

CANADA / JUDGMENT

R. v. J.S.H.

2024 BCSC 690

COURT

Supreme Court of British Columbia

DECIDED

8 April 2024

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2024 BCSC 690 R. v. J.S.H.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. J.S.H. ,

2024 BCSC 690

Date: 20240408

Docket: 36814-2

Registry: Fort St. John

Rex

v.

J.S.H.

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Before: The Honourable Mr. Justice Riley

Oral Reasons for Judgment

Re: Unreasonable Delay

Counsel for the Crown:

J.A. Michaels

Counsel for the Accused:

M.M. Hajivandi

Place and Date of Hearing:

Prince George, B.C.

March 26-28, 2024

Place and Date of Judgment:

Prince George, B.C.

April 8, 2024

Introduction

[1] The accused J.S.H. is charged with sexual assault, sexual touching in relation to a person under the age of 16, sexual interference with a person under the age of 16, and uttering a threat to cause death or bodily harm. The indictment alleges that Mr. H committed these offences some time between 1 January 2018 and 31 December 2019, when the complainant was 12 or 13 years old. The charges were laid on 27 December 2020, and the trial is scheduled for six days, commencing on 15 April 2024. Against this backdrop, Mr. H applies for a judicial stay of proceedings under s. 24(1) of the Canadian Charter of Rights and Freedoms, based on an alleged breach of the right to be tried within a reasonable time as guaranteed under s. 11(b) of the Charter.

Facts and Procedural History

[2] I would summarize the procedural history of the case as follows:

- (a) On 27 December 2020, charges were laid against Mr. H in the Provincial Court of British Columbia.
- (b) On 28 December 2020, Mr. H appeared in Provincial Court, in custody, and was released on conditions.
- (c) At a Provincial Court appearance on 25 January 2021, Mr. Waddington appeared as counsel for Mr. H. He requested a six-week adjournment, to obtain and review the disclosure. Crown counsel questioned why the defence needed that long and then said, "I'm fine with it so long as it is a defence request". Mr. Waddington confirmed that it was a "defence request" but added that it was to obtain and review the "particulars" and six weeks was not an "excessive delay" for that purpose. The presiding Judicial Justice granted the adjournment.
- (d) On 2 February 2021, the Crown delivered the initial disclosure package to Mr. Waddington. This disclosure included a narrative Report to Crown Counsel summarizing (i) the complainant's statement alleging that Mr. H had sexually assaulted her; (ii) a statement from the complainant's mother Ms. H; and (iii) oral statements made to the investigating officer by the complainant's brother and father.

- (e) At a Provincial Court appearance on 8 March 2021, defence counsel Mr. Waddington appeared for Mr. H and requested a three-week adjournment to obtain instructions. The adjournment was granted.
- (f) On 29 March 2021, Mr. Waddington again appeared in court for Mr. H and requested a three-week adjournment. Crown counsel indicated that the Crown was ready to proceed. The presiding Judicial Justice granted the defence request and adjourned the matter.
- (g) On 19 April 2021, Mr. Waddington once again appeared in court for Mr. H. His request for a further two-week adjournment was granted.
- (h) On 3 May 2021, Mr. Waddington appeared in court and requested yet another two-week adjournment. The Judicial Justice granted the adjournment.
- (i) On 17 May 2021, Mr. H appeared in court without counsel. He was under the impression that Mr. Waddington had withdrawn. The presiding Provincial Court Judge indicated that Mr. Waddington would need to appear in court and make a formal application to withdraw as counsel of record. The matter was adjourned for two weeks to facilitate that step.
- (j) On 31 May 2021, Mr. H and Mr. Waddington appeared in court. Mr. Waddington's request to withdraw as counsel was granted. Mr. H then requested a two-week adjournment to prepare and file a Rowbotham application. The Crown noted that the case was already 150 days old. The presiding Provincial Court Judge indicated that he was going to hold Mr. H's "feet to the fire". He granted an adjournment, on the expectation that "something's going to happen" on the next date.
- (k) At the next appearance on 14 June 2021, Mr. H told the presiding Provincial Court Judge that he had completed and submitted his Rowbotham application, but that he left something out and he would re-submit it right away. The Provincial Court Judge adjourned the matter for one week.
- (l) At a court appearance on 21 June 2021, Mr. H told the Provincial Court Judge that he had completed and submitted his Rowbotham application. Crown counsel indicated that the Legal Services Branch of the Attorney General would require four weeks to consider the application. The Judge adjourned the matter to 19 July 2021, with the expectation that the Rowbotham application would be dealt with in some fashion at that point in time.
- (m) On 19 July 2021, Mr. Rivard appeared in court as counsel of record for Mr. H. Mr. Rivard indicated that he had instructions from Mr. H to abandon the Rowbotham application and set the matter for trial. Counsel's time estimate for the trial was two days. The Provincial Court Judge adjourned the matter to the Judicial Case Manager ("JCM")'s office to set a trial date.
- (n) On 22 July 2021, Mr. H's case was before a JCM in the Provincial Court, but there had been no election as to mode of trial, so the matter was adjourned to 26 July 2021, for Mr. H to elect his mode of trial.

- (o) On 26 July 2021, Mr. Rivard appeared in court as counsel for Mr. H. Mr. Rivard waived reading of the charges and elected trial in Provincial Court. The matter was once again adjourned to the JCM for a pre-trial conference and to fix a date for trial.
- (p) On 5 August 2021, the JCM scheduled a pre-trial conference for 24 September 2021.
- (q) On 9 September 2021, the Crown delivered the first supplementary disclosure package to Mr. Rivard. This package included transcripts and video recordings of the statements given by the complainant, the complainant's mother, and the complainant's brother.
- (r) On 24 September 2021, there was a pre-trial conference before a Provincial Court Judge. The matter was adjourned to the JCM's office to fix a trial date.
- (s) On 14 October 2021, the JCM scheduled a two-day trial, commencing on 29 June 2022. The trial scheduling memo indicates that earlier trial dates were offered for a two-day trial commencing on 26 May 2022, but those dates were declined by Mr. Rivard.
- (t) On 27 April 2022, Mr. Hajivandi sent an email to the Crown's office indicating that his firm, Duncan and Associates, had been retained as counsel for Mr. H. The email indicated that he would be applying to adjourn the trial currently set for 29 June 2022, and that Mr. H "will be waiving delay caused by this adjournment". Crown counsel responded indicating that the Crown would not oppose the adjournment "if you waive delay".
- (u) At an appearance in Provincial Court on 29 April 2022, Mr. Hajivandi's associate Ms. John spoke to an adjournment request on behalf of Mr. H. The basis for the request was that Mr. H had recently retained Mr. Duncan (of Mr. Hajivandi's firm), who was seeking an adjournment of the 29 June 2022 trial date, to review the disclosure and obtain instructions. The Crown asked for confirmation that defence was waiving delay, and Ms. John responded in the affirmative. The presiding Provincial Court Judge adjourned the trial on that basis.
- (v) On 15 August 2022, the parties had another pre-trial conference. Emails in the record reflect an agreement that two sets of dates would be arranged, with the first set of dates reserved for pre-trial applications and the second set of dates for the trial. The matter was then adjourned for the JCM's office to set the dates.
- (w) On 25 August 2022, the JCM scheduled (i) pre-trial applications for three days commencing 25 April 2023, and (ii) trial dates for four consecutive days commencing 12 September 2023. An associated trial scheduling memo indicates that defence counsel was not available for earlier hearing dates commencing on 23 February 2023 and 8 March 2023.
- (x) On 8 February 2023, counsel for Mr. H filed a written notice of re-election pursuant to s. 536.2 of the Criminal Code, re-electing trial by Judge alone in Supreme Court.

- (y) In an email exchange that concluded on 24 February 2023, the Crown and the defence agreed that the three days originally set for pre-trial applications commencing on 25 April 2023 could be converted to preliminary inquiry dates. This was confirmed on the record in court on 10 March 2023. The defence wanted certain witnesses to be called at the preliminary inquiry. The Crown agreed to obtain subpoenas for witnesses requested by the defence. The time estimate for the preliminary inquiry was revised downward to two days.
- (z) In a subsequent email exchange between 12 March 2023 and 23 March 2023, the Crown and the defence reached an agreement on which witnesses would be called at the preliminary inquiry.

(aa) The preliminary inquiry began on 25 April 2023 and concluded on 26 April 2023. In submissions before me, both the Crown and the defence took the position that the preliminary inquiry did not run smoothly. There were disputes about whether the Crown had the right to a focus hearing, whether the defence had an obligation to file a statement of issues, whether certain disclosure had been made, whether the complainant's video recorded statement could be played, and the scope of permissible cross-examination of witnesses by defence counsel. Each side blames the other for the manner in which the hearing proceeded. In any event, the complainant's video recorded statement was admitted and she was cross-examined. The defence also cross-examined several other witnesses. At the conclusion of the hearing, the presiding Provincial Court Judge, Judge Reeves, ordered Mr. H to stand trial and directed him to attend the Supreme Court in Fort St. John on 29 May 2023.

(bb) The first appearance in this Court was on 29 May 2023. Mr. Catona, appearing as agent for Mr. Hajivandi on behalf of the accused, indicated that Mr. Hajivandi was requesting an adjournment to the next assize on 17 July 2023, for the stated purpose of having discussions with the Crown prior to scheduling a pre-trial conference. Crown counsel, Ms. Michaels, indicated that the matter was already 857 days old, no further discussions were necessary prior to fixing dates, and the Crown had already provided its available dates. The Crown said that if an adjournment of the fix date were granted, it should be considered a defence adjournment, that the defence provide notice of any pre-trial applications, and that pre-trial conference and trial dates be set at the next appearance. The presiding Judge was reluctant to make any "findings of fact", but added that matter needed to move forward "with some urgency". He adjourned the matter to 12 June 2023, for the purpose of setting dates for a pre-trial conference, pre-trial applications, and the trial.

(cc) When the case was called in court on 12 June 2023, Crown counsel appeared, but no one appeared for the defence. Crown counsel Ms. Michaels advised that Mr. Hajivandi was taking the position that the court had no jurisdiction because an indictment had not been filed when the matter was first spoken to in Supreme Court on 29 May 2023. The Crown's response was that Mr. H had been ordered to stand trial in the Supreme Court, the court had jurisdiction, the matter was dated, Mr. Hajivandi was counsel and was expected to appear on behalf of Mr. H, and for all of these reasons a warrant should be issued for Mr. H's arrest. The presiding Judge indicated that if there were going to be arguments over jurisdiction and the Crown's request for a warrant, the

matter would have to be set down for a hearing on those issues. The Judge adjourned the case to 17 July 2023, which was the next assize in Fort St. John.

(dd) The matter appeared on the court list in Fort St. John for the assize commencing on 17 July 2023. The hearing of the defence's jurisdictional argument and the Crown's request for a warrant was initially set for 18 July 2023 but did not proceed because Crown counsel was ill. The arguments proceeded on 21 July 2023 before Associate Chief Justice Holmes, who reserved judgment until 9 August 2023.

(ee) On 9 August 2023, Holmes A.C.J. gave reasons for judgment, indexed as R. v. J.H., 2023 BCSC 1391. The Associate Chief Justice held that the committal order made by Judge Reeves on 26 April 2023, ordering Mr. H to stand trial in Supreme Court gave this Court jurisdiction. Section 548(2.1) of the Criminal Code gave the Provincial Court Judge the authority to fix the date on which the accused must appear in Supreme Court, and the process by which Provincial Court records are transmitted to the Supreme Court is governed by s. 551 of the Criminal Code. Hence, the absence of an indictment at the time of Mr. H's first appearance on 29 May 2023 did not deprive the Court of jurisdiction. Having reached these conclusions, Holmes A.C.J. directed Mr. H to appear in court, either in person or by counsel, on the next scheduled date, failing which a warrant would be issued for Mr. H's arrest. In her reasons at para. 45, Holmes A.C.J. expressly made no pronouncement as to "responsibility for the delay", but went on to state that "much time has elapsed" since the charges were first laid. She directed both the Crown and defence to make "best efforts" to discuss the required dates and arrange them in advance of the next appearance, subject to the Court's approval.

(ff) The next court appearance was on 14 August 2023, before Justice Tindale, who adjourned the matter to 16 August 2023 for a pre-trial conference.

(gg) A pre-trial conference took place before me on 16 August 2023, and continued on 18 August 2023. In the course of those proceedings, the Court was advised the accused was intending to bring an application under s. 11(b) of the Charter. In view of the delay concerns, I made it clear that the pre-trial applications should be heard in any suitable location where court time could be made available. Crown counsel advised that there was likely to be more court availability for pre-trial applications in Prince George than in Fort St. John. The Crown took the position that the pre-trial applications could be heard in September or October 2023, but defence counsel said he did not have three clear days until March 2024. At the end of the pre-trial conference, (i) the s. 11(b) application was scheduled for three days commencing 25 March 2024, in Prince George, (ii) the defence applications for production and disclosure of various categories of records were scheduled for four days commencing 8 April 2024, in Prince George, and (iii) a further pre-trial conference was set to take place on 29 September 2023, before me or the assigned trial Judge, at which point the trial date would be scheduled. In the interim, the parties were to look for the earliest trial dates in both Prince George and Fort St. John.

(hh) On 23 August 2023, I was assigned as the trial Judge and case management Judge in this matter.

(ii) At the pre-trial conference before me on 29 September 2023, the parties confirmed that the trial had been set for six days, commencing 15 April 2024, in Fort St. John. Crown counsel indicated that there might be earlier available dates for the applications, and asked the Court to canvass with defence counsel whether he was available on any of those dates. Mr. Hajivandi confirmed that he was not. With respect to outstanding disputes regarding the state of disclosure, I directed that (i) the defence was to provide the Crown with a letter by 6 October 2023, setting out any outstanding disclosure demands, (ii) the Crown was to respond in writing by 13 October 2023, and (iii) if the defence was unsatisfied with the response, defence counsel was to file a disclosure application with the Court by no later than 3 November 2023.

(jj) There were further pre-trial conferences or case management conferences before me on 7 November 2023 and 9 February 2024, however the issues discussed at those conferences had to do with filing deadlines for the applications, the requirement to obtain transcripts for the s. 11(b) application, Crown witness accommodation applications, and Mr. H's application for an order under s. 650(2)(b) of the Criminal Code allowing counsel to appear on his behalf at the pre-trial applications. None of these matters had any bearing on the hearing dates or the trial date.

Legal Principles

- [3] The right to trial within a reasonable time as guaranteed by s. 11(b) of the Charter is a matter of importance to all justice system participants, and to the public in general. The ability to provide a fair trial within a reasonable time is one of the hallmarks of a proper functioning justice system in a free and democratic society operating under the rule of law: *R. v. Jordan*, 2016 SCC 27 at paras. 2-3. One can consider the importance of the right to trial within a reasonable time from three different perspectives.
- [4] First, from the accused's perspective, the right to trial within a reasonable time is an "essential part" of the justice system's commitment to treating presumptively innocent accused persons in a manner that protects liberty, security of the person, and fair trial interests: *Jordan* at para. 20.
- [5] Second, victims and their families have an interest in timely trials. Among other things, trial within a reasonable time places victims and witnesses in a position to make the best possible contribution to the process, while limiting the attendant stress, anxiety, and inconvenience: *Jordan* at paras. 22-24.
- [6] Third, from the public's perspective, bringing cases to trial within a reasonable time is "important to maintaining overall public confidence" in the justice system: *Jordan* at para. 25. Lengthy delays undermine public confidence in the justice system. Moreover, the goals of efficiency and justice are interconnected, and in this regard "timely trials further the interests of justice": *Jordan* at para. 28.

- [7] In an effort to refocus the s. 11(b) analysis on these interests, the majority in Jordan established a new framework for the consideration of s. 11(b) claims. The focal point of this new framework was the establishment of ceilings beyond which delay will be considered presumptively unreasonable. For trials in provincial court, the presumptive ceiling was set at 18 months. For trials in superior court, the presumptive ceiling was set at 30 months: Jordan at paras. 46 and 49.
- [8] The Jordan ceilings are not aspirational targets, but rather, they represent the point at which delay becomes presumptively unreasonable. Compelling, case-specific factors remain relevant for assessing the overall delay for cases both above and below the presumptive ceiling: Jordan at para. 56.
- [9] Where delay exceeds the relevant ceiling, it is presumed to be unreasonable and the burden will fall on the Crown to rebut that presumption. To do so, the Crown must establish exceptional circumstances. In the absence of such exceptional circumstances, the right to trial within a reasonable time has been violated and the court must issue a judicial stay of proceedings: Jordan at para. 47.
- [10] Where the delay does not exceed the presumptive ceiling, the analysis is not necessarily complete. For a case involving delay under the ceiling, the onus is on the accused to show unreasonable delay within the meaning of s. 11(b). To do so, the accused must show (i) that the defence took meaningful steps reflecting a sustained effort to expedite the proceedings; and (ii) that the case took markedly longer than it reasonably should have: Jordan at paras. 48 and 82. This analysis is not based on a mechanical examination of the minutiae of the proceedings, but rather on a "bird's-eye" assessment of the case: Jordan at para. 91.
- [11] To go back a step, there is one other important aspect of the analytical framework set out in Jordan. It has to do with the calculation of delay. For s. 11(b) purposes, the delay in issue will be the total delay from the date the charges are laid until the completion of the trial, less any delay that is caused solely by the accused. This is referred to as defence delay. As the majority stated quite simply in Jordan at para. 60, "delay attributable to the defence must be subtracted".
- [12] Defence delay can be broken down into two components. The first is delay that is waived by the accused. The second is delay caused "solely by the conduct of the defence": Jordan at paras. 61-67. I will briefly review the law with respect to each of these two components or types of defence delay.
- [13] Dealing firstly with waiver, the majority in Jordan affirmed at para. 61 that waiver of delay must be clear and unequivocal and requires full knowledge of the right and the effect of waiving it. In the context of s. 11(b), it is not the right itself that is waived but rather the inclusion of specific time periods in the determination of whether the overall delay is unreasonable. Subsequent case law has confirmed the pre-Jordan principle that waiver can be either express or implied, but mere silence or inaction, without more, will not be enough to establish a waiver of delay: R. v. J.F., 2022 SCC 17 at para. 47, citing R. v. Askov, [1990] 2

S.C.R. 1199, 1990 CanLII 45 at paras. 1228-29.

- [14] The second broad category of defence delay contemplates periods of time that are not waived by the defence, but rather, delay that is caused solely by the conduct of the defence. This includes deliberate tactics intended to cause delay, and actions that have the effect of causing delay: *R. v. Cody*, 2017 SCC 31 at paras. 30-32.
- [15] The majority in *Jordan* gave several examples of defence delay. The most obvious example is delay that is the product of "deliberate and calculated defence tactics aimed at causing delay". Conduct of this sort includes bringing frivolous applications or making frivolous requests: *Jordan* at para. 63.
- [16] A second example of defence delay arises where the court and the Crown are ready to proceed to trial but the defence is not. For defence unavailability to count as defence delay, the evidence must establish that the court and the Crown were both available for a particular date, but the defence was not: *Jordan* at para. 64.
- [17] The examples of defence delay discussed in *Jordan* were just that, examples. It remains open to trial judges to identify other defence actions or conduct that is the sole and direct cause of delay: *Jordan* at para. 64.
- [18] Not all decisions or actions taken by the defence will be found to create defence delay for the purposes of s. 11(b). Actions taken to legitimately "respond to the charges" do not give rise to defence delay: *Jordan* at para. 65. Thus, for example, the first available dates for a particular step may not be suitable where the defence has not yet had sufficient time to prepare. Further, subject to some further qualifications discussed below, defence applications that are not frivolous are not to be counted as defence delay. This is because legitimate defence applications undertaken in response to the charges are accounted for or accommodated in the presumptive ceilings: *Jordan* at para. 65.
- [19] Subsequent case law has explained that in assessing defence delay, the court may take into account not just the accused's decision to take a step in the proceedings, but also the manner in which that step is taken. In this regard, the overall number of defence applications, their proximity to the *Jordan* ceilings, compliance with notice requirements, and overall timeliness of defence applications are all factors that may be taken into account in assessing whether the defence conduct, including defence applications, constitute defence delay. Even an application that is meritorious can be held to create defence delay where it is found to have been intended to cause delay, or where the manner of pursuing it exhibits marked inefficiency or marked indifference toward delay: *Cody* at para. 32. This approach is consistent with the underlying philosophy articulated in *Jordan*, as stated in *Cody* at para. 1, that "every actor in the justice system" has the responsibility to ensure that criminal proceedings are conducted in a manner that respects the constitutionally protected right to trial within a reasonable time.

- [20] The point that defence delay can flow not just from the decision to take a step in the proceedings but also the manner in which a particular step is taken was underscored more recently in *R. v. Boulanger*, 2022 SCC 2. In that case, the Court was considering a period of delay arising from a defence application seeking disclosure of an unredacted copy of an information to obtain a search warrant. The Court agreed with the dissenting appeal court judge that although the defence application to litigate the redactions was legitimate, the manner in which the defence pursued the application was not, because it was not brought in a timely way, leading to an adjournment of a defence motion to challenge the validity of the search warrant. The trial judge did not err in holding the defence responsible for the resulting 84 days of delay.
- [21] Another concept recognized in *Boulanger* was the possibility of apportionment of responsibility for a particular period of delay. At issue was 112 days of delay associated with the scheduling of continuation dates. The defence was unavailable in May, so the judge scheduled the continuation dates in September of the same year. However, the evidence did not establish that the defence was unavailable for the entire period of time, so the trial judge was in error in characterizing the entire period as defence delay. Justice Kasirer went on to explain that "[a]ll participants in the justice system, including the defence, must take a proactive approach in order to prevent unnecessary delay", such that in some cases "the circumstances may justify apportioning responsibility for delay among the participants rather than attributing the entire delay to the defence": at para. 8. On the facts in *Boulanger*, after examining all of the causes of the adjournment and the subsequent delay, it was "fair and reasonable" to hold the defence responsible for one-half of the 112 days of delay in issue: at para. 10.

Analysis

- [22] Applying the analytical framework set out in *Jordan*, helpfully summarized in *R. v. Coulter*, 2016 ONCA 704 at paras. 34-50, I will break the analysis down into three steps. The first step is to identify the total amount of elapsed time between the laying of charges and the anticipated completion of the trial. The second step is to deduct any defence delay, which includes any periods of time that have been waived by the defence, and any delay attributable solely to the actions of the accused or defence counsel. The third step, which is only engaged where the net delay exceeds the presumptive ceiling of 30 months, requires the Crown to establish that there are exceptional circumstances justifying the excess delay.
- [23] In this particular case, the charges were laid on 27 December 2021, and a total of 40 months will have elapsed if the trial finishes as currently scheduled on 22 April 2024. This exceeds the presumptive ceiling of 30 months for a case tried in superior court. The key issue in this case is therefore how much of the total delay of 40 months is properly characterized as defence delay to be deducted for the purposes of the s.11(b) analysis.

- [24] In the course of the hearing before me, the parties made submissions about more or less every adjournment and every date set in this case. My reasons will not recount all of their submissions, as I do not consider it appropriate to attribute blame or make findings on degrees of responsibility for each and every adjournment of the case, from the date of the initial appearance, including each and every subsequent fix date appearance, all the way through to the conclusion of the trial. The Jordan framework does not require that approach. In some ways, the approach mandated in Jordan is much simpler. With the exception of periods of delay that are either waived or counted as other defence delay, all other delay is included in determining whether the case exceeds the presumptive ceiling.
- [25] In this case, as I say, the total duration from the laying of charges to the anticipated end of the trial date is 40 months. The question is how much of that delay was either waived or is otherwise to be deducted as defence delay. I will therefore focus the analysis on whether particular periods of delay were either waived or are otherwise attributable solely to the conduct of the defence. However, before doing so, I will address what I will refer to as the global or more categorical arguments raised by both the Crown and the defence.

The Global Arguments

- [26] One of the submissions advanced by the Crown was that in addition to other specific periods of delay attributable to the defence (which I will address in more detail below), the entire period of time from the scheduled conclusion of the initial trial date on 30 June 2022 up to the end of the currently-scheduled trial date of 22 April 2024 ought to be characterized as defence delay. The Crown says this is and has always been a straightforward case that could have been tried in two days, and the only reason the trial did not proceed as originally scheduled was because Mr. H retained new counsel and re-elected to trial in Supreme Court, thereafter prolonging the proceedings in various ways. I do not find this argument convincing for two reasons.
- [27] First and foremost, this entire line of reasoning invites speculation about how the case might have proceeded if it had been handled differently, by different counsel, rather than a consideration of what actually happened. It is true that if Mr. H had not retained new counsel and re-elected his mode of trial, the case might have proceeded to trial in Provincial Court as originally scheduled on 29 June 2022. Of course, if that had happened, then the presumptive ceiling would have been 18 months, and not 30 months. But that is an aside. The larger point is that this is not how the case in fact proceeded. The accused did in fact retain new counsel, he did in fact re-elect, and as a result of these and other developments the trial is now scheduled to conclude in Supreme Court on 22 April 2024. I see no point in conducting the s. 11(b) analysis on the basis of some hypothetical assessment of how the case might have proceeded if it had been handled differently, by either party. I consider that approach to be unjustifiably speculative. It is impossible to know how the case would have turned out if Mr. H had never changed counsel and re-elected his mode of trial.

- [28] This leads me to the second reason why I do not find the Crown's argument convincing. The entire argument seems to rest on the footing that there was only one legitimate or proper way for the defence to approach this case. The Crown says the case is simple and could have been tried in two days. The only reason it did not, says the Crown, is because Mr. H changed lawyers and his new counsel then dragged the case out by various means. With respect, there may be many different ways to defend the same case. The fact that one defence counsel might plan to run a trial in two days, without a preliminary inquiry and without any pre-trial applications, does not mean it is somehow wrong or improper for another counsel, acting on the instructions of the client, to approach the matter differently. The accused changed counsel, which he was entitled to do. The accused then exercised his statutory right to re-elect for trial in Supreme Court. On the whole of the record before me, the evidence does not support a finding that the accused did either of these things with the intent to cause delay. I will examine each of these points to assess whether they are the source of defence delay below. But in answer to the Crown's broader argument that any delay past the originally-scheduled conclusion of trial on 30 June 2022 is defence delay, one of the reasons I do not find this argument convincing is that it incorrectly assumes that there was only one way for the defence to properly litigate the case.
- [29] Defence counsel advanced a converse argument, also inviting speculation about how the case could or would have proceeded had Mr. H never changed lawyers. The defence argument was highly critical of the conduct of prior counsel, suggesting that it was somehow improper or unprofessional for Mr. Rivard to have proceeded to arraignment and then set trial dates when he did, based on disclosure which Mr. Hajivandi now says was incomplete or deficient. Mr. Hajivandi speculates that if the matter had proceeded as originally scheduled, the 29 June 2022 trial would inevitably have been adjourned due to late disclosure, or worse still, if the trial had proceeded there would have been a miscarriage of justice based on non-disclosure of information that was essential to the defence position. Mr. Hajivandi submits that disclosure was not in fact complete until mid-August 2023, such that none of the delay up to that point ought to be counted as defence delay. I do not find the defence argument convincing, for reasons that parallel my rejection of the Crown's argument about what might have happened if the case had been handled differently.
- [30] First, the defence argument (like the Crown argument disposed of above) is impermissibly speculative. It is impossible to predict how the case might have unfolded if Mr. H had not changed counsel, because that is not what happened. The question is whether the delay was unreasonable having regard to the manner in which the matter was in fact conducted, not how the case might have turned out if it had been handled differently.
- [31] Second, the fact that Mr. H, on the advice of his current counsel, re-elected for trial in Supreme Court is no basis for calling into question the approach of Mr. H's prior counsel. As noted above, there may be more than one way for a defence lawyer to properly represent the interests of the accused in a case such as this. I will deal with the disclosure argument in more detail below, but for the time being I will simply say that when Mr. H's prior counsel

proceeded to arraignment on 26 July 2021, he had the initial disclosure package which summarized the allegations of the complainant along with the statements of the other potential witnesses including the complainant's father, mother, and brother. Further, a matter of weeks after the arraignment, and prior to setting the first trial date, defence counsel obtained disclosure of the transcribed witness statements. I will add that if upon receipt of the transcribed statements counsel was of the view that they materially altered the case that Mr. H had to meet, counsel could then have advised Mr. H to exercise his statutory right to re-elect. That did not happen. I see no utility in proceeding any further down the road of discussing prior defence counsel's conduct of the case.

- [32] Another global submission advanced by Crown counsel was focussed on the fact that Mr. H said nothing on the record about delay until the first pre-trial conference before me on 16 August 2023, more than 30 months after the charges were laid. Crown counsel adds that the formal notice application alleging a breach of the right to trial within a reasonable time under s. 11(b) was not filed with the Court until 12 January 2024. On this basis, Crown counsel submitted that this is one of those cases where counsel was not interested in a timely trial and was content to allow time to pass by without raising s. 11(b), up to the point that it became tactically advantageous to do so. The thrust of the Crown's submission was that Mr. H's conduct ought to be interpreted as an implied waiver of delay, or alternatively that the entire manner in which the defence was conducted after Mr. Hajivandi's firm was retained was designed to cause delay.
- [33] Crown counsel relies on J.F., where Chief Justice Wagner, for the majority, stated that "all participants in the criminal justice system" must take "proactive measures to remedy any delay and to ensure that the accused is tried in a timely manner" (para. 30), that s. 11(b) was "not intended to make it possible for an accused to frustrate the ends of justice" (para. 32), that defence inaction may constitute "illegitimate conduct" amounting to defence delay (para. 33), that a s. 11(b) application must be brought "reasonably and expeditiously" and "[l]ateness in raising delay is contrary to the proper administration of justice" (para. 34), and that the defence duty to act proactively includes the responsibility to bring an application for a stay based on delay in a timely manner (para. 36).
- [34] In my view, the reasoning in J.F. does not assist the Crown in this case. The issue in J.F. was whether the accused could bring a s. 11(b) application at a re-trial alleging unreasonable delay in connection with the first trial. The majority ruled that the accused could not. Part of the reasoning was that a s. 11(b) application must be brought in a timely way, and the court will not normally entertain such an application when it is raised for the first time after the trial is concluded. It would therefore be anomalous to allow the accused to bring a s. 11(b) application at a re-trial, based on alleged unreasonable delay in relation to the prior trial.
- [35] With regard to waiver, the majority in J.F. rejected the argument that the failure to raise the s. 11(b) issue prior to the re-trial amounted to an implied waiver. Chief Justice Wagner reasoned that "waiver of the delay cannot be inferred solely from the accused's silence or failure to act": J.F. at paras. 44-46. There is other case law suggesting that mere agreement to

a future date, standing alone, is not a basis on which to infer a s. 11(b) waiver. The law does acknowledge the possibility of implied waiver, but even an implied waiver must be based on circumstances that make the accused's position clear and unequivocal.

[36] With regard to actions of the accused, there may be instances where an application for a stay based on unreasonable delay is brought so late that the bringing of the motion itself will produce defence delay. This flows from the reasoning in *Cody* that even a legitimate step taken in defence of the charges can be carried out in an illegitimate manner. Thus, where a delay application is filed so late that the application itself causes delay in bringing the case to trial, those actions will be counted as defence delay. However, that is not what happened in this case. The defence signalled an intent to bring a s. 11(b) application at the time that the trial dates were being arranged in this Court, in the pre-trial conference that began on 16 August 2023. Court time and counsel availability for the delay application was therefore factored into the scheduling of the trial. Deadlines were also set for the filing of notice and supporting materials, in time to ensure that the s. 11(b) application proceeded in an orderly fashion. In this particular context, the fact that the s. 11(b) notice itself was not filed until several months before the trial is of no moment. The timing of the formal notice certainly did not have any impact on the scheduling of either the delay motion or the trial.

[37] I will now move on to consider the arguments about discrete periods or blocks of time that are alleged by the Crown to be defence delay.

(i) Delay During the Intake Period

[38] The first discrete block of time has to do with what I will call the intake period, from the date of the first fix date appearance in Provincial Court on 25 January 2021 to 19 July 2021 when Mr. H's then-counsel indicated that the matter should be set for trial. This is a period of slightly less than six months in total. Crown counsel says that for this entire period of time, the defence either waived the delay, or it is attributable solely to defence actions. For his part, Mr. Hajivandi concedes that some of the time in issue was defence delay, but not the entire six months.

[39] Mr. Hajivandi says the six-week delay from 25 January 2021 to 8 March 2021 ought not to be counted against the defence because it was necessary for defence counsel to obtain and review the disclosure and discuss it with Mr. H before being in a position to proceed to fix any dates. Mr. Hajivandi cites *Jordan* at para. 65, where the majority stated that defence action to legitimately respond to the charges falls outside the ambit of defence delay. This can include "preparation time". In reply, the Crown submitted that six weeks was longer than what is normally required for this purpose. The Crown adds that the initial disclosure package was delivered to Mr. Waddington on about 2 February 2021, and questions whether a further five weeks would be required for the defence to review it. On my reading of *Jordan*, time required by the defence to "legitimately" respond to the charges is in effect baked into the presumptive ceilings. This includes a reasonable amount of time to obtain and review disclosure in order to be prepared to proceed with arraignment. In this case, counsel

indicated that he required six weeks for that purpose. I see some merit in the defence submission that a reasonable amount of time was required for counsel to (i) obtain the disclosure, (ii) review it, (iii) discuss it with the client, and (iv) be in a position to proceed to arraignment. However, I also accept the Crown's argument that it was unreasonable for the defence to require six weeks for this purpose. This is not a complex case. The Crown case involves witness testimony from, at most, four civilian witnesses and two police officers. In my view, four weeks would be a generous amount of time for this step in the process. I would characterize the balance of this time, two weeks, as defence delay.

- [40] Mr. Hajivandi also says the period from 17 May 2021 to 31 May 2021, associated with Mr. Waddington's withdrawal from the record, should not be counted as defence delay. Recall that on 17 May 2021, Mr. H appeared on his own and indicated that Mr. Waddington was no longer his counsel. The Provincial Court Judge responded that Mr. Waddington had to make a formal request to withdraw from the record and adjourned the matter over to 31 May 2021 for that specific purpose. Mr. Hajivandi says this step was unnecessary because the matter had not yet been set for trial, so counsel did not require leave of the court to withdraw from the record. Hence, Mr. Hajivandi submits, this two-week time period was not delay caused "solely" by the defence as contemplated in *Jordan*. I do not question the authority of the Provincial Court Judge to require counsel's attendance before the court before allowing him to withdraw. However, I would say that on the facts of this particular case, before arraignment, and before any contested hearing dates of any kind had been set, the delay associated with requiring counsel to appear before the court to formally withdraw from the record should not be counted against Mr. H as defence delay. It was not, in my view, delay caused solely by the actions of the accused or his then-counsel.
- [41] Finally, defence counsel submits that the entire period from 31 May 2021 to 17 July 2021, during which Mr. H was pursuing a potential Rowbotham application, ought not to be considered as defence delay. Mr. Hajivandi again cited passages from *Jordan* and *Cody* explaining that not all defence conduct constitutes defence delay. Legitimate actions taken by the defence in response to the charges are built in to the presumptive ceilings, and ought not to be counted as defence delay unless they were meritless, undertaken for the tactical purpose of causing delay, or pursued unreasonably in a manner that causes unnecessary delay.
- [42] Defence counsel cites *R. v. McConnell*, 2018 BCSC 2258 at paras. 208-217. In that case, the court was asked to consider whether a delay of some 10 months required to litigate a Rowbotham application ought to be included as delay going "toward the presumptive ceiling", or alternatively as defence delay. Justice Maisonville cited a number of cases where the time required to litigate meritless Rowbotham applications was counted as defence delay. Even though Mr. McConnell's Rowbotham application was ultimately dismissed, the court was not satisfied that it was "baseless" or "meritless". Justice Maisonville thus declined to characterize the time required to litigate it as defence delay: *McConnell* at para. 217.

- [43] In response to this submission, the Crown points out that in this particular case, Mr. H was given a number of adjournments to perfect his application, and then the Rowbotham process came to an end when Mr. Rivard appeared in court and abandoned the application, without a determination on its merits. The Crown further points out that on more than one occasion the presiding Provincial Court Judge stated on the record that if Mr. H did not or could not retain counsel, then it would be necessary for the court to consider an order under s. 486.3 of the Criminal Code appointing counsel to conduct the cross-examination of the child complainant. This last point goes to the question of whether the case would have been found to be sufficiently complex to justify a Rowbotham order, which weighs in favour of the view that the application lacked merit. In all of these circumstances, the Crown submits that all of the delay associated with the aborted Rowbotham application ought to be characterized as defence delay.
- [44] On the one hand, the absence of a ruling makes it difficult to assess the merit of Mr. H's position on the Rowbotham application. On the other hand, one can infer from the fact that the application was ultimately withdrawn that it was, for whatever reason, determined to be unnecessary. In other words, Mr. H was able to retain counsel without obtaining a Rowbotham order. The record does not suggest that this was the result of any kind of private funding arrangement between the Attorney General of British Columbia, the accused, and defence counsel. The transcript of proceedings on 19 July 2021 simply indicates Mr. H retained Mr. Rivard as counsel, and then instructed him to abandon the Rowbotham application and set the matter for trial.
- [45] The majority in Jordan stated at paras. 64--65 that it will be up to trial judges to assess whether a particular delay is attributable solely to the actions of the defence. While I can accept that the time required to address defence applications legitimately brought in response to the charges ought not to be counted as defence delay, on the facts of this particular case I am not prepared to extend that notion to a defence application that was ultimately determined, by the accused and his then-counsel, to be unnecessary. I would therefore characterize the time required to address this issue as defence delay.
- [46] To recap, of the six months of total delay that passed before Mr. H retained Mr. Rivard, I find that four weeks for defence counsel to obtain and review the disclosure, and a further two weeks of delay associated with Mr. Waddington's formal withdrawal from the record are appropriately counted toward the Jordan ceiling. The remaining four and one-half months of delay, associated with Mr. Waddington's repeated requests for further adjournments, and Mr. H's subsequently abandoned Rowbotham application, are properly characterized as defence delay.

(ii) Defence Unavailability in Scheduling of the First Trial Date

[47] The second discrete block of time in issue is a period of one month, from 26 May 2022 to 29 June 2022, when there was court time and Crown counsel was available for trial, but defence counsel Mr. Rivard was not. The Crown relies on Jordan at para. 64 to say that this block of time is defence delay. I accept that submission.

(iii) Adjournment of the First Trial Date

[48] The third discrete block of time in issue is the delay arising from Mr. H's successful application to adjourn the 29 June 2022 trial date, to accommodate the availability of his new counsel. The Crown says this period of delay was waived by the accused, relying on defence counsel's express waiver of delay, as set out in a letter from Mr. Hajivandi dated 27 April 2022, and as stated on the record on 29 April 2022.

[49] Counsel for Mr. H submits that the waiver was not clear and unequivocal, and in particular it was not clear exactly what period of time Mr. H was waiving. I do not agree. The waiver was express, and was offered up in support of the defence request to adjourn the trial. On the basis of that waiver, the Crown did not oppose the adjournment.

[50] As for how much delay was waived, Mr. Hajivandi's letter of 27 April 2022 stated that Mr. H was prepared to waive the delay "caused by this adjournment". It is easy enough to ascertain from the record that the delay in issue was from the first trial date of 29 June 2022, up to the pre-trial application dates subsequently set for 25 April 2023. That is a total of 10 months.

[51] Counsel for Mr. H also argues that the waiver was not effective because it was based on what defence counsel knew at the time, and defence counsel was not aware that there had been a failure to disclose relevant material, such that the matter was never actually ready to proceed to trial as originally scheduled on 29 June 2022. Thus, Mr. Hajivandi submits, the waiver was not fully informed and therefore ineffective. Alternatively, counsel submits that even if a waiver is found, based on a "bird's eye view" of all of the circumstances, including the disclosure issues which only came to light after the waiver was given, this is an appropriate case for apportionment of the associated delay as between the Crown and the defence.

[52] The first disclosure complaint advanced by Mr. Hajivandi was that at the time of Mr. H's arraignment, the Crown had not yet disclosed the transcript or the audio recording of the witness statements, including the statement of the complainant. Mr. Hajivandi says this is significant, because in his view the arraignment should never have taken place until the accused had been given this basic disclosure. I have already commented on this submission above but I will address it again here, in the specific context of the defence argument about waiver of delay. To begin with, it must be remembered that Mr. Hajivandi was not counsel for Mr. H when the arraignment hearing took place, so I do not see what this particular argument has to do with the effectiveness of Mr. H's waiver of delay associated with obtaining new counsel, many months later. In any event, while Mr. Hajivandi may have approached the matter differently, Mr. H was represented by experienced defence counsel, who was, I infer, satisfied that he had sufficient disclosure for Mr. H to understand the case

he had to meet, in order to make an informed election as to his mode of trial. The initial disclosure package contained a narrative Report to Crown Counsel setting out the allegations made by the complainant. Furthermore, Mr. Rivard received disclosure of the video recording and transcript of the complainant's statement a matter of weeks after the arraignment and clearly would have been in a position to advise Mr. H to re-elect if that disclosure significantly altered the case to meet. For all of these reasons, I conclude that this complaint is unfounded, and in any event has no bearing on Mr. H's subsequent waiver of delay associated with obtaining new counsel.

[53] Another complaint advanced by Mr. Hajivandi has to do with the state of the disclosure with respect to the complainant's father. I would summarize the relevant circumstances as follows:

- (a) For context, the charges in this case stem from the complainant's allegation that Mr. H, a former roommate of the complainant's father Mr. S, sexually assaulted the complainant during times when she was visiting her father's home.
- (b) The initial Report to Crown Counsel, bearing police file number 20-12066, was first disclosed to Mr. H through his then-counsel Mr. Waddington on or about 2 February 2021. The relevant details are as follows:
 - (i) The allegations against Mr. H came to the attention of the police by way of a phone call from the complainant's father, Mr. S, on 27 December 2020.
 - (ii) Cst. Wagantall attended Mr. S's residence on the same date. Mr. S's son, the complainant's brother, told the officer about the substance of his sister's allegation against Mr. H. When Mr. S was asked about the allegations, he said among other things that, "it was not possible as he never left [the complainant] alone with anyone else in his residence". Both Mr. S and his son agreed to provide formal statements to the police the following day.
 - (iii) On the same day, Cst. Wagantall and Cst. Dreyer attended the residence of the complainant and her mother Ms. H, both of whom then went to the police station and gave video-recorded statements.
 - (iv) Later in the day on 27 December 2020, Cst. Wagantall made a follow-up telephone call to Mr. S, seeking identifying information with respect to Mr. H. In that phone call, Mr. S told the officer that he had spoken with Mr. H about the matter by telephone, in the course of which Mr. S informed Mr. H of the particulars of the complainant's allegations as recounted to Mr. S by his son.
- (c) The supplementary disclosure package disclosed to Mr. H through his then-counsel Mr. Rivard on or about 9 September 2021 included transcribed statements of the complainant, the complainant's mother, and the complainant's brother, but no statement from the father Mr. S.

- (d) In a series of written disclosure requests commencing in February 2023, Mr. Hajivandi sought disclosure of, among other things, any records of Mr. S's 27 December 2020 initial phone call reporting the allegation to the police, any statement given by Mr. S to the police, and all outstanding occurrence reports in relation to the investigation.
- (e) On or about 21 March 2023, the Crown disclosed to Mr. Hajivandi a three-page document entitled "Occurrence Report 2, RCC Narrative". This document was dated 7 February 2021. It bore police file number 2020-12077 and was authored by Cst. Dreyer. The relevant details are as follows:
 - (i) On 29 December 2020, Cst. Wagantall arrested Mr. S for obstruction of justice, based on Mr. S's conduct in telephoning Mr. H as described in para. (b)(iv), during which Mr. S revealed to Mr. H the details of the complainant's allegations, while the police investigation was still ongoing. Mr. S was advised of his rights and declined to consult with counsel. He was released the same day by the police with a requirement to attend court on 22 March 2021.
 - (ii) The report contained further details with respect to Mr. S's conversation with the lead investigator during the follow-up telephone conversation on 27 December 2020, as recounted in para. (b)(iv) above. In particular, the report states that Mr. S told Cst. Wagantall he did not believe his daughter's allegations against Mr. H were true. Mr. S suspected that the allegations were just "stories" originating with his ex-wife Ms. H, because their son did not want to live with Ms. H anymore.
 - (iii) On or about 7 February 2021, Cst. Dreyer prepared Occurrence Report 2, recommending a charge of obstruction of justice against Mr. S, in connection with Mr. S's actions in revealing to Mr. H the details of the complainant's allegations, while the police investigation was still ongoing.
- (f) Although Mr. S had been released by the police on a promise to appear in court on 22 March 2021, that court appearance never took place, evidently because no obstruction of justice charge was ever laid against Mr. S.
- (g) As noted, the fact that there had been a separate or parallel investigation and arrest of Mr. S for obstruction of justice was not disclosed to Mr. H, through his counsel Mr. Hajivandi, until 21 March 2023. At the hearing before me, Crown counsel explained that the investigation of Mr. S was done under a separate police file and the police evidently took the position that it was not relevant to the prosecution of Mr. H for sexual assault. The matter only came to the attention of the Crown as a result of Mr. Hajivandi's specific written requests for disclosure.
- (h) Meanwhile, the agreement between the Crown and defence to convert the originally scheduled pre-trial application dates commencing on 25 April 2023 to preliminary inquiry dates was confirmed on the record in court on 10 March 2023. At that court appearance, the parties told the presiding Provincial Court Judge that only two days would be required for the preliminary inquiry. The Crown agreed to subpoena certain witnesses, including Mr. S.

- (i) Ultimately, at the preliminary inquiry on 25-26 April 2023 the defence took the position that it was not necessary for the Crown to call Mr. S as a witness. I will add, by way of further context, that much of the court time at the preliminary inquiry was devoted to arguments about whether there was a need for a focus hearing or a statement of issues, the scope of the hearing, and the Provincial Court Judge's authority to limit the scope of questioning. This limited the amount of court time available for examination of witnesses.
 - (j) The Crown did call Cst. Wagantall, his watch commander Cst. Christinger, and the complainant at the preliminary inquiry. All three of these witnesses were cross-examined by defence counsel.
 - (k) In the course of submissions, Mr. Hajivandi related that he has spoken to or interviewed Mr. S, and has been able to obtain information that Mr. Hajivandi believes is relevant to the defence case in this matter. I stress that there is nothing wrong with this. There is no property in a witness and the defence is entitled to seek out evidence relevant to its case. The point is that Mr. S has been an independent source of at least some information that defence counsel considers to be helpful to his client's case.
- [54] Yet another disclosure issue raised by the defence has to do with statements made by the complainant's mother Ms. H. Again, by way context, at the time of the allegations the complainant was 12 to 13 years old and lived with her mother. The complainant alleges that on occasions when she went to her father's house for visits, her father's then-roommate Mr. H sexually assaulted her. The defence says the issue of when and how much time the complainant actually spent at her father's house will be an important matter at trial. Against this backdrop, the issue pertaining to the mother Ms. H is as follows:
- a) Ms. H gave a video recorded statement to the police on 27 December 2020. In it, Ms. H stated that the complainant lived with her and went to visit her father Mr. S at his house perhaps twice per month, on weekends, staying until about 10:00 p.m. Ms. H did not want the complainant to stay overnight at Mr. S's house because Ms. H did not trust him or did not feel it was a safe place. Ms. H suspected that Mr. S used drugs, including cocaine.
 - b) Ms. H's statement was summarized in the initial disclosure package provided to Mr. H's then-counsel Mr. Waddington on or about 2 February 2021. The statement itself was disclosed to Mr. H's subsequent counsel Mr. Rivard on 9 September 2021.
 - c) At the request of the defence, the Crown subpoenaed Ms. H to testify at the preliminary inquiry. However, it appears that there was limited time at the preliminary inquiry, due at least in part to arguments over procedural issues and the scope of the hearing. At some point, defence counsel told the Crown that Ms. H need not be called as a witness at the preliminary inquiry, provided defence counsel had the opportunity to obtain information from her about (i) the complainant's counselling history, (ii) the prescription drugs that the complainant takes, and (iii) the dates of Mr. S and Ms. H's separation and divorce.

- d) In an email from Crown counsel Ms. Michaels to defence counsel Mr. Hajivandi on 26 April 2023, the Crown provided written confirmation of Ms. H's answers to the enquiries listed in paragraph (c) above.
 - e) On 16 August 2023, the Crown provided disclosure of a report dated 11 January 2021, written by Cst. Wagantall. The report documented a phone call between Cst. Wagantall and Ms. H, during which Ms. H stated that she was wrong in her police statement when she said that the complainant never stayed overnight at Mr. S's house. In fact, according to Ms. H the complainant stayed overnight at Mr. S's house several times in 2019. More specifically, the complainant visited Mr. S on or about 15 March 2019, staying for "a few days". She also stayed overnight at Mr. S's house three or four other times prior to that, all in 2019.
 - f) In submissions before me, Crown counsel conceded that the 11 January 2021 report was relevant and ought to have been disclosed earlier. Counsel says there was an error in not disclosing it and that it appeared to have been overlooked in the initial disclosure. The copy of this report that was shown to me at the hearing indicates that it was printed out on 9 June 2023 and, as noted, it was disclosed to the defence on 16 August 2023.
- [55] Mr. Hajivandi raised other complaints about disclosure or alleged delays in disclosure, but the key ones are the two that I have just outlined. Defence counsel submits that (i) Occurrence Report 2 relating to the arrest of Mr. S for obstruction, and (ii) the follow-up report with respect to Ms. H's statement about the dates of the complainant's visits to Mr. S's residence ought to have been disclosed to the defence in a timely way. Neither of these documents was disclosed until the defence made specific disclosure requests that forced the police and the Crown to respond.
- [56] Defence counsel says both of these reports contained information that was highly relevant to the defence. In particular:
- a) The report relating to Mr. S's arrest refers to or relates to the allegations made by the complainant against Mr. H, and reasons why those allegations might not be true, namely the alleged motive of Ms. H to encourage false allegations against Mr. H. Further, this report indicates that Mr. S can give relevant evidence at trial, helpful to the defence, on the issue of Mr. H's opportunity to commit the offences. Recall Mr. S's statement to the police that he never left the complainant alone with third parties in his house.
 - b) The report relating to Ms. H is also important because it speaks directly to the issue of Mr. H's opportunity to commit the offences. Initially, Ms. H said the complainant never stayed overnight at Mr. S's house. In the follow-up report, Ms. H corrected this and gave specific dates or date ranges when the complainant is said to have stayed overnight at Mr. S's house. Defence counsel says the dates are important because they can assist the defence in pinning down the time frame of the complainant's allegations, and in developing evidence speaking to Mr. H's whereabouts and opportunity to commit the offences during that time frame.

- [57] With regard to the timing of this disclosure, Crown counsel submits that the Crown's evidence relating to Mr. H's opportunity to commit the offences was clearly documented in the initial Report to Crown counsel disclosed to Mr. H on or about 2 February 2021. That report sets out Mr. S's belief that he never left the complainant alone in his house with any third parties, and Ms. H's initial belief or assertion that the complainant never stayed overnight at Mr. S's house. The contents of the supplementary disclosure with respect to Mr. S (provided well before the preliminary inquiry) simply filled in the picture by offering a possible explanation for why the police ultimately did not get a formal witness statement from Mr. S, following his arrest for obstruction of justice. This is not to say the supplementary disclosure with respect to Mr. S was irrelevant or not of assistance to the defence. The Crown's point was that the issue of Mr. H's opportunity to commit the offences, and the potential evidence of both Mr. S and Ms. H on that issue, was disclosed from the outset. The supplementary report about Mr. S appears not to have been disclosed earlier because (i) it was a report created in relation to a separate investigation of Mr. S, (ii) the police did not initially provide it to the Crown, and (iii) it only came to the attention of the Crown in the wake of defence disclosure requests, at which point it was disclosed. The disclosure process did not work perfectly, but in the end, the process worked, based on what I will call a dialogue between the defence and the Crown. The supplementary report relating to Ms. H was disclosed much later, and the explanation for the delay in disclosure is not nearly as compelling. The most that the Crown can say about the timing of this particular disclosure is that there was an error or that this report was overlooked.
- [58] Mr. Hajivandi says the timing of the disclosure is relevant to the waiver issue in two inter-related ways. First, counsel says that if the trial had proceeded as originally scheduled on 29 June 2022, without the benefit of this disclosure, there would or could have been a miscarriage of justice. Second, counsel submits that when his firm was retained to defend Mr. H, sought an adjournment of the trial, and waived delay, they still did not have this disclosure. Thus, defence says, the waiver was not fully informed or otherwise not legally effective, because it was based on less than complete disclosure.
- [59] I have already addressed the point above about deciding this motion on the basis of what actually occurred, not what might have occurred if the case had been handled differently. I do not see any value in speculating about how the trial would have unfolded if it proceeded as scheduled on 29 June 2022, with Mr. H being represented by prior counsel. That exercise is entirely speculative. I do see some merit in the Crown's submission that the issue of Mr. H's opportunity to commit the offences is laid out in the initial disclosure. Statements attributable to both Mr. S and Ms. H on that issue were clearly summarized in the initial Report to Crown Counsel. As to what use prior defence counsel would have made with that information, and whether the further disclosure would have come to light in the run up to the trial or during the trial, one can only speculate at this point. The important thing to focus on is what actually happened, and how it affected the delay.

- [60] As to the second prong of the defence argument relating to the timing of the disclosure, I do not accept that it had any material bearing on the defence waiver of delay associated with adjournment of the first trial. Mr. H chose to retain new counsel, some four to five months before his initial trial date. When Mr. Hajivandi's colleague Mr. Duncan became counsel of record, Mr. Hajivandi made a written request to adjourn the trial, and indicated that as a term or condition of the adjournment application that Mr. H would waive the associated delay. That was the reason for the waiver. This position affected the Crown response. One must keep in mind that a trial date was set and the complainant and presumably other witnesses had been notified and would have been anticipating a trial on 29 June 2022. The Crown did not oppose adjournment of the trial to accommodate Mr. H's decision to retain new counsel, but a condition of that position was that the defence was waiving the delay. Mr. H was represented by experienced counsel at the time he gave his waiver of delay. I have been given no reason to believe Mr. H did not understand the legal significance of his waiver. He was giving up the right to rely on delay between the 29 June 2022 trial date and the next trial date available to his new counsel, so that he could be represented at trial by Mr. Duncan or Mr. Duncan's firm as the case may be. In all of these circumstances, I find that the timing of supplementary disclosure with respect to both Mr. S and Ms. H did not have any material impact on Mr. H's express waiver of delay associated with the adjournment of the first trial date.
- [61] Defence counsel's alternative submission was that the disclosure issues described above justify apportionment of the delay associated with the adjournment of the first trial date. Counsel relies on *R. v. Hanan*, 2023 SCC 12 at para. 9, which in turn cites *Boulanger* for the proposition that "[a]ll relevant circumstances should be considered to determine how delay should be apportioned among the participants". Again, counsel submits that because of the state of the disclosure prior to the 29 June 2022 trial date, the case was not actually ready for trial. Counsel submits, therefore, that viewing "all relevant circumstances" or taking a "bird's eye" view of the case, this is an appropriate situation for apportionment of the delay associated with the adjournment of the 29 June 2022 trial date.
- [62] This is a novel argument. In most instances, apportionment of delay involves dividing up periods of delay arising from unavailability of counsel following an adjournment, taking into account the reasons for the adjournment. In this case, there was an express waiver of the delay. Even if one were to look past the waiver to look into the reasons for the delay, there was a single clearly identifiable reason for the adjournment of the trial, namely the fact that Mr. H had retained new counsel who sought to re-schedule the trial. Further, the entirety of the associated delay is clearly attributable to defence unavailability. Earlier dates for the new trial or newly-added pre-trial motions were offered, but defence counsel was not available. In these circumstances, I do not consider it appropriate or just to apportion the delay as between the defence and the Crown. I have considered the defence argument about disclosure but I do not find that the state of the disclosure had any bearing on this particular delay in the proceedings. It is pure speculation to consider what might have happened if the original trial date had not been adjourned at the request of the defence.

[63] To recap, the delay associated with this adjournment is ten months, from 29 June 2022 to 25 April 2023. I find that this delay of ten months was waived by the defence and is to be deducted from the overall delay for the purposes of the s. 11(b) analysis.

(iv) Delays in Setting Trial Dates in Supreme Court

[64] The record reflects that by the time of Mr. H's first appearance in this Court on 29 May 2023, the Crown was ready and eager to set trial dates. However, defence counsel Mr. Hajivandi did not attend court, and had not provided his availability for pre-trial conference, pre-trial applications, or trial. Thereafter, the matter was adjourned a number of times to accommodate the defence argument about the Supreme Court's jurisdiction, and no progress was made on the scheduling of dates until the first pre-trial conference before me on 16 August 2023. The Crown says this entire period, which I would calculate at two and one-half months, should be characterized as defence delay.

[65] Mr. Hajivandi's response was that even though he was ultimately unsuccessful in his jurisdictional argument, the issue was a novel one and it was not illegitimate for his client to litigate it. Counsel submits that prior to the ruling given by A.C.J. Holmes in this particular case, the law was unclear about whether this Court had jurisdiction prior to the filing of an indictment. Although the Associate Chief Justice ultimately rejected the defence position on this issue, she also expressly made no finding on ultimate responsibility for the associated delay. Finally, Mr. Hajivandi once again cites Jordan at para. 65 and Cody at para. 29 for the proposition that the time required to litigate applications brought by the accused in response to the charges is properly factored into the presumptive ceilings, and ought not to be counted as defence delay.

[66] I agree with defence counsel that not all unsuccessful defence applications are to be counted as defence delay under the Jordan framework. In Jordan, the court made the point that legitimate defence applications brought in order for the accused to respond to the charges do not give rise to defence delay. Thus, where an application is brought legitimately in response to the charges, it will not be counted as defence delay unless it is manifestly frivolous, brought for the purposes of causing delay, or conducted or carried out in a manner that is illegitimate or causes delay.

[67] In this particular case, Mr. Hajivandi stresses that his argument about the jurisdiction of this Court prior to the filing of an indictment was a novel one. In response, the Crown asserts that the jurisdictional argument was novel because the answer was obvious, to the point that no one had ever tried to litigate it before. For my part, even though the defence argument on jurisdiction failed, I would not characterize it as manifestly frivolous.

[68] However, even though the defence argument itself was not manifestly frivolous, I agree with Crown counsel that it was not an argument or application brought in response to the charges as contemplated in the s. 11(b) case law. As Crown counsel points out, all parties, including the defence, have an obligation to avoid unnecessary delay. In this case, the argument advanced by the defence did not go to the admissibility of evidence, or testing the evidence,

or protecting or vindicating the accused's Charter rights, or any other issue that would assist in determining the outcome of the case. Even if the defence argument on jurisdiction was successful, any jurisdictional lacunae could have been remedied by the issuance of a warrant after the filing of the indictment. Hence the defence argument, while novel, would never have advanced the case or assisted in its ultimate resolution.

[69] I therefore find that the entire period of delay from the first appearance in Supreme Court on 29 May 2023 to the first pre-trial conference on 18 August 2023 is attributable solely to the actions of the accused. The associated two and one-half months is properly deducted as defence delay.

(v) Limited Defence Availability for Pre-Trial Applications and Trial

[70] Crown counsel argued that there was court time and the Crown was available for pre-trial applications commencing in October 2023, but those dates could not be used because defence counsel was not available for three consecutive court days until March 2024. The Crown submits that defence counsel's unavailability gives rise to a further five months of defence delay.

[71] I do not accept that submission, for two reasons.

[72] First, I agree with Mr. Hajivandi that this is one of those instances where the defence could not have been expected to proceed with pre-trial applications on the first dates made available by the court. As the majority noted in *Jordan* at para. 65, the presumptive ceilings must allow time for the defence to prepare for trial. I am not convinced that when scheduling of pre-trial applications was being discussed in late August 2023, it was realistic to expect the defence to be ready to proceed with the pre-trial applications in October 2023. I stress that this is a case-specific conclusion, based on the scheduling dynamics and availability of counsel in this particular case. This is not intended to represent any kind of guideline regarding how much time would normally be allowed for defence counsel to be ready to proceed.

[73] Second, even if defence counsel had been available for pre-trial applications starting in October 2023, it is questionable whether it would have been possible to schedule a trial in this matter any earlier than March 2024, a matter of weeks before the trial date that is now in place. In other words, at least in this particular case, it is questionable whether setting earlier dates for the pre-trial applications would have had any material impact on the trial dates.

Summing Up the Defence Delay

[74] To summarize, I find that the following periods are properly deducted on the basis of waiver or defence delay: (i) four and one-half months during the intake period, (ii) one month due to unavailability of former defence counsel (Mr. Rivard) in the scheduling of the first trial date, (iii) ten months that were waived by Mr. H when he retained new counsel and obtained

an adjournment of the first trial date, and (iv) two and one-half months of delay associated with the scheduling of dates in the Supreme Court. Thus, of the 40 months of delay from the date that charges were laid until the anticipated end of the trial, 18 months are properly deducted as defence delay. In the result, the total delay for s. 11(b) purposes is 22 months, which is well under the presumptive ceiling of 30 months.

Completing the s. 11(b) Analysis

- [75] Mr. Hajivandi did not advance an argument that even if the delay was under the 30-month presumptive ceiling, it was nevertheless unreasonable as contemplated in *Jordan* at paras. 48, 82-91. Even if such an argument had been advanced, I would have no difficulty rejecting it.
- [76] The record does not reflect any sustained effort by the accused to expedite the proceedings. Indeed, the defence expressed no concern about, and made no mention of his right to trial within a reasonable time until the pre-trial conference in Supreme Court on 16 August 2023. To be clear, simply voicing concern about delay on the record would probably not qualify as "meaningful steps" indicative of a "sustained effort" to expedite the proceedings. I am merely pointing out that this is not a case where the defence even voiced concern about delay until the time came to fix the trial dates in this Court.
- [77] Nor would I conclude that this case took markedly longer than it should have taken to come to trial. The overall delay from the date of the charges to the anticipated end of the trial is 40 months, but that includes 18 months of defence delay. Excluding defence delay, the delay is 22 months, for a two-stage proceeding with a preliminary inquiry in Provincial Court, followed by seven days of pre-trial motions, and a six day trial in Supreme Court. Stepping back and taking a "bird's eye view" of the case, I see no evidence of complacency or foot-dragging on the part of the Crown, and no evidence of delay due to lack of court availability.

Conclusion

- [78] Mr. H's application for a judicial stay of proceedings based on unreasonable delay is dismissed.

"Riley J."

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