

Ontario Superior Court of Justice

M.R. Gibson J.

Heard: February 4, 2025.

Judgment: March 14, 2025.

Court File No.: CR-23-010596

[2025] O.J. No. 1155 | 2025 ONSC 1677

RE: His Majesty the King, Respondent, and Steven Jackson, Applicant

(50 paras.)

## Counsel

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Erin Jamieson, Counsel for the Respondent Crown.

Peter Thorning, Counsel for Applicant Steven Jackson.

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### ENDORSEMENT

#### APPLICATION FOR STAY OF PROCEEDINGS

#### PURSUANT TO SS. 11(B) AND 24(1) OF

#### THE CHARTER

**M.R. GIBSON J.**

#### Overview

**1** Steven Jackson ("the Applicant") was arrested on July 3, 2022. He is charged on an Indictment dated February 23, 2023, with eight counts, including assault, assault with a weapon, mischief, criminal harassment, uttering a threat to cause death, and uttering threats to kill an animal.

**2** It is alleged that the Applicant is the perpetrator of persistent intimate partner violence against his wife Kimberly Jackson ("the Complainant"). The alleged incidents are said to have occurred in multiple locations, but most incidents are said to have occurred at their shared residence in the City of Kitchener. At the time of his arrest, the Applicant and the Complainant had been married for 31 years and in a relationship for 35 years.

**3** The Applicant seeks a stay of proceedings based on unreasonable delay. The Applicant's Information was sworn in Kitchener, Ontario on July 4, 2022, making the *Jordan* date January 4, 2025. The total delay from the date of the Information being sworn on July 4, 2022, to the anticipated completion of the trial in the Superior Court of Justice on April 18, 2025, is 1,019 days, or 33 months and 14 days. Both the Crown and Defence agree that this is the correct number.

4 This delay is 3 months and 14 days over the ceiling set in *R. v. Jordan*, [2016 SCC 27](#), and is presumptively unreasonable. The Applicant says that there is no Defence delay in this matter. The Crown submits that 31 days, or one month, should be deducted as Defence delay because the Applicant changed Defence counsel.

5 This is not a complex case. Delays due to the COVID-19 pandemic are not a factor. The Applicant requests a stay of proceedings pursuant to s. 24(1) of the *Charter* as his right to be tried within a reasonable time guaranteed by s. 11(b) has been infringed. The Crown resists, and submits that once applicable deductions are applied, the net delay will be below the presumptive ceiling.

## **Facts**

### *Procedural History*

6 On July 3, 2022, the Applicant was arrested and charged with the above-noted offences and held for a show cause hearing. The Information was sworn on July 4, 2022. He appeared in court that day and the matter was put over for a contested bail hearing. On July 5, 2022, Defence counsel Michelle Dwyer requested a bail hearing for the following day, however, there was no availability. The bail hearing was then scheduled July 7, 2022. The Applicant was released from custody on July 7, 2022. The Applicant's first court appearance following bail was on July 28, 2022. He had retained Ms. Dwyer in advance of his first appearance. Ms. Dwyer requested a return date of August 24, 2022, to receive and review disclosure. The Crown advised disclosure was still being vetted, and requested a return date of September 1, 2022, which was agreeable to Ms. Dwyer. The Crown was not able to elect at the first appearance.

7 At the September 1, 2022, appearance, Ms. Dwyer advised she had requested disclosure on July 11 and August 24 and was not yet in receipt of it. The Crown advised disclosure had been vetted and would be shared shortly. Both parties agreed on a return date of September 29, 2022. On September 29, 2022, Ms. Dwyer advised she recently received disclosure and would need some time to review it. The matter was set to return on November 10, 2022, with no objection from either party. On November 10, 2022, an agent appeared for Ms. Dwyer. The agent advised that a Crown-Pre Trial occurred on October 20, 2022, and a large amount of audio and video disclosure was received on October 25, 2022. While the Crown's position at this appearance was that there was more than enough disclosure provided to move the matter forward to a JPT, the Crown also agreed that significant material was very recently disclosed. The matter was adjourned to December 15, 2022.

8 On November 18, 2022, the Applicant first contacted Defence counsel Peter Thorning regarding taking over his file. Mr. Thorning was retained and had the Applicant's file by November 29, 2022. On December 8, 2022, Defence Counsel sent an additional disclosure request to the Crown via e-mail. The Defence requested disclosure of the following: 1) A copy of the video and audio of the complainant's statement; 2) A copy of the audio of the following witness' statements: i. Jocelyn Cann; ii. Lisa Hall; and iii. Diana Ryder; 3) A copy of the disclosure and/or any materials relevant to Mr. Jackson's previous s. 810 peace bond proceeding relating to the complainant; 4) Robert Ryder Sr.'s statement referring to what he believes was a camera he found in his basement; 5) a video recording of Mr. Jackson entering the warehouse he shares with the complainant to access her computer; and 6) Diana Ryder's photographs of one of the assaults (handprint on Ms. Jackson's buttocks).

9 At the court appearance on December 15, 2022, the Defence advised that Mr. Thorning's firm had been retained. The Defence advised they were in receipt of initial disclosure and were awaiting further disclosure but were nonetheless moving the matter forward to a Crown Pre-Trial on December 30, 2022. The parties agreed on a return date of January 5, 2023. The Crown made no comments regarding delay. The matter was judicially pre-tried on December 30, 2022. On January 5, 2023, Defence Counsel appeared and inquired about the Crown's election. The Crown advised they had contacted Defence to inquire if they would waive the limitation period. The Defence advised they were not in receipt of that email but would promptly obtain instructions and communicate the Applicant's position on the limitation period. The Crown made no comments regarding delay. The parties agreed on a return date of February 2nd, 2023. On February 2, 2023, the Crown elected to proceed by way of Indictment. The

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Defence elected to proceed by way of Judge and Jury. The matter was adjourned with the consent of both parties to the Superior Court Assignment Court on February 24, 2023. On February 24, 2023, Defence counsel requested to adjourn the matter to the next assignment court date, with a pre-trial to be set in the interim. This request was on the consent of the Crown. The Crown expressed no delay concerns. The matter was adjourned to March 31, 2023.

**10** On March 12, 2023, Defence Counsel acknowledged via email receipt of the Arrest Report dated February 10, 2008, and the accompanying General Report. The Defence followed up on their previous disclosure request. They sent an emailed further disclosure request, including: i. Any and all Officer's notes pertaining to Mr. Jackson's previous s. 810 peace bond proceeding relating to the complainant; ii. The associated s. 810 peace bond or further paperwork; iii. Any and all audio recordings, statements in any form, and all related pictures; iv. Any further evidence collected during the above investigation; and, v. Whether the camera referred to in Robert Ryder Sr.'s statement was seized?

**11** On March 15, 2024, Defence Counsel clarified the reason for the above-noted disclosure request, as well as the reason it fell within the *Stinchcombe* regime. On March 31, 2023, Defence Counsel advised a Judicial Pre-Trial was scheduled for April 11, 2023, at 4:30 p.m. Both parties consented to the matter being brought back on April 28, 2023. On April 28, 2023, both parties appeared in Court and requested a return date of May 26, 2023, in trial scheduling court, with motion and trial dates to be set in the interim. On May 26, 2023, trial dates were confirmed on the record. The Applicant was remanded to the first day of trial on September 3, 2024.

**12** On May 16, 2024, the first day of pre-trial motions, the Defence advised the Crown had recently reconsidered their position respecting the 2008 records, and now agreed those records were likely relevant and disclosable under *Stinchcombe*. The Crown undertook to locate that disclosure. The Crown conceded stage 1 of the s.276/278 application, and the matter was adjourned to stage 2. Both parties agreed to adjourn the matter to July 25, 2024.

**13** On June 25, 2024, the Defence filed a Supplementary Application Record in relation to the s. 276/278 Applications. The Application Record contained an Affidavit sworn by the Applicant which included a short video of the Complainant in which she can be seen nude. The Affidavit also included a still image from the video.

**14** On July 25, 2024, Defence Counsel appeared for what was anticipated to be stage 2 of the s. 276/268 application, however, the Applicant was arrested in the hallway prior to entering the courtroom. The Applicant was arrested due to the contents of his affidavit included in the Supplementary Application Record filed on June 25, 2024, for this matter. His affidavit included a video of the Complainant (a "live video") in which she can be seen nude, as well as a still image taken from that video. An unredacted copy was provided to the Court and the Crown. It was sent to the Complainant's counsel in a redacted form.

**15** Upon receipt of the affidavit, the Complainant's counsel advised the Complainant did not consent to the taking of the photograph. Following the Applicant's arrest, the Applicant was taken into an interview room and questioned about the photograph in the affidavit. The Applicant was then escorted by police to the detention area on the lower level of the Kitchener Courthouse and processed. Following his release, he was returned to the courtroom. The Crown requested the pre-trial motions continue, hours after the Applicant's liberty had been taken away because of an affidavit he filed on the same motion.

**16** Defence counsel took the position that they could not proceed with the argument for one of two reasons: either (1) the Complainant lied about not consenting to the photograph, which goes to her credibility at trial; or (2) the Complainant was telling the truth about not consenting to the photograph, meaning that Counsel had been involved in the commissioning of a criminal offence -- which would have ramifications for the continued representation of the Applicant. In short, the Defence advised: "Mr. Jackson cannot have a fair trial unless there is a finding about whether or not she lied in an effort to avoid cross-examination at this trial about the issue of consent."

**17** The Crown advised the Court that it was Complainant's counsel who advised the Complainant did not consent to the taking of the live photo. The Crown then requested a police investigation for potential voyeurism. It was the

Crown's position the motions should not be adjourned. The presiding judge, Justice Smith, indicated that he was not surprised by Defence counsel's comments about the way in which the Applicant was arrested. Defence counsel advised they were "happy to appear before this court on the days currently scheduled for trial to discuss what we know about the potential fallout in relation to this issue," and further were "happy for the court to maintain control, and timely control over this case and its outcome." The Defence also requested that the Crown make clear their position on the voyeurism charge before the next appearance.

**18** Complainant's counsel advised that they were not available for the trial dates in September, should they be repurposed to hear stage 2 of the s.276/278 application. Ultimately the Crown agreed that there was no option other than to adjourn the trial dates. The September dates, save for September 3-6, were vacated on the consent of all parties.

**19** On July 26, 2024, the Defence requested disclosure on the voyeurism charge via e-mail. On August 12, 2024, Defence received disclosure on the voyeurism charge. On September 3, 2024, Defence appeared and set new trial dates on the record. The matter was set for a 10-day trial during the weeks of April 7 and April 14, 2025, which were the earliest dates the trial judge, Justice Smith, had available. The pre-trial motions were set for February 6, 2025, and March 17, 2025.

**20** The Applicant has not been convicted of voyeurism, and the Crown indicated in October 2024 that this charge would be withdrawn.

## **Law**

### *The Right to be Tried Within a Reasonable Time*

**21** The right to a timely trial is a fundamental tenet of the criminal justice system and is enshrined in s.11(b) of the *Canadian Charter of Rights and Freedoms*. The rights of the accused are balanced against the legitimate state interest in prosecuting criminal activity. However, achieving this balance cannot come at the expense of accused persons, who are presumed innocent and are eager to minimize the anxiety and stigma of their exposure to criminal proceedings. In *R. v. Jordan*, [2016 SCC 27](#), the Supreme Court of Canada set out a new framework which introduced presumptive ceilings for a timely trial. In the Ontario Court of Justice, the presumptive ceiling is 18 months, and in the Superior Court of Justice the presumptive ceiling is 30 months. Anything beyond the specified ceilings is presumptively unreasonable and the onus lies with the Crown to rebut this presumption by referring to exceptional circumstances.

### *The Framework for Assessing Whether Delay Is Unconstitutional*

**22** In *R. v. Zahor*, [2022 ONCA 449](#), the Court of Appeal for Ontario set out the following step-by-step approach to clarify the application of the *Jordan* analytical framework. (1) Calculate the total delay. The Court must calculate the total delay, which extends from the laying of the charge to the actual or anticipated end of the trial. For the Applicant, the total delay from the date of the Information being sworn on July 4, 2022, to the anticipated completion of the trial on April 18, 2025, is 33 months and 14 days.

**23** (2) Calculate the net delay. To calculate net delay Defence delay must be subtracted from the total delay. Defence delay can fall into two categories: (1) delay which is waived by the Defence or (2) delay that lies at the feet of the Defence. The former refers to delay that is "clearly and unequivocally waived by the Defence." The latter refers to delay that is "caused solely or directly by the Defence's conduct." Delay as a result of Defence's conduct would include tactical choices, such as frivolous applications and requests, and also includes periods of time during which the Court and the Crown are prepared to proceed but the Defence is not.

**24** In *R. v. Cody*, [2017 SCC 31](#), the Supreme Court clarified only delays which are solely caused by the Defence or which flow from illegitimate action by the Defence are to be subtracted as Defence delay.

**25** (3) Compare the net delay to the presumptive ceiling. The presumptive ceiling is not an "aspirational target" but instead the "point at which delay becomes presumptively unreasonable": *Jordan*, at para. 56.

**26** If the delay exceeds the presumptive ceiling, the Crown must establish the presence of exceptional circumstances that justify the delay. The onus is on the Crown to establish exceptional circumstances led to a delay exceeding the presumptive ceiling. There are two types of exceptional circumstances: discrete events and particularly complex cases. In such exceptional circumstances the Crown must demonstrate it took reasonable steps prior to the delay exceeding the ceiling. In the case where the Crown is unable to demonstrate these steps, the charges will be stayed: *Jordan*, at paras. 69-71.

**27** Discrete events are unexpected and uncontrollable happenings which lead to delay that could not reasonably have been mitigated by the Crown. Discrete events can include medical emergencies, recanting witnesses, or misestimation of trial time estimates despite a good faith basis. This analysis is quantitative: delay caused by discrete events is subtracted from the net delay. If the net delay still exceeds the presumptive ceiling, the Court must assess whether the complexity of the case warrants the delay. This analysis is qualitative: the Court must consider the delay "in light of the particular complexity of the case": *Cody*, at para. 64.

**28** Further, as the Court of Appeal clarified in *Zahor*, the presumptive ceiling already accounts for the growing complexity of criminal proceedings today and only particularly complex cases will qualify under this standard: *Zahor*, at para. 73.

**29** While the existence of presumptive ceilings should enhance analytical simplicity and foster constructive incentives, they are not the end of the exercise. As the majority stated in *Jordan*, "reasonableness cannot be captured by a number alone, which is why the new framework is not solely a function of time": *Jordan*, at para. 51. Compelling case-specific factors remain relevant to assessing the reasonableness of periods of delay both above and below the ceiling.

### **The Position of the Applicant**

**30** The position of the Applicant is that there was no Defence delay, and that there are no exceptional circumstances which justify the delay. It submits that the delay in this case was caused by the police mishandling of the voyeurism charge.

### **The Position of the Crown**

**31** The Respondent submits that 31 days, or one month, should be deducted as Defence delay. The Crown acknowledges that, even with the proposed deduction of this period of Defence delay, the net delay would still fall above the presumptive ceiling. The onus falls on the Respondent to demonstrate exceptional circumstances that justify delay exceeding the presumptive *Jordan* ceiling of 30 months. The Crown submits that the delay arising from the voyeurism charge against the Applicant was a discrete, exceptional event that the Respondent could have had no way to predict. It submits that the time between the previously scheduled trial commencement date (September 3, 2024) and the beginning of the new trial (April 7, 2025) should be deducted as an exceptional circumstance. That time is 217 days, which would bring the net delay in this case to 771 days, or 25 months and 11 days, well under the presumptive ceiling.

### **Analysis**

**32** This case has not been affected by discrete events and does not involve complexities that may justify delays under exceptional circumstances. This case involves a series of assaults with one single Complainant. There are no judicial authorizations, and disclosure is not voluminous. The Applicant's July 25, 2024, arrest resulted in the

Complainant being charged with one count of voyeurism involving the same Complainant. I note that this charge was subsequently stayed by the Crown in the Ontario Court of Justice.

*Defence Delay*

**33** The Applicant submits there is no delay attributable to the Defence in these proceedings. There has been neither an explicit waiver, nor any delay that lies solely at the feet of the Defence. The Defence promptly requested and reviewed initial disclosure. The Defence also asked repeatedly for further disclosure. The Defence moved the matter towards meaningful pre-trials in a swift manner. Motion dates and trial dates were then set expeditiously.

**34** The Crown submits that some delay was occasioned by the change in Defence Counsel, which was at the instance of, and solely attributable to, Mr. Jackson.

**35** It should be noted that Mr. Thorning's office was first contacted by the Applicant on November 18, 2022. Mr. Thorning's office had the Applicant's updated file by November 29, 2022. Further, the Defence promptly scheduled a continuing Crown Pre-Trial for December 30, 2022, in which counsel discussed outstanding disclosure, time estimates, Defence applications, and the JPT form. The transition between former and current Defence Counsel was efficient and expeditious. Nonetheless, there was some delay solely attributable to the choices and actions of the Applicant in changing Defence counsel. I find that one month, or 31 days, can be attributed to this. However, even if one accepts that Crown's position that some 31 days should be attributed as Defence delay, this still leaves a net delay of 32 months and 14 days.

*Exceptional Circumstances*

**36** Since the net delay is above the presumptive ceiling, the burden shifts to the Crown to justify the presumptively unreasonable delay by pointing to exceptional circumstances. The Applicant submits there are no discrete events that would justify the delay beyond the Jordan ceiling. Exceptional circumstances lie outside the Crown's control in the sense (1) they are reasonably unforeseen or reasonably unavoidable, and (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise. So long as they meet this definition, they will be considered exceptional.

**37** The key issue that I must grapple with on this application is whether the laying of the new voyeurism charge constitutes an exceptional circumstance that was a discrete event and, if so, was it a discrete event justifying the delay over the presumptive ceiling?

**38** I do not assess that it was. The delay in this case was caused by the police mishandling of the voyeurism charge, which unnecessarily derailed the proceedings, and foreseeably precluded the trial proceeding on the then-scheduled dates.

**39** The Defence contends that the police did not have reasonable and probable grounds ("RPG") to lay the voyeurism charge, but even if they did, the new charge could have been handled in a way not designed to interrupt and interfere with these proceedings. I make no finding on the RPG issue, as that charge is not before this Court, but I agree with the assessment that the manner in which the police handled the investigation, arrest and charging of the Applicant was inappropriate.

**40** The Crown contends that exceptional circumstances are things that lie outside the Crown's control - they have to be reasonably unforeseen, and Crown counsel cannot reasonably remedy delay emanating from these circumstances once they arise. There was simply no way the Respondent Crown, it says, could have foreseen the new allegations leading to new charges in this case.

**41** The difficulty with the Crown's position is that, for the purposes of the delay analysis, the actions of the police as agents of the State are attributable to the Crown. Exceptional discrete events are unexpected and uncontrollable happenings. The advent of the "live photo" issue may have been unexpected by the Crown, but how it played out it was not uncontrollable. Crown counsel might not have foreseen the new allegations in advance, but could have

influenced the police not to proceed in the way that they did, as the Crown was advised of the police intention to arrest the Applicant the day before. Moreover, even apart from the role of the Crown, with the application of any forethought, the police must have known that their actions would disrupt the proceedings.

**42** The Applicant was arrested outside the courtroom minutes before Court was to open. The police and the Crown must have known the arrest would prevent the Court from commencing with arguments on the motion. This was the direct result from the decision to arrest the Applicant minutes prior to court opening. Indeed, the police commenced questioning of the Applicant to gather evidence about the new charges immediately following arrest during the time court was to be in session. The police and the Crown would have been aware that any statement provided by the Applicant in response to police questioning about the circumstances under which the live photo was taken would have been relevant and material evidence on the charges on the Indictment before the Court. While police may not be criticized for continuing an investigation of charges before the Court, it is most unorthodox to arrest the accused for this purpose moments before a court hearing, and it was not necessary to do so. The disruptive effect was eminently foreseeable.

**43** In making the arrest in this way, the police were reckless to the risk their actions would have in infringing the Applicant's right to silence, right to remain silent, the presumption of innocence and his right to retain and instruct counsel. The Applicant was arrested for conduct that occurred under the direction of the Defence counsel who was standing next to the Applicant when he was arrested. Both the Police and the Crown should have known their conduct would create a wedge in the solicitor-client relationship that would have to be bridged before this matter proceeded. There was no urgency in this investigation. No necessity to arrest the Applicant and lay this charge at that time. The Applicant had been compliant with the terms of his judicial interim release. The Applicant, through his counsel, could have been forewarned about the anticipated arrest and made arrangements for the Applicant to have been arrested in a less disruptive manner.

**44** The new charge could and should have been handled in a way designed not to interrupt and interfere with the ongoing court proceedings.

**45** Due to the police mishandling of the voyeurism investigation and charge, the original trial dates had to be adjourned and eventually rescheduled to April 2025. It is going to take 33 months and 14 days to complete the Applicant's trial. Even subtracting Defence delay, the net delay remains 32 months and 14 days.

#### *Complexity of the Case*

**46** There is nothing unusually complex about this case. This is not a project case, and the disclosure is minimal. All charges involve the same accused and the same Complainant. While there were originally 34 counts, the Crown only proceeded on 8 of them. Further, if this was a concern, there is no evidence of the Crown creating a plan for a complex prosecution in order to use court time efficiently, as suggested in *Jordan*.

**47** The delay caused by the July 25, 2024, arrest of the Applicant is not a discrete event. Given the absence of exceptional circumstances, the Respondent has not met its onus of justifying the presumptively unreasonable delay in this case. While the Crown was diligent in scheduling trial dates, after the matter was adjourned following the Applicant's arrest, the earliest trial dates the Court could offer were in April 2025. Even when the Crown has taken serious efforts to attempt to find a solution in a particular case, where excessive delay persists, that does not necessarily mean the resulting delay is automatically rendered acceptable for constitutional purposes.

#### **Conclusion**

**48** After the conclusion of the Applicant's trial, and accounting for a Defence delay of 31 days due to the Applicant's change of defence counsel, the total delay remains 32 months and 14 days. This exceeds the *Jordan* timelines. This case is not unduly complex and there are no discrete circumstances justifying the delay. As such, the Applicant's right to a trial within a reasonable time has been violated. Accordingly, the only sufficient remedy is to stay the proceedings under section 24(1) of the *Charter*.

**49** This is a difficult conclusion in the circumstances of this case. The charges of intimate partner violence facing Mr. Jackson are serious and disturbing. However, in respect of the delay in this case, one cannot say "close enough." As Copeland J.A. stated in *R. v. Vrbanic*, [2025 ONCA 151](#), at para. 63:

One might be tempted to reason that this is "close enough." However, as I have already noted, in *Jordan*, at para. 56, the majority made clear that the presumptive ceiling "is not an aspirational target. Rather, it is the point at which delay becomes presumptively unreasonable." The hard ceilings in *Jordan* give practical effect to this principle. A "close enough" approach would foster the uncertainty and culture of complacency rejected by *Jordan*.

**Order**

**50** The Application is granted. The charges on the Indictment are stayed pursuant to s.24(1) of the *Charter*.

M.R. GIBSON J.