

CANADA / JUDGMENT

R. v. FSJ729

2025 BCSC 1941

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Supreme Court of British Columbia

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2025 BCSC 1941 R. v. FSJ729

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. FSJ729,

2025 BCSC 1941

Date: 20251003

Docket: 37729-1

Registry: Fort St. John

Rex

v.

FSJ729

Before: The Honourable Mr Justice Crerar

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Oral Reasons for Judgment: Jordan application

Counsel for the Crown:

J.H. Fung

Counsel for the Accused:

R.C. Gibbs, KC

Place and Date of Hearing:

September 29, October 1, 3, 2025

Place and Date of Judgment:

Fort St. John

October 3, 2025

I. Introduction

- [1] The accused applicant, charged with three counts of sexual assault against his former wife during their marriage, brings a *R. v. Jordan*, 2016 SCC 27, application for a stay of proceedings based on the alleged breach of his Charter s. 11(b) right to a timely trial.
- [2] Today is October 3, 2025. A trial by jury is scheduled to start October 27, 2025. In between now and then, if a stay is not granted, the Court will hear the accused's application under the Criminal Code, ss. 276/278 for leave to adduce at trial a large binder of texts and other communications about sexual activity during the marital period in question, that the accused argues will show that the alleged sexual assaults never occurred. If the ss. 276/278 application proceeds to the second stage, independent counsel for the complainant will also participate. Given this tight timing, which will affect the schedules of the complainant, the accused, multiple counsel, the potential jurors, court staff, and the Court, I deliver these brief oral reasons today. I make my usual reservation to edit or expand these reasons, but the substance and result will not change.
- [3] As a final preliminary note, I should state that the present Crown counsel Mr Fung was only recently assigned to this file: references to earlier Crown actions and decisions are not attributable to him personally.

II. Facts

- [4] The charges flow from the wife's June 8, 2022 police statement. The wife alleged that the accused forced various forms of non-consensual sex upon her over roughly a two-year period. She alleged that the accused choked her during sex--at times with his hands, at times with his legs--on multiple occasions, starting around December 2019. She alleged a specific incident around May 2020, where he forced sex on her in the shower, followed by sex in the bedroom with an anal plug or toy. She alleged that around November 2021, he inserted a hand and other objects in her vagina, leading to bleeding, for which she saw a doctor. She alleged that on other occasions, he inserted his penis and a vibrator in her vagina and engaged in "fisting" her vagina. She alleged non-consensual sex where he put her feet behind her head. She also alleged that the accused slapped her hard on her buttocks on multiple occasions.

[5] For his part, the accused denies that there was any non-consensual sex during the marriage, in the ways alleged in the police statement, or otherwise. In his past and present ss.276/278 applications, defence argues that the wife fabricated these allegations to punish him for a workplace affair, and to gain leverage in acrimonious divorce proceedings in which the wife also made a complaint to the Ministry of Family and Child Services. The wife made the police complaint 10 weeks after the couple separated.

[6] The original August 4, 2022 information set out a single count, based on an alleged incident or incidents of sexual assault, occurring over a 27-month span:

Count 1: from December 1, 2019 to February 28, 2022, inclusive did sexually assault [wife], contrary to s. 271 of the Criminal Code.

[7] This matter proceeded in the Provincial Court for almost three years: from the initial charge date of August 4, 2022, until June 10, 2025, when the Crown filed a direct indictment and the matter was transferred to this Court. I was assigned as trial judge soon after.

[8] Throughout the Provincial Court proceedings, both defence and the Provincial Court Judge pressed Crown on the prejudicial ambiguity of the single-count charge: which, if any or all of the allegations, and which, if any, of the eight or so different manners of sexual assault described in the police report form the basis for the charge, and when were they alleged to have occurred?

[9] The primary focus of the Provincial Court proceedings were two defence applications under Code, ss. 276/278 for leave to adduce at trial some 452 pages of texts and other communications about sexual activity during the marriage: those documents indicate that throughout the period the couple was actively and regularly engaged in consensual sexual activity, some of which involved mutual language and activities that could objectively be considered as violent. In arguing for their relevance, the accused noted that there was no reference to any of the alleged sexual assaults in the nearly daily communications over the relevant period. The materials and the application scheduled to be heard by this Court are largely identical to those considered by the Provincial Court.

[10] Neither the January/June 2024 nor the October 2024 hearings of that application completed.

[11] On January 10, 2024, in the first application, based on the single-count information, the Provincial Court Judge ruled that all but one of the documents could proceed to the second stage of the inquiry. The second stage started on June 19, 2024, with counsel for the Crown, the accused, and the complainant.

[12] On June 20, 2024, 22 months into the prosecution, and midway through the second stage hearing, and in response to repeated concerns voiced by both the defence and the Court about the ambiguity of the one-count information, the Crown filed the new three-count information:

- a) Count 1: from December 1, 2019 to May 30, 2020, inclusive in committing a sexual assault did choke, suffocate or strangle [wife], contrary to s. 272(2)(b) of the Criminal Code;
- b) Count 2: from May 26, 2020 to the May 27, 2020, inclusive did sexually assault [wife], contrary to s. 271 ; and
- c) Count 3: from October 1, 2021 to November 11, 2021, inclusive in sexually assaulting [wife], caused bodily harm to [wife], contrary to s. 272(2)(b) .

[13] That three-count information is identical in content to the indictment in the present Supreme Court proceedings, filed on June 10, 2025.

[14] As set out above, the original information alleged simple sexual assault under s. 271. As that offence had a maximum penalty of 10 years, the accused had no right to a preliminary enquiry. The new June 2024 three-count information added the two s. 272(2)(b) counts of aggravated sexual assault (choking (count 1) and bodily harm (count 3)), increasing the jeopardy of the accused from 10 to 14 years maximum penalty, and entitling him to a preliminary inquiry, under Code s. 536(2).

[15] Several trials had been scheduled in the Provincial Court, of which this present application focused on three:

- a) the January 3, 2024 trial had to be adjourned in part due to the accused filing on December 21, 2023, his ss. 276/278 application: the winter break, and the mandatory two-stage structure of that application, the second stage of which requires independent legal counsel for the complainant, rendered those trial dates impossible;
- b) the November 18, 2024 trial was also adjourned, due to defence counsel's illness; and
- c) another trial was scheduled to start in July 2025. It became redundant when the accused elected trial by jury, with a preliminary enquiry, in the Supreme Court, in March 2025.

[16] Two other important procedural anomalies further complicate this already complicated matter:

- a) on October 17, 2022, the accused elected trial by a Provincial Court Judge. But no plea was ever taken from the accused in the Provincial Court proceeding, then or at any time; and
- b) when the Crown put forward the new June 2024 three-count information, with the increased jeopardy of 14 years' imprisonment, the Code, s. 536(2) required the Provincial Court Judge to put the accused to his election as to whether he wished trial by a Provincial Court Judge without a jury or preliminary inquiry; or by a Supreme Court Judge with or without a jury, with the option of a preliminary inquiry. That mandatory election was not in fact put to the accused until March 6, 2025. At that point, the accused elected to have a Supreme Court trial with judge and jury, with a preliminary inquiry, as was his right.

- [17] Counsel concede that everyone wholly overlooked the necessity of putting the accused to his election on the new June 2024 three-count information at the time it was filed, assuming that the initial election for trial in the Provincial Court would simply "roll over" for the new three-count information. It was in fact defence who raised the issue, along with the lack of the initial arraignment, in March 2025.
- [18] The failure to put the election to the accused meant that the Provincial Court did not have jurisdiction over the proceedings: Code, s. 536(3)(b); *R. v. Gibson*, 2017 BCCA 367 at para. 4. In other words, the Provincial Court did not have jurisdiction either to set or hear either of the hypothetical November 2024 or July 2025 trials, delays of which the Crown attributes in part to defence-attributable delay. Had defence counsel not raised in March 2025 the lack of the mandatory re-election, and had either trial proceeded, that trial would have been a nullity: see *R. v. Mitchell* (1997), 36 OR (3d) 643, [1997] OJ No 5148 at para. 30 (CA); *R. v. Spence*, 2001 BCCA 521 at para. 16; *R. v. Shia*, 2015 ONCA 190 at paras. 24-27.[1]
- [19] As set out above, a trial by judge and jury is scheduled to start in this Court in four weeks: on October 27, 2025. It is estimated to run for seven days and end on November 4, 2025.
- [20] The time elapsed between the initial charge to the anticipated end of trial is 1,188 days, or 39.6 months: almost 10 months over the presumptive Jordan ceiling.

III. Discussion and decision

- [21] The Crown approached this application as a garden-variety Jordan application, involving a mathematical calculation of delay attributable to defence, and deduction of that time from the total time between charge and trial-end.[2] As set out by our Court of Appeal in *R. v. Rai*, 2019 BCCA 377 at para. 94, quoting *R. v. Coulter*, 2016 ONCA 704:
- [32] At the heart of the new framework lies a ceiling, beyond which delay is presumptively unreasonable. The presumptive ceiling is 18 months for cases going to trial in the provincial court and 30 months for cases going to trial in the superior court or cases going to trial in the provincial court after a preliminary inquiry (*Jordan*, para. 46).
- [33] ... [T]he new framework is set out below ...
- [34] Calculate the total delay, which is the period from the charge to the actual or anticipated end of trial (*Jordan*, at para. 47).
- [35] Subtract defence delay from the total delay, which results in the "Net Delay" (*Jordan*, at para. 66).
- [36] Compare the Net Delay to the presumptive ceiling (*Jordan*, at para. 66).

- [37] If the Net Delay exceeds the presumptive ceiling, it is presumptively unreasonable. To rebut the presumption, the Crown must establish the presence of exceptional circumstances (Jordan, para. 47). If it cannot rebut the presumption, a stay will follow (Jordan, para. 47). In general, exceptional circumstances fall under two categories: discrete events and particularly complex cases (Jordan, para. 71).
- [38] Subtract delay caused by discrete events from the Net Delay (leaving the "Remaining Delay") for the purpose of determining whether the presumptive ceiling has been reached (Jordan, para. 75).
- [39] If the Remaining Delay exceeds the presumptive ceiling, the court must consider whether the case was particularly complex such that the time the case has taken is justified and the delay is reasonable (Jordan, at para. 80).
- [40] If the Remaining Delay falls below the presumptive ceiling, the onus is on the defence to show that the delay is unreasonable (Jordan, para. 48).

[emphasis in original]

- [22] To that end, and within that arithmetical framework, Crown argues that the accused is responsible for half of the impugned delay of the trial, leaving the net delay at 19.5 months. Crown notes that the accused's adjournments and the accused's lack of availability on available trial dates before June 10, 2025, leaves the accused responsible for at least 14 months of the total pre-trial delay. Crown further argues an additional 5.5 months of defence delay, as filing the ss.276/278 application on December 21, 2023, made the January 3, 2024 trial impossible.[3]
- [23] The Crown does not allege any defence delay or other delay to be deducted with respect to the Provincial Court period after March 6, 2025, or with respect to these Supreme Court proceedings since June 2025.
- [24] To recount, the Crown also accepts, responsibly, that:
- a) the Court was obliged to give the accused his election after the Crown's introduction of the three-count information, under Code s. 536(2);
 - b) between June 2024 and March 2025, when that was done, the Provincial Court had no jurisdiction over the accused or the criminal proceedings;
 - c) the accused was entitled in March 2025, to elect trial by judge and jury in this Court; and
 - d) apart from that right, there was no tactical or abusive aspect to the timing or content of the accused's election.
- [25] For his part, defence counsel does not dispute the Crown's calculations of defence-attributable delay flowing from his illness or his schedule with respect to scheduling hearings and trials in the Provincial Court.

- [26] Defence does dispute attributions of defence delay to the time dedicated to the two ss. 276/278 applications. Such applications are standard and common in sexual assault proceedings, especially where, as here, the accused and complainant were in a long-term relationship generating copious digital communications, including those on sexual matters. The fact that the Provincial Court Judge found, in the first round of hearings, almost all, and, in the second round of hearings, roughly 20% of those records to pass through to the second stage of enquiry is *prima facie* evidence that the applications were reasonable and not frivolous. The two rounds of those applications, with necessary complications of scheduling, were necessitated by the Crown's introduction of the three-count information part-way through the second stage of the first iteration of the defence's application. In this, defence cites Jordan:
- [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.
- [emphasis added]
- [27] In its application, defence primarily focusses on first principles of the s. 11(b) right to be tried within a reasonable time, and the revised Jordan philosophy and methodology to address delay.
- [28] Defence starts with the Jordan recognition that the right to be tried within a reasonable time is important not only to the individuals directly involved in the proceeding--the accused and the complainant--but also to society as a whole:
- [19] As we have said, the right to be tried within a reasonable time is central to the administration of Canada's system of criminal justice. It finds expression in the familiar maxim: "Justice delayed is justice denied." An unreasonable delay denies justice to the accused, victims and their families, and the public as a whole.
- [20] Trials within a reasonable time are an essential part of our criminal justice system's commitment to treating presumptively innocent accused persons in a manner that protects their interests in liberty, security of the person, and a fair trial. Liberty is engaged because a timely trial means an accused person will spend as little time as possible held in pre-trial custody or living in the community under release conditions. Security of the person is impacted because a long-delayed trial means prolonging the stress, anxiety, and stigma an accused may suffer. Fair trial interests are affected because the longer a trial is delayed, the more likely it is that some accused will be prejudiced in mounting a defence, owing to faded memories, unavailability of witnesses, or lost or degraded evidence.

- [29] While calculation of relative causes of delay still plays a role under Jordan, the mathematical tail does not wag the delay dog. The ultimate enquiry is whether the time taken markedly exceeds that reasonably required to complete the trial:
- [51] While the presumptive ceiling will enhance analytical simplicity and foster constructive incentives, it is not the end of the exercise: as we will explain in greater detail, compelling case-specific factors remain relevant to assessing the reasonableness of a period of delay both above and below the ceiling. Obviously, reasonableness cannot be captured by a number alone, which is why the new framework is not solely a function of time.
- [91] Determining whether the time the case has taken markedly exceeds what was reasonably required is not a matter of precise calculation. Trial judges should not parse each day or month, as has been the common practice since Morin, to determine whether each step was reasonably required. Instead, trial judges should step back from the minutiae and adopt a bird's-eye view of the case. All this said, this determination is a question of fact falling well within the expertise of the trial judge
- [111] Third, the new framework reduces, although does not eliminate, the need to engage in complicated micro-counting. 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
- [emphasis added]
- [30] Defence notes that the present case is not complex. It is a classic he said-she said sexual assault case. There are only two main witnesses: the accused and complainant; the complainant's family doctor is a third, minor witness. It is not complicated by multiple co-accused, or multiple witnesses, or complicated evidence. At the same time, the accused must respond to multiple alleged incidents dating back some four to six years. The complaint itself dates back to June 2022: over three years ago. The Crown has known its relatively simple case since that time.
- [31] Defence argues that any defence delay occasioned by adjournments due to illness and unavailability during the Provincial Court phase of this prosecution is largely irrelevant, for several reasons.
- [32] First, as set out above, the Provincial Court lacked jurisdiction over the accused between June 2024 and March 2025, such that it was not in a position to preside at or set down either the November 2024 or the July 2025 Provincial Court trial dates.
- [33] Second, all court participants find themselves on the eve of this Supreme Court trial, 39 months after the start of these proceedings, and almost six years after the alleged incidents, largely due to the decisions, actions, and inaction of the Crown.

- [34] The single-count information, as originally drafted, spanning 27 months in the lives of a sexually-active couple, and providing no particulars of specific dates or forms of sexual assault, was inadequate for trial in the first place. Again, throughout the Provincial Court proceedings, both defence and the Provincial Court Judge pressed Crown on the prejudicial ambiguity of the charge.
- [35] The Crown effectively conceded the inadequacy of the original information when it recast the charge in the three-count form in June 2024. The new information did not represent a mere reformulation of the existing one-count information, or the benign provision of particulars, however. Again, the new counts 1 and 3 substantially increase the jeopardy faced by the accused: from the maximum 10 years for the original s. 271 sexual assault simpliciter to 14 years for the s. 272(2)(b) sexual assault involving choking and bodily harm. It also substantially increased the risk of procedural complexity and delay. It triggered the obligation to put the election to the accused, and the accused's exercise of his right to trial by judge and jury, with a preliminary inquiry, in this Court. It also necessitated the adjournment of the ss.276/278 application, midway through the second phase, and the rescheduling of that application, starting with the first stage in October 2024.
- [36] The Crown could have avoided all of this, and could have clearly informed the accused of the specific allegations he faced, by drafting a properly particularised three-count information from day one: the Crown had that information in hand, presumably, from the complainant and her police statement. Alternatively, when pressed repeatedly by defence and the Provincial Court Judge, the Crown could have provided particulars of the single count, including dates, and manners and circumstances of specific instances of sexual assault. Alternatively, the Crown could have provided a three-count information, retaining the existing level of jeopardy, based on the original s. 271 sexual assault simpliciter. If so, the proceedings may well have remained in the Provincial Court, and the trial may well have already occurred, in a timely manner.
- [37] I agree with defence, and for that matter the Provincial Court Judge, of the undesirability of the original one-count information encompassing multiple forms of alleged sexual assault spanning a broad time period.

[38] It did not comply with the word and spirit of s. 789 of the Code:

Formalities of information

789 (1) In proceedings to which this Part applies, an information

- (a) shall be in writing and under oath; and
- (b) may charge more than one offence or relate to more than one matter of complaint, but where more than one offence is charged or the information relates to more than one matter of complaint, each offence or matter of complaint, as the case may be, shall be set out in a separate count.

[39] It would not comply with the word and spirit of s. 581 of the Code, with respect to indictments:

Substance of offence

581(1) Each count in an indictment shall in general apply to a single transaction and shall contain in substance a statement that the accused or defendant committed an offence therein specified.

Form of statement

- (2) The statement referred to in subsection (1) may be
- (a) in popular language without technical averments or allegations of matters that are not essential to be proved;
 - (b) in the words of the enactment that describes the offence or declares the matters charged to be an indictable offence; or
 - (c) in words that are sufficient to give to the accused notice of the offence with which he is charged.

Details of circumstances

- (3) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to, but otherwise the absence or insufficiency of details does not vitiate the count.

[emphasis added]

[40] It leaves the accused unsure of the allegations against him. It compromises his ability to respond and prepare a defence. It also puts the court in a difficult position, particularly if the jury convicts the accused, and the court has to make sentencing findings under s. 724 where, inherently, it is not clear whether the jury convicted the accused on one or some or all of the alleged incidents: see *R. v 32992*, 2024 BCSC 2073 at paras. 83-94. As noted in that decision, while a single count alleging multiple instances of sexual assault over months or years may be reasonable in a prosecution for historical sexual abuse of a child (who maintained no daybook during the time long past, and with respect to whom there can be no defence of consent or mistaken belief in consent), it is less reasonable and more prejudicial when used with respect to a more recent alleged sexual assault against an adult complainant, especially one with whom the accused has had a long-term relationship involving consensual sex at regular intervals, further blurring which sexual incident or incidents form the charge.[4]

- [41] Parenthetically, even the present three-count charge remains vague with respect to the number and dates and modalities of the alleged sexual assaults. Again, the assaults alleged in the three counts still span almost two years, with only the May 2020 allegation in count 2 providing any specificity, presumably relating to the alleged shower and anal toy assault.
- [42] Defence further complains that the accused's ability to make full answer and defence to the charge was prejudiced even more by the Crown's late divulged, and then changing, theory of the case. On June 20, 2024, just before the introduction of the new three-count information, Crown set out in court its theory of the case. Specifically, the accused started an affair with a co-worker. He then abusively used the threat of continuing the affair as leverage to demand from the wife "sexual favors" that she had previously clearly stated "were off the table." In the course of the present hearing, the present Crown counsel confirmed that this was in fact no longer the theory of the Crown's case.
- [43] Finally, defence notes that he did not lie in the weeds waiting to bring a Jordan application. The transcript from the June 2024 hearing indicates that defence counsel himself was immediately raising concerns about the Jordan ceiling at that stage. In that, along with defence raising in March 2025 the lack of an arraignment and election, defence exhibited the proactivity expected of Jordan.
- [44] The Crown's vacillations in the face of express judicial admonitions against the vague one-count charge fell short of the Jordan exhortations that the Crown, in exercising its discretion, must always be alive to the s. 11(b) right of the accused to a timely trial:
- [79] It bears reiterating that such determinations fall well within the trial judge's expertise. And, of course, the trial judge will also want to consider whether the Crown, having initiated what could reasonably be expected to be a complex prosecution, developed and followed a concrete plan to minimize the delay occasioned by such complexity (*R. v. Auclair*, 2014 SCC 6, [2014] 1 S.C.R. 83, at para. 2). Where it has failed to do so, the Crown will not be able to show exceptional circumstances, because it will not be able to show that the circumstances were outside its control. In a similar vein, and for the same reason, the Crown may wish to consider whether multiple charges for the same conduct, or trying multiple co-accused together, will unduly complicate a proceeding. While the court plays no supervisory role for such decisions, Crown counsel must be alive to the fact that any delay resulting from their prosecutorial discretion must conform to the accused's s. 11(b) right (see, e.g., *Vassell*). As this Court said in *R. v. Rodgeron*, 2015 SCC 38, [2015] 2 S.C.R. 760:

Certainly, it is within the Crown's discretion to prosecute charges where the evidence would permit a reasonable jury to convict. However, some semblance of a cost-benefit analysis would serve the justice system well. Where the additional or heightened charges are marginal, and pursuing them would necessitate a substantially more complex trial process and jury charge, the Crown should carefully consider whether the public interest would be better served by either declining to prosecute the marginal charges from the outset or deciding not to pursue them once the evidence at trial is complete. [para. 45]

- [45] The prosecution of this matter fell short of the Jordan, para. 112 reminder of "the Crown's ever-present constitutional obligation to bring the accused to trial within a reasonable time."
- [46] Nor can the necessity to put the accused to his election and his exercise of his right to be tried before this court constitute an exceptional circumstance under Jordan. At para. 69, Jordan confirms that "[e]xceptional circumstances lie outside the Crown's control in the sense that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise." [emphasis in original]. The chain of events unleashed by the Crown's original ambiguous information, and late-stage redrafting of the information, was entirely in the Crown's control.
- [47] Apart from that prejudice, I agree with the entirety of the defence's submissions, as summarised above. Specifically, while defence-attributable delay may have contributed to the adjournment of the November 2024 or July 2025 scheduled Provincial Court trials, those trials and the Provincial Court proceeding were in effect void ab initio. In the words of Gibson, any trial would have been "a nullity". No jurisdictionally-sound or viable trials were adjourned; they could not have legitimately proceeded.
- [48] Jordan at para. 64 confirms that defence delay should only be found where the Crown and Court are ready to proceed, but the defence is not. By extension, where no jurisdictionally-sound trial could be scheduled or held, none of the Crown, Defence, or Court is truly able to proceed, and no delay during that period should be attributable to defence.
- [49] Jurisdiction and procedural normalcy were not established until March 2025, when the Provincial Court put the accused to his election. And, again, the Crown can point to no defence delay between that date and the anticipated end of the Supreme Court trial on November 4, 2025.
- [50] In short, neither the 5.5-month nor the 14-month period the Crown attributes to defence delay should be deducted from the Jordan calculation. There is no causal nexus between any defence delay in the proceedings in which the Provincial Court lacked jurisdiction, and the date of the present Supreme Court trial, 39 months into this prosecution, and nine months over the presumptive Jordan limit. Defence-attributable delay with respect to the scheduled Provincial Court trials is irrelevant to the calculation, as those trials could not have taken place, and as the accused was entitled to be put to his election on the new information, and was entitled at that moment to select trial by judge and jury, with a preliminary enquiry, in this Court.
- [51] As for trials scheduled before the new three-count information, and the jurisdictional snafu, I have no evidence on whether the January 2024 trial could have in fact proceeded, and whether the late filing of the ss.276/278 application would have made any difference. Again, counsel was entitled to bring that application, and its relative success, again, confirms that it was not frivolous. There was no evidence that the January 2024 trial could have proceeded, even if the two-stage ss.276/278 application had been filed earlier: we know that that

application in fact took several days, with the two stage held over a period spanning five months.

- [52] In the Jordan consideration in *R. v. JSH*, 2024 BCSC 690 at para. 27, Justice Riley (before his translation to the Court of Appeal) cautioned against speculation about how a proceeding might have progressed based on hypothetical alternative facts. It is artificial to deduct defence-attributable time with respect to the adjourned January 2024 and earlier scheduled Provincial Court trials, that hypothetically could have occurred within the Jordan limit, as we now know that the accused, exercising his rights, has elected a trial by judge and jury in this Court. Further, we know that in June 2024 the Crown filed the new three-count information, effectively acknowledging the inadequacy of the information on which those earlier hypothetical trials would have been based. And from that point on, the Provincial Court lacked jurisdiction to schedule or to hear any other hypothetical trials. We cannot speculate about an eventuality that did not occur and could not have appropriately occurred: swifter progression to a Provincial Court trial.
- [53] Alternatively, in the event that I am incorrect in my analysis of this unusual case, for which counsel could provide me no jurisprudential guidance or precedent,[5] I would exercise the discretion bestowed upon me by Jordan at paras. 56 and 82 to stay the charges notwithstanding any defence-attributable delay deductions that might bring this case below the Jordan presumptive 30-month ceiling, for the reasons set out above. The defence has established that it took meaningful steps to expedite the proceedings, and in fact spoke up to avoid the jurisdictional conundrum that would have been created had the Provincial Court trial proceeded: were a trial later to have been revealed as a nullity months after its completion, a Jordan stay would have been certain for the accused. Further, the case took markedly longer than it reasonably should have. This relatively simple case could and should have been completed within 18 months, had the Crown provided sufficient clarity of the allegations facing the accused, which it possessed at the outset, from the outset, instead of setting forth a chain of delay through its three-count information, with increased jeopardy and change of trial court and trial modality, 22 months into the prosecution.

IV. Conclusion

- [54] I grant the declaration sought: that there has been a breach of the accused's right to be tried within a reasonable time, as guaranteed by s. 11(b) of the Charter.
- [55] I direct a judicial stay of proceedings.
- [56] Mr [redacted], you are free to go.

"Crerar J"

- [1] As noted in Gibson at para. 4, "the error is not curable by resort to s. 686(1)(b)(iv) of the Code."

- [2] To be fair to Crown counsel: of course, the defence's oral argument at the hearing significantly fleshed out the position set out in defence's notice of application, which would not necessarily have alerted the Crown that this was not an ordinary Jordan application.
- [3] To be clear, Crown, fairly, does not assert any deliberate delay or misconduct on the part of defence in the form discussed in Jordan at para. 21: most of the delay was attributable to defence counsel's busy calendar as well as health issues.
- [4] That said, as recognised in R v 32992 at paras 84 and 85, such counts have sometimes been used with respect to adult complainants.
- [5] Counsel were unable to provide the Court authorities in this regard, ruminating that this was a case of first instance.
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