

CANADA / JUDGMENT

R. v. Sharma

2022 BCSC 2080

COURT

Supreme Court of British Columbia

DECIDED

29 November 2022

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2022 BCSC 2080 R. v. Sharma

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sharma,

2022 BCSC 2080

Date: 20221129

Docket: 71011

Registry: Chilliwack

Rex

v.

Mandeep Sharma

Meghan Sharma

Before: The Honourable Mr. Justice Riley

Oral Ruling on Charter Application

Counsel for the Accused (Applicant) Mandeep Sharma:

J.R. Ray, K.C.

Counsel for the Accused (Applicant)

Meghan Sharma:

B.D. Vaze

Counsel for the Crown (Respondent):

F. Lepine

Place and Dates of Trial/Hearing:

New Westminster, B.C.

October 31 and November 1, 2022

Place and Date of Judgment:

New Westminster, B.C.

November 29, 2022

Introduction

[1] The two accused, Mr. Sharma and Ms. Sharma, are charged with possession of controlled substances for the purpose of trafficking. Both accused now apply for a judicial stay of proceedings based on an alleged breach of the right to be tried within a reasonable time as guaranteed under s. 11(b) of the Charter. In *R. v. Jordan*, 2016 SCC 27, the Court established a presumption that the unreasonable delay threshold will be crossed where the total time from the date that charges are laid to the completion of trial in superior court exceeds 30 months. In this particular case, the charges were laid some 39 months ago, and a total of some 42 months will have elapsed by the time the trial is expected to finish on 3 February 2023. After accounting for time that has been waived by the accused, the delay in issue between the parties is some 37.5 months. In this context, there are two crucial questions to be determined. The first is whether any of the delay in issue qualifies as "defence delay" to be deducted from the total. The second is whether any remaining delay in excess of the presumptive 30-month guideline established in *Jordan* can be justified on the basis of "exceptional circumstances".

Procedural History of the Case

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

- a) The charges arise from police searches conducted on 16 February 2018. The Crown intends to lead evidence at trial indicating that on that date, the police executed a search warrant at the Sharma residence resulting in the seizure of substantial quantities of packaged drugs. The Crown alleges that most of the packages were cocaine, but there was also evidence that one of the packages was found to contain fentanyl. On the same date, the police also executed a search warrant at a business premise tied to Mr. Sharma, resulting in the seizure of a substantial quantity of marihuana.

- b) On 2 August 2019, the applicants were charged by way of an Information sworn in the Provincial Court of British Columbia with offences under the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA]. Specifically, Mr. Sharma was charged on count 1 with possession of marihuana for the purpose of trafficking, and Mr. Sharma and Ms. Sharma were charged jointly on count 2 with possession of cocaine for the purpose of trafficking.
- c) The first appearance in the Provincial Court was on 5 September 2019. There were several subsequent court appearances for intake, disclosure, and arraignment. When called upon to elect their mode of trial, the applicants initially elected to be tried by a Provincial Court Judge.
- d) The record before me indicates that the first available dates for a ten-day trial in Provincial Court were in August of 2020. However, when the dates were offered, Ms. Sharma's counsel, Mr. Vaze, requested later dates. In the result, the parties ultimately secured trial dates in November of 2020, as set out in the following subparagraph.
- e) On 5 December 2019, the parties appeared in Provincial Court and confirmed trial dates commencing 9 November 2020, and running for a total of ten court days over a three week period.
- f) On or about 15 October 2020, with the consent of the Crown, the applicants changed their election to trial by Judge alone in Supreme Court. The re-election was effected in writing, and there was no court appearance speaking to the circumstances. The Provincial Court trial date was converted into a date for a two-day preliminary inquiry.
- g) On 9 November 2020, the preliminary inquiry commenced, and concluded in a single day.
- h) The parties then communicated via email with Supreme Court Scheduling for the purposes of arranging a trial date. The first date offered for a ten-day trial in Supreme Court was 28 June 2021. Counsel for Mr. Sharma indicated that he was content with that date, but counsel for Ms. Sharma requested dates in September or October of 2021. Ultimately, the parties agreed to schedule a ten-day trial commencing on 13 September 2021.
- i) On 14 December 2020, the parties appeared in Supreme Court and confirmed the 13 September 2021 trial date.
- j) On 26 July 2021, the parties had their first pre-trial conference in Supreme Court, before Justice Beames. There were still some unresolved issues regarding the manner in which the trial was to proceed, so Justice Beames directed a further pre-trial conference.
- k) On 18 August 2021, the parties had a second pre-trial conference in Supreme Court, before Justice Blok, who made some directions for the Crown to provide certain additional information to the defence, and then confirmed the trial date of 13 September 2021.

- l) On 8 September 2021, defence counsel called the matter ahead to apply for an adjournment of the upcoming trial. The Crown opposed the adjournment. After hearing submissions from counsel for all parties, Justice Tammen granted the defence adjournment application, based upon recent changes in the Crown's case. I will describe the facts relating to this adjournment in more detail below.
- m) Following the adjournment of the first Supreme Court trial date, the parties again communicated via email with Supreme Court Scheduling. The first available court date for a ten-day trial was on 4 January 2022. All of the parties agreed to that date, which was confirmed in court on 13 September 2021.
- n) On 31 December 2021, the Chief Justice issued a direction that all in person criminal matters set to be heard during the week of 4 January 2022 were cancelled, due to concerns about a province-wide surge in COVID-19 cases.
- o) On 4 January 2022, Supreme Court Scheduling sent an email to the parties advising that the first available date for a ten-day trial was 21 March 2022, and attaching a list of available dates from that point forward. On 6 January 2022, the Crown's office responded with an email indicating that Crown counsel and the Crown witnesses would be available from 24 May 2022 onward. Defence counsel responded that 24 May 2022 "works for both defence counsel". On this basis, the parties scheduled a ten-day trial to commence on 24 May 2022.
- p) On 25 January 2022, Supreme Court Scheduling sent an email to the parties indicating that the week of 24 May 2022 was no longer available, because the Supreme Court's spring conference, originally set for the preceding week, had been moved to the week of 24 May 2022. On that basis, the parties were advised that the trial would have to be re-scheduled. Thereafter, there was an email exchange, the net result of which was that all of the parties agreed to schedule a ten-day trial commencing 29 August 2022. The particulars of the dates offered and the positions of the parties are set out in greater detail below.
- q) On 1 February 2022, the parties appeared in Supreme Court and confirmed the ten-day trial date to commence on 29 August 2022. Counsel made comments on the record about the circumstances leading up to the re-scheduling, and the suitability of the new trial date, as discussed below.
- r) On 25 August 2022, the parties were advised that the trial in this matter had been assigned to Justice Caldwell.
- s) On 29 August 2022, which was to be the first day of the trial, defence counsel applied for a further adjournment. The stated basis for the application was that Justice Caldwell was also the assigned trial judge on another matter arising out of the same police investigation. None of the parties formally applied for a ruling that Justice Caldwell recuse himself. Rather, the defence and the Crown jointly requested that the matter be adjourned and assigned to a new trial judge, on the condition that Mr. Sharma and Ms. Sharma would expressly waive any delay arising from this particular adjournment. On that basis, Justice Caldwell granted the

adjournment.

- t) In a series of subsequent pre-trial conferences before me, new trial dates were arranged commencing 16 January 2023. The amount of time required for the trial was extended from 10 days to 15 days, based on an expanding list of Charter applications. I was later assigned as the case management judge and trial judge, and the s. 11(b) application was argued before me on 31 October 2022, for two days.

Legal Analysis

Summary of the Approach

- [3] Applying the analytical framework set out in *Jordan*, helpfully summarized in *R. v. Coulter*, 2016 ONCA 704 at para. 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 their 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.

Summary of Timeline and Key Points in Procedural History

- [4] The total elapsed time from the laying of charges on 2 August 2019 (subparagraph (b) above) to the anticipated completion of the trial on 3 February 2023 (subparagraph (t) above) is 42 months. Both applicants expressly waived 4.5 months of delay, from the scheduled third trial date on 29 August 2022 (subparagraph (s) above), to the commencement of the fourth trial date on 16 January 2023 (subparagraph (t) above). This means the amount of delay in issue is 37.5 months.
- [5] It is helpful to break down the overall delay into a number of discrete blocks, each under a separate heading. I should note that the figures listed in brackets above each sub-heading are merely to provide some sense of the amount of time in issue and are not precise. For one thing, there is overlap in the amount of delay associated with each block of time, which explains why the figures listed in brackets do not add up exactly to the total delay of 37.5 months that is in issue in this case. I wish to be clear that my final analysis will be based on the total delay of 37.5 months as I have broken it down in the preceding paragraph.
- (i) Laying of Charges to Conclusion of Preliminary Inquiry [16 months]
- [6] There are several disputed periods of delay under this heading.

- [7] The Crown argues some three months of delay is attributable solely to the conduct of Ms. Sharma, on account of Mr. Vaze's unavailability for trial from 10 August 2020 to 9 November 2020. The Crown relies on Jordan at para. 64, where the majority held that periods of time during which the court and the Crown are ready to proceed, but the defence is not, are properly characterized as defence delay.
- [8] The evidence as to the scheduling of the 9 November 2020 trial date is not entirely satisfactory. The record before me includes a "Scheduling Notice" from the Provincial Court in Abbotsford indicating that first "Date Offered" was 10 August 2020, but this date was "Declined By" Ms. Sharma's counsel Mr. Vaze. The only other detail furnished on the Scheduling Notice is a shorthand note stating, "Def. Csl. B.V. u/a & u/a entire months of Sep & Oct, 2020 & first available Nov/20." It is not difficult to discern the meaning of this note, namely that a trial date of 10 August 2020 was offered, but Ms. Sharma's counsel Mr. Vaze declined that date because he was unavailable until November 2020. The difficulty is that there is nothing on the Scheduling Notice form itself stating expressly when the Crown was first available. Nor is there any evidence on the Scheduling Notice indicating, at least in explicit terms, whether the "Dates Offered" were merely dates when court time is available, or alternatively whether these were dates when court time was available and the Crown was ready to proceed. Nor has the Crown been able to marshal any evidence from its own file to show whether the Crown and Crown witnesses were actually ready to proceed on the "Dates Offered" but declined by Ms. Sharma's counsel.
- [9] This point is significant, because the majority made it clear in Jordan at para. 64 that "the defence will have directly caused the delay if the court and the Crown are ready to proceed, but the defence is not". In this case, there is evidence that the Court was ready to proceed, and counsel for Ms. Sharma was not. However, there is no direct evidence that the Crown was ready to proceed.
- [10] Crown counsel frankly acknowledges the absence of any direct evidence on this point, but argues that the Court should draw an inference that the Crown was ready to proceed. The Scheduling Notice indicates that a 10 August 2020 trial date was "offered", and that it was "declined" by Ms. Sharma's counsel, who was expressly said to be unavailable until November of 2020. Relying on this evidence, Crown counsel submits that it was more likely than not that the Crown was available, and the only reason the 10 August 2020 date was not selected was because of the unavailability of Ms. Sharma's counsel.
- [11] The Crown's interpretation of the Scheduling Notice is actually consistent with what the majority said about the issue of defence availability in Jordan at para. 64. The full paragraph reads as follows:
- [64] As another example, the defence will have directly caused the delay if the court and the Crown are ready to proceed, but the defence is not. The period of delay resulting from that unavailability will be attributed to the defence. However, periods of time during which the court and the Crown are unavailable will not constitute defence delay, even if defence

counsel is also unavailable. This should discourage unnecessary inquiries into defence counsel availability at each appearance. Beyond defence unavailability, it will of course be open to trial judges to find that other defence actions or conduct have caused delay (see, e.g., *R. v. Elliott* (2003), 114 C.R.R. (2d) 1 (Ont. C.A.), at paras. 175-82).

[emphasis added]

- [12] The underlined portion of this passage highlights that it would only be necessary to note on the record that defence counsel is not available when both the Court and the Crown are available. When court time is available, but the Crown is not, there would be no basis for the Court to enquire into the availability of defence counsel. This approach serves to avoid "unnecessary inquiries into defence counsel availability".
- [13] Interpreting the notations on the Scheduling Memo together with the discussion of the proper scope of enquiry into defence counsel's availability as set out in *Jordan* at para. 64, I conclude that the Crown was in fact available for the 10 August 2020 trial date, and the only reason the date was not selected was because counsel for Ms. Sharma was unavailable. I conclude that, vis-a-vis Ms. Sharma, the period of time from 10 August 2020 to 9 November 2020 is defence delay.
- [14] That leaves open for consideration the characterization of this three-month time period vis-a-vis the co-accused Mr. Sharma. Crown counsel cites *R. v. Rai*, 2019 BCCA 377 at para. 113 for the proposition that, "[w]hen outside the Crown's control, delay caused by a co-accused can qualify as an exceptional circumstance: *R. v. Curry*, 2016 BCSC 1435 at para. 160-166." In my view, both *Rai* and *Curry* are distinguishable, in that they involved periods of discrete and substantial delay arising from the unanticipated adjournments or other delays of scheduled hearing dates at the behest of a co-accused. I question whether the same reasoning could be applied to delay occasioned by the unavailability of a co-accused's counsel in the scheduling of trial dates.
- [15] The concept of "exceptional circumstances" applies to developments that are (i) reasonably unforeseen or unavoidable, and (ii) cannot reasonably be remedied: *Jordan* at para. 69. Further, "exceptional circumstances" generally fall into one of two categories, namely "discrete events" or "particularly complex cases", although this is not necessarily a closed list: *Jordan* at para. 71. Given these contours, I have some difficulty applying the concept of exceptional circumstances to delays in scheduling arising from unavailability of counsel for one of a number of co-accused, at least at the initial scheduling stage. The situation is different where a date has been set and is later adjourned due to the unavailability of counsel for a co-accused or other problems with a co-accused's representation, and where severance is not a realistic or justifiable option. That was the kind of situation that arose in both *Rai* and *Curry*.
- [16] There are also cases where limited availability of counsel for multiple co-accused has been taken into account as a factor contributing to exceptional complexity. Indeed, this factor was acknowledged in *Jordan* at para. 77 as an element of potential complexity. See also *R. v.*

Jurkus, 2018 ONCA 489 at para. 67-71; R. v. Eheler, 2021 BCCA 316 at para. 71. However, there has been no suggestion that the present prosecution is exceptionally complex. It is a relatively straightforward drug prosecution involving charges arising from two separate searches on the same date. There is now a long list of Charter applications advanced by the two accused, but that of itself does not make the case exceptionally complex. I conclude that the approach contemplated in cases such as Jurkus and Eheler does not assist the Crown in this case.

- [17] Counsel for Mr. Sharma submits that the delay associated with the unavailability of Ms. Sharma's counsel is only defence delay in relation to Ms. Sharma. One can easily infer from the record that Mr. Sharma's counsel was available and ready to proceed to trial on 10 August 2020. Thus, counsel says there is no reason why his client should bear any responsibility for delay associated with the unavailability of counsel for the co-accused. Counsel submits that, vis-a-vis Mr. Sharma, the three-month delay attributable to the unavailability of counsel for the co-accused does not fit within the meaning of "defence delay" as described in Jordan at para. 64. For all of these reasons, Mr. Sharma takes the position that the Court should calculate the overall delay separately vis-a-vis each accused.
- [18] There is some appeal to Mr. Sharma's argument, when one considers that s. 11(b) of the Charter creates an individual or personal right of each accused to be tried within a reasonable time. However, this approach may not fully account for the important public interests in favour of joint trials of multiple accused facing joint allegations, and the necessary practical implications of such joint trials. In R. v. Vassell, 2016 SCC 26 at para. 6, Justice Moldaver stated that "delay caused by proceeding against multiple co-accused must be accepted as a fact of life and must be considered in deciding what constitutes a reasonable time for trial". Although Vassell was a pre-Jordan case, this principle has been acknowledged in more recent cases: R. v. Singh, 2016 BCCA 427 at para. 91; R. v. Daye, 2022 ONCA 675 at para. 26.
- [19] The decision to proceed jointly against multiple accused is a matter within the Crown's discretion, generally not reviewable by the courts. However, where a decision is made to proceed jointly against multiple accused, the Crown must be cognizant of each accused's s. 11(b) rights as the case moves its way through the courts. As explained in Jordan at para. 79, "[w]hile the court plays no supervisory role for such decisions, Crown counsel must be alive to the fact that any delay resulting from their prosecutorial discretion must conform to the accused's s. 11(b) right (see, e.g., Vassell)".
- [20] Thus, there will be situations where the public interest in favour of joint trials must give way to other important interests, one of which is the right of each accused to be tried within a reasonable time. Options such as severance may have to be considered by the Crown, by the defence, or possibly even by the court on its own motion. Exactly how these considerations play out will depend very much on the facts of each case. In the present case, no one suggested that severance would have been warranted to address a three-month period when one defence counsel was available but the other was not, at the initial scheduling phase.

This was understandable at the time. By that point in the proceedings the anticipated trial date was within the applicable Jordan ceiling of 18 months for trial in Provincial Court, although there was not much room to spare.

- [21] The tensions at play in determining how to treat limited availability of counsel for multiple co-accused under s. 11(b) of the Charter produce a gordian knot that is not easy to untie. As discussed below, some courts appear to favour an "individualized" approach, others have taken a "communal" approach, and others still have taken a less categorical, "case-specific" approach.
- [22] Appellate courts in other provinces have made the point that "[d]elay arising from a co-accused's conduct is not automatically attributed as defence delay against all accused". On this basis, the Courts in both Alberta and Ontario have generally favored an "individualized approach": *R. v. Klassen*, 2018 ABCA 258 at para. 88; *R. v. Gopie*, 2017 ONCA 728 at para. 128.
- [23] For its part, the Supreme Court of Canada has yet to definitively pronounce on the issue. The Court has expressly left open the question of "whether and in what circumstances multiple accused should be treated communally as opposed to individually when assessing defence delay under s. 11(b)": *R. v. Yusuf*, 2021 SCC 2 at para. 4. In *Yusuf*, the trial judge characterized delay attributable to the unavailability of counsel for one accused as defence delay vis-a-vis that accused, but was not prepared to do so vis-a-vis the other accused. The Court of Appeal took a different tack, finding that at least some periods of delay attributable to unavailability of one accused's counsel could be characterized "communally" as defence delay for all accused, while other such periods of delay ought to be assessed "individually": *R. v. Pauls*, 2020 ONCA 220 at para. 45-54. We can see from this that in grappling with the question of delay arising from the unavailability of counsel for multiple co-accused, the Ontario courts have sometimes assessed the delay on an individualized basis, and other times assessed it communally.
- [24] In *R. v. Creighton*, 2022 BCSC 1728 at para. 64 to 65, Justice Winteringham considered the remarks of the Supreme Court of Canada in *Yusuf*, along with a number of other cases, concluding that it "remains undecided" whether the delay occasioned by scheduling dates to accommodate limited availability of multiple defence counsel should be treated as defence delay to be "deducted from the overall delay" in the s. 11(b) analysis. Winteringham J. went on to take a case-specific approach to the issue of delay occasioned by the unavailability of a co-accused's counsel. On the facts of the case before her Winteringham J. determined that it was appropriate to treat a period of delay attributable to unavailability of "[e]ither one or the other defence lawyer" as "defence delay" vis-a-vis both of them. Winteringham J. stressed that this was a finding based specifically on the record before her, not a categorical determination about "the proper approach for calculating delay when there are multiple accused": *Creighton* at para. 73-74.

- [25] I intend to follow Winteringham J.'s lead by adopting a case-specific approach, rather than a categorical one. After considering the arguments of both Crown counsel and counsel for Mr. Sharma, I conclude that the three months in issue here should not be counted as defence delay vis-a-vis Mr. Sharma. On the record before me I have no difficulty concluding that the Court offered a trial date commencing 10 August 2020, that counsel for Mr. Sharma was ready to proceed, and that the only reason the trial was not scheduled for that time frame was the unavailability of counsel for the co-accused Ms. Sharma. There is a clearly-identifiable three-month time frame when Mr. Sharma and his counsel were ready to proceed to trial but another party was not. This is distinguishable from Creighton, where the Court was concerned with a time frame in which counsel for one accused was unavailable on some dates and counsel for the other accused was unavailable on others. Examined from the perspective of Mr. Sharma, one cannot say the three months in issue here was delay caused "solely by the conduct" of Mr. Sharma or his counsel. Indeed, neither Mr. Sharma nor his counsel played any role whatsoever in this particular delay. Nor is there any evidence that Mr. Sharma agreed to the delay in a manner that could be viewed as a waiver of his s. 11(b) rights.
- [26] In all the circumstances, I accept the submission of Mr. Sharma's counsel that the net delay for Mr. Sharma should be calculated differently from the net delay for the co-accused Ms. Sharma. I stress that this is a case-specific finding, not to be taken as laying down any kind of general rule as to the allocation of delay attributable solely to the unavailability of a co-accused's counsel. In the result, I would deduct three months as "defence delay" vis-a-vis Ms. Sharma, but I would not deduct anything from the overall delay vis-a-vis Mr. Sharma.
- [27] The next point of contention between the parties has to do with the implications of the defence re-election as to mode of trial, from trial in Provincial Court, to trial by Judge alone in Supreme Court. For ease of reference, I may refer to this from time to time in my reasons as a "re-election up". The re-election was effected on 15 October 2020, in writing, with no court appearance and no formal comment by the parties on the record. The immediate effect of the election was really twofold. First, the ten-day trial set for 9 November 2020 was converted into a two-day preliminary inquiry. Second, since the case would now proceed to trial in Supreme Court, the Jordan ceiling was raised from 18 months to 30 months. This second point meant that the s. 11(b) implications cut both ways. On the one hand, if the matter had proceeded to trial on 9 November 2020 and finished on time, the trial would have concluded within the 18-month ceiling applicable to cases tried in Provincial Court. On the other hand, even though the Jordan clock kept ticking when the Provincial Court dates were converted from a trial into a preliminary inquiry, the decision of the accused to have a trial in Supreme Court gave the Crown an additional 12 months to prosecute the case. In this regard, the case law appears to recognize that as a general rule the prospective effect of a change in election from trial in Provincial Court to trial in Supreme Court is accounted for in the 30-month ceiling for trials in superior court: *R. v. Eremenko*, 2018 BCSC 1138 at para. 75; *R. v. Nasery*, 2017 ABQB 564 at para. 60.

- [28] In *R. v. Lai*, 2021 BCCA 105 at para. 99-102, the majority took the view that it would be an error to treat an as-of-right "re-election up" as a discrete exceptional circumstance, because that possibility is in effect built into the 30-month ceiling for trials in superior court. The Supreme Court of Canada later affirmed the result, but did not entirely endorse the Court of Appeal's reasoning. In the majority judgment, Justice Moldaver invoked the proposition from *R. v. Cody*, 2017 SCC 30 at para. 32 that one must consider not only "the decision to take a step" in the proceeding, but also "the manner in which it is conducted". On the particular facts in issue in *Lai*, Moldaver J. held that the accused's conduct in exercising a right to re-elect at the last minute, without sound explanation, was not a legitimate response to the charges. Hence, all of the time associated with the loss of the initial trial dates should have been characterized as defence delay: *R. v. Lai*, 2021 SCC 52.
- [29] Returning to the case at bar, the focus of the Crown's argument is not the prospective effect of the re-election, but rather the lost opportunity for earlier dates associated with the defence change in position as to mode of trial. Recall that the accused initially elected trial in Provincial Court and proceeded to schedule a ten-day trial. Later, the accused re-elected trial in Supreme Court, with a two-day preliminary inquiry. On this basis, the Crown submits that if the accused had initially elected trial in Supreme Court following a preliminary inquiry, the parties would have been able to secure dates for a two-day preliminary inquiry much sooner than the date ultimately secured for a ten-day trial in Provincial Court.
- [30] The Crown relies on obiter comments in *R. v. Lee*, 2017 ONSC 4862 at para. 21, for the proposition that where there is no good reason or explanation for an ill-timed re-election as to mode of trial, "some portion of the resulting delay may well be deducted". In *Lee*, the Court pointed out that the issue was not so much the decision of the accused to change his or her position with respect to mode of trial, but rather the timing of the re-election. Where the re-election is made late in the proceedings, such that the overall delay in Provincial Court is longer than it might otherwise have been, the accused might be expected to provide a good reason for the timing of the change in election, or otherwise bear responsibility for "some portion" of the delay. On the facts in *Lee*, the Court found that late re-election was a product of late Crown disclosure, so there was no basis for holding the accused responsible for any delay.
- [31] I accept the proposition that an untimely re-election could, on the right facts, be found to have resulted in a lost opportunity to schedule earlier dates for a preliminary inquiry. That conclusion is consistent with the obiter remarks in *Lee*, and the comments of Moldaver J. in *Lai*. The question is not so much the accused's choice to re-elect, but the timing of the re-election. To put it another way, borrowing from *Cody* and *Lai*, the court may scrutinize not merely the decision to take a particular step in the proceeding, but also the manner in which it is conducted. It is hard to ignore the reality that by and large a preliminary inquiry is more focussed and less involved, and therefore requires considerably less court time than a trial. If the accused makes an early election for trial in superior court and a one or two day preliminary inquiry is required, the parties are much more likely to secure an earlier date

than they would get for an eight or ten day Provincial Court trial. By contrast, if the accused initially elects trial in Provincial Court and an eight or ten day trial is booked, and then much later the accused re-elects up and requests a preliminary inquiry, the opportunity for an earlier date will very likely have been lost.

- [32] The difficulty with the Crown's position is the absence of any evidence on the record as to the amount of time lost due to the change in election by the two accused. There is no way to discern, some two years after the event, whether there would in fact have been earlier dates if the accused had initially sought a two-day preliminary inquiry rather than a ten-day Provincial Court trial. Nor is it possible to determine precisely how much earlier the dates would have been, considering that this would be a function of not only available court time, but also the availability of the parties. The best one could do on this record would be to make an educated guess about how much time was forsaken in booking a ten-day trial rather than a two-day preliminary inquiry. As the Crown stated in its written argument, "[w]e will never know when the preliminary inquiry would have taken place had the Sharmas elected to have a preliminary inquiry and a trial in Supreme Court in the first place, or had they re-elected earlier."
- [33] Evidentiary gaps of this sort can be avoided, if the parties are mindful of delay throughout the course of the proceedings. In *Jordan*, the majority pointed out at para. 62 that where the accused chooses to re-elect down (from a trial in Supreme Court to a trial in Provincial Court) with the consent of the Crown, 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". Of course, here the situation is different, in that the two accused wished to re-elect up (from a trial in Provincial Court to a trial in Supreme Court). However, the principle remains the same. It would have been open to the Crown to require, as a condition of its consent to the re-election, that the defence either waive some period of the delay that had already occurred in Provincial Court, or stipulate on the record that if the re-election had been made earlier, a two-day preliminary inquiry could have been arranged a certain number of months earlier than the date when the preliminary inquiry ultimately proceeded. In deciding whether to agree to such a stipulation, defence counsel could have consulted their calendars and taken into account the availability of court time in Provincial Court over the relevant time frame, much closer in time to the events in issue.
- [34] However, since none of the steps discussed in the preceding paragraph took place, the Crown's argument is thwarted by an evidentiary gap. There are simply too many variables at play here for the Court to determine with any confidence whether an earlier date could have been secured, and precisely when that earlier date would have been. I have been given no evidence about the amount of lead time generally required to book a two-day hearing in Provincial Court, and how that compares with the amount of lead time generally required to book a ten-day trial in Provincial Court. Nor have I been given any evidence as to the availability of the parties for an earlier, two-day hearing in Provincial Court. Nor can I have any confidence on the record before me that the parties would actually have been ready to

proceed with a two-day preliminary inquiry any earlier than the date they ultimately selected. While Crown counsel's argument is lucid and logical, it is not grounded in the record before me.

[35] The Crown has also cited several cases where a late re-election as to mode of trial has been characterized as a discrete event warranting treatment as an exceptional circumstance, namely *R. v. Truong*, 2017 BCSC 736 at para. 60-62 and *R. v. Herman*, 2017 BCSC 215 at para. 82-89. However, both cases are distinguishable. In *Truong*, the accused re-elected as of right, so the Crown had no control over the situation.[1] In *Herman*, the re-election was one of two unexpected developments, the other being the unanticipated illness of Crown counsel, and the trial judge treated both developments as exceptional circumstances that, taken together, produced an identifiable amount of delay. In the case at bar, the Crown's principal argument was that the late re-election was an action that qualified as defence delay, not an exceptional circumstance. In any event, I find that the re-election in this case does not constitute an exceptional circumstance because the Crown's consent was required and given, such that this was not an "unavoidable" development.

[36] I would sum up the results in relation to the 16-month block of time from the laying of charges to the completion of the preliminary inquiry in two points. First, vis-a-vis Mr. Sharma, I find that none of the 16 months in issue here is defence delay. Second, vis-a-vis Ms. Sharma, I would deduct three months for defence delay arising from counsel's unavailability from 10 August 2020 to 9 November 2020.

(ii) Order of Committal to First Scheduled Trial Date [9 months]

[37] The only dispute between the parties regarding this block of time pertains a period of some two months, between the first trial date offered and the trial date ultimately agreed upon by the parties. Recall that Supreme Court Scheduling offered a ten-day trial commencing 28 June 2021, but counsel for Ms. Sharma requested dates in September or October of 2021, and the parties settled on a ten-day trial commencing on 13 September 2021.

[38] The Crown argues that the period of 2.5 months between the first date offered and the date ultimately agreed upon should be characterized as defence delay, based on the unavailability of Ms. Sharma's counsel. Ms. Sharma submits that it is not clear from the record whether the Crown and police witnesses were in fact available for trial commencing on 28 June 2021. Mr. Sharma contends that whatever the characterization of the delay vis-a-vis Ms. Sharma, neither Mr. Sharma nor his counsel had any responsibility for the delay.

[39] Adopting the case-specific approach outlined at paragraphs 24 to 25 above, I find that on the particular facts of this case it is appropriate to analyze the delay relating to the scheduling of the first trial date in Supreme Court separately in relation to each accused.

[40] I will first analyze the situation from Ms. Sharma's perspective. There is nothing in the record stating in express terms that the Crown and its witnesses were available and ready to proceed. However, to the extent that this is a deficiency in the record, I would chalk it up to

the actions of counsel for Ms. Sharma. Based on the comments in Jordan at para. 64, defence counsel was not obliged to say anything about his availability unless and until it was clear that both the court and the Crown were available and ready to proceed to trial. Thus, when Supreme Court Scheduling offered dates commencing 28 June 2021, it would have been open to Ms. Sharma's counsel to remain silent unless and until the Crown indicated its unavailability. However, rather than waiting to find out the Crown's position, counsel immediately enquired about dates in September or October. I interpret this as defence counsel declining the first offered dates, and I find that the resulting 2.5 months of delay is attributable solely to the actions of Ms. Sharma's counsel.

- [41] I next consider the situation from Mr. Sharma's perspective. When Supreme Court Scheduling offered trial dates commencing on 28 June 2021, counsel for Mr. Sharma replied that he was available and ready to proceed. The 13 September 2021 date was booked due to actions of counsel for the co-accused, Ms. Sharma. I conclude that neither Mr. Sharma nor his counsel bear any responsibility for the resulting 2.5 months of delay. This delay is certainly not attributable solely to the conduct of Mr. Sharma or his counsel, hence it cannot be characterized as defence delay vis-a-vis Mr. Sharma.
- [42] To summarize, of the nine months from the date of committal to the first Supreme Court trial date, I find no defence delay vis-a-vis Mr. Sharma, and 2.5 months of defence delay vis-a-vis Ms. Sharma.

(iii) Adjournment of First Trial Date to Second Trial Date [3.5 months]

- [43] On 8 September 2021, the accused applied for and were granted a last-minute adjournment of the first Supreme Court trial date, set for 13 September 2021. The Crown says the adjournment application was unjustified and the resulting 3.5 months of delay is attributable solely to actions of the accused. The accused take the opposite position, asserting that the adjournment was necessitated by significant changes in the case they had to meet.
- [44] To fully appreciate what occurred on 8 September 2021 when the defence called the matter ahead to seek an adjournment of the trial, it is necessary to review the circumstances leading up to the adjournment application in some detail.
- [45] A pre-trial conference was scheduled for 26 July 2021, some eight to ten weeks before the pending trial date. The Crown synopsis filed in advance of that pre-trial conference indicated that: (i) the drug exhibits that had been seized in the search of the Sharma residence were being "reprocessed", (ii) new certificates of analysis were being sought, and (iii) the possession for the purpose of trafficking charge in relation to the drugs seized from the Sharma residence "may be amended to include fentanyl, depending on the new analysis". This was the first indication from the Crown of any intent to prove an allegation that the applicants possessed fentanyl for the purpose of trafficking.

- [46] At the pre-trial conference before Justice Beames on 26 July 2021, following a lengthy discussion about the multiple Charter issues to be raised at trial, counsel for Mr. Sharma expressed concern "about the trial going ahead" as scheduled if the Crown obtained new certificates of analysis with a view to amending the Indictment to include fentanyl allegations. Beames J. posed some questions about the manner in which the trial would proceed and about the use of the trial time. Among other things, Beames J. questioned whether the case was likely to be completed in the ten days of trial time that had been reserved given the number of Charter issues being raised. Beames J. also suggested that if there were new certificates of analysis leading to an application to amend the Indictment, "that may well change the entire complexion of the trial and throw its current scheduling into complete disarray". In the result, Beames J. directed a further pre-trial conference to discuss these issues and others.
- [47] The parties appeared before Justice Blok at a further pre-trial conference on 18 August 2021, some two weeks before the scheduled trial date. Blok J. directed, among other things, that on or before 1 September 2021, the Crown was to provide the defence with a summary of any additional evidence to be tendered during the Charter voir dire, and any new certificates of analysis to be relied upon by the Crown.
- [48] On 1 September 2021, Crown counsel delivered a package of material to the defence. This material included a new expert report from the Crown's drug expert, Cst. Walker. In that report, Cst. Walker referenced a 1.51 gram package of a substance said to be fentanyl, and went on to opine that all of the drugs seized from the Sharma residence - including the 1.51 gram package of alleged fentanyl - were possessed for the purpose of trafficking. The facts or assumptions underlying Cst. Walker's opinion about the fentanyl would appear to have come from the re-processing of the drug exhibits and the new certificates of analysis recently disclosed to the defence.
- [49] On 8 September 2021, the matter was called ahead for a defence application to adjourn the trial. The application was brought by counsel for Mr. Sharma and supported by counsel for Ms. Sharma. There were two bases for the defence adjournment application, each of which I will summarize briefly.
- [50] First, the defence raised concern about an alleged change in the nature of the Crown's case arising from the reprocessing of the exhibits, the new certificates of analysis, and Cst. Walker's expert report opining that the 1.51 gram package alleged to contain fentanyl was possessed for the purpose of trafficking. On the basis of this recently-produced evidence, the Crown intended to apply for an amendment of the Indictment to allege possession of fentanyl for the purpose of trafficking. Counsel for Mr. Sharma asserted that an adjournment was required for the defence to consider, among other things, the evidence surrounding the new drug analysis and the continuity of the drug exhibits. Counsel for Ms. Sharma adopted Mr. Sharma's submissions, adding that the Crown's stated intent to allege possession of fentanyl for the purpose of trafficking constituted a significant change in jeopardy for the two accused, necessitating a full opportunity to carefully examine the

evidence with respect to the reprocessing of the exhibits.

- [51] Second, the defence raised concern about the Crown's recently-announced intention to call a particular officer, Cst. Hurtabuisse, as a witness in the Charter applications. The defence had previously been provided with a 290-page report from Cst. Hurtabuisse but had not been advised that the Crown intended to call her as a witness in the Charter applications until two weeks before the trial was set to commence.
- [52] The Crown opposed the adjournment application. Crown counsel pointed out that the initial disclosure package provided in 2019 included one or more certificates of analysis indicating cocaine, and also one certificate of analysis indicating fentanyl. The Crown maintained that the reprocessing of the exhibits and the new certificates of analysis simply clarified which packages of drugs were cocaine and which were fentanyl. The Crown maintained that the possibility of an amended Indictment could be dealt with "down the road" by the trial judge, who would be called on to decide whether or not to grant it.
- [53] In oral reasons for judgment indexed as R. v. Sharma, 2021 BCSC 2094 [unreported], Justice Tammen granted the defence application to adjourn the trial. Tammen J. held that the case was "not ready for trial", because the Crown had "completely recast its case": at para. 3. The case as originally framed involved allegations of possession of marihuana and cocaine for the purpose of trafficking. In the "days and weeks" leading up to the trial, the Crown evinced an intention to amend the Indictment to include an allegation of possession of fentanyl for the purpose of trafficking. Noting that the proceedings had been initiated some 18 months earlier, Tammen J. found it "baffling" that the Crown's expert witness decided to arrange for a further analysis of the seized drugs leading the Crown to "recast its case" in the fashion described above: at para. 4. Tammen J. found that an adjournment was necessary to give the defence an opportunity to "explore this new disclosure, what brought it about, and address the implications of the change in Crown position": at para. 5.
- [54] Tammen J. also made reference to the Crown's recently-stated intention to call Cst. Hurtabuisse (who prepared a 290-page report addressing certain cell phone evidence) as a witness in the Charter voir dire. (I note here that the report itself had previously been disclosed, but the Crown had only recently announced its intention to call Cst. Hurtabuisse as a witness in the voir dire.) Tammen J. cited this as another factor weighing in favour of the defence adjournment application.
- [55] The Crown says the Court is not bound by Tammen J.'s conclusions as to the basis for the adjournment. Crown counsel submits that a motions judge cannot make findings that later bind the trial judge. The Crown points out that Tammen J.'s ruling on the adjournment application was an interlocutory decision, and there was no ability to appeal it, even if it was based on a complete misconception of the circumstances. Crown counsel says the Court must conduct an independent assessment of the merits of the defence adjournment application before Tammen J. Counsel goes on to argue that the defence adjournment application was ill-conceived and unjustified for a number of reasons.

- [56] I am not prepared to accept the Crown's invitation to conduct a de novo assessment of the basis for the adjournment. Another Justice of this Court, after hearing full submissions in a contested hearing, gave a reasoned decision granting an adjournment of the trial. Deference is owed to that decision, and it would not be appropriate for me to disregard it, or to somehow sit in review of it. I agree with counsel for Mr. Sharma that I could only conduct an independent assessment of the adjournment if there has been a material change in circumstances, or if the reality of the situation is shown - on a more complete or more reliable record - to be materially different than that which was presented to Tammén J.
- [57] The Crown says that in submissions before Tammén J., counsel for the two accused misconstrued and (unintentionally) misrepresented the true state of affairs. In submissions on 8 September 2021, defence counsel told Tammén J. that some of the drug samples seized from the Sharma residence that had previously been tested and determined to be cocaine were "re-tested" and found to be fentanyl. That was not accurate. The Crown says the change in the case was in fact much more nuanced.
- [58] In submissions before me, Crown counsel explained the reality of the situation as follows. From the very outset, at least one of the samples of drugs seized from the Sharma residence had been tested and determined to contain fentanyl. The relevant certificate of analysis confirming this had been provided to the defence as part of the initial disclosure package in 2019. However, based on the manner in which the drug exhibits had been processed, it was not possible to determine with any precision which of the various packages of seized drugs was the source of the sample that tested positive for fentanyl. Several years later, in the summer of 2021, the Crown's drug expert Cst. Walker arranged for the drug exhibits to be "re-processed", in order to obtain more precise information about precisely which package of seized drugs contained fentanyl. Each package was sampled and tested, yielding a separate certificate of analysis for each. By this process, Cst. Walker was able to ascertain which package of seized drugs was in fact fentanyl. Relying in part on the "re-processing" and the new certificates of analysis, Cst. Walker was then in a position to form an expert opinion - proffered for the first time in the summer of 2021 - that all of the drugs seized from the Sharma residence, including a 1.51 gram package of fentanyl, were possessed for the purpose of trafficking. This, in turn, led Crown counsel to advise the defence that the Crown would be seeking to amend the Indictment to include an allegation of possession of fentanyl for the purpose of trafficking.
- [59] Against this backdrop, Crown counsel submitted that Tammén J. was led astray by the defence submission, as reflected in the statement at para. 3 of the reasons that, "Crown now says that the substance analysed to be cocaine was, in fact, fentanyl". As explained above, the reality of the situation is that one of the drug samples was always known to be fentanyl, but up until the summer of 2021, it was not possible to determine which of the samples was fentanyl and it was, accordingly, not possible for the Crown's expert to offer any opinion as to whether the fentanyl was possessed for the purpose of trafficking.

- [60] I accept the Crown's submission that the change in the Crown's case was in fact more nuanced, and somewhat more difficult to explain than the impugned remark at para. 3 of the Tammen J.'s reasons might suggest. However, I do not consider the difference to be at all material to the outcome. The "overarching issue" identified by Tammen J. remained the same. As Tammen J. explained, there was "ample time for the appropriate analysis to be made of the substances". Despite this, "in the weeks leading up to trial", the Crown's expert "thought that a further analysis needed to be conducted", and in the result, the Crown's case had been "recast" to include an allegation that the accused were in possession of fentanyl for the purpose of trafficking. In this context, Tammen J.'s conclusion that the accused "must be given an opportunity to explore this new disclosure, what brought it about, and address the implications of the change in Crown position" was entirely apt. Recall the remarks of Beames J. at the initial pre-trial conference, that the Crown's proposal to amend the Indictment, "may well change the entire complexion of the trial and throw its current scheduling into complete disarray". Thus, at a pre-trial conference some six weeks before trial, Beames J. predicted what might happen if the Crown chose to re-cast its case, and this was more or less exactly what came to pass.
- [61] Before me, Crown counsel also argued that the application to amend the Indictment would be a matter for the trial judge, who could consider and weigh the alleged prejudice to the defence in deciding whether to grant the amendment. In the Crown's submission, "the adjournment resolved nothing" in this regard. With respect, this submission misses the point. A matter of weeks before the trial, the Crown provided further disclosure - including the evidence of the exhibit re-processing, and an updated expert opinion - and announced its intention to amend the Indictment to include a new allegation of possession of fentanyl for the purpose of trafficking. From the defence perspective, this materially altered the case the accused had to meet in several interrelated ways.
- [62] For one thing, the Crown's change in position had the potential to drastically alter the extent of the jeopardy faced by the accused. Although cocaine and fentanyl are both Schedule I substances under the CDSA, courts have recognized that in view of the heightened public safety risks associated with fentanyl distribution, severe sentences are often required for offenders convicted of fentanyl trafficking offences. See *R. v. Smith*, 2017 BCCA 112; *R. v. Lloyd*, 2019 BCCA 128.
- [63] Moreover, the defence had the right to review all of the evidence - the old, together with the new - regarding the manner in which the exhibits were seized, processed, analysed, re-processed, and further analysed. The defence also had the right to conduct a thorough assessment of the Crown's new expert opinion. The defence had the right to make its own inquiries and investigations into all of this, to decide whether and how to challenge the Crown's evidence as it was presented. Those inquiries may or may not have gone anywhere, but the fact is that the defence had the right to make them, and it would not have been feasible to do so a matter of weeks before the trial.

[64] The concerns I have just listed go well beyond mere legal argument about an application to amend the Indictment to conform with the evidence. For all of these reasons, I reject the Crown's submission that the adjournment of the trial "resolved nothing". The adjournment gave the accused the necessary opportunity to properly prepare for the recently-announced change in the case they had to meet.

[65] In the result I find that none of the 3.5-month delay flowing from the adjournment of the first Supreme Court trial is attributable to the conduct of the defence. Although it was the accused who applied to adjourn the trial, the adjournment was necessitated by the Crown's last-minute decision to "recast" its case to include an allegation of possession of fentanyl for the purpose of trafficking.

(iv) Cancellation of Second Trial Date to Third Scheduled Trial Date [4.5 months]

[66] Recall that on 31 December 2021, the Chief Justice issued a directive cancelling all trials for the week of 4 January 2022, due to concerns about COVID-19. In the result, the 4 January 2022 trial in this matter was adjourned and re-scheduled for 24 May 2022. I have no difficulty concluding that the COVID-19 adjournment was a "discrete event" that was both unanticipated and beyond the control of the Crown. It therefore qualifies as an exceptional circumstance as contemplated in *Jordan* at para. 69-73.

[67] Counsel for Ms. Sharma argued that the COVID-19 adjournment of the second Supreme Court trial date would never have occurred if the Crown had not caused an adjournment of the first Supreme Court trial date for reasons discussed under the previous heading. The thrust of this argument is that where the Crown causes an adjournment that has the effect of delaying the trial, the Crown is somehow barred, either in logic or in law, from arguing that any subsequent delay in completion of the trial qualifies as an exceptional circumstance. I cannot accept this position. No legal support has been provided for it. Of course, in circumstances where the trial is delayed for any reason, including actions of the Crown, concerns about the accused's right to a trial within a reasonable time will become heightened. The Crown would be expected to be diligent and vigilant in avoiding any further delay, to the greatest extent possible. But that is not to say that where a case is adjourned once due to actions of the Crown, subsequent trial dates are somehow peremptory on the Crown, or that the Crown must be held legally responsible for each and every further delay in the proceedings.

[68] The question that remains is how much of the 4.5 month delay following from the adjournment of the second Supreme Court trial date is attributable to the Chief Justice's COVID-19 direction. While it may in some circumstances be appropriate to subtract the entire period of delay resulting from a discrete event, this will not necessarily always be the case. As the majority explained in *Jordan* at para. 75, "it may not be appropriate to subtract the entire period of delay occasioned by discrete exceptional events". The Crown "must always be prepared to mitigate the delay resulting from a discrete exceptional circumstance". The Crown must do what can reasonably be done to "mitigate" the delay, and

both the Crown and the justice system may be required to "prioritize" the case, "[w]ithin reason".

- [69] Returning to the facts, recall that after notifying the parties of the Chief Justice's directive cancelling all trials for the week of 4 January 2022, Supreme Court Scheduling subsequently offered the parties new trial dates commencing on 21 March 2022. On 6 January 2022, the Crown's office responded with an email indicating that Crown counsel and the Crown witnesses were available from 24 May 2022 onward. The defence immediately accepted this date.
- [70] In this recounting of the facts, we see no evidence that the Crown made any positive effort to mitigate the delay or prioritize the case by arranging for another Crown counsel, or another Crown agent firm to take the case, or by juggling or coordinating witnesses to make them available, even in two separate one-week blocks of time. Court time was available as early as 21 March 2022, but the new date - the third Supreme Court trial date - was set for 24 May 2022.
- [71] Of course, one must place these concerns in context. When the 4 January 2022 trial date was cancelled, the parties were able to secure a new trial date within 4.5 months. All things considered, this was a relatively quick turn-around for a ten-day trial. And it is possible that Crown efforts to mitigate the delay might not have been fruitful. However, since there is no evidence of any attempt at all to mitigate - despite the fact that two trial dates had already been lost, and the case had been before the court for 29 months at that point - it is impossible to know for certain what would have happened.
- [72] On balance, considering everything I have just discussed, I am not satisfied that the Crown was sufficiently proactive in trying to mitigate the effects of the COVID-19 adjournment, or in prioritizing this case given its unfortunate history. I find that the COVID-19 adjournment was a discrete event that qualified as an exceptional circumstance, but I would only deduct 2.5 months of delay on account of this development. The situation might well have been different if there was evidence that the Crown tried to mitigate the delay but was unable to do so despite best efforts. The Crown does not need to establish that its efforts at mitigation were successful, but only that reasonable efforts were made: Jordan at para. 70.
- (v) Cancellation of Third Trial Date to Fourth Scheduled Trial Date [3 months]
- [73] Within a few weeks of the parties confirming the third Supreme Court trial date, Supreme Court Scheduling informed the parties that the week of 24 May 2022 was no longer available, because the Court's Spring Conference had been "moved" from the week of 17 May 2022 to the week of 24 May 2022. Thereafter, the parties arranged for a fourth Supreme Court trial date, commencing on 29 August 2022 and concluding on 9 September 2022.

- [74] The Crown says the resulting three-month delay, from 24 May 2022 to 29 August 2022, was a further exceptional circumstance arising from a discrete event, namely the Court's decision to adjust the date for its Spring Conference. For its part, the defence submits that the Court's decision to move its Spring Conference to the week of 24 May 2022 was a scheduling decision properly characterized as a form of "institutional delay".
- [75] I do not accept the defence submission, for a number of reasons. First, the concept of "institutional delay" was developed under the Askov framework. This concept is not easily adopted to the Jordan framework, under which the Crown is ultimately responsible for all delay except that which is caused entirely by the defence, and delay arising from exceptional circumstances. Second, the majority acknowledged in Jordan at para. 73 that criminal proceedings do not always run as smoothly as well-oiled machines. No participant in the justice system can be held to a standard of perfection. Scheduling conflicts arise from time to time. Supreme Court Scheduling notified the parties of the change in the Court's calendar within a matter of weeks of the second Supreme Court trial date being fixed, and the trial was thereafter re-scheduled in a matter of days. Third and finally, from the perspective of the Crown as the moving party in the prosecution, the re-scheduling of the Court's Spring Conference was both unanticipated and entirely beyond the Crown's control. For all of these reasons, I conclude that the cancellation of the 24 May 2022 trial date was a discrete event that qualifies as an exceptional circumstance.
- [76] The defence complains that the cancellation of the 24 May 2022 trial date was indicative of a failure to properly prioritize this case, given its history. In my view, that is a separate matter, to which I will turn in due course.
- [77] As explained in paragraph 68 above, where a particular delay is caused by an exceptional circumstance, the Crown must do what can reasonably be done to mitigate the delay, and both the Crown and the justice system may be required to prioritize the case, within reason: Jordan at para. 75. In my view, this is where the defence concern about the failure to properly prioritize this case, in view of its history, enters the equation.
- [78] When Supreme Court Scheduling notified the parties that the Court had moved its Spring Conference to the week of 24 May 2022, it should have set off alarm bells for the Crown. From the perspective of the right to trial within a reasonable time, the situation could only have been regarded as dire. Even if the case had proceeded on 24 May 2022 and concluded on time, it would already have been four months over the presumptive Jordan ceiling of 30 months. The prospect of further delay would only have made matters worse.
- [79] On 1 February 2022, after the new date of 29 August 2022 was booked through Supreme Court Scheduling, the parties appeared in Court to confirm it. Counsel for Mr. Sharma put the following concern on the record:

Mr. Justice, I just want to point out that there is a trial date already set for this matter in - I believe it's May, it but it was set at a time when the court's calendar was open, but we have now been advised that the judge's conference has been moved back one week and this date is now having to be reset. So, I just - I agree with what [Crown counsel] said about the proposed dates, but I want to emphasize, because we're into Jordan territory with this case, that the reason why we're now here is because of a change in the judge's conference dates.

[80] Counsel for Ms. Sharma adopted those remarks.

[81] Crown counsel then responded as follows:

I'm just a little concerned about the points that have been put forward. I mean, when those sorts of submissions are made, I - or those sorts of points are made, it's a little disturbing because I anticipate that there will be a Jordan application coming. I know what we've already had our difficulties with this case and the January dates were just barely within the Jordan envelope. The COVID adjournment is a discrete event.

I don't know that there's much point in going back to the drawing board, though, here to see if we can possibly find earlier dates. I think that we're - from the Crown's perspective what we're going to do is we're going to live with the dates that have been fixed and leave it at that.

[82] The presiding Justice then interjected to remark that "whatever argument arises in August, you'll deal within August, I presume", to which Crown counsel replied, "[p]resumably, yes".

[83] I am not satisfied that, in taking this approach, the Crown complied with its obligation to mitigate the delay arising from the cancellation of the 24 May 2022 trial date. There is no evidence of any attempt to prioritize the case, or to find creative scheduling solutions that would mitigate the delay resulting from the cancellation of the third Supreme Court trial date. In particular:

- a) It does not appear that any request was made to the Court to assign a Judge who could have been excused from the Court's Spring Conference in order to ensure that this case went to trial as scheduled. Although this would have been an unusual request, it would certainly have been worth pursuing given the history of the case, including a prior COVID adjournment, and the unfortunate effect that re-scheduling of the Spring Conference had on this particular case.
- b) Alternatively, even if the re-scheduling of the Spring Conference meant that the case could not be heard during the week of 24 May 2022, there is no evidence of any request to start the case the following week, 30 May 2022, which was the second week of trial time that had been reserved when the third Supreme Court trial date was set. If that option had been considered, the cancellation of the 24 May 2022 date might only have delayed the completion of the trial by one week.

- c) Although the record indicates that there was limited availability for trial dates in Abbotsford from June through to August 2022, there is no evidence that any consideration was given to the availability of trial dates in other registries, including Chilliwack, New Westminster, or even Port Coquitlam. It is not uncommon for Supreme Court Scheduling to entertain requests to move cases between registries throughout the district. Indeed, defence counsel points out that the instant case started in Chilliwack and was later moved to Abbotsford in an effort to obtain earlier dates. The fifth Supreme Court trial date was scheduled to take place in New Westminster, for similar reasons.
 - d) There is no evidence that the Crown made any enquiries about moving the trial date forward, to schedule at least one week of trial time before 24 May 2022. I appreciate the Crown's office had earlier advised that Crown counsel and the police witnesses were not available until 24 May 2022. However, as explained in paragraph 70 above, there is no evidence that the Crown made any special effort to find another Crown counsel who could be available earlier, or to arrange its witness schedule in a manner that would allow even one week of the case to proceed at some point earlier than 24 May 2022.
- [84] My conclusion might have been different had the Crown proposed any of these options, either alone or in combination, even if those efforts proved to be unfruitful. As noted above and explained in Jordan at para. 70, the Crown need not establish that its efforts at mitigation were successful, but only that reasonable efforts were made. In this case, one can never know if any of the above-noted options would have succeeded in mitigating the delay, because the Crown made a choice not to "go back to the drawing board" to "see if we can possibly find earlier dates". Rather, despite the mounting delay and the looming s. 11(b) issue, the Crown chose to "live with the dates that have been fixed". On this record, I am not satisfied that it would be appropriate to deduct any time from the overall delay on account of the cancellation of the third Supreme Court trial date.

(vi) Balance of Delay to Anticipated Completion of the Trial [0.5 Months]

- [85] While the fourth Supreme Court trial date was set for 29 August 2022, I find on a balance of probabilities that the trial would not have completed as scheduled on 9 September 2022, for several reasons. First, the assigned trial judge, Justice Caldwell, was unavailable for 1.5 days of the 10 days of court time that had been reserved. Second, while 10 days had been booked for the trial, there were only nine days of trial time available because of the Labour Day holiday on 5 September 2022. Third, no allowance had been made for the two days of court time required for delay application. Fourth, there is no realistic possibility that all of the Charter issues now raised by the accused could have been properly litigated in 10 days. This concern had been raised by a number of Judges at various points in the proceedings, as early as 26 July 2021,[2] but was not acknowledged by the parties until they appeared before me on 22 September 2022, and the fifth Supreme Court trial date was scheduled for a total of 15 days. In view of all these points, I conclude that if the trial had commenced as scheduled on 29 August 2022, it would not have completed until 23 September 2022.

Conclusion

- [86] After accounting for the 4.5 months of delay that has been expressly waived by both accused, the total delay is slightly in excess of 37.5 months.
- [87] As regards Ms. Sharma, I would deduct a total of 5.5 months on account of defence delay for the two periods of time when Ms. Sharma's counsel was unavailable or otherwise declined earlier trial dates. The net delay in Ms. Sharma's case is 32 months. I have found that a total of 2.5 months of delay is attributable to an exceptional circumstance, namely the COVID-19 adjournment of the 4 January 2022 trial date. This brings the total delay in Ms. Sharma's case down to somewhere between 29.5 and 29.75 months, which is just barely under the 30-month Jordan ceiling. While this case is close to the line, I conclude that Ms. Sharma's right to trial within a reasonable time has not been infringed.
- [88] As regards Mr. Sharma, I would not deduct any time on account of defence delay. Of the total delay of 37.5 months, I attribute 2.5 months to exceptional circumstances arising from the COVID-19 adjournment of the 4 January 2022 trial date. Thus, the net delay in Mr. Sharma's case is at slightly in excess of 35 months, which is well over the Jordan ceiling. I conclude that Mr. Sharma's right to trial within a reasonable time as guaranteed under s. 11(b) of the Charter has been infringed. The proceedings against Mr. Sharma are stayed.

"Riley J."

- [1] Truong at para. 62. At the relevant time, s. 561(2) of the Criminal Code provided that an accused who initially elects trial in Provincial Court could re-elect to another mode of trial, as of right, no less than 14 days before the first trial date. In 2019, s. 561(2) was amended to provide that an accused who initially elects trial in Provincial Court can only re-elect, as of right, no less than 60 days before the first trial date.
- [2] The concern about the sufficiency of the time estimate was raised by Beames J. at a pre-trial conference on 26 July 2021. It was canvassed by at least one counsel in a subsequent pre-trial conference before Blok J. on 18 August 2021, but left unresolved. It was raised a third time by Caldwell J. at a fix date on 1 February 2022, at which point Crown counsel submitted that the ten-day time estimate was based upon the input of a number of experienced counsel and thus considered appropriate. Despite all of this, in my view the parties never really came to grips with the concerns articulated by Beames J. in the pre-trial conference on 26 July 2021, until the time estimated was addressed in some detail in a pre-trial conference before me on 22 September 2022.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/22/20/2022BCSC2080.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-sharma-2022>

Prepared on 29 October 2026 · Esheria