PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v H*, 2024 NSPC 13

Date: 20240207
Docket: 8576759-8576762
Registry: Truro

Between:

His Majesty the King

v

CMH

Restriction on Publication: Section 110 of the *Youth Criminal Justice Act*; and Section 486.4 of the *Criminal Code of Canada*

DECISION REGARDING APPLICATION FOR STAY OF PROCEEDINGS

Judge:	The Honourable Judge Del W Atwood
Heard:	2024: 22January, 7 February in Truro, Nova Scotia
Charge:	Sections 151, 152, 155 and 271 of the *Criminal Code of Canada*
Counsel:	Thomas Kayter III for the Nova Scotia Public Prosecution Service Michelle James for CMH

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT s. 110(1) and s. 111(1) OF THE *YOUTH CRIMINAL JUSTICE ACT* AND s. 486.4 OF THE *CRIMINAL CODE OF CANADA* APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

110. (1) – Identity of offender not to be published – Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

By the Court:

Synopsis

[1] This is a decision dealing with an application for a stay of proceedings because of a delayed trial.

[2] CMH is being tried as a young person for offences under § 151, 152, 155 and 271 of the *Criminal Code of Canada* (cases 8576759-8576762; information 839713) alleged to have been committed between 28 February 2006-28 February 2008.

[3] The trial was scheduled initially for a date that was 17 months and 10 days after the information was sworn. Less than a month prior to the trial date, a third-party-record issue arose less, which led to an adjournment of the trial to a date 18 months, 18 days after the information was sworn.

[4] CMH has applied for a judicial stay of proceedings, arguing that his right to a speedy trial has been violated.

[5] For the reasons that follow, the Court grants that application and records a judicial stay of proceedings.

Case chronology

Date of event	Presiding judge	Outcome	Relevant facts
5 July 2022			Information 839713 sworn
26 July 2022			Designation of counsel filed with the court.
27 July 2022	Bégin	Prosecution proceeds by indictment. Publication ban ordered. Adjourned to 15 August 2022 on defence application to obtain disclosure.	
15 August 2022	Bégin	Adjourned to 26 September 2022 to allow defence to review disclosure.	
26 September 2022	Bégin	Adjourned on court's own motion to 17 October 2022.	Storm recovery following Hurricane Fiona.
17 October 2022	Bégin	CMH pleads not guilty. Trial set for 14 December 2023.	Presiding judge declines request by prosecutor for an earlier trial date.
24 July 2023	Bégin	Pretrial conference convened. 14 December 2023 trial date preserved.	
21 Nov 2023			Court receives application from prosecutor for trial

			adjournment due to late-breaking third-party records issue.
28 November 2023	Hereema	14 December 2023 converted to a status-check date; new trial date set for 25 October 2024; defence filings to be received by 14 December 2023.	Prosecution and defence alert the court to the possibility of a § 278.3 application.
14 December 2023	Bégin	Stage 1 records application scheduled for 10 January 2024. Trial rescheduled to 22 January 2024.	Defence counsel declined trial dates of 2 and 4 January 2024 due to prior court commitments.
10 January 2024	Hereema	Stage 1 hearing adjourned to 12 January 2024 to be heard by the assigned trial judge.	Counsel for the complainant draws to the attention of the presiding judge the factthat service of the § 278.3 application had been accepted by the prosecution on behalf of the complainant, which led to a delay in counsel for the complainant

			receiving notice of the application.
12 January 2024	Atwood	Records application proceeds and production of third-party records is ordered on terms negotiated among counsel.	
15 January 2024		Section 11(b) *Charter* application filed by defence counsel. Counsel agree that the application be heard on the date set for trial, 22 January 2024.	

Time intervals in issue

[6] There has been efficient collaboration between counsel that allows the Court to focus on two contentious intervals of time:

- 2 or 4 January 2024 to 22 January 2024, which the prosecution identifies as defence delay.
- 26 September 2022 to 17 October 2022 which the prosecution identifies as exceptional-circumstance delay

Sources of information

[7] The Court has received from counsel an Agreed Statement of Fact (Exhibit No 1), which I treat as equivalent to a formal admission. Facts which have been admitted formally are conclusive and require no further proof: *R v Castellani*, [1970] SCR 310 at 317; *R v Curry* (1980), 38 NSR (2d) 575 at ¶ 26 (CA); *R v Falconer*, 2016 NSCA 22 at ¶ 45; *R v Hood*, 2016 NSPC 78 at ¶ 31; *R v MacBeth*, 2017 NSPC 46 at ¶ 27; *R v Patterson*, 2018 NSPC 46 at ¶ 3.

[8] I have also reviewed information 839713, as well as the endorsements, and the materials contained in the file of the Court.

[9] Finally, I have heard oral argument from counsel, supported by comprehensive briefs.

Law governing unreasonable delay—general principles

[10] The governing constitutional authority is the *Canadian Charter of Rights and Freedoms*, ¶ 11(b), Part 1 of *the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11:

> 11 Any person charged with an offence has the right
>
> . . .
>
> (b) to be tried within a reasonable time;
>
> . . . .

[11] As reemphasised in *R v MacNeil*, 2023 NSPC 32 at ¶ 27, the rights of an accused person under ¶ 11(b) run from the time a charge is laid until its conclusion (citing *R v MacDougall*, [1998] 3 SCR 45 at ¶ 19).

[12] *R v Jordan*, 2016 SCC 27 at ¶ 5, 46, 49, 105 [*Jordan*] describes what should be an uncomplicated unreasonable-delay-assessment algorithm. It enforces the right of a person charged with an offence to be tried within a reasonable time.

[13] There is a presumptive case-origin-to-outcome ceiling of 18 months for matters adjudicated in Provincial Court—including youth-justice matters; the decisive interval is measured as running from the time of the laying of a charge and continuing, not to the date of any eventual ¶ 11(b) *Charter* hearing, but to the anticipated-end-of-trial date—*Jordan* at ¶ 5, 46, 49, 105.

[14] From that interval must be deducted delay waived or caused solely by defence counsel, as defence delay does not count toward the presumptive ceiling; however, defence actions taken legitimately to respond to charges do not constitute defence delay—*Jordan* at ¶ 65, 66, 105.

[15] Further, when a person charged with an offence consents to a date for trial offered by the court, or to an adjournment sought by the prosecution or directed by the court, that consent does not amount, without more, to a waiver. Rather,

the prosecution must demonstrate that, in agreeing to a trial date, the defence was engaging in something more than an acquiescence in the inevitable. Proof of waiver of delay is a high bar, and there must be evidence of clear, unequivocal, and informed acceptance—*Jordan* at ¶ 61; *R v Morin*, [1992] 1 SCR 771 at 790.

[16] Delay (minus defence delay) that exceeds the 18-month-provincial-court ceiling is presumptively unreasonable—*Jordan* at ¶ 47, 49, 56, 68, 105.

[17] Once the presumptive ceiling is exceeded, the burden shifts to the prosecution to present persuasive evidence of exceptional circumstances sufficient to rebut the presumption of unreasonableness—*Jordan* at ¶ 47, 58, 68, 105.

[18] An exceptional circumstance may be:

- a discrete, unavoidable, exceptional, or unforeseeable event; or,
- a complex case requiring exceptional time allocation—*Jordan* at ¶ 71, 73, 75, 81, 82, 105.

[19] There is no complex-case issue raised in this matter.

[20] When no exceptional circumstances exist, or when the exceptional-circumstance adjustment leaves a case in excess of the presumptive ceiling, a stay is the appropriate § 24(1) *Charter* remedy; it is the only remedial tool—*Jordan* at ¶ 35.

[21] In a case when delay, after adjustment for an exceptional circumstance, does not exceed the presumptive ceiling, a person being tried may have proceedings stayed by proving that meaningful and sustained steps were taken to expedite proceedings and that the case took markedly longer than it should have to bring to trial—*Jordan* at ¶ 48, 82, 84-86, 105, 111, 113. Stays of cases beneath the ceiling are to be rare, granted only in the clearest of cases—*Jordan* at ¶ 48. Beneath-the-ceiling delay is not a live issue in this application.

[22] *Jordan* encourages preventive problem solving; it requires the prosecution to act proactively throughout proceedings to justify delays that exceed the presumptive ceiling—*Jordan* at ¶ 112-113. Defence counsel are to be part of the solution.

[23] However, it must be emphasized that courts play a significant role in addressing the culture of complacency. Delay must not be condemned or rationalized at the back end; rather, the court must be an active participant in the

project to "change courtroom culture, maximize efficiency, and minimize delay, thereby showing that it is possible to do better": *Jordan* at ¶ 41. The presumptive ceilings will not permit parties—or the courts—to conduct business as usual: *Jordan* at ¶ 107. Moreover, courts must be accountable, and play an important role in changing courtroom culture: Jordan at ¶ 114. Courts must implement more efficient procedures, and all courts must be mindful of the impact of their decisions on the conduct of trials: Jordan at ¶ 139.

Defence delay elaborated

[24] Defence delay must be unequivocal; it does not include defence actions taken legitimately to respond to charges: *Jordan* at ¶ 65; *R v Roy*, 2023 NSPC 23 at ¶ 8; *R v Atwell*, 2023 NSPC 14 at ¶ 12-15; *R v CB*, 2023 NSPC 48 at ¶ 34-35. Further, in *R v Hanan*, 2023 SCC 101 at ¶ 9 [*Hanan*], the Court rejected the application of a bright-line rule which would allocate to defence any delay arising from an offered trial date being rejected. Defence counsel is not required to maintain a state of perpetual availability: *R v Godin*, 2009 SCC 26 at ¶ 23 [*Godin*]. While *Godin* predates *Jordan*, it was cited with approval in *Jordan* at ¶ 179, and remains an authoritative source of delay-attribution-and-allocation principles.

Allocation of defence delay in this case

[25] The prosecution asserts that the interval from 2 or 4 January 2024 up to 22 January 2024 be allocated to defence delay.

[26] I have reviewed the endorsements recorded on information 839713, the agreed statement of facts, and I have considered the written and oral submissions of counsel.

[27] I am persuaded that counsel for CMH has established on a balance of probabilities that this interval not be allocated to defence delay.

[28] By 21 November 2023, defence counsel had been made aware by the prosecution of the existence of privacy-protected third party records. Defence counsel and the prosecutor acted diligently to bring the matter before the court on 28 November 2023 to advise the court of the likelihood that the trial would not be able to proceed as scheduled, due to the anticipated need for an application under § 273.3 of the *Code*. The Court set dates for the filing of application materials, and tentatively assigned a new trial date of 25 October 2024, which would have been a constitutionally untenable 27 months, 20 days after the information was sworn.

[29] On 14 December 2023, the Court scheduled a stage-one § 278.3 application hearing for 10 January 2024, and, given the urgency, moved the trial date ahead to 22 January 2024.

[30] There were earlier trial dates available on the docket.

[31] Paragraph 20 of the Agreed Statement of Facts states that "January 2 & 4 were not available for Defence counsel as a result of prior court commitments, but Defence counsel did indicate that she had other availability in January[.]"

[32] The prosecution points out that it was diligent in moving matters forward, and in canvassing trial dates prior to 25 October 2024. To be sure, the prosecution moved quickly, as did defence counsel.

[33] However, the diligence of the prosecution does not axiomatically place the controversial interval in the defence-delay column. Recall that in *Hanan*, the Supreme Court of Canada rejected the application of a bright-line rule which would allocate to defence any delay arising from an offered trial date being rejected.

[34] Defence counsel cannot be expected to drop other court commitments—which involve professional duties and obligations to other courts and clients—to try to remedy a *Charter* vulnerability that was created by the Court itself.

[35] In fact, defence counsel—in concert with the prosecutor and counsel representing the privacy interests of the complainant—acted with diligence to move the § 278.3 application forward with impressive speed. Applications for third-party records normally require 60-days' notice (per § 278.3(5)). Prior to SC 2018, c 29, s 24, the notice period was only 14 days. It was lengthened by Parliament in recognition of the typically prolonged period required to properly adjudicate with sensitivity applications that may affect profoundly the privacy rights of vulnerable persons. Significantly, the 60-day notice period advances proceedings to the first-stage only. Had the prosecution, the records custodian and the complainant not waived the 60-day notice, even a 22 January 2024 trial date would not have been possible.

[36] In this case, proceedings were accelerated because of the very good collaboration and cooperation among all counsel. Unfortunately in the course of that good cooperation, defence counsel was not available for the first two short-notice trial dates in January 2024 that were offered by the Court. That is not surprising. And it should not be penalizing.

[37] Based on these findings, the interval of 2 January or 4 January 2024 to 22 January 2024 is not allocated to defence delay. The Court was not invited to

consider any other intervals as defence delay. Accordingly, there is no defence delay in this case.

[38] As a result, the net delay remains 18 months 18 days.

[39] This exceeds the presumptive ceiling of 18 months for matters tried in Provincial Court.

[40] The burden now rests with the prosecution to establish on a balance of probabilities the existence of an exceptional circumstance.

Exceptional circumstances—discrete, unavoidable, exceptional or unforeseeable event

[41] The prosecution advocates that the interval of 26 September 2022 to 17 October 2022 be allocated to exceptional-circumstance delay.

[42] Paragraphs 8-9 of the Agreed Statement of Fact describe briefly what transpired on 26 September 2022, the date when CMH was expected to put in a plea. Counsel had received an email from court administration that:

> [d]ue to the on-going clean up from Hurricane Fiona, please call into the Shubenacadie Provincial Court, using this conference number to have the matters adjourned. Please be patient as we have large amounts of people to deal with today and two courts as well.

[43] All youth matters were called together and set over to 17 October 2022 “at the Court’s behest.”

[44] The information records that defence counsel appeared on 26 September 2022 by telephone (permissible under § 650.02 of the *Code*), and the prosecutor appears to have been present at the justice centre along with the presiding judge. Defence had filed with the Court a proper designation of counsel prior to the arraignment date, and so the requirements of § 650.01 of the *Code* had been fulfilled.

[45] Accordingly, all necessary conditions were in place to allow the Court to receive a plea from CMH: a proper judicial officer, prosecuting counsel, defence counsel with a proper written authority, and an operating record.

[46] The storm-recovery circumstances of proceedings on 26 September 2022 were unusual; however, in my view, they were not extraordinary for the purposes of taking pleas. By that date, the Court had had two and a half years of experience dealing with the pandemic, during which remote proceedings for dealing with arraignments and pleas had become a commonplace.

[47] It is not clear from the Agreed Statement of Fact or from the record why the presiding judge would not have entertained taking pleas on 26 September.

[48] The brief submitted by the prosecution makes reference to the way court files are managed and data get entered. The brief goes on to describe that, on 26 September 2022, court staff would have had to enter a powerless building to collect court files and calendars, and then would have needed to force open keyless electronic locks. All of this is advanced in support of the proposition that it would have operationally impossible to take pleas from CMH on 26 September 2022.

[49] All of these assertions by the prosecution involve a migration outside what is contained in the Agreed Statement of Facts. If the proposition is that the Court should take judicial notice of what is asserted in the prosecution brief, or treat the assertions as the proper subject matter of a common-sense inference, I decline to do so: first, because there is no evidentiary basis to support it; second, because it is directly contrary to what I know staff are able to accomplish in circumstances such as those that existed on 26 September 2022. Proof of the existence of exceptional circumstances in a ¶ 11(b) *Charter* application rests with the prosecution. A proof requires evidence. Apart from the Agreed Statement of Facts, there is no evidence before the Court. I find the existence of exceptional circumstances unproven.

[50] Even if I am wrong on this point, it would have been open to the Court to mitigate delay by reconvening to take pleas much earlier than 17 October 2022, say, later in the week of 26 September 2022, or early the following week, the week of 3 October 2022.

[51] Why did the Court not do so?

[52] Paragraphs 10-12 of the Agreed Statement of Fact are revealing of the attitude of the Court.

[53] When CMH was back before the Court for plea on 17 October 2022, the court set the 14 December 2023 trial date. The prosecutor accepted the date, but could not acquiesce in it as it was a youth-justice matter. The prosecutor went further, and suggested a pretrial conference the following month to give the PPS office time to identify an earlier opening.

[54] The presiding judge declined the prosecutor's advice as "Mr […] was an adult now" which "takes some of that time pressure off." The judge went on: "This is well within the time, this was laid in July of this year, so we'll be fine."

[55] In fact, a 14 December 2023 trial date was not fine, as, at 17 months and 10 days after the laying of the information, the proceeding was close to going

Jordan critical, not even allowing for pre-trial complications, such as the third-party-records application that, in fact, eventually materialized.

[56] Apart from the binding ceilings in *Jordan*, the Report of the Nunn Commission of Inquiry, *Spiralling out of Control: Lessons Learned from a Boy in Trouble: Report of the Nunn Commission of Inquiry* (Halifax: 2006) at 171-182 [*Nunn Report*] underscores the need for prompt action in youth-criminal-justice matters; the *Nunn Report* did not carve out exceptions for cases involving adults being prosecuted for alleged offences committed as young persons. While the presumptive time limits in *Jordan* apply to youth-justice cases (*R v KJM*, 2019 SCC 55 at ¶ 4; *R v XJ*, 2023 NSCA 52 at ¶ 9-10 [*XJ*]) the *Nunn Report* should operate as a constant reminder of the need for Courts to invigilate against any form of culture of delay and complacency in the administration of youth criminal justice.

[57] I conclude, with regret, that a culture of complacency saw the Court not responding appropriately to the precautionary advice given, particularly by the prosecution, to set an early trial date.

[58] In accepting 14 December 2023 as the trial date, defence counsel was simply acquiescing in the inevitable: notwithstanding the urgency of the situation

raised by the prosecution, it would appear that the presiding judge had already made up his mind.

[59] Had the Court recognized and acted on the urgency identified by the prosecutor, there would have no undue-delay issue to be litigated.

[60] The observation made by the presiding judge on 17 October 2022 that the 14 December 2023 trial date would be "well within the time" might be difficult to understand, given the 18-month *Jordan* time limit for matters heard in Provincial Court. However, the same judge had also dealt with the trial that led to the appeal in *XJ*; recall that, in that case, the judge was of the erroneous view that indictable matters, even when tried in Provincial Court, enjoyed a 30-month time ceiling. The judgment of the Court of Appeal in *XJ*, which addressed that error, was not released until 26 July 2023, so that, on 17 October 2022, the presiding judge might still have harboured the belief that a 30-month ceiling applied to CMH's indictable charges.

[61] In any event, I find no exceptional-circumstance delay in this case.

Conclusion

[62] The interval between the date the charges against CMH were laid and the 22 January 2024 trial date is 18 months and 18 days.

[63] There is no defence delay.

[64] There is no exceptional circumstance delay.

[65] As the interval exceeds the presumptive ceiling, the charges against CMH are judicially stayed. This applies to all charges in information 839713.

[66] The Court is indebted to Counsel for their submissions.

Atwood, JPC