
CANADA / JUDGMENT

R. v. J.H.T.

2016 BCSC 2382

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 2382 R. v. J.H.T.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. J.H.T.,

2016 BCSC 2382

Date: 20161216

Docket: 33643

Registry: Prince George

Regina

v.

J.H.T.

Restriction on Publication: Pursuant to ss. 486.4(1) and 648(1) of the Criminal Code of Canada

Before: The Honourable Mr. Justice Tindale

Oral Reasons for Judgment

Re: Delay Application

Counsel for Crown:

J. Johnston

(via teleconference)

Appearing on his own behalf:

J.H.T.

(via teleconference)

Place and Date of Hearing:

Place and Date Oral Result Given in Court:

Prince George, B.C.

December 6 & 7, 2016

Prince George, B.C.

December 16, 2016

Place and Date of Judgment:

Prince George, B.C.

December 16, 2016

- [1] THE COURT: J.H.T. seeks a judicial stay of proceedings on Court File No. 33643. J.H.T. alleges that there has been a violation of his section 11 (b) right pursuant to the Canadian Charter of Rights and Freedoms ("Charter") to be tried in a reasonable time. J.H.T. also alleges violations of his section 7, 11(d) and 12 Charter rights.
- [2] The information in this matter was laid on January 11, 2011. The trial of this matter is set to commence on January 3, 2017 and continue to the expected completion date of March 2, 2017.
- [3] The Crown is opposed to the relief claimed by J.H.T.

Background

- [4] On September 2, 2009 Y.D. gave a statement to the RCMP in Kamloops, British Columbia alleging that J.H.T. had engaged in sexually inappropriate activity with her sister J.C. in the early 1980s.
- [5] On September 3, 2009 Y.D. gave a statement to an investigator for the British Columbia College of Teachers alleging that J.H.T. had engaged in sexually inappropriate activity with her sister J.C. in the early 1980s.
- [6] Also on September 3, 2009 J.C. gave a statement to an investigator for the British Columbia College of Teachers alleging that J.H.T. had physically and sexually abused her in the early 1980s. J.C. alleged that the incidents occurred in Prince George, British Columbia and that J.H.T. was her teacher and basketball coach at the time.
- [7] The RCMP in Kamloops British Columbia sent J.C.'s complaint to the RCMP in Prince George, British Columbia.

- [8] On September 29, 2009 Inspector Bomford of the RCMP in Prince George sent a letter to Mike McKay, Superintendent of School District No. 36 in Surrey, British Columbia advising them that J.H.T. who was a teacher in that district was being investigated with regard to the complaint made by J.C.
- [9] On September 30, 2009 Superintendent Mike McKay sent a letter to J.H.T. advising him that because of the RCMP investigation he was suspended with pay.
- [10] On October 27, 2009 J.C. provided a statement to the RCMP in North Vancouver, British Columbia.
- [11] Cst. Vince Reddekop took on the role of the lead investigator in this matter on October 1, 2009.
- [12] On November 25, 2009 S.P. ("aka T.") gave a statement to the RCMP alleging that J.H.T. had inappropriately touched her in the 1980's.
- [13] On January 11, 2011 the information in this matter was sworn.
- [14] J.H.T.'s first appearance on the charges was on March 2, 2011. Also on March 2, 2011 the RCMP provided a news release which stated the following in part:

The Prince George RCMP have confirmed charges have been laid against 66-year-old J.H.T. a former gym teacher and basketball coach at D.P. Todd Secondary in Prince George. The charges include a number of sexual related offences that resulted from inappropriate interactions with two former students during the 1980s. The students were 13 years old when the interactions began.

- [15] On June 8, 2011 J.H.T. elected to be tried by a Provincial Court Judge with the trial fixed to commence on June 4, 2012.
- [16] On May 9, 2012 J.H.T. with the consent of the Crown re-elected to be tried by a Supreme Court Judge and jury. Also with the consent of the Crown the Provincial Court trial was converted into a 5 day preliminary inquiry.
- [17] The preliminary inquiry commenced on June 4, 2012.
- [18] On June 25, 2012 a trial date was set in the Supreme Court of British Columbia for a period of 4 weeks commencing on May 27, 2013.
- [19] On April 10 and May 16, 2013 pre-trial conferences were held in this matter.
- [20] The trial commenced on May 27, 2013 in the Supreme Court of British Columbia.
- [21] On June 26, 2013 a mistrial was declared by Mr. Justice Ball.
- [22] On July 29, 2013 this matter was adjourned by consent to September 9, 2013.

- [23] On September 9, 2013 both J.H.T. and the Crown agreed that a pre-trial conference with Associate Chief Judge Cullen should be scheduled. This matter was adjourned to September 23, 2013.
- [24] On September 23, 2013 the matter was adjourned by consent to October 4, 2013 at 9:00 am for an appearance in front of Associate Chief Judge Cullen.
- [25] On October 4, 2013 a pre-trial conference was held and both parties agreed that a new trial judge should be assigned. This was ordered by the court. Counsel for J.H.T. also mentioned possibly bringing a change of venue application. This matter was adjourned October 29, 2013.
- [26] I was assigned as the new trial judge on October 4, 2013.
- [27] On October 21, 2013 this matter was adjourned to October 31, 2013.
- [28] On October 31, 2013 a pre-trial conference was held. The parties agreed that four weeks for pre-trial applications and five weeks for the trial were required. Also a one-day change of venue application needed to be set. This matter was adjourned to November 12, 2013 to accommodate the change of venue application.
- [29] On November 12, 2013 the matter was adjourned for one week as J.H.T.'s lawyer was not available.
- [30] On November 18, 2013 dates were not available to accommodate the change of venue application.
- [31] On November 25, 2013 the change of venue application was set for February 12, 2014.
- [32] On February 12, 2014 the change of venue application was heard.
- [33] On February 28, 2014 I pronounced reasons denying the change of venue application.
- [34] As a result of a local Prince George newspaper printing an article regarding J.H.T. in breach of a publication ban a further change of venue application was heard on March 14, 2014.
- [35] On March 17, 2014 J.H.T.'s lawyer Ms. Gaffar indicated her intention to be removed as counsel of record for J.H.T. .
- [36] On April 11, 2014 I pronounced reasons granting the change of venue application and transferring this matter to Quesnel, British Columbia.
- [37] On May 5, 2014 this matter was adjourned to May 26, 2014 in order to give J.H.T. time to find new counsel.
- [38] On May 26, 2014 Mr. Zipp informed the court that he would be likely acting for J.H.T. and asked that the matter be adjourned to July 14, 2014.

- [39] On July 14, 2014 this matter was adjourned to August 18, 2014 to allow Mr. Zipp to review the materials and fix a trial date.
- [40] On August 18, 2014 Mr. Zipp appeared as counsel of record for J.H.T. and the matter was adjourned to September 8, 2014.
- [41] On September 8, 2014 the second trial date was fixed to commence on August 31, 2015 for seven weeks.
- [42] There were appearances on November 4, 10, 17 and 24, 2014 as well as January 9, 2015, June 25, 2015, July 13, 2015 and July 29, 2015 which dealt primarily with the fixing and hearing of various pretrial applications.
- [43] On August 18, 2015 Mr. Zipp applied to be removed as counsel of record and J.H.T. indicates that he will represent himself.
- [44] On August 24, 2015 J.H.T. informs the court that he has reconsidered his position and would like to have counsel act for him. The court makes inquiries with Mr. Zipp if he would act for the purpose of cross-examining the complainants based on an application made by Crown. Mr. Zipp indicated that he was not prepared to act based on the legal aid rates he would receive.
- [45] On August 25, 2015 the trial set for August 31, 2015 was adjourned so that J.H.T. could seek new counsel and bring a Rowbotham application. The Crown did not oppose that adjournment request.
- [46] There were brief hearings on September 21, October 19, November 16, December 7, and December 14, 2015. There were also brief hearings on January 4, January 25, February 9, March 21, and March 29, 2016. All of these hearings were for the purpose of monitoring J.H.T.'s progress in making his Rowbotham application.
- [47] On April 21, 2016 the Rowbotham application was heard.
- [48] On May 4, 2016 I pronounced reasons denying J.H.T.'s Rowbotham application.
- [49] On June 6, 2016 Ms. Malfair on behalf of the Crown informs the court that a Crown counsel from Quesnel will be responsible for the prosecution of the file. The matter was adjourned to July 11, 2016 to fix a date for trial.
- [50] On July 11, 2016 a new trial date of January 3, 2017 was discussed. It was estimated it would take 8 weeks. The matter was adjourned to August 29, 2015 to fix a date for trial and to determine whether or not J.H.T. would be in a position to bring his delay application and if the Crown would be ready to proceed with the trial in January 2017.
- [51] There were brief appearances on August 29, September 19 and September 26, 2016.
- [52] On October 3, 2016 J.H.T. informs the court that he is in the process of preparing his delay application with the assistance of a lawyer.

- [53] On October 12, 2016 J.H.T. filed his notice of application for a judicial stay of proceedings as well as his supporting affidavit.
- [54] On October 17, 2016 the third trial date was confirmed. The trial was set to commence on January 3, 2017 for 8 weeks. Also the Crown's renewed application to have a lawyer appointed to cross-examine the complainants is set for November 1, 2016.
- [55] On November 1, 2016 the Crown's application to appoint a lawyer is heard and dismissed.
- [56] On December 5 and 6, 2016 J.H.T.'s delay application is heard.

Evidence

- [57] The evidence on this hearing was primarily in the form of transcripts of the various appearances as well as books of documents filed by the parties. Exhibit 1 on this hearing was an admissions of fact by J.H.T. pursuant to section 655 of the Criminal Code of Canada. Exhibit 7 is a certified true copy of the record of proceedings in this matter.
- [58] In addition Cst. Vincent Reddekop testified that he was the lead investigator with regard to this matter. He testified that March 2, 2011 was the date that J.H.T. had his first appearance. Cst. Reddekop was aware that the press release went out on March 2, 2011.
- [59] He agreed that he did not have any basis to think that S.P. who was one of the complainants was 13 at the time of the alleged incident.
- [60] Cst. Reddekop testified that the last witness he interviewed before sending his report to Crown counsel was interviewed on February 17, 2010. The disclosure package was sent to the Crown on July 26, 2010.
- [61] Cst. Reddekop agreed on cross-examination that he knew J.H.T. was suspended from his job in the Surrey School District. He also agreed on cross-examination after looking at the various yearbooks for D.P. Todd Secondary School that J.C. was likely not in her grade 8 year when the incidents occurred.
- [62] Cst. Reddekop agreed that he did not do anything to confirm the age of S.P., however, he stated he did ask J.C. what her age was when the incidents occurred.

Position of the Parties

J.H.T.

- [63] J.H.T. seeks a judicial stay of proceedings for two reasons. First, J.H.T. alleges serious misconduct by the RCMP that has caused him significant prejudice and which he argues is a violation of his section 7, 11(d) and 12 rights under the Charter.
- [64] Second, J.H.T. argues that there has been a 73.4 month delay between the laying of charges and the scheduled completion of the trial which is a violation of his section 11(b) right to be tried in a reasonable time.

- [65] J.H.T. argues that both the Crown and defence's cases are completely dependent on the memory of witnesses. The incidents are alleged to have occurred over 30 years ago. One witness Mr. McFadyen has died since giving his statement to the police.
- [66] J.H.T. argues that he has done his best given his financial situation to provide all of the transcripts that are relevant to this application.
- [67] J.H.T. argues that the delay in this matter is 43.4 months in excess of the presumptive ceiling of 30 months established by the Supreme Court of Canada in *R. v. Jordan* 2016 SCC 27.

Pre-Charge Delay

- [68] J.H.T. argues that there is 16.5 months of pre-charge investigations. J.H.T. argues that he suffered great anxiety as a result of not being informed as to the allegations against him until February 15, 2011. J.H.T. notes he was suspended from work early on in this process. J.H.T. asks this court to take into account the pre-charge delay in its assessment of whether post-charge delay in this case is unreasonable.
- [69] J.H.T. also argues that the press release issued by the RCMP on March 2, 2011 stating "the students were 13 years old at the time" caused him serious prejudice. J.H.T. also notes that this report ran in the Vancouver Sun, Prince George Citizen and Prince George Free Press newspapers. J.H.T. argues that the two complainants would have been 14 at the time of the alleged offenses. J.H.T. vehemently denies these allegations. He says the press release compounded his prejudice by making it appear that he was a pedophile. J.H.T. argues that the RCMP were derelict in their duties by not properly ascertaining the age of the complainants at the time of the alleged incidents.

Post-Charge Delay

- [70] With regard to J.H.T.'s application that there has been unreasonable delay in bringing this matter to trial he has characterized the various milestones in the proceeding as falling into 7 stages which are as follows:

Stage 1: the time from laying of charges on January 11, 2011 until the completion of the preliminary hearing on June 7, 2012 which was 16.8 months;

Stage 2: the time from the end of the preliminary hearing on June 7, 2012 until the last day of the first trial when the mistrial was declared on June 26, 2013 which was 12.6 months;

Stage 3: the time from the last day of the first trial on June 26, 2013 until the date when the first change of venue application was denied on February 28, 2014 which is eight months;

Stage 4: the time from February 28, 2014 until J.H.T. was represented by new counsel, Mr. Zipp, which is 2.2 months;

Stage 5: the time from the date J.H.T.'s new counsel Mr. Zipp began representing him on May 5, 2015 until August 25, 2015 when J.H.T. was again unrepresented was 15.75 months;

Stage 6: the time from the date that J.H.T. notified the court he was seeking legal aid on August 25, 2015 until his Rowbotham application was denied on May 4, 2016 was 8.3 months; and

Stage 7: the total time from the date the Rowbotham application was denied on May 4, 2016 until the anticipated conclusion of the second trial on February 24, 2017 is 9.75 months.

- [71] J.H.T. argues that for Stages 1 and 2 there is no delay solely caused by the defence. He argues that there is no evidence of any frivolous or unnecessary applications or any lack of preparation on behalf of the defence. J.H.T. notes that the delay should be determined to be 29.4 months to this point.
- [72] J.H.T. argues that with regard to Stage 3 which includes the change of venue application that should not count against the defence because it was not frivolous or caused solely by the defence. J.H.T. argues this delay was made necessary by the mistrial because of the substantial and mostly negative publicity towards the defendant in the Prince George newspapers. He notes that eventually the change of venue application was granted. J.H.T. argues that the total delay up to this point would be 37.4 months
- [73] J.H.T. argues that Stage 4 should not be counted against him as most of the delay was caused by the second change of venue application that was not his fault. J.H.T. argues that the total delay up to this point would be 39.6 months.
- [74] J.H.T. argues that Stage 5 should not count against him as it is clear that the matter moved along as quickly as possible. The Crown and defence worked together to set a new trial date as well as a number of pre-trial applications were heard. J.H.T. argues that the delay up to this point would be 55.35 months.
- [75] J.H.T. argues that during Stage 6 the appearances were solely for the purpose of allowing the court to keep track of his efforts to apply for legal aid and make his Rowbotham application. His efforts to obtain a lawyer were to allow him to make full answer and defence. J.H.T. argues that the delay should be determined to be 63.65 months.
- [76] J.H.T. argues that part of the Stage 7 delay was because a new Crown counsel took over the file. Other than that the new trial dates were promptly set and none of this stage should count as defence delay.
- [77] J.H.T. argues that the total delay should be determined to be 73.4 months. He argues it is impossible for the defence to cause such a monumental amount of deliberate, calculated and irresponsible delay to bring this matter 43 months over the presumptive ceiling as determined in Jordan.
- [78] J.H.T. argues that there has been no waiver of his right to a trial in a reasonable time at any point during this case.
- [79] J.H.T. argues that there have been no exceptional circumstances in this case. He argues that the mistrial declared on June 26, 2013 was caused by one of the Crown witnesses, J.C., saying something prejudicial in front of the jury. J.H.T. argues that J.C. was under direct

examination by the Crown and was in the control of the Crown when she gave her objectionable testimony. J.H.T. argues that the Crown should have been aware that J.C. was going to give her objectionable testimony about physical abuse she alleges J.H.T. inflicted on her because she had said the same thing on three prior occasions.

- [80] J.C. in her statement of September 3, 2009 to the College of Teachers as well as her statement of October 29, 2009 to the RCMP discussed the allegations of physical abuse.
- [81] J.C. testified about the physical abuse during the preliminary inquiry when she gave her evidence on June 5, 2012.
- [82] In addition J.H.T.'s lawyer during the trial on June 26, 2013 anticipated this evidence and alerted the court to it as well as the Crown. Nonetheless, the Crown after having a discussion with the court did not speak to J.C. about restricting her evidence in this regard.
- [83] J.H.T. argues that it was reasonably foreseeable that J.C. would testify about the physical abuse.
- [84] J.H.T. argues that the mistrial should not be considered as an exceptional circumstance and the court should find that there has been a 73.4 month delay. This is a violation of his section 11(b) rights.
- [85] J.H.T. argues that this is not a complex case and the accusations come from three complainants. J.H.T. argues that he has suffered prejudice because of the prolonged nature of this matter.

The Crown

- [86] The Crown argues the stay of proceeding should not be granted. The Crown states that with the "exceptional circumstances" in this case the delay is under the presumptive ceiling set in Jordan.
- [87] In addition the Crown argues that even if the delay in this trial is not due to exceptional circumstances the Crown reasonably relied on the factors as set out in *R. v. Morin* [1992] 1 SCR 771. The Crown says the circumstances of this case meet the "transitional exceptional circumstances" exception as set out in Jordan.
- [88] The Crown argues that with regard to pre-charge delay none of the alleged pre-charge delay has had an effect on the fairness of the trial. The Crown further argues that J.H.T. has not been subjected to any cruel and unusual treatment or punishment such that his section 12 Charter rights have been violated.
- [89] The Crown notes that from September 2, 2009 when the complaint was first initiated to January 11, 2011 when the information was laid does not provide a reasonable basis to conclude that trial fairness has been compromised.

- [90] The Crown argues that the threshold in considering whether the accused's ability to make full answer and defence has been compromised by pre-charge delay must be real and substantial rather than merely notional or possible. There is no evidence of an ulterior or oblique purpose on the part of the RCMP in delaying the investigation.
- [91] The Crown also notes that J.H.T. has admitted that the RCMP were entitled to notify his employer of the offenses. The Crown notes that the charges were ultimately approved. The fact that J.H.T. was suspended from the School Board would have occurred even if there had been little or no pre-charge delay.

Post-Charge Delay

- [92] The Crown argues that with regard to the post-charge delay J.H.T. has the burden of persuading the court that his Charter rights or Freedoms have been infringed or denied. The Crown argues that J.H.T. must put the full record before the court or take the risk that the evidence will be insufficient to establish his claim for Charter relief.
- [93] The Crown has based her submissions on basically the same stages as J.H.T. other than she has combined J.H.T.'s Stages 4 and 5 together.
- [94] The Crown notes that Stage 1 is approximately 17 months in duration. The Crown argues that because J.H.T. re-elected to be tried by a Supreme Court Judge with a jury on May 9, 2012 it is reasonable to expect that the trial could have been scheduled within the 8 to 10 months contemplated by the Morin guidelines rather than the 12 months it took to the first trial date. The Crown submits that two months should be attributed as defence delay.
- [95] Alternatively, the Crown argues that if it is found pursuant to Jordan that this was a defence action legitimately taken to respond to the charges there should still be two months deducted because the re-election could be categorized as an exceptional circumstance.
- [96] The Crown argues that under the Jordan framework the delay for Stage 1 is 15 months.
- [97] The Crown argues that applying the Morin framework and assuming that 6 to 8 months is a reasonable estimate for preparation time, and considering the approximately 2 months between the swearing of the information and the first appearance as an inherent time requirement there would be no delay under the Morin framework. This would include a 2 month deduction for defence delay because of the re-election.
- [98] The Crown argues that with regard to Stage 2 which is 12.6 months in duration this entire period of time should be deducted from the total time calculation because the mistrial is an exceptional circumstance pursuant Jordan. In that regard the Crown argues that the trial judge did not fault the Crown for the mistrial.
- [99] The Crown argues that under the Morin guidelines the time lapse due to a mistrial is to be considered inherent delay: R. v. Khan 2011 ONCA 173 para. 63.

- [100] The Crown argues that there is no delay under the Jordan or Morin framework at the end of Stage 2.
- [101] The Crown argues that with regard to Stage 3 the duration of time is approximately 8 months. The Crown argues that the entirety of this stage should be attributed to the change of venue application. Under Jordan the change of venue application is an exceptional circumstance as it was out of the control of the Crown. Under the Morin guidelines the change of venue application and the time devoted to it should be considered neutral or inherent time requirements.
- [102] The Crown argues that Stage 4 is approximately 18 months in duration which spans from the date after the change of venue application until August 25, 2015 when the second trial was adjourned.
- [103] The Crown argues that this time period contains several exceptional circumstances and incidents of defence delay. In that regard there was a second change of venue application brought because of a breach of a pre-trial publication ban by a local Prince George newspaper. J.H.T.'s lawyer Ms. Gaffar was removed as counsel of record for personal reasons. Mr. Zipp was also removed as counsel of record.
- [104] The Crown argues that under the Morin framework the time period from February 29, 2014 until Mr. Zipp's first appearance of counsel should be considered either an inherent time requirement to find new counsel or defence delay. The Crown also says that as of August 18, 2014 when Mr. Zipp begins acting as counsel for J.H.T. 6 to 8 months for defence preparation is reasonable and should be considered as an inherent time requirement. The Crown further argues that the inherent time requirements for the case start on April 1, 2015 (the date of the first pre-trial application) and continue to run until the end of August 25, 2015.
- [105] The Crown argues that there is no delay under the Jordan or the Morin framework for this stage.
- [106] The Crown notes that Stage 5 is a period of approximately 8 months which runs from the time after the second trial was adjourned until May 4, 2016 when Mr. J.H.T.'s Rowbotham application was denied.
- [107] The Crown notes that J.H.T. did not file an affidavit in support of that application until January 20, 2016. The Crown argues that this application is an exceptional circumstance as defined in Jordan. As such the Crown argues that there is no delay for this stage.
- [108] The Crown further argues that the entirety of Stage 5 should be considered defence delay pursuant to the framework in Morin.
- [109] The Crown characterizes Stage 6 as May 5, 2016 until January 3, 2017 which is the first day for the commencement of the trial.

- [110] The Crown notes that the trial is scheduled to last for 8 weeks.
- [111] The Crown argues that even the most vigilant of systems time is required to accommodate an 8 week trial. Since the fixing of the third trial date there has been pre-trial motions and applications heard.
- [112] The Crown notes that from May 5, 2016 to the first day scheduled for the trial is approximately 8 months.
- [113] The Crown argues that the entirety of the delay for this stage should be deducted as an exceptional circumstance under the Jordan framework.
- [114] The Crown further argues that under the Morin guideline the 8 months to set the trial should be attributed to institutional delay.
- [115] Ultimately the Crown argues that under the Jordan framework there is 15 months of delay which is below the presumptive ceiling. The Crown further argues that there is no delay pursuant to the Morin guidelines.
- [116] The Crown submits that J.H.T.'s applications should be dismissed.

Decision

- [117] J.H.T. seeks a judicial stay of proceedings based on violations of his section 7, 11(b), 11(d) and 12 Charter rights. J.H.T. argues that these violations have caused him prejudice and impact his ability to have a fair trial.

- [118] Section 7 of the Charter reads as follows:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

- [119] Section 11(b) & (d) of the Charter reads as follows:

Any person charged with an offence has the right

- (b) to be tried within a reasonable time;
- (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

- [120] Section 12 of the Charter reads as follows:

Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

- [121] J.H.T.'s arguments deal with pre-charge delay as well as what he characterized as serious misconduct on the part of the RCMP in the pre-charge period. His arguments also deal with post-charge delay and a breach of his section 11(b) right to have a trial within a reasonable time.

Pre-Charge Delay

- [122] With regard to the pre-charge time period J.H.T. argues that it took too long from the time the initial complaint was made until the charges were laid. He also argues that because he was suspended from work as a result of a letter sent by the RCMP to his employer and because the RCMP said the two complainants were 13 years of age in the press release he has been deprived of his right to life, liberty and security of the person as well as subjected to cruel and unusual punishment.
- [123] The evidence discloses that the RCMP interviewed and gathered documentary evidence between the initial complaint being made on September 2, 2009 up until February 17, 2010. J.H.T. views this period of time as reasonable however he says from February 17, 2010 until January 11, 2011 which is a period of approximately 11 months was unreasonable. Nothing happened in terms of investigative steps. J.H.T. complains that he was left in the dark about the charges against him until particulars were provided to his lawyer on February 15, 2011.
- [124] J.H.T. also complains that the press release was inaccurate because S.P. was 14 years of age at the time of the alleged incident and the evidence discloses that. Also had the police conducted a proper investigation they would have known that J.C. was mistaken when she said the incidents occurred when she was 13. J.H.T. argues that because the age of consent was 14 years at that time the public reading the various news articles would assume that he was a pedophile.
- [125] J.H.T. conceded during this hearing that the RCMP were justified in sending a letter to his employer regarding the offences. Cst. Reddekop testified that he interviewed a number of witnesses and then had to process the information as well as review statements before sending his file to the Crown for charge approval.
- [126] Cst. Reddekop also testified that he did not have any evidence that S.P. was 13 years of age at the time of the alleged incident however he was told directly by J.C. that she was 13. I have no evidence as to any difference the public may have perceived in reading a newspaper article alleging that the complainants were 13 as opposed to 14 years old. Quite frankly I cannot see how it would have made any difference whether the complainants were 13 or 14 years of age given that the allegations are of a teacher being charged with sexually related offenses against former students.
- [127] I have no doubt that this entire proceeding has been very stressful for J.H.T. and his family. I also have no doubt that the pre-charge period was particularly stressful for J.H.T. as he was suspended from work albeit with pay and was left in limbo for a period of time. However the circumstances surrounding the RCMP investigation including the press release and the letter to the Surrey School District do not amount to cruel and unusual punishment or a deprivation of J.H.T.'s life, liberty or security of person.

[128] The pre-charge period is not counted in determining the length of delay though it may in some circumstances have an influence on the overall determination as to whether post-charge delay is unreasonable.

[129] There is nothing in the actions of the RCMP in the investigation of this matter which would justify a judicial stay of proceedings. J.H.T.'s application in this regard is dismissed.

Post-Charge Delay

[130] With regard to the section 11(b) of the Charter argument J.H.T. relies on the decision in Jordan which changed the framework for determining whether delay in criminal proceedings is unreasonable.

[131] The decision in Jordan addresses the concerns of the Supreme Court of Canada about the culture of complacency which exists in the criminal justice system and provides a new framework for s. 11(b). The new framework is summarized at para. 105 as follows:

- (1) There is a ceiling beyond which delay becomes presumptively unreasonable. 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). Defence delay does not count towards the presumptive ceiling.
- (2) Once the presumptive ceiling is exceeded, the burden shifts to the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. Exceptional circumstances lie outside the Crown's control in that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) they cannot reasonably be remedied. If the exceptional circumstance relates to a discrete event, the delay reasonably attributable to that event is subtracted. If the exceptional circumstance arises from the case's complexity, the delay is reasonable.
- (3) Below the presumptive ceiling, in clear cases, the defence may show that the delay is unreasonable. To do so, the defence must establish two things: (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.
- (5) For cases currently in the system, the framework must be applied flexibly and contextually, with due sensitivity to the parties' reliance on the previous state of the law.

[132] The information in this matter was laid on January 11, 2011 and the anticipated completion date of the trial is March 2, 2017. This is a delay of approximately 73 1/2 months. This delay is well over the presumptive ceiling in Jordan.

[133] The next step in the analysis is to determine if there was any defence delay. In that regard the court in Jordan said the following at paras. 61-63:

- [61] Defence delay has two components. The first is delay waived by the defence (Askov, at pp. 1228-29; Morin, at pp. 790-91). Waiver can be explicit or implicit, but in either case, it must be clear and unequivocal. The accused must have full knowledge of his or her rights, as well as the effect waiver will have on those rights. However, as in the past, "[i]n considering the issue of 'waiver' in the context of s. 11 (b), it must be remembered that it is not the right itself which is being waived, but merely the inclusion of specific periods in the overall assessment of reasonableness" (R. v. Conway, [1989] 1 S.C.R. 1659, per L'Heureux-Dube J., at p. 1686).
- [62] Accused persons sometimes, either before or during their preliminary hearing, wish to re-elect from a superior court trial to a provincial court trial for legitimate reasons. To do so, the Crown's consent must be obtained (Criminal Code, R.S.C. 1985, c. C-46, s. 561). Of course, it would generally be open to the Crown to ask the accused to waive the delay stemming from the re-election as a condition of its consent.
- [63] The second component of defence delay is caused solely by the conduct of the defence. This kind of defence delay comprises "those situations where the accused's acts either directly caused the delay... or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial" (Askov, at pp. 1227-28). Deliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests, are the most straightforward examples of defence delay. Trial judges should generally dismiss such applications and requests the moment it becomes apparent they are frivolous.
- [134] J.H.T. deposed in his affidavit made on October 20, 2016 that he did not waive any periods of delay. Upon a review of the transcripts that have been provided there is not any clear and unequivocal waivers by J.H.T. of any of the delay.
- [135] There are however periods of delay which were directly caused by the acts of the defence. I agree with the Crown that 2 months should be deducted in relationship to J.H.T.'s re-election to be tried by a Supreme Court Judge and Jury on May 9, 2012.
- [136] The mistrial was not caused in any manner by J.H.T. and as a result of the mistrial this matter was further delayed until October 4, 2013 when a new trial judge was appointed.
- [137] The delay from the laying of the information on January 11, 2011 until October 4, 2013 is approximately 32 1/2 months less 2 months for defence delay which leaves 30 1/2 months of delay.
- [138] Between October 4, 2013 and February 28, 2014 when I pronounced reasons denying J.H.T.'s change of venue application I find that this period of delay was caused by J.H.T. This delay is approximately 4 1/2 months.

- [139] From February 28, 2014 until September 8, 2014 when the second trial date was fixed two events occurred. First a local Prince George newspaper printed an article regarding J.H.T. in breach of a publication ban which resulted in an order on April 11, 2014 changing the venue of this trial to Quesnel. Also, J.H.T.'s lawyer Ms. Gaffar was removed as counsel of record.
- [140] The delay from February 20, 2014 until April 11, 2014 in my view is not attributable to J.H.T., however, the remaining delay is caused by the defence as his lawyer was no longer able to act for him. The defence delay for this period of time is five months.
- [141] The time from September 8, 2014 when the second trial date is fixed until August 18, 2015 when Mr. Zipp applies to be removed as counsel of record is not attributable to the defence. During this period of time the matter was set for trial and progressed in a reasonable fashion.
- [142] From August 18, 2015 when Mr. Zipp applies to be removed as counsel of record until May 4, 2016 when I pronounced reasons denying J.H.T.'s Rowbotham application is delay attributable to the defence. This delay is approximately 11 1/2 months.
- [143] The period from May 4, 2016 until the anticipated end of the trial on March 2, 2017 is not attributable to the defence.
- [144] The total amount of defence delay is approximately 23 months. This leaves approximately 50 months of delay which vastly exceeds the presumptive ceiling set in Jordan. The delay in this matter is presumptively unreasonable.
- [145] The Crown has the onus to show that the delay is not unreasonable based on exceptional circumstances which includes the particular complexity of the trial and discrete exceptional circumstances.
- [146] The court in Jordan said the following with regard to the complexity of a trial at paras. 77-79:
- [77] As indicated, exceptional circumstances also cover a second category, namely, cases that are particularly complex. This too requires elaboration. Particularly complex cases are cases that, because of the nature of the evidence or the nature of the issues, require an inordinate amount of trial or preparation time such that the delay is justified. As for the nature of the evidence, hallmarks of particularly complex cases include voluminous disclosure, a large number of witnesses, significant requirements for expert evidence, and charges covering a long period of time. Particularly complex cases arising from the nature of the issues may be characterized by, among other things, a large number of charges and pre-trial applications; novel or complicated legal issues; and a large number of significant issues in dispute. Proceeding jointly against multiple co-accused, so long as it is in the interest of justice to do so, may also impact the complexity of the case.

- [78] A typical murder trial will not usually be sufficiently complex to comprise an exceptional circumstance. However, if an inordinate amount of trial or preparation time is needed as a result of the nature of the evidence or the issues such that the time the case has taken is justified, the complexity of the case will qualify as presenting an exceptional circumstance.
- [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....
- [147] In the case at bar there is no evidence from the Crown that they developed and followed a concrete plan to minimize the delay occasioned by any complexity of this trial. The Crown has failed to show that the complexity of the trial is an exceptional circumstance because they have not shown that the circumstances were outside of their control.
- [148] The case at bar involves allegations of historic sexual abuse. There are a number of witnesses and three complainants. The trial is set for approximately 8 weeks in length. There is not a significant requirement for expert evidence nor are there any novel or particularly complicated legal issues or even a large number of significant issues in dispute. The trier of fact will be faced with the task of a credibility assessment. This trial is not so complex to justify more than 30 months to complete the trial or to qualify as an exceptional circumstance. There were pre-trial applications heard after the first trial to determine whether or not rulings made at the first trial would be binding on the subsequent trial pursuant to section 653.1 of the Criminal Code. These pre-trial applications did not add to the complexity of this matter.
- [149] The Crown also argues that there are discrete exceptional circumstances which lie outside their control that should be deducted from any delay in this matter.
- [150] In Jordan the court said the following about discrete exceptional circumstances at para. 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.

[151] The Crown argues that the discrete exceptional circumstances in this case are the mistrial, both of the change of venue applications, and the two occasions that J.H.T.'s lawyers were removed as counsel of record. The Crown also points to the delay caused by J.H.T.'s Rowbotham application.

[152] I have already deducted as defence delay the appropriate time periods attributable to J.H.T.'s change of venue application, his Rowbotham application and the delay caused by both of his lawyers being removed as counsel of record. I agree with the Crown that the second change of venue application which came about as a result of the newspaper article being published in breach of a publication ban was out of the control the Crown and is an exceptional circumstance. I would deduct an additional two months for the delay caused by the second change of venue application resulting in 48 months of delay.

[153] With regard to the delay caused by the mistrial I do not accept that this was an exceptional circumstance which was unforeseeable or unavoidable. Certainly mistrial applications can be unforeseeable.

[154] In *R. v. Khan* the court in attributing the delay caused by a mistrial as neutral or to inherent time requirements stated the following at para. 63:

This court has held that where a mistrial results from unforeseeable events not attributable to the Crown, the resulting delay should be treated as neutral...

[Emphasis added]

[155] In my view the mistrial in this case was attributable to the Crown for the following reasons.

[156] The mistrial was caused because J.C. stated that J.H.T. used to beat her up when she attended Reid College. This was inadmissible discreditable conduct evidence.

[157] J.C. had stated the same thing three times prior to the first trial during the course of this investigation and at the preliminary Inquiry.

[158] On September 3, 2009 J.C. while giving her statement to Sheila Cessford, an investigator for the British Columbia College of Teachers, said the following starting at page 13 of that statement:

JC: I went to college at Reid College in Portland, Oregon. And it's a four-year college, it's a different word in the United States than it is in Canada but, my parents drove me from Prince George to Portland and when we found my dorm room, on the door was a note saying J. J. call J. and that is how I found out he followed me. But that summer before College, I was thinking, okay this is my natural break. I didn't, I didn't have the strength to do it on my own, but I thought this might be my natural break to get away from him but when he followed me I just gave into it.

[159] J.C. went on to say the following in regard to her time at Reid College at page 14 of her statement:

JC: Definitely sexual as always and also it became violent.

SC: How did it become violent?

JC: It became violent pretty, pretty quickly and it became violent because I started to notice other boys and other boys were showing interest in me and he got very, very jealous.

SC: And when you say he became violent, what did he do?

JC: He threw me against the wall and my neighbour called the police, the police came. He pushed me around things like that. I think he was still involved with R. R. was at a college in Washington State playing basketball and sometimes he went up to see her.

[160] On October 27, 2009 J.C. gave a statement to Cst. Cormier of the RCMP. J.C. said the following beginning at line 602 of her statement:

There was a lot of physical violence that didn't start in high school years but it definitely happened during Reid College years...

[161] J.C. testified at the preliminary inquiry in this matter on June 5, 2012. Beginning at page 51 of the preliminary inquiry transcript J.C. testified to the following:

Q. Okay. And how was the relationship?

A. The-- the relationship was very volatile at that point. The first two years at Reid were-- there was a lot of drama and he was-- you know, had part-time jobs here and there, he wasn't making much money so when he lived with me he could save a little bit of money. But one thing that started to happen was-- I started to meet people at school and found out that there are people that kind of wanted to be with me and talk to me and some of them were boys. And-- and guys didn't really pay attention to me before, but suddenly for the first time they were wanting to talk to me and J. was with me around campus walking around so they were aware of him, but I was aware that-- I think some of the guys liked me and when-- here or there, they would ask to do things together, I would go and do things with them, social things, and sometimes it was a group setting, sometimes it was just with one guy. But there was one guy in particular, his name was Mark.

Q. Well, rather than get into specifics

A. Okay.

Q. once you started to branch out, let's call it that, how-- did that affect things with J.H.T?

A. Yes. This-- we-- we fought a lot during that time and he was very jealous and quite violent as well when I would do things-- or go out with boys.

[162] On June 26, 2013 J.C., a witness for the Crown, testified at the first trial of this matter. The following exchange occurred between J.C., the Crown, the defence counsel and the court which can be found beginning at page 23 the transcript:

Q. Now, the relationship that you had with him, you've told us about a couple of years during college, was it a happy relationship?

A. The relationship I had with J.H.T. during those two years was very different. It was not as happy, no.

Q. It was not happy?

Ms. Gaffar: My Lord, I have an issue I wish to address in front of the jury, please?

The Court: Thank you. Ladies and gentlemen.

Ms. Gaffar: Sorry, in the absence of the jury.

The Court: Yes, no, I appreciate what you meant.

(Jury Out)

(Witness Stood Down)

The Court: Go ahead, Ms. Gaffar.

Ms. Gaffar: My Lord, I'd like to know the purpose for which this evidence is being led, and the evidence that the Crown seeks to elicit from the witness. I'm concerned that evidence may be elicited from this witness that is inadmissible as it goes to discreditable conduct. And I would like to know that in advance, so that we don't have a problem with the jury hearing evidence it should not.

The Court: Where are we going, Ms. Keyes?

Ms. Keyes: I was-- the next question was, did the relationship end? And it's merely as an explanation for how, towards the end, it wasn't happy. I'm not going to elicit any details about what went on.

The Court: There's no behavior?

Ms. Keyes: No.

Ms. Gaffar: Thank you, My Lord.

[163] The next question by the Crown was not "did the relationship end"?

[164] At that point J.C. and the jury were brought back in and the following questioning occurred:

Q. Now, J.C., you mentioned the relationship was unhappy.

A. Yes.

Q. And did it and at some point?

A. Yes, it ended at-- after I finished my second year at Reid College, but I didn't get to say that he used to beat me up at Reid College.

- [165] Ultimately the trial judge on the first trial declared a mistrial. He clearly stated that the Crown did not deliberately lead this evidence. He did not however say it was not the Crown's fault as that was never addressed. The issue for this application is not to apportion blame but to attribute delay.
- [166] There is no evidence on this application that the Crown spoke to J.C. after she was stood down from giving her evidence in relationship to the violence at Reid College.
- [167] The Crown who was questioning J.C. at the trial was the same Crown who questioned J.C. at the preliminary inquiry and had in her possession J.C.'s previous statements
- [168] J.C. in her statements and during her preliminary inquiry testimony gave evidence of physical violence that she alleged J.H.T. perpetrated on her while she was at Reid College. J.H.T.'s lawyer objected and alerted the court and specifically the Crown to her concerns about discreditable conduct evidence being given by J.C.
- [169] In Jordan the following definition of exceptional circumstances was given at para. 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 any further hurdle of being rare or entirely uncommon.
- [170] J.C. was a Crown witness being questioned by the Crown during her direct examination at trial in front of the jury in an area where she had on three previous occasions stated that J.H.T. physically abused her. There is no evidence that the Crown took any steps before J.C. gave her testimony on June 26, 2013 or after J.H.T.'s lawyer had alerted the court and the Crown to this concern to caution J.C.
- [171] This is not a situation where J.C. for the first time blurted out inadmissible evidence. J.C. was in the Crown's control at the time she gave her evidence during her direct examination. The Crown had to have been aware that J.C. had previously stated in relationship to her years at Reid College that J.H.T. was violent towards her. Despite the concern by J.H.T.'s lawyer the Crown after discussion with the court asked J.C. "Now, J.C. you mentioned the relationship was unhappy".
- [172] Given the manner in which J.C. gave her statements and her evidence at the preliminary inquiry it was reasonably foreseeable that the question about the unhappy relationship would elicit the answer that it did.
- [173] In my view given all of the circumstances surrounding the evidence of J.C. it was reasonably foreseeable that J.C. would mention the violence that she had previously alleged J.H.T. perpetrated on her. Things can happen very quickly during a trial however J.C.'s inadmissible evidence was reasonably foreseeable and avoidable.

- [174] For the above noted reasons I do not find that the mistrial was an exceptional circumstance as described in Jordan and there will be no deduction for the delay caused by the mistrial which I find is attributable to the actions of the Crown and is not an exceptional circumstance.
- [175] At this stage of the analysis I find that there has been 48 months of delay which exceeds the presumptive ceiling of 30 months.
- [176] Given J.H.T. was charged prior to the decision in Jordan I must consider the parties' reliance on the previous state of the law. The guidelines set out in Morin were the previous state of the law when J.H.T. was initially charged.
- [177] The Crown has not provided any specific evidence that they relied on the guidelines as set out in Morin with regard to the issue of delay in this matter. I will however consider the Morin guidelines.
- [178] In Morin the court summarizes the factors to be considered in a delay application at para. 31

The general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which this section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay. As I noted in Smith, supra, "[i]t is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable?" (p.1131). While the Court has at times indicated otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be listed as follows:

1. the length of the delay;
2. waiver of time periods;
3. the reason for the delay, including
 - (a) inherent time requirements of the case,
 - (b) actions of the accused,
 - (c) actions of the Crown:
 - (d) limits on institutional resources, and [page 788]
 - (e) other reasons for delay; and
4. prejudice to the accused.

- [179] The length of the delay in this matter has already been established as approximately 73 1/2 months from the time the information was laid until the anticipated completion date of the trial.

- [180] As I have already found J.H.T. did not waive any of the delay in this matter.
- [181] The reasons for the delay are multifactorial which primarily revolve around actions of the accused and the Crown.
- [182] There are also inherent time requirements in terms of preparing the case and institutional delay.
- [183] Again starting from the period when the information was laid on January 11, 2011 until October 4, 2013 when a new judge was appointed as a result of the mistrial is a period of 32 1/2 months. During that period of time two months of delay is attributable to the defence as a result of their re-election which would result in 30 1/2 months of delay. The delay from June 26, 2013 until October 4, 2013 is as a result of the crown's actions. The rest of the delay in this time frame is as a result of inherent time requirements and institutional delay.
- [184] Even assuming that for the time period from October 4, 2013 until May 5, 2016 all of the delay is attributable to the defence because of the change of venue applications, the change of defence lawyers on two occasions, the Rowbotham application as well as inherent time requirements such as for Mr. Zipp to prepare for the trial the resulting delay to May 5, 2016 is 30 1/2 months.
- [185] The Crown has conceded in their argument that the period from May 5, 2016 until the commencement of the trial on January 3, 2017 which is a period of approximately 8 months is attributable to institutional delay.
- [186] That would mean that for the period from January 11, 2011 until October 4, 2013 after deducting two months for defence delay would result in 30 1/2 months of delay adding to that the eight months for the period from May 5, 2016 on January 3, 2017 would result in delay of 38 1/2 months.
- [187] In my view the period from May 5, 2016 should actually be calculated to the anticipated completion date of the trial which is March 2, 2017 which would result in 10 months of delay or 40 1/2 months of delay not attributable to the defence.
- [188] The delay from May 5, 2016 until March 2, 2017 is properly attributed to the Crown. But for the mistrial there would have been no need to set this trial date. The Crown also changed counsel during this period of time.
- [189] In Morin the court found that it was appropriate to suggest a period of institutional delay of between 8 to 10 months as a guide to provincial court and an additional 6 to 8 months after committal to trial.

- [190] The Crown has argued that for the period from the laying of the information until the mistrial given the nature of the trial 6 to 8 months would be reasonable for inherent time requirements. In addition the Crown argues that from the date of the laying of information until J.H.T.'s first appearance which is approximately 2 months this period should be considered as an intake period.
- [191] In my view 18 months for institutional delay and eight months for inherent time requirements given the nature of the trial and the institutional constraints in the Prince George area is reasonable.
- [192] It would be reasonable for the trial to have concluded in 26 months. The 40 1/2 months of delay far exceeds what is reasonable under the Morin guidelines. Given the lengthy period of delay under the Morin guidelines prejudice can be inferred as a result of the delay to J.H.T. However, there are also concrete examples of prejudice to J.H.T. He was suspended from his job and the death of one witness.
- [193] The Crown has not satisfied the burden of establishing that the delay in this case was reasonable based on the previous legal framework in Morin.
- [194] J.H.T. has established that his right to be tried in a reasonable time has been infringed.

Conclusion

- [195] I direct that a stay of proceeding be entered in these proceedings.

"The Honourable Mr. Justice Tindale"

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