

CANADA / JUDGMENT

R. v. B.M.

2025 BCSC 1253

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Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. B.M.,

2025 BCSC 1253

Date: 20250520

Docket: 48909

Registry: Penticton

Rex

v.

B.M.

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Before: The Honourable Associate Chief Justice H. Holmes

Oral Ruling re Application for a Stay of Proceedings

because of Delay

Counsel for the Crown:

A. Vandersluys

Counsel for the Accused:

R. Gill

Place and Date of Hearing:

Penticton, B.C.

May 15, 2025

Place and Date of Judgment:

Penticton, B.C.

May 20, 2025

INTRODUCTION

- [1] These are the reasons for a decision given on May 20, 2025, dismissing B.M.'s application for a stay of proceedings. I also recommend some steps for counsel when re-booking a criminal case that was "bumped" - a matter not relevant to B.M.'s position as reframed in the hearing, though raised at an earlier stage.
- [2] B.M. sought a stay of proceedings on the basis that the delay between the date of the charge and the projected end of his trial was unreasonable, in violation of s. 11(b) of the Charter.
- [3] B.M. was charged on December 30, 2021 with sexually assaulting A.V. As at the time of the hearing of his application, his five-day trial was to begin on June 16, 2025. This meant that roughly three and a half years would have elapsed between the charge and the end of the trial, a delay well past the 30-month "presumptive ceiling" for reasonable delay established in *R. v. Jordan*, 2016 SCC 27.
- [4] In the hearing of B.M.'s application, the Crown contended, and B.M. accepted, that B.M. is responsible for approximately 11 months of the overall delay. However, they disagreed about two short periods, one of two weeks, and the other of three weeks. The Crown attributed those short periods to defence delay, while B.M. said that they were not defence delay because they represented time reasonably required for him to retain and consult with counsel.
- [5] B.M. agreed that if either or both of the disputed periods is found to reflect defence delay, then the overall delay would fall slightly short of 30 months, and his application must fail.
- [6] The Crown agreed that if neither of the disputed periods is found to reflect defence delay, then the overall delay would be slightly more than 30 months. The Crown agreed that there were no exceptional circumstances to justify delay in excess of 30 months, and that a stay of proceedings would therefore be necessary.

THE APPLICABLE LAW

- [7] The framework set out in *Jordan* for assessing when delay is unreasonable and contrary to s. 11(b) is well-known and is not in dispute. It therefore suffices, for the purpose of giving legal context to this application, to simply repeat a portion of the summary released with the Court's reasons in *Jordan*:

At the heart of this new framework is a presumptive ceiling beyond which delay -- from the charge to the actual or anticipated end of trial -- is presumed to be unreasonable, unless exceptional circumstances justify it. The presumptive ceiling is 18 months for cases tried in the provincial court, and 30 months for cases in the superior court (or cases tried in the provincial court after a preliminary inquiry). Delay attributable to or waived by the defence does not count towards the presumptive ceiling.

Once the presumptive ceiling is exceeded, the burden is on the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. If the Crown cannot do so, a stay will follow.

THE EVIDENCE

- [8] I will start by describing the evidence, beginning with the form in which it was put before the Court, and then setting out the relevant facts concerning the progress of B.M.'s case from the date of the charges to the date of the hearing of this application.
- [9] Later, I will discuss whether, on the facts, the two short disputed periods are properly characterized as defence delay.

The Form of the Evidence

- [10] In support of his application, B.M. filed transcripts (exhibit 1) of some of the proceedings in this matter that took place before the Provincial Court.
- [11] B.M. also filed an affidavit relating to the scheduling of the trial for the Penticton assize beginning June 16, 2025 - the trial was originally scheduled for June 2024. However, his position in the hearing focused only on earlier stages of the proceedings, and counsel did not rely on the affidavit or address it except when the Court asked them to do so. The affidavit was therefore not relevant to the issue as framed in the hearing. However, I will say something later about the topic the affidavit addresses, because this is a useful opportunity to provide some clarification and guidance for the criminal Bar on a matter that may not be well understood.

- [12] Given the positions of counsel in the hearing, in the end, the most useful document became the Crown's aide memoire chart (exhibit A). The parties agreed that this document accurately sets out the dates representing the progress of B.M.'s case before the Provincial Court and this Court, as well as the basic facts concerning what took place on each date. For this reason, exhibit A probably should have been marked as a numbered exhibit proper in the hearing, subject to the following two points about how it should be relied on.
- [13] First, the portions shown in blue on exhibit A represent two long periods that the Crown attributes to defence delay, starting and ending, for each period, with the first and last dates shown in blue. As mentioned, and as to be discussed below, B.M. disagrees with the Crown's position only to the extent that he submits that two short periods within the first long period should be removed from that period of defence delay.
- [14] Second, the calculation set out in the final portion of exhibit A, page 2, should be disregarded. The calculation was disputed, and it was in any event revised by counsel during the hearing.
- [15] Finally, concerning the evidence before the Court, I note that defence counsel asked the Court to disregard the chart in the defence trial binder (exhibit 1, tab 2), and I have done so.
- [16] At this point, I will describe in general terms the two long periods of delay that the Crown attributes entirely to defence delay, drawing from the dates and descriptions shown in blue in exhibit A.
- [17] I will then do the same for the two short periods that B.M. submits should be removed from the first long period because they are not properly characterized as defence delay.

The Periods of Delay Attributed by the Crown to the Defence

The First Long Period: April 20, 2022 to February 8, 2023

- [18] The first long period that the Crown attributes to defence delay began when a bench warrant was issued because B.M. failed to appear in the Provincial Court on April 20, 2022, as required. He had made two previous appearances in that Court in March 2022, after he had been charged and released on an undertaking to appear.
- [19] By February 8, 2023, the end of the period, B.M. had failed to appear on four more occasions. Each time, a bench warrant was issued. B.M. was present at some court appearances during this long period, but usually when he had been re-arrested on one or another of the bench warrants and the appearance related to his release on bail.
- [20] At many of the appearances in this period, B.M. indicated that he was seeking counsel and applying for legal aid. At some, he said he would like to hire counsel privately.
- [21] The last day of the period is February 8, 2023, the date when the Court was advised that Mr. Michael Patterson was retained as B.M.'s counsel, but had not yet spoken with B.M.

The Second Long Period: May 1, 2023 to July 17, 2023

- [22] As noted, B.M. agrees that the entirety of this two-and-a-half-month period is properly characterized as defence delay. This period represented time lost as a result of B.M. seeking new counsel when it became clear that Mr. Patterson would not be available for a trial within a reasonable time - on May 1, 2023, the Court offered dates for trial on the March 25, 2024 assize, but Mr. Patterson was not available until after that time.
- [23] After some appearances in Provincial Court relating to bail for B.M., Mr. Patterson was given leave to withdraw on June 7, 2023. The proceedings were adjourned for B.M. to retain new counsel.
- [24] Mr. Gill appeared for B.M. on July 17, 2023, marking the end of this period of agreed defence delay.
- [25] I turn now to discuss the two short periods that B.M. submits should be removed from the first long period.

The First Disputed Period: May 25 - June 8, 2022

- [26] The first disputed period is the 14 days between May 25 and June 8, 2022.
- [27] On May 25, B.M. appeared in the Provincial Court and said he was still seeking counsel and applying for legal aid. The Court told him that he needed to get these matters moving along - the allegations were getting old and the case needed to progress. May 25 was B.M.'s first appearance after the second bench warrant was issued on May 18, 2022 for B.M.'s failure to appear in court as required; however, that warrant was cancelled when B.M. contacted the Court at the end of the day. The first bench warrant had been issued on April 20, 2022, as I mentioned earlier.
- [28] June 8, 2022 was B.M.'s next scheduled appearance date, after May 25. However, on June 8, B.M. again failed to appear, and a third bench warrant was issued.

The Second Disputed Period: November 30 - December 21, 2022

- [29] The second disputed period began when, on November 30, 2022, B.M. appeared by telephone in the Provincial Court and indicated that he had applied for legal aid. A fourth bench warrant had been issued on November 23, 2022, and resulted in B.M. being arrested and released on November 25, 2022.
- [30] On November 30, 2022, B.M. also made an election for trial by a Provincial Court Judge, having received the assistance of duty counsel to do so. The proceedings were then adjourned until December 21, 2022, to see if counsel had been appointed for B.M.
- [31] This disputed period concluded when, on December 21, 2022, B.M. did not attend court and a fifth bench warrant was issued.

[32] I turn now to discuss whether the two short disputed periods are properly attributed to defence delay.

ANALYSIS

[33] B.M. submits that the two disputed periods should not be characterized as defence delay because they represent time he legitimately required to retain and consult with counsel.

[34] The Supreme Court of Canada in *Jordan*, at para. 65, recognized that defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay:

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

[35] The exhibit A chart allows for time, that it does not characterize as defence delay, for each of Mr. Patterson and Mr. Gill, after they were respectively retained, to review the Crown disclosure and consult with B.M. It similarly allows time for Mr. Gill to prepare for trial. The issue relating to the two disputed periods is whether B.M. legitimately required those periods for the more limited purpose of retaining counsel and for early consultation about the approach the defence would take to the case.

[36] I conclude that B.M. did not.

[37] If one or both of the disputed periods were to be examined in isolation from the rest of the history of this case, the defence position would have some weight. The first disputed period began with B.M. telling the Court that he was seeking counsel and applying for legal aid, and it ended when he failed to attend court two weeks later. The second disputed period began when B.M. told the Court that he had applied for legal aid and he formally elected trial by a Provincial Court judge, and it ended when he failed to attend court three weeks later. Even taken together, five weeks would not be an unreasonable amount of time for an accused person to retain counsel to handle a serious charge such as B.M. faces, and to consult with counsel about a path forward.

[38] The difficulty for B.M. is that the disputed periods fell within an extremely long period during which he did little to move the case forward, and much to drag it out. He had ample time during that period, without relying on the two disputed periods, to retain counsel and develop the defence approach to the case.

- [39] B.M. had sufficient time to retain counsel during the time before the first long period attributed to defence delay. He had approximately six weeks available to him to retain counsel between his first appearance on March 2, 2022 and his first failure to appear on April 20, 2022, the start of the first long period. (Measuring from the date of his release on February 2, 2022, after his first arrest, he had approximately ten weeks before April 20, 2022.) For B.M. to simply retain and consult with counsel, six weeks was a sufficient time, ten weeks all the more so.
- [40] But on a more bird's eye view of the proceedings, B.M. also had available to him, for retaining and consulting with counsel, the entirety of the first period that the Crown attributes to defence delay. The period is properly characterized as defence delay because B.M.'s case was essentially stalled during that time by his repeated failures to appear, and the consequent re-arrests and bail proceedings. However, there is no evidence that B.M.'s failures to appear also prevented him from retaining counsel sooner than he did.
- [41] For this reason, I do not consider it "double-counting" to attribute the first long period to defence delay because B.M. was repeatedly failing to appear as required, and also to characterize some or all of that time as available to B.M. for the purpose of retaining and consulting with counsel. His failures to appear in court did not "stop the clock" for measuring the time he reasonably required for retaining and consulting with counsel. Nor did they permit B.M. to opt out of the criminal justice process for all purposes - indeed, B.M. professed not to be doing so when, on several occasions after arrests during the first long period, he assured the Provincial Court that he would be taking steps to retain counsel forthwith.

Conclusion

- [42] B.M. had ample time available to him for retaining and consulting counsel, without having to rely on the disputed two- and three-week periods. Those disputed periods are therefore properly characterized as defence delay.
- [43] As B.M. acknowledges, the overall delay is therefore slightly less than 30 months. There being no reason that the delay should nonetheless be considered unreasonable, his application for a stay of proceedings must fail.

THE EFFECTS OF "BUMPING": GENERAL COMMENTS

The One-Year Delay that the Parties Attribute to Bumping

- [44] As originally framed, B.M.'s application focused on a one-year period of delay, later in the progress of the case, that both he and the Crown attributed to systemic delay resulting from a lack of court time.

- [45] This period ran from June 10, 2024 to June 20, 2025. June 10, 2024 should have been the first day of B.M.'s trial, as previously scheduled. However, the trial was "bumped" for lack of court time. In Penticton, this Court has only one courtroom, and a criminal trial with the accused person in custody was given priority for hearing.
- [46] The end of this period, June 20, 2025, was the projected last day of the trial as re-booked.
- [47] As noted above, B.M. reframed his application at the hearing to focus instead on earlier stages of the proceedings. As a result, this period of delay became irrelevant to his application. Nonetheless, I will say something about the one-year period following the bumping of the trial in June 2024 in the hope that counsel will be able to avoid such lengthy delays if bumping or other unforeseen events prevent other criminal cases proceeding as scheduled.
- [48] First, some brief general comments about bumping, and why, though unfortunate, it is sometimes necessary.

Why Does the Court Bump Cases?

- [49] The Court does its best to avoid bumping trials, and regrets having to do so. The Court is aware of the significant hardship of various types that bumping causes to parties, counsel, and witnesses when the cases for which they have prepared are unable to proceed as scheduled.
- [50] The Court is perhaps unmatched in the country in its flexibility to move judicial and other resources from one court location to another, in response to last minute changes in workload in each location. It is not unusual for judges to sit in two or more court locations around the province during a single week, as work resolves in one location but holds firm in another.
- [51] Bumping is nonetheless unavoidable in some circumstances. The judicial or court staff required for a case may be unexpectedly unavailable. For a one-courtroom location such as Penticton, the courtroom may be needed for a higher priority matter. Or, in a more general way, the delicate scheduling balance for the work in a court location may not find the predicted level - scheduling for the Court's significant caseload must find the balance between ensuring that judicial and court resources are fully occupied, on one hand, and avoiding over-booking cases that the Court will be unable to hear, on the other. Over-booking is always necessary for civil and family cases, if judicial resources are to be fully occupied. Double-booking criminal cases is sometimes necessary for the same reason.
- [52] For criminal cases, bumping has obvious adverse implications for the accused person's constitutional rights, as well as significant negative effects for complainants, witnesses, counsel, and others. After describing and commenting on the evidence about how B.M.'s trial was rebooked after it was bumped, I will make some recommendations about how counsel should approach that process, so as to reduce the delay before the rebooked trial.

[53] In the comments below, I am not expressing conclusions about whether counsel in this case should have done more than they did, or on whether the Court could in fact have accommodated the trial earlier. The evidence is not sufficient to support conclusions on those points, and, as I said, those conclusions are unnecessary for the determination of the application as reframed in the hearing.

The Evidence About Rebooking B.M.'s Trial

[54] The evidence about how the trial was re-booked is as follows. The affidavit I mentioned earlier indicates that a former legal assistant for B.M.'s counsel sent an email to Crown counsel on July 19, 2024, advising that she had spoken with the Court's scheduling staff about dates and had been offered the June 2025 dates. The substance of the email reads in full as follows:

Further to our recent call, I was in contact with Scheduling.

Although trying for earlier dates, I was advised by Scheduling that these are the earliest dates that we may be, actually, heard:

1. Trial 5 days (reduced from 6 days) June 16 to 20, 2025, and
2. Pretrial Conference, February 26, 2025.

These dates can be confirmed on Monday.

Should you have any concerns before then, please feel free in contacting our offices.

[55] On the basis of this affidavit, B.M. and the Crown agree that the dates for the re-booked trial (on the June 16, 2025 Penticton assize) were the earliest dates offered by the Court's scheduling staff, although counsel had earlier available dates.

Comments on the Evidence

[56] Nothing in the affidavit, or in the statements counsel made to the Court about how B.M.'s trial was re-booked after it was bumped, indicated that Crown or defence counsel took any steps to ask the Court or its scheduling staff for earlier dates than had been offered to the legal assistant.

[57] It is true that the legal assistant's email begins with, "Although trying for earlier dates ". However, the email does not make clear whether scheduling staff were aware that the trial the legal assistant was seeking to book had been bumped from a previously booked date. More fundamentally, it is common ground that no steps were taken to query the dates noted in the legal assistant's email, or to ask scheduling staff or the Court to consider finding earlier dates. Rather, the dates set out in the legal assistant's email were simply confirmed before the Court at the fix-date appearance shortly afterwards.

- [58] The assumption that no earlier dates could have been secured is contrary to my own experience in overseeing most aspects of the Court's criminal law operations. For the Court to bump a criminal trial is unusual - especially a trial involving charges and allegations such as those B.M. faces. Generally, if the Court or its scheduling staff are aware that a request for dates relates to a criminal case for which a previously-scheduled trial was bumped, they will do their best to find dates as early as counsel can manage.
- [59] In this instance, doing so might have meant the Court arranging an additional sitting in Penticton, over and above the regular assizes. It might have meant displacing a lower priority case in Penticton. It might have meant moving the trial to Kelowna, less than an hour's drive from Penticton. With the uncertainties inherent to the scheduled caseload in the Court's thirty court locations, the Court must often maximize the use of judicial and other resources by moving cases from one court location to another, such as from Port Alberni to Nanaimo, from New Westminster to Port Coquitlam, or from Abbotsford to Chilliwack or Port Coquitlam. The Court makes all efforts to keep criminal cases in the community where the offence is alleged to have taken place. However, the reality of increasing caseloads and insufficient courtrooms in many locations often means that a next best solution must be found.
- [60] As I said, whether more should have been done by counsel to ask scheduling staff or the Court at the fix-date appearance to find earlier dates for the previously bumped trial is unnecessary to decide. Nor is it necessary to decide whether the one-year delay until the trial dates described in the legal assistant's email represents institutional delay, as the Crown and defence appear to assume it does. No matter the cause or characterization of the delay in this case, it is evident that some recommendations may be useful to help avoid similar delay if a criminal case is bumped in the future.

Recommended Steps After a Criminal Case is Bumped

- [61] If a criminal case is bumped - that is, adjourned by the Court from its scheduled dates because of the unavailability of court or judicial resources - counsel should contact the Scheduling Manager for the court location at their earliest convenience to arrange new dates.
- [62] Counsel should advise or remind the Scheduling Manager that the case was bumped, and they should provide their earliest mutually available or agreed dates for rebooking.
- [63] If counsel are advised that those dates cannot be accommodated by the Court, and if the dates offered by the Scheduling Manager pose difficulties or risk to the accused person's right to a trial within a reasonable time, counsel should so advise the Scheduling Manager, who will try to find a satisfactory solution.

[64] If the Scheduling Manager is unable to find a satisfactory solution, counsel should arrange a case management conference before the assigned judge to determine whether earlier dates can be arranged. If no judge has been assigned to the case, counsel should promptly set out the following in a letter to the Associate Chief Justice, but sent through the Scheduling Manager:

- their concerns about the offered dates
- their mutually available dates
- any factors that in their view relate to the priority that should be given to the trial, and
- if applicable, any factors that may make the particular trial unsuitable to be moved to another court location.

[65] Finally, I will comment on the objective of the recommendations made above.

The Objective of these Recommendations

[66] The objective of the recommendations above is not to promote a strategic or adversarial approach to scheduling. Rather, where counsel have mutually available dates that are earlier than those the Court offers, it is to encourage counsel to bring to the Court's attention any concerns they may have that the offered dates appear not to reflect the level of priority the particular trial should have. This will enable the Court to find solutions, if appropriate and if possible.

[67] It must be borne in mind that scheduling involves much more than matching counsel availability with un-booked court time. Scheduling is a complex task that takes account of numerous factors relating to the particular case, including its priority relative to the Court's overall caseload, and the judicial and courtroom resources and staff available to the Court.

[68] I note that for these and other reasons, the comments in Jordan at para. 64 and the end of para. 122 (made in the context of discussing when the unavailability of defence counsel amounts to defence delay) are difficult to apply more generally. The comments can be read as suggesting that in each instance where the Crown agrees to book dates for when defence counsel is first available, but the Crown has earlier available dates, the Court should conduct an assessment of whether it could have accommodated the case on the Crown's earlier dates.

[69] For the Court to do this would require multifactorial assessments as at multiple times. The Court would be required to do this for a large number of its criminal cases: with the shrinking defence Bar and the expanding criminal caseload in the province, the Crown is often, perhaps usually, available for earlier trial dates than is the defence. For the Court to assess whether it could accommodate the trial on the Crown's earlier dates would be an entirely hypothetical exercise unless the Crown were asking the Court to book the trial on those dates despite the defence being unavailable.

- [70] If the Crown is not asking the Court to book the trial on the earlier dates when the defence is unavailable, the Crown should not ask the Court to engage in this hypothetical exercise. The exercise makes unnecessary use of scarce Court resources. It also embeds a strategic or adversarial approach to the scheduling process that in my view runs counter to the Court's fundamental objectives in Jordan,
- [71] The Court in Jordan was concerned to improve the efficiency of the process for getting a case to trial. It also called for collaboration among counsel and with the courts in achieving this objective. The Court cannot have intended to convert the scheduling process to a strategic or adversarial one, focused more on laying down a Jordan record than on moving the case ahead. Nor can the Court have intended to add to the courts' existing administrative burden. This is clear from the Court's concluding comment that the new framework for assessing unreasonable delay would reduce, though not eliminate, "the need to engage in complicated micro-counting": at para. 111. The Court continued:
- [111] While judges will still have to determine defence delay, the inquiry beneath the ceiling into whether the case took markedly longer than it reasonably should have replaces the micro-counting process with a global assessment. This inquiry need only arise if the accused has taken meaningful and sustained steps to expedite matters. And above the ceiling, a s. 11(b) analysis is triggered only where the Crown seeks to rely on exceptional circumstances. A framework that is simpler to apply is itself of value: ". . . we must remind ourselves that the best test will be relatively easy to apply; otherwise, stay applications themselves will contribute to the already heavy load on trial judges and compound the problem of delay" (Morin, per McLachlin J., at p. 810).
- [72] The steps I have recommended aim to assist both counsel and the Court in finding the earliest dates possible for trial by promoting a collaborative approach that balances the need for dynamic court scheduling with the imperatives set out in Jordan.

ORDER

[73] B.M.'s application for a stay of proceedings based on unreasonable delay is dismissed.

"Associate Chief Justice H. Holmes"

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