he wanted the trial to take place in [Town B], and therefore counsel could not consent to having the trial in [Town A].
11. October 14, 2020 - application for stay of proceedings heard.
- [11] As can be seen from the Case Chronology, the total delay from the time the charge was brought to the anticipated end of the trial is 47.7 months. IV. Defence Delay
- [12] Defence delay is divided into two components:
 1. Delay waived by the defence;
 2. Delay that is caused solely or directly by the conduct of the defence: Jordan, paras. 61, 63, 66, and Cody, paras. 26-28.
- [13] The defence did not waive delay at any time. The Crown makes no such argument.
- [14] As noted above, and confirmed in the Case Chronology, at the fix date appearance on June 15, 2018, the Crown offered 10-day trial dates in [Town B], available to the court, for trials commencing:
 1. September 24, 2018;
 2. November 26, 2018; and
 3. April 1, 2019.
- [15] Defence counsel was unavailable for the September and November dates. Therefore the trial was scheduled to commence April 1, 2019.
- [16] The Crown argues that 6.2 months between September 24, 2018 and April 1, 2019 is defence delay.

- [17] The defence concedes that some of this should be considered defence delay, but contends that it would be unfair to deduct the whole of this time. The defence argues that three options in a span of eight months is unreasonable, and so it would be unfair to deduct all of this time as defence delay, when no dates were offered between November 26 and April 1. The defence suggests that the deduction should be limited to the time period between November 26, 2018 and April 1, 2019.
- [18] In making this argument, the defence relies upon the pre-Jordan decision of the Supreme Court of Canada in *R. v. Godin*, 2009 SCC 26 [Godin]. The applicant relies upon the comment in para. 23 of Godin that: 23 Scheduling requires reasonable availability and reasonable cooperation; it does not, for s. 11(b) purposes, require defence counsel to hold themselves in a state of perpetual availability.
- [19] In *R. v. Balogh*, 2020 BCCA 96, the Court distinguished Godin on the facts of the case, but also noted that it was decided under the pre-Jordan, Morin analysis. Fenlon J.A., for the Court, states:
- [29] As to the continued relevance of Godin, I would not say that a trial judge could never be justified in allocating or refusing to allocate some part of delay to a party based on the reasoning in Godin, but under Jordan the general rule is strong and clear: defence unavailability should be characterized as defence delay from the first day that the court and Crown are ready to proceed and the defence is not. [My emphasis.]
- [20] In Jordan, the Court stated: 64 As another example, the defence will have directly caused the delay if the court and the Crown are ready to proceed, but the defence is not. The period of delay resulting from that unavailability will be attributed to the defence.
- [21] While Balogh may leave a small window open for the defence to argue that defence unavailability might not be characterized as defence delay, in some circumstances, I am not persuaded that the general rule should not apply in this case.
- [22] I disagree that the offer of three dates for two-week jury trial in [Town B] in a span of eight months was unreasonable. [Town B] is a small centre, operating on the assize system. Supreme Court sittings at [Town B] are limited.
- [23] The defence has not established any particular ground of unfairness or otherwise and that would justify ignoring some part of this period of delay.
- [24] Unlike the accused in Godin, this is not a case where it can be said the defence has made significant efforts to expedite the proceeding. Two examples will suffice.
- [25] First, the accused elected for trial in Provincial Court. The trial would have proceeded on April 18, 2018, but for the applicant's 11th hour re-election on March 29, 2018. The defence offered no specific reason or rationale for the re-election. Indeed, at a pre-trial conference with Judge Brooks on March 26, 2018, both counsel advised the court that the trial was ready to proceed on the scheduled dates.

- [26] The efforts to schedule Supreme Court trial dates being addressed here were made necessary by that re-election.
- [27] Second, although [Town B] is located within the [Town A] Judicial District, and the applicant only briefly resided in [Town B], the applicant has consistently refused to consent to earlier trial dates available in [Town A].
- [28] As the Crown noted in its submissions to Justice MacNaughton at [Town B] on May 16, 2019, in discussing dates for the rescheduled trial following the adjournment on April 1, 2019, the Crown was seeking to schedule the matter in [Town A]. The Crown observed that the applicant's only connection to [Town B] is that he played two seasons for the local junior hockey team, [team name] and the final season ended just after the alleged offence in April 2016.
- [29] The defence contended that the applicant had a right to be tried in the community in which the offence is alleged to have occurred.
- [30] The applicant's insistence that the trial take place in [Town B] is unexplained. He offered no reason personal to him for insisting on a trial in [Town B]. He refers to the principle that criminal trials should be held in the venue in which the alleged crime took place. He reiterated his position when the trial dates were being re-scheduled again in 2020.
- [31] In the circumstances, his position is inconsistent with a desire for urgency.
- [32] I therefore conclude that 6.2 months of delay should be characterized as defence delay, on this ground.
- [33] The defence appropriately concedes that another two weeks should be deducted from the total delay. Through inadvertence, defence counsel was unavailable for the fix date on June 11, 2018, which was adjourned to June 15, and a pre-trial conference on May 6, 2019, which was rescheduled to May 16, 2019. Thus, another two weeks, or roughly one half of a month, is attributable to defence delay.
- [34] The total defence delay is therefore 6.7 months.
- [35] Deducting a total of 6.7 months of defence delay from the total delay of 47.7 months leaves a net delay of 41 months.
- [36] Because the net delay of 41 months exceeds the 30 month ceiling, it is presumptively unreasonable, and it therefore falls to the Crown to demonstrate exceptional circumstances: Cody, para. 44, citing Jordan, para. 68. V. Exceptional Circumstances
- [37] As this is not a transitional case, exceptional circumstances generally fall into two categories: discrete events and particularly complex cases: Cody, para. 46, citing Jordan, para. 71.
- [38] The Crown does not argue that this is a particularly complex case. It is not.

[39] The Crown contends that there are three discrete events that should be considered exceptional circumstances. I will refer to these as "discrete exceptional circumstances".

1. The Covid-19 pandemic;
2. The adjournment of the trial that had been scheduled April 1, 2019; and
3. The late re-election from Provincial Court to Supreme Court.

[40] Exceptional circumstances were described in *Jordan* as follows: 69 Exceptional circumstances lie outside the Crown's control in the sense that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise. So long as they meet this definition, they will be considered exceptional. They need not meet a further hurdle of being rare or entirely uncommon.

[41] However, the Court added that the Crown must also show that it took reasonable steps to avoid and address the problem before the delay exceeded the ceiling: 70 It is not enough for the Crown, once the ceiling is breached, to point to a past difficulty. It must also show that it took reasonable available steps to avoid and address the problem before the delay exceeded the ceiling. This might include prompt resort to case management processes to seek the assistance of the court, or seeking assistance from the defence to streamline evidence or issues for trial or to coordinate pre-trial applications, or resorting to any other appropriate procedural means. The Crown, we emphasize, is not required to show that the steps it took were ultimately successful - rather, just that it took reasonable steps in an attempt to avoid the delay.

[42] The determination of whether circumstances are "exceptional" will depend on the trial judge's good sense and experience: *Jordan* para. 71.

[43] The Court added the following commentary, applicable to this case: 73 Discrete, exceptional events that arise at trial may also qualify and require some elaboration. Trials are not well-oiled machines. Unforeseeable or unavoidable developments can cause cases to quickly go awry, leading to delay. For example, a complainant might unexpectedly recant while testifying, requiring the Crown to change its case. In addition, if the trial goes longer than reasonably expected - even where the parties have made a good faith effort to establish realistic time estimates - then it is likely the delay was unavoidable and may therefore amount to an exceptional circumstance. 74 Trial judges should be alive to the practical realities of trials, especially when the trial was scheduled to conclude below the ceiling but, in the end, exceeded it. In such cases, the focus should be on whether the Crown made reasonable efforts to respond and to conclude the trial under the ceiling. Trial judges should also bear in mind that when an issue arises at trial close to the ceiling, it will be more difficult for the Crown and the court to respond with a timely solution. For this reason, it is likely that unforeseeable or unavoidable delays occurring during trials that are scheduled to wrap up close to the ceiling will qualify as presenting exceptional circumstances.

[44] Although these passages refer to "events that arise at trial", it is clear that pre-trial events may qualify: Cody, paragraphs 48-56.

1. Covid-19 Pandemic

[45] The pandemic resulted in a delay of 7.1 months, (from month 40.2 to 47.7 on the Case Chronology attached as Schedule "A").

[46] There can be no question that the adjournment of the May 2020 trial due to the pandemic is a discrete exceptional circumstance. As the applicant concedes, the Covid-19 crisis could not have been foreseen by the Crown. However, the defence adds that an issue remains as to whether the court has done all that the jurisprudence requires. The applicant notes that jury trials are being held in other locations in the province well before December 2020.

[47] I have no difficulty concluding that the entire 7.1 months delay qualifies as a discrete exceptional circumstance.

[48] The provincial state of emergency was declared March 17, 2020, and has been extended a number of times since then. It remains in effect.

[49] The province remains very much in the middle of a global pandemic, the end of which is unpredictable, but appears to be, at a minimum, many months away. Stringent travel restrictions remain in place. Strict public health guidelines also remain in place, requiring limits on the size of gatherings, physical distancing, mask wearing, and hygiene requirements. Covid-19 is a very serious disease with significant potential for deadly consequences.

[50] It is an understatement to say that the pandemic has presented particular challenges to the court in relation to conducting criminal jury trials during the pandemic. Traditional jury selection procedures involve gathering together a large panel of potential jurors who attend at the courthouse for jury selection at the same time. Once selected, the jurors sit in close proximity to each other in the courtroom, and must work together in an enclosed private space potentially for significant time periods for jury deliberations, which by definition involve extensive oral discussions. These are all circumstances that involve significant risks to health.

[51] Although I was appointed as case management judge under s. 551.1 of the Code on November 28, 2019, Associate Chief Justice Holmes was involved personally in resetting the trial of this matter, as she had the best information regarding the court's ability to resume criminal jury trials. As noted, to that end, she personally conducted pretrial conferences with counsel on July 16 and July 31, 2020.

[52] As Holmes A.C.J. noted in the July, 2020 pre-trial conferences, the Court relied on outside consultants engaged by the provincial government to assess the numerous courthouses throughout the province for suitability in the context of Covid-19 protocols. Criminal jury selections and trials began in some areas on September 8, 2020.

- [53] On July 16, Holmes A.C.J. advised counsel that [Town A] dates could be available as early as September 14, 21, or 28. However, the Court was still waiting for information from the Covid-19 consultants, and as a result it remained uncertain whether the [Town B] courthouse could be made suitable. She added that there was good confidence about accommodating jury trials safely in [Town A]. Holmes A.C.J. noted that she could direct the trial take place in [Town A] as a matter of court administration. The applicant, through counsel, continued to maintain the position that he wished to have the trial take place in [Town B].
- [54] At the next pretrial conference on July 31, 2020, Holmes A.C.J. advised counsel that uncertainty remained as to suitability of both [Town A] and [Town B] courthouses. Modifications to the courtrooms would be required. In addition, the Court had settled on a two-stage jury selection process. The Crown reiterated that it was available to conduct the trial in September, in [Town A]. After discussion, the Court directed that the matter proceed to trial commencing Monday, December 7, 2020 in [Town B], with two-stage jury selection commencing on Friday, December 4 and Saturday, December 5. The Court explained the two-stage jury selection process to counsel.
- [55] Had the applicant been agreeable to having the trial occur in [Town A], the delay would have been significantly reduced. The trial would have been one of the very first criminal jury trials taking place in the province during the Covid-19 pandemic.
- [56] The applicant has not suggested that the Court or the Crown have failed to take any particular step or measure that might have been taken to mitigate the delay.
- [57] In all the circumstances, I have no difficulty concluding that the Crown and the Court did everything reasonably possible to mitigate the pandemic delay.
- [58] After deduction of 7.1 months for the effects of the Covid-19 pandemic, the net delay is 33.9 months, which remains above the 30 month presumptive ceiling established in Jordan.
2. Adjournment of the Trial on April 1, 2019
- [59] The Crown contends that the adjournment of the trial on April 1, 2019, on the application of the defence, is a discrete exceptional circumstance.
- [60] Had the trial proceeded as scheduled, it would have concluded well within the 30 month ceiling, but in particular having regard to the defence delay of 6.7 months that preceded it.
- [61] I referred to the basic facts relating to the adjournment previously. The Crown met with the SANE, Ms. F., on March 7, 2019, for a pretrial interview. Crown Counsel learned that she had not been provided with the Emergency Department records for the complainant's attendance at [Town B] on April 15, 2016.

- [62] It is common ground that the fact the complainant attended the emergency department is referred to in the narrative section of the Report to Crown counsel, which was disclosed to the defence. The report stated: She attended the emergency department. The examination was carried out by a trained sexual assault nurse examiner, Registered Nurse [L.F.]. Exhibits seized by [F.] were turned over to Constable Gammie.
- [63] I infer, then, that when the police initially investigated the matter, they obtained the records generated by the SANE, but not those generated by the emergency department. The police provided the SANE records to the Crown, who disclosed those to the defence.
- [64] As defence counsel submitted to Justice Young, the report to Crown counsel did not mention a doctor, and there was no reason why defence counsel should have asked for other medical records. In my view, in this respect, both parties were in the same position. Neither Crown or defence were aware that there were other medical records that could potentially be relevant.
- [65] So it appears that neither the police, Crown nor defence thought to consider whether, since the complainant had attended the emergency department, there could be other records of the emergency department beyond those of the SANE, which might be relevant.
- [66] The Crown requested the emergency department records immediately after the SANE interview, but there were delays in obtaining them. The police, or perhaps the Crown, sought the complainant's consent to release the records. She was by then living out of the province. Obtaining the signed consent took some time. Unfortunately, the records department put the records in the mail. When the police discovered that the records department had mailed the documents, a police officer attended personally to obtain the records.
- [67] As noted, the Crown received the records on March 27, and disclosed them to the defence on Friday, March 29. The records were partly illegible. The Crown obtained and provided a transcription of most of the handwritten notes on the afternoon of March 29. In effect the records were disclosed to the defence the day before the trial.
- [68] At the opening of the trial on Monday, April 1, the defence applied to adjourn the trial. In granting the adjournment Justice Young stated:
- [3] Because of what I anticipate to be a direct conflict in the evidence, I find that any examination or interviews of the complainant in the days following the event are potentially relevant. The record of the sexual assault nurse examiner has been available for some time, however, it was unknown to Crown until March 7, 2019, that the complainant was also examined in the emergency department by an emergency physician.

- [69] The Court agreed with the submission of defence counsel that the records contained potentially relevant evidence, given the proximity of the examinations to the incident. The Court held that the defence had shown a reasonable possibility of impairment of the right of full answer and defence. The possibility of adjourning the trial briefly was ruled out.
- [70] The Court added:
- [13] So on a balance of probabilities, I find that the defence has lost a realistic opportunity to garner evidence or to make a decision about the defence as it relates to these clinical records.
- [14] Accordingly, I find it is in the interest of Justice that this trial be adjourned. I do not find that either Crown or defence is responsible for the late production of these records. It was not clear to Crown counsel that these records existed until she conducted a pretrial interview of the sexual assault nurse examiner on March 7, 2019. She then pursued the production of these clinical records with reasonable haste. There is no indication to defence counsel that these records even existed prior to them being delivered to him on Friday before the commencement of the trial.
- [71] It can be said that a more diligent investigation by the police would have resulted in obtaining the records earlier. It might also have been possible for the Crown or defence to ask questions about this.
- [72] In short, for purposes of this application, I conclude that an error on the part of the police in not obtaining the emergency department hospital records led to the adjournment. I note that this is not a situation where the Crown has negligently or deliberately failed to disclose documents that it was obliged to disclose. The apparently key information had been provided, namely, the evidence and records of the SANE, who was the forensic examiner.
- [73] There has been no suggestion on this application that, as it turned out, anything in the records is of any great significance. There are a few seemingly innocuous notes made by the emergency room physician. It appears the complainant also spoke with a nurse, Ms. [R.G.]. I do not know whether either of these individuals might give evidence at the trial. However, I do not mean to suggest that it was not appropriate for the defence to seek to adjourn the matter, or for the Court to grant the adjournment, based upon the circumstances at the time.
- [74] I accept the Crown's position that the problem with disclosure of the hospital records, which precipitated the adjournment, is a discrete exceptional circumstance. I accept that it was reasonably unavoidable and unforeseeable. The Crown acted promptly, although perhaps not perfectly, in following up to obtain the records as soon as possible and to disclose them immediately.
- [75] As Cody makes clear, an inadvertent oversight may qualify as a discrete event. The court stated: 58 In principle, an inadvertent oversight may well qualify as a discrete event. The first prong of the test for exceptional circumstances requires only that the event at issue be reasonably unforeseeable or reasonably unavoidable. It does not impose a standard of

perfection upon the Crown. As this Court observed in *Jordan*, "[t]rials are not well-oiled machines" (para. 73). Mistakes happen. Indeed, they are an inevitable reality of a human criminal justice system and can lead to exceptional and reasonably unavoidable delay that should be deducted for the purpose of s. 11(b).

- [76] See also *R. v. Vega Ramirez*, 2019 BCCA 446, at para. 53-56. In that case, the Crown had set a trial date without first ensuring that the complainant, a resident of Japan, was available. An adjournment of 85 days ensued. The court of appeal noted that the record did not indicate that had the complainant been contacted in advance, the trial would have been scheduled any sooner than it was.
- [77] The court added that, in any event, the incident was at most an "inadvertent oversight" as discussed in *Cody*, at para. 58, quoted above.
- [78] In *Cody*, the accused brought a Charter application to exclude the evidence found in his vehicle at the time of his arrest. His arrest was incidental to a police drug trafficking investigation called "Operation Razorback". However, on the Friday before the Charter application was set to be heard, the Crown advised defence counsel that misconduct allegations had been made against one of the police officers involved in Operation Razorback. The Crown expected to provide disclosure concerning the allegations, pursuant to *R. v. McNeil*, 2009 SCC 3. As a result the Charter application was postponed, for a total of five months, as it turned out.
- [79] *Cody*, then, was a case not just of police oversight, but of possible police misconduct, serious enough to trigger disclosure requirements.
- [80] The court stated: 54 We agree with the Crown that the emergence of this new disclosure obligation qualified as a discrete event, and would deduct a portion of the delay that followed. It was reasonably unavoidable and unforeseeable, and the Crown acted responsibly in making prompt disclosure, following up as the matter proceeded, and seeking the next earliest available dates. The Crown may have been able to take additional steps, such as disavowing any reliance on the officer's evidence or tendering it through an agreed statement of facts. However, the requirement is that of reasonableness: the Crown need not exhaust every conceivable option for redressing the event in question to satisfy the reasonable diligence requirement.
- [81] The Court allocated three months of delay in connection with the *McNeil* discrete event.
- [82] I conclude that the adjournment of the trial that took place April 1, 2019 was caused by a discrete exceptional circumstance.
- [83] The total delay caused by the adjournment is 13.1 months (April 1, 2019 to May 4, 2020).
- [84] The Crown made reasonable efforts to reschedule the trial as soon as possible, including repeatedly offering earlier dates in [Town A], and also in [Town B].

- [85] Here too, perfection is not the standard. In *Cody*, the court states: 59 The question under the second prong of the test is whether the Crown took reasonable steps to remediate the error and minimize delay. The Crown "is not required to show that the steps it took were ultimately successful - rather, just that it took reasonable steps in an attempt to avoid the delay" (*Jordan*, at para. 70).
- [86] At the fix date hearing on May 16, 2019, the Crown noted that when the trial adjourned on April 1, 2019, it had immediately offered trial dates, available to the Court and Crown, in June, July, September and November 2019 for a 10 day trial in [Town A]. The defence had not been responsive about re-setting the trial dates. By the time of the fix date appearance, the June and September dates were no longer available for the court, but the July 22 or November 25, 2019 dates remained available. The Crown urged the court to order that the trial proceed in [Town A] on one of the dates available. The Crown also urged that if the matter were not heard in [Town A], that the trial could be heard in nine days (rather than 10), in February 2020, at [Town B]. The defence took the position that the applicant was entitled to have the trial take place in [Town B], and the Crown would need to bring a change of venue application if it wanted to insist that the trial take place in [Town A]. The defence also indicated that it would be unwise to set a trial estimated for 10 days into a nine-day slot, such as in February, 2020 at [Town B]. The court directed that the trial proceed May 4, 2020 in [Town B], and left open the possibility that the Crown could bring a change of venue application for earlier dates in [Town A].
- [87] It is a well-established principle that criminal trials should be held in the venue in which the alleged crime took place: *R. v. O'Reilly* 2016 BCSC 1791, at para. 26, citing *R. v. Suzack*, 2000 CanLII 5630 (ONCA), [2000] O.J. No. 100, at para. 30. However, s. 599 of the Code only requires an order for a change of venue for the trial to take place in another "territorial division". In B.C., this means another judicial district, pursuant to the Code, s. 2 and the Supreme Court Act, s. 8. [Town A] and [Town B] are both in the [Town A] judicial district.
- [88] Nonetheless, it might be said that the Crown could have forced the issue of having an earlier trial in [Town A], by formally bringing a change of venue application.
- [89] However, in my view it is not open to the defence to contend that the Crown should have brought a change of venue application or forced the trial to take place in in [Town A], against the expressed wishes of the defence. Clearly the defence was not interested in expediting the trial by having it heard in [Town A].
- [90] I can infer that the Crown was able to proceed on any of the dates it had suggested and the court was able to accommodate the parties on those dates, that is, commencing as early as June 2019, in [Town A]. It is reasonable to assume that similar dates were not available in [Town B] due to the limits of court resources at that particular location. However, there is no evidence about when the defence would have been available and ready to proceed with the trial in [Town B], on any dates other than May 2020.

[91] It is not possible to conclude that some portion of the delay occasioned by the adjournment was caused by the court system being unable to accommodate the parties, when there is no evidence as to when the defence would have been prepared to proceed in [Town B].

[92] It is also difficult to conclude that the system could not accommodate the parties, at least in the circumstances of this case, when several early trial dates were offered in the same judicial district, but the applicant refused to accept the earlier trial dates, without providing any persuasive reason.

[93] I therefore conclude that the discrete exceptional circumstance relating to the hospital records caused delay of 13.1 months. This results in a delay remaining of 20.8 months.

3. Late Re-Election from Provincial Court to Supreme Court

[94] In case I have erred in the foregoing analysis, I will also address the Crown's alternative argument that the applicant's late re-election to a Supreme Court judge and jury trial, on the eve of the scheduled Provincial Court trial, qualifies as a discrete exceptional circumstance.

[95] The Crown argues that the one day preliminary inquiry would have been accommodated much earlier, had the applicant elected for a Supreme Court trial with a jury in the first place, or had he re-elected sooner. The Crown argues that it is also reasonable to conclude that the Supreme Court trial would have been scheduled for an earlier date as well. The Crown characterizes this as an "11th hour tactical decision of the applicant". The Crown contends that it had no ability to anticipate or mitigate the delay that was caused.

[96] The defence contends that the re-election was neither defence delay, nor a discrete exceptional event. The defence argues that the applicant is entitled to re-elect pursuant to s. 461(2) of the Code. As noted by Justice Jenkins in *R. v. Eremenko*, 2018 BCSC 1138, at paras. 66 to 75, the Jordan time limits already provide for an increase in the time limit by 12 months upon re-election.

[97] On the other hand, there are several British Columbia authorities where a late re-election has been categorized as a discrete exceptional circumstance.

[98] In *R. v. R.K.K.*, 2020 BCSC 45, Justice G.C. Weatherill stated:

[37] A re-election is a legitimate procedural step available to an accused. However, it would be inconsistent with the values expressed in *Jordan* to include in delay calculation the effect of an accused's decision not to take advantage of an imminently scheduled trial date in the court in which he had originally elected to be tried. Doing so would place responsibility upon the Crown for a delay that it could not have prevented. Re-election that causes the loss of a scheduled trial date is not to be used to "buttress" the defence case for unreasonable delay (*R. v. Herman*, 2017 BCSC 215 at para. 86 [*Herman*]). Rather, it ought to be considered as a discrete event, or exceptional circumstance, and therefore results in the deduction of the time period between the re-election and when the trial is rescheduled: *R. v. Lai*, 2018 BCSC 867 at paras. 188-190 (see also: [*R. v. Truong*, 2017 BCSC 736] at paras. 60-62 and

Herman, at paras. 83-88).

- [99] An appeal of one of the decisions mentioned, *R. v. Lai*, 2018 BCSC 867, is currently under reserve at the Court of Appeal.
- [100] As in *Truong*, in this case no evidence was led to explain why the re-election occurred, and why it was left until the eve of the Provincial Court trial. In *Lai*, there was evidence as to when the Supreme Court trial could have been held. In *Truong*, Justice Kent could only speculate about that. Nonetheless, he stated: "In my view, it would be fair and appropriate to assign at least three months' delay to the late re-election even though it was a re-election as of right."
- [101] While it is true that the Jordan ceiling increases by 12 months for trials in the Superior Courts, in my view this does not affect the question of whether a late re-election can be considered a discrete exceptional circumstance. This is a determination to be made on the facts and circumstances of the case.
- [102] In this case, the Provincial Court trial dates of April 18-26, 2018 were set 11.6 months earlier, on May 1, 2017.
- [103] When the re-election occurred on March 29, 2018, the last of the scheduled trial dates, April 26, 2018, was utilized for the preliminary inquiry. The applicant argues that the late re-election resulted in no delay, in that one of the dates reserved for trial was utilized for the preliminary inquiry. However, it is reasonable to infer that a short preliminary inquiry would have been scheduled to occur substantially sooner than the trial, and that in turn, scheduling of the Supreme Court trial would also have taken place sooner. No evidence about this was presented on this application, and I infer that no such evidence exists, because there was no reason to generate this information at the time. However, in my view a conservative estimate of the delay caused by the late re-election would be two months.
- [104] Although the Crown argues that the late re-election is a discrete exceptional circumstance, in my view it may more properly be characterized as defence delay. Although it is true that the Code allows the accused to re-elect as of right before 14 days before the provincial court trial, this does not mean that the accused has not nonetheless, "directly caused the delay" [*Jordan*, para. 63], which should not be counted in the delay analysis. The applicant has not sought to show that this was a defence action legitimately taken to respond to the charges. I am driven to infer that the decision was tactical, as the Crown contends.
- [105] Therefore, if it were necessary to do so, I would subtract another two months from the delay calculations. VI. Conclusion
- [106] As the delay is either 20.8 months, or 18.8 months if the delay attributable to the late re-election is also subtracted, the application is dismissed. "Verhoeven J." SCHEDULE "A" Case Chronology Date Description Time since swearing of information Days Months December 29, 2016 Information sworn. 0 0 January 23, 2017 Defence requests disclosure 25 0.8 January 30, 2017 Defence adjourns to review disclosure and seek instructions. 32 1.1 February 6,

2017 Agent does not appear as arranged. Arrest warrant issued. 39 1.3 February 20, 2017 Arraignment hearing. 53 1.7 February 24, 2017 Letter from defence to Crown requesting disclosure on readable disks 57 1.9 March 6, 2017 Adjourned to March 27, 2017 for additional disclosure and deliberation of trial-related issues. 67 2.2 March 8, 2017 Additional disclosure received 69 2.3 March 20, 2017 Disclosure update received from Crown. 81 2.7 March 27, 2017 Defence adjourns to review disclosure. 88 2.9 April 10, 2017 Adjourned to review disclosure. Crown agrees to adjournment. 102 3.4 April 24, 2017 Arraignment hearing. Defence agent adjourns. 116 3.8 May 1, 2017 Election entered for Provincial Court trial. Trial dates set for 18, 19, 20, 25, and 26 April 2018. Pre-trial conference set for 5 March 2018. 123 4 March 5, 2018 Pre-trial conference adjourned by consent requisition to 19 March so that recently assigned Crown counsel can review the file. 431 14.2 March 19, 2018 Pre-trial conference. 445 14.6 March 26, 2018 Pre-trial conference. 452 14.9 March 29, 2018 Applicant files notice to re-elect. 455 15 April 18, 2018 Start of Provincial Court trial dates (cancelled). 475 15.6 April 26, 2018 Preliminary inquiry. 483 15.9 April 30, 2018 Indictment sworn. 487 16 May 7, 2018 First Supreme Court fix date. Crown counsel emails court scheduling. Explains that the trial will likely be two weeks long, but out of caution three weeks should be set. Scheduling replies and offers trial dates beginning on 24 September, 26 November, and 1 April. 494 16.3 May 24, 2018 Crown counsel emails defence counsel to follow up on fixing trial dates. The November dates are now unavailable. 511 16.8 June 11, 2018 Fix date appearance. 529 17.4 June 15, 2018 Fix date appearance. 533 17.5 September 24, 2018 Offered ten day trial dates in [Town B]. 634 20.9 November 26, 2018 Offered ten day trial dates in [Town B]. 697 22.9 February 20, 2019 Pre-trial conference 783 25.8 March 29, 2019 Medical records received. 820 27 April 1, 2019 Original Supreme Court trial commencement date. Adjourned by defence. 823 27.1 May 6, 2019 Fix date appearance. 858 28.2 May 15, 2019 Defence counsel phones scheduling, who offers 18 Feb and 30 March for a 9-day trial. 4 May for a 10 day trial. Crown wants to revisit the time estimate, but agrees to set the May dates in the interim. 867 28.5 May 16, 2019 Fix date appearance. Crown suggests that the trial be relocated to [Town A]. Defence resists, and says that a change of venue application is required. May dates confirmed. 868 28.6 June 17, 2019 Offered ten day trial dates in [Town A]. 900 29.6 July 22, 2019 Offered ten day trial dates in [Town A]. 935 30.8 September 23, 2019 Offered ten day trial dates in [Town A]. 998 32.8 November 25, 2019 Offered ten day trial dates in [Town A]. 1110 37.1 November 25, 2019 Pre-trial conference. 1061 34.9 November 29, 2019 Pre-trial conference. 1065 35 January 8, 2020 Pre-trial conference. Section 11 (b) application issues canvassed and counsel agree to set a date for the application to be heard. Other pre-trial applications discussed. 1105 36.3 January 30, 2020 Pre-trial conference. Section 11 (b) application scheduling discussed. 1127 37.1 February 18, 2020 Offered trial dates for a nine day trial in [Town B]. 1146 37.7 February 18, 2020 Pre-trial conference. Confirmed 8 and 9 April for s. 11(b) application. 1146 37.7 March 30, 2020 Offered trial dates for a nine day trial in [Town B]. 1187 39.1 March 31, 2020 Pre-trial conference. Covid-19 scheduling problems canvassed. Crown raises moving trial to [Town A], but defence does not consent. 1188 39.1 May 4, 2020 Scheduled start of trial. Adjourned due to Covid-19. 1222 40.2 May 15, 2020 Last day of scheduled trial. 1233 40.6

June 8, 2020 Pre-trial conference. Adjourned to 12 June. 1257 41.3 June 12, 2020 Pre-trial conference. Counsel agree to set a change of venue application. 1261 41.5 July 13, 2020 Pre-trial conference. Adjourned to 16 July. 1292 42.5 July 16, 2020 Pre-trial conference. Court notes that [Town A] jury trials are likely to resume in September. [Town B]'s suitability for a jury trial is still uncertain. Crown says that Covid-19 uncertainty is delaying its change of venue application. 1295 42.6 July 31, 2020 Pre-trial conference. Trial tentatively set to begin on 7 December in [Town B]. Section 11 (b) application to be brought in September or October. 1310 43.1 August 10, 2020 Pre-trial conference. Adjourned to 13 August. 1320 43.4 August 13, 2020 Pre-trial conference. December trial dates confirmed. Section 11(b) application to be heard on 14 or 15 October. 1323 43.5 December 7, 2020 Trial dates commence. 1439 47.3 December 18, 2020 Anticipated end of trial. 1450 47.7

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