SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Graham*, 2022 NSSC 370

Date: 20230104
Docket: CRP No. 514346
Registry: Pictou

Between:

His Majesty the King

v.

Angela Michelle Graham

DECISION ON APPEAL

Judge:	The Honourable Justice Scott C. Norton
Heard:	December 12, 2022, in Halifax, Nova Scotia
Decision:	January 4, 2023
Counsel:	T.W. Gorman, for the Crown Hector MacIsaac, for Angela Michelle Graham

By the Court:

Introduction

[1] The Crown appeals from the Decision of the Honourable Judge Del W. Atwood finding that delay in bringing Ms. Graham's case to trial violated her s. 11(b) *Charter* right to be tried within a reasonable time and required a stay of the proceedings against her (*R. v. Graham*, 2022 NSPC 10).

[2] Ms. Graham is charged with two offences that are alleged to have occurred on 21 January, 2019:

- public mischief by making a false report to police of armed robbery, s. 140(1) of the *Criminal Code*; and,
- theft of money from her employer in an amount not exceeding five thousand dollars, s. 334(b) of the *Code.*

[3] The Crown elected to proceed summarily and Ms. Graham pleaded not guilty.

[4] Ms. Graham filed a Notice of s. 11(b) *Charter* Application on December 10, 2021. It was heard on February 2, 2022. On March 30, 2022, Judge Atwood granted the motion and released the written reasons for his decision.

The Timeline of the Case

[5] The trial judge created the following chronology of the proceedings (pp. 4-7, references omitted):

> Case chronology
>
> - 19 July 2019: information 791303 sworn and Ms. Graham served with process.
> - 16 September 2019: arraignment date; prosecution elects summary process and defence counsel seeks adjournment to review disclosure.
> - 15 October 2019: Ms Graham pleads not guilty; trial scheduled for 3-4 June 2020.
> - 13 March 2020: defence counsel files an application seeking further disclosure of material from the prosecution.
> - 16 March 2020: most in-person proceedings in Provincial Court suspended due to the pandemic
> - 18 March 2020: further restrictions imposed on in-person proceedings in Provincial Court—online: 22 March 2020: originating declaration of a state of emergency in the Province of Nova Scotia under the *Emergency Management Act*
> - 23 March 2020: issuance of first order by the medical officer of health under § 32 of the *Health Protection Act*
> - 14 May 2020: Provincial Court to resume trials for persons in custody effective 1 June 2020
> - 3 June 2020: application for disclosure called for scheduling of hearing, and trial adjourned; court sets 27 July 2020 as date for virtual hearing of disclosure application; prosecution brief to be filed by 26 June 2020, and defence rebuttal by 10 July 2020.
> - 16 June 2020: Provincial Court permits limited resumption of in-person trials for persons not in custody; participants entering from outside the Province to be subject to a 14-day self-isolation requirement
> - 27 July 2020: application for disclosure granted—2020 NSPC 59; case adjourned to 25 August 2020 to schedule a trial date.
> - 25 August 2020: case called virtually; adjourned to 19 October 2020 for the scheduling of a trial date as defence counsel had not drawn up a draft order to be issued by the court confirming the terms of disclosure.
> - 19 October 2020: trial date scheduled for 22-23 June 2021; earlier trial dates were not available due to the significant backlog of cases which had accumulated over the course of the suspension of in-person proceedings.

- 30 March 2021: trial in cases 8496976-9 (young person charged with sexual assault) scheduled for 22-23 June 2021; court assigned priority to the case to comport with 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 Commission*]; as a result, Ms. Graham's case was ordered to be brought forward for rescheduling.

- 12 April 2021: Ms. Graham's case brought forward by court order to reschedule trial, in order to make way for the trial of the young person charged with sexual assault; Ms. Graham's trial rescheduled for 2-3 February 2022, the first open two-day date on the court's calendar; counsel for Ms. Graham did not object to the adjournment, but stated that Ms. Graham would have been ready for trial on 22-23 June 2021; earlier trial dates were not available due to the significant backlog of cases which had accumulated over the course of the suspension of in-person proceedings.

- 21 June 2021: the prosecution informs the court by email that proceedings would be stayed in the case involving the young person whose trial was scheduled for 22-23 June 2021.

- 20 December 2021: defence counsel applies for a stay of proceedings, alleging a violation of ¶ 11(b) of the *Charter*; application scheduled to be heard on 2 February 2022.

- 31 December 2021: Provincial Court suspends in-person proceedings due to pandemic wave; this suspension continues until 11 February 2022

- 2 February 2022: application for stay of proceedings heard virtually.

The Trial Judge's Decision

[6] The trial judge concluded at para. 4 of the Decision:

> [4] For the reasons that follow, I find that the delay in bringing Ms. Graham's case to trial:
>
> - exceeds the relevant 18-month presumptive ceiling established in *R v Jordan*, 2016 SCC 27 [*Jordan*];
>
> - remains above the presumptive ceiling when adjusted for defence delay and intervening exceptional circumstances; and
>
> - requires the imposition of a stay of proceedings as the appropriate remedy.

[7] In describing the legal analysis he employed on the motion, the trial judge explained as follows:

> [8] *Jordan* describes a clear unreasonable-delay algorithm.
>
> [9] There is a presumptive case-origin-to-outcome ceiling of 18 months for trials in provincial court, running from the time of the laying of a charge to, not the date of a ¶ 11(b) Charter hearing, but the anticipated-end-of-trial date—*Jordan* at ¶ 5, 46, 49, 105.
>
> [10] From that delay total 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.
>
> [11] 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 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. In *Jordan* at ¶ 4, a 4-month delay was attributed to defence waiver when there was a last-minute change of counsel prior to trial. That is not the situation here: Ms. Graham has had the same counsel throughout, and she has accepted every trial date proposed by the court.
>
> [12] Delay (minus defence delay) that exceeds the 18-month-provincial-court ceiling is presumptively unreasonable—*Jordan* at ¶ 47, 49, 56, 68, 105.
>
> [13] 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.
>
> [14] 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.

[8] The trial judge calculated the total delay from the date of the laying of the charge to the date of the proposed hearing. He misstated the dates of the hearing as being June 20 and 24, 2022. The actual scheduled trial dates were April 25 and 26, 2023.

[9] The trial judge then considered the issue of defence delay or waiver and found that the only defence delay was for a period of 55 days from August 25, 2020 to October 19, 2020 due to the delay in defence counsel completing the preparation of the draft disclosure order for submission to the court.

[10] The trial judge did not take the following periods into account as defence delay or waived delay on the basis that the actions were legitimately taken to respond to the charges (para. 18):

> - 16 September 2019-15 October 2019: defence adjournment to review disclosure.
>
> - 3 June 2020-25 August 2020: the period of time from Ms. Graham's first trial date until the first day of defence-attributed delay; this interval is allocated to the adjudication of the disclosure application brought by defence. The ¶ 11(b) *Charter* brief from defence counsel argued this portion of the delay calculation as a fault-finding exercise: the prosecution was supposedly at fault in withholding material, and so any delay arising from the disclosure application ought not count against Ms. Graham. This approach was erroneous. Fault is neither necessary, not necessarily sufficient. Indeed, I found the application for disclosure as being flawed procedurally, and the opposition to it by the prosecution as being principled and reasonable; however, the court did grant it as being ultimately meritorious. Consequently, I reckon it to have been an

> action taken legitimately to respond to the charges. This was not the same sort of procedural history as in *R v Ste-Marie*, 2022 SCC 3 at ¶ 8-9 in which the accused persons in that case caused most of the trial delays by filing multiple—mostly meritless—applications, motions and interlocutory appeals.
>
> - 22 June 2021-2 February 2022: the period of time from Ms. Graham's second scheduled trial date to her third scheduled trial date. Although Ms. Graham did not object to the adjournment that was ordered to allow a trial of a young person to take precedence over hers, I take her position as having acquiesced in the inevitable. When Ms. Graham's case was called on 12 April 2021 to reschedule her trial, the court had already docketed the 22-23 June 2021 trial dates to the hearing of the youth-justice matter. There is further granularity to this issue. The trial of the young person whose case was scheduled for 22-23 June 2021, which led to Ms. Graham's trial being adjourned, ended up not going ahead as the charges were stayed by the prosecution. The first notice the court had of this was a memorandum from the prosecution provided to the court on 21 June 2021: There had been a last-minute, follow-up investigation done by police which had revealed new evidence; this revealed material led to the stay. Case history convinces me that provincial and federal prosecutors in Pictou County are consistently diligent in continually evaluating, in all cases, the realistic prospect of conviction, and I am assured that prosecutors bring matters to a halt once that legal threshold is no longer met. What frustrates their work are these eve-of-trial follow-up investigations by police, which lead almost inevitably to dismissals, stays, or disclosure adjournments. I found apposite the analysis in *R v Ghraizi*, 2022 ABCA 96 [*Ghraizi*], particularly at ¶ 6, which underscores the role of the state in advancing speedy-trial interests. Although *Ghraizi* addressed the obligations of the prosecution, it is my view that policing services share the same responsibilities—even more so, as it is the decision by police to lay a charge that starts the *Jordan* clock running. In Ms. Graham's case, I find it at least possible that her trial might have been able to proceed as scheduled on 22-23 June 2021 had police presented the prosecution with evidence in the case involving the young person earlier than was done.

[11] The trial judge then noted that the Crown had not advanced a complex-case argument and addressed the Crown submissions on exceptional circumstances (paras. 20-33):

> [20] The state of emergency that prevailed in the Province of Nova Scotia from 22 March 2020 until the expiry of the last order in council on 20 March 2022—(2022) R Gaz I, 569—has presented manifold challenges to all Nova Scotians, including persons with interests at stake in proceedings in Provincial Court.

[21] The impact on court services has been profound and will be enduring.

[22] Of particular application to this case is the backlog of cases awaiting trial and the widening gulf for all cases between arraignment and time of trial.

[23] Prior to the pandemic, cases before the Provincial Court at the Pictou Justice Centre were usually resolved within three to six months. Our list of *Jordan*-vulnerable matters was short, populated mostly by cases of persons who were unlawfully at large and subject to bench or other warrants, or who were serial counsel-changers.

[24] We are now two years into the pandemic, and the landscape has changed completely. Our *Jordan*-vulnerable case list is burgeoning. We are setting trial dates well into 2023, a phenomenon that is unprecedented in Pictou County.

[25] Counsel have, in many cases, worked cooperatively to relieve some of the pressure. There is increasing use of resolution conferences, and informal resolution discussions are leading to efficient and time-saving trial admissions, joint recommendations and restorative-justice outcomes.

[26] Notwithstanding these positive steps, the impact of the state of emergency, and the protective measures that were implemented by courts to safeguard the health and well-being of justice-system participants, will take years to unwind—the status quo ante is a far-off land, and some things might never be the same.

[27] This is the new normal. The pandemic continues. A transition to an endemic condition may not relieve the need to continue with certain public-health protective measures, as "endemic" simply means "more predictable", not "less serious". It is an uncertain assumption that the current variant and subvariant lead to less severe disease; in fact, people who are unvaccinated (including small children who are not eligible for the vaccine), and vaccinated persons who are immunocompromised, remain at elevated risk of hospitalization and death; many people who must access court services are in the high-risk category. New variants will not necessarily be less pathogenic or virulent than ancestral versions; as was observed in a recent medical-journal article, viruses don't inevitably evolve toward being less virulent—evolution simply selects those that are fit and excel at multiplying. The weekly tally of reported cases (likely an undercount due to the greater use of at-home rapid kits, rather than health-authority-monitored molecular testing) and deaths remains at levels that would have been considered alarming when the state of emergency began.

[28] Accordingly, the need for caution remains. Significantly, while the state of emergency has come to an end, the unified judiciary of the province have determined it prudent to continue to observe within our justice centres many of the health-protective measures that existed during the currency of the state of emergency—online:
https://www.courts.ns.ca/News_of_Courts/documents/Courts_COVID19_Restrictions_Maintained_03_18_22.pdf.

[29] Double, triple, and quadruple bookings of dockets in the hope of last-minute resolutions are unlikely to resume any time soon, given the need to limit courthouse capacities. Placing restrictions on daily dockets will have a long-term impact on backlogs, given current resources.

[30] Working cooperatively with counsel, the court has attempted—with partial success because of the numbers of persons with interests at stake involved in any one criminal-justice matter, let alone hundreds—to assign priority to the scheduling of trials. Early trial dates are essential in youth-justice matters, given the commitment made by courts to abide by Nunn Commission 90-day timelines. Also prioritized are cases alleging family violence, sexual abuse, and the abuse of children and vulnerable persons. Finally, courts have taken steps to accelerate hearings for persons on remand because of the fundamental liberty-and-presumption-of-innocence interests engaged in those types of cases.

[31] This forensic triaging will likely continue for an extended period of time, as courts seek to work through accumulating backlogs. I am using the term "triaging" advisedly, to underscore the fact that the court must be concerned with urgency in prioritizing cases. Trial dates should not get shuffled through a snakes-and-ladders game of chance that would see some cases get moved up, while others get moved back, through random selection. To be sure, triaging will create tensions, as no one with an interest in the outcome of a trial will want to see proceedings delayed. But delays will be inevitable. Persons such as Ms. Graham may see their cases postponed; but that does not mean that their constitutionally protected speedy-trial rights are extinguished.

[32] This is no longer exceptional. Rather, it is the long-term norm.

[33] There have arisen during the currency of the state of emergency particular circumstances that would constitute discrete events as meeting the criteria for exceptional circumstances:

- Adjournments necessitated by trial dates falling during periods of suspension of in-person proceedings.
- Adjournments necessitated by the COID-19-related quarantining of an essential trial participant.

Only one adjournment was required of Ms. Graham's matter that would meet one of these criteria, and that was the adjournment on 2 February 2022, which coincided with the hearing of the 11(b) *Charter* application. In-person proceedings had been suspended on 31 December 2021 and continued until 11 February 2022. The period of time from 2 February 2022 to the notional end of trial date of 24 June 2022, warrants ***an additional deduction from total delay of 142 days.***

[12] The trial judge concluded by making an adjusted-delay calculation, at para. 34:

> [34] The final, adjusted-delay calculation in Ms. Graham's case is as follows:
>
> - Total delay 1071 days
> - Minus defence delay -55 days
> - Net delay =1016 days
> - Minus discrete-event delay -142 days
> - Adjusted delay =874 days or 29 months.
>
> [35] As an adjusted delay of 29 months exceeds the presumptive ceiling for matters in provincial court, a stay of proceedings is ordered in relation to both counts, ending any related process.

Standard of Review

[13] The parties agree on the standard of review. In *R. v. Burgess*, 2022 NSSC 335, Justice Coady provided this summary:

> [5] The Nova Scotia Court of Appeal addressed the standard of review in section 11(b) appeals in *R. v Ellis*, 2020 NSCA 78. That Court endorsed the approach of the British Columbia Court of Appeal in *R. v Pipping*, 2020 BCCA 104. Justice Derrick stated at paragraph 81:
>
> **81** In *Pipping* the court held:
>
> > [92] The post[] Jordan s. 11(b) framework invokes different standards of review at three different stages: (1) findings of fact relevant to defence conduct; (2) the characterization of delay and the attribution of responsibility; and (3) the determination of whether the total delay is unreasonable and the decision to impose a stay.
> >
> > [93] At the first stage, the findings of fact of a trial judge that are relevant to defence conduct are afforded deference on review, and subject to a standard of palpable and overriding error: *R. v. Horner*, 2012 BCCA 7 at para. 70; *R. v. K.N.*, 2018 BCCA 246 at para. 13.

> [94] At the second stage, first instance judges are uniquely positioned to gauge responsibility for delay; *Jordan* at para. 65. The determination of whether defence conduct is legitimate or illegitimate is highly discretionary, and appellate courts must show a high level of deference on review: *Cody* at para. 31; *R. v. S.C.W.*, 2018 BCCA 346, leave ref'd (2019) SCC Docket 38403, *[2018] S.C.C.A. No. 452* at para. 38.
>
> [95] At the third stage, the ultimate determination of whether the total delay is unreasonable and the decision to impose a stay is a question of law subject to a correctness standard: *K.N.* at para. 13; *R. v. Christhurajah*, 2019 BCCA 210 at para. 113.

The court noted that the Ontario Court of Appeal have taken the view that all aspects of the section 11(b) analysis should attract the correctness standard (*R. v Jurkos*, 2018 ONCA 489). I am also of the view that the *Pipping* approach is preferrable.

Analysis

[14] I conclude that whether the trial judge committed reversible error turns on his consideration of the period of delay resulting from the adjournment of the June 22 and 23, 2021 trial dates until February 2, 2022. It is clear that the trial judge ascribed the delay post February 2, 2022, to the Covid pandemic as an exceptional circumstance. As such it is not a basis for the Crown to argue the Decision should be overturned.

[15] The Crown refers to a letter sent to Judge Atwood, dated March 9, 2021 by counsel Craig Clarke, on behalf of Ms. Graham, stating:

> This matter is set for June 22 and June 23, 2021 for trial. Ms. Graham is now residing in Alberta and I recently had a telephone call with her to discuss trial

> preparation. I am writing to ask that the court consider setting this matter for a pre-trial conference in early May of 2021 to discuss the COVID-19 protocols currently in place at that time.
>
> Ms. Graham is unable to leave her job for a two-week isolation period and again, due to her job requirements, when she returns to Alberta post trial. Of course the trial is approximately three and a half months down the road and a great deal could change between now and then and therefore, I feel that it may be in the best interest both parties as well as the court to review the matter in terms of the protocols currently applicable in early May, well in advance of the start of the trial.

[16] On March 30, 2021, the trial judge was addressing a Youth Justice matter, R. v. I.H., and made the following comments (Ms. Graham's present counsel Mr. McIsaac represented I.H.):

> This is a youth justice matter, and pursuant to the court's commitment to comply with the Nunn Commission Report, the court is going to do its best to…counsel, the…there is some prospect that the matter that's scheduled for trial June 22nd and 23rd, a Graham matter, will…will likely not be proceeding given the fact that the court has been informed that the accused is in the Province of…in that case is in the Province of Alberta and is likely to be unable to return on a timely basis.
>
> …
>
> This matter will be adjourned for trial to the 22nd and 23rd of June 2021. I'm going to order and direct that the Graham matter which is currently on the docket for the 22nd and 23rd of June be brought forward to April 12th and 11:00 in the a.m. with notice to the prosecution and notice to Mr. Clarke of the need to reschedule those trial dates.

[17] The Graham matter came back before the trial judge on April 12, 2021. The record shows the following exchange:

> **THE COURT:** So, counsel, indeed the Graham matter was scheduled for the... for the 22nd and 23rd of... of June. We've had to use that for another in-person matter that is... is somewhat **Jordan** vulnerable and I do note, Mr. Clarke, that we received notification that there might be difficulty having Ms. Graham back in... in Nova Scotia by those dates in any event.
>
> **MR. CLARKE (ON PHONE):** Yes, your Honour. I contacted her when... when I got notification from the Court. She was prepared to do what she needed to

> do but I do understand in speaking with Mr. MacIsaac that the other matter involved a youth and, of course, Supreme Court's been pretty clear on that being a priority. So we just ask that the matter be scheduled as soon as possible and she'll have to do what she needs to do to get here.

[18] The trial judge rescheduled the trial of the Graham matter to February 2 and 3, 2022 and, in answer to the Crown's inquiry, confirmed that these were the earliest dates available.

[19] The Crown argued at the application that this delay was implicitly waived by counsel for Ms. Graham based upon his letter to the court; imputed knowledge of the change in dates from the presence of his law partner, Mr. MacIsaac, at the I.H. hearing; and not making any protest or objection that the trial dates had been taken from Ms. Graham based on a misunderstanding of her availability to attend the trial.

[20] In his decision on the s.11(b) *Charter* application, the trial judge addressed the issue as follows. In the recitation of the chronology, he stated:

> • 30 March 2021: trial in cases 8496976-9 (young person charged with sexual assault) scheduled for 22-23 June 2021; court assigned priority to the case to comport with 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 Commission]; as a result, Ms. Graham's case was ordered to be brought forward for rescheduling.
>
> • 12 April 2021: Ms. Graham's case brought forward by court order to reschedule trial, in order to make way for the trial of the young person charged with sexual assault; Ms. Graham's trial rescheduled for 2-3 February 2022, the first open two-day date on the court's calendar; counsel for Ms. Graham did not object to the adjournment, but stated that Ms. Graham would have been ready for trial on 22-23 June 2021; earlier trial dates were not available due to the significant backlog of

> cases which had accumulated over the course of the suspension of in-person proceedings.
>
> [Emphasis added]

[21] In the legal analysis, he held that:

> • 22 June 2021-2 February 2022: the period of time from Ms. Graham's second scheduled trial date to her third scheduled trial date. Although Ms. Graham did not object to the adjournment that was ordered to allow a trial of a young person to take precedence over hers, I take her position as having acquiesced in the inevitable. When Ms. Graham's case was called on 12 April 2021 to reschedule her trial, the court had already docketed the 22-23 June 2021 trial dates to the hearing of the youth-justice matter. There is further granularity to this issue. The trial of the young person whose case was scheduled for 22-23 June 2021, which led to Ms. Graham's trial being adjourned, ended up not going ahead as the charges were stayed by the prosecution. The first notice the court had of this was a memorandum from the prosecution provided to the court on 21 June 2021: There had been a last-minute, follow-up investigation done by police which had revealed new evidence; this revealed material led to the stay. Case history convinces me that provincial and federal prosecutors in Pictou County are consistently diligent in continually evaluating, in all cases, the realistic prospect of conviction, and I am assured that prosecutors bring matters to a halt once that legal threshold is no longer met. What frustrates their work are these eve-of-trial follow-up investigations by police, which lead almost inevitably to dismissals, stays, or disclosure adjournments. I found apposite the analysis in *R v Ghraizi*, 2022 ABCA 96 [*Ghraizi*], particularly at ¶ 6, which underscores the role of the state in advancing speedy-trial interests. Although *Ghraizi* addressed the obligations of the prosecution, it is my view that policing services share the same responsibilities—even more so, as it is the decision by police to lay a charge that starts the *Jordan* clock running. In Ms. Graham's case, I find it at least possible that her trial might have been able to proceed as scheduled on 22-23 June 2021 had police presented the prosecution with evidence in the case involving the young person earlier than was done.
>
> [Emphasis added]

[22] The Crown asserts, first, that the trial judge mades no mention of and conducted no analysis of the impact of the letter received from Mr. Clarke raising concerns about the ability of Ms. Graham to attend the trial due to hardship that would be caused by having to isolate for two weeks both before and after trial. As

stated previously, the Crown asserts that there was an implicit waiver of the delay when the trial was adjourned. Second, the I.H. matter was given priority because it was a Youth Justice matter, not because it was "*Jordan* vulnerable", as stated by the trial judge at the April 12, 2021 hearing. Third, the reasons for the I.H. trial not going ahead, stated in the Decision to be "follow-up investigation done by police which had revealed new evidence; this revealed material led to the stay" are not part of the record in this case and in any event are not accurately stated by the trial judge. It appears from the decision that the trial judge, acting on this irrelevant and incorrect information, attributed the resulting delay to the state.

[23] Ms. Graham acknowledges that it appears that the ambiguity of the Clarke letter was one factor taken into consideration by the trial judge. However, she asserts that it is clear from the record that the trial judge decided on his own to assign the Graham trial dates to the I.H. matter due to its priority as a Youth Justice matter in accordance with the Nunn Inquiry Report and thus Ms. Graham in agreeing to new trial dates "acquiesced in the inevitable".

[24] Despite the unfortunate reference by the trial judge to irrelevant and incorrect information about why the I.H. file did not proceed, the trial judge found that Ms. Graham had "acquiesced to the inevitable" adjournment of her trial based on his prioritizing the I.H. matter ahead of hers. The trial judge would know best if he was

influenced in making that decision by the letter received from Mr. Clarke and whether he considered that letter to be an implicit waiver as the Crown had argued. The trial judge did not make that finding. His decision to not so find is entitled to deference from this Court (*Ellis*; *Pipping*).

[25] The Appeal is dismissed.

Norton, J.