PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Williams*, 2019 NSPC 48

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Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Danielle Lynn Williams and Shauna Elisha Allison

Restriction on Publication:
Ban on Publication Under Section 486.4 and 486.5 of the *Criminal Code*

Judge:	The Honourable Judge Theodore Tax,
Heard:	September 11, 2019, in Dartmouth, Nova Scotia
Decision	September 18, 2019
Charge:	Section 279(2), 272(1)(a), 267(a), 267(b), 264.1(1)(a), 88(1), 145(3) x2, 733.1(1)(a) x2, of Criminal Code of Canada
Counsel:	Tiffany Thorne, for the Public Prosecution Service of Nova Scotia Peter Kidston, for Darlene Williams Patrick Eagan for Shauna Allison.

By the Court:

[1] The issue before the Court arises from the fact that the Crown Attorney has completed her direct examination of the complainant, MB, but only one of the two Defence Counsel have been able to partially conduct his cross examination of MB. Defence Counsel seek the exclusion of the complainant's evidence or the dismissal of the trial as a breach of their right to make full answer and defence on behalf of their clients. The Crown Attorney seeks a further adjournment of the trial in order to secure the attendance of MB to complete her cross examination and any re-examination by the Crown Attorney.

[2] Therefore. the issue before the Court brings into question what, if any, remedial discretionary actions should be taken by the Court in attempting to balance the fundamental principles to ensure a fair trial for the accused with the right to cross-examine as a cornerstone of an adversarial trial process while, at the same time, applying those principles in a fair and balanced manner to accord with due regard for the pursuit of the truth.

Background Facts:

[3] The trial of Ms. Darlene Williams and Ms. Shauna Allison on several charges, commenced on July 2, 2019 in the Provincial Court. The most serious of the offences for which they are jointly charged involve allegations relating to the confinement of MB, committing a sexual assault on MB, using or threatening to use a weapon, assault of MB with a weapon, assault causing bodily harm to MB, uttering threats to cause bodily harm or death to MB and possession of a weapon for a dangerous purpose.

[4] The Information which alleged that those offences occurred between November 28, 2018 and December 1, 2018 at or near Dartmouth, Nova Scotia, was sworn on December 3, 2018. The Crown proceeded by indictment. On January 15, 2019, the two accused elected to have their trial in the Provincial Court and entered not guilty pleas. Based upon the information related to the Court at that time, and confirmed during a pre-trial conference on April 2, 2019, the parties estimated that three days would be required to complete the trial. As a result, the Court scheduled July 2 and 3, 2019 as the first two days for the trial with the third day scheduled for July 23, 2019.

[5] On the first day of the trial, the Crown Attorney advised the Court that she had intended to call the complainant, MB as the first witness, however, MB was not able to attend court on that first day scheduled for trial. The Court was subsequently advised that the vehicle in which MB was being driven to the court from her home location broke down and that she had left a message on the Crown Attorney's phone to that effect.

[6] Since the Crown Attorney had planned to call other witnesses following the testimony of MB and they were present in court, the trial commenced with the filing of several Exhibits. The Exhibits filed at the outset of the trial included an Agreed Statement of Facts between the parties, certified copies of court orders, photographs taken in and around a residence by a police officer on December 1, 2018 and a Forensic Analysis – Lab Report dated March 26, 2019.

[7] During the first trial day, the Crown Attorney called Det/Const. Corey Bergman and Det/Const. James Wasson. Det/Const. Wasson is a member of the Forensic Identification Section who took the photographs which were marked as Exhibit 6. Det/Const. Wasson also filed Exhibits 8, 9, 10 and 11 which he seized inside or just outside 32 Brule St. in Dartmouth, NS, while executing a search warrant on December 1, 2018. Exhibit 8 is a purple flashlight which was seized from a living room couch in that residence, Exhibit 9 is a pair of pants, Exhibit 10 is strands of hair which were separated from what appears to be packing tape and Exhibit 11 is the tape itself, after the hair was separated from it.

[8] Since no other witnesses were available to provide their evidence on July 2, 2019, the court adjourned this matter early in the afternoon. However, prior to adjourning the trial until the previously scheduled continuation date of July 3, 2019, the Crown Attorney advised the Court that she would be calling a Sexual Assault Nurse Examiner and the complainant, MB the next day. The Crown Attorney estimated that the SANE nurse's evidence would be about one hour and that the rest of the day could be utilized for the evidence of MB.

[9] On July 3, 2019 when court commenced, the Crown Attorney advised the Court that MB had not yet arrived and that she would be proceeding with the evidence of Ms. Samantha King. Ms. King is registered nurse, who has trained as a Sexual Assault Nurse Examiner. She provided evidence relating to her examination of MB on November 30, 2018 starting at about 11:15 PM. The examination lasted about two hours and Ms. King's report of the examination done on MB was filed as Exhibit 12, with additional pages relating to information about that examination

being filed as Exhibit 12(a). In addition, Ms. King had taken 6 pictures of MB during the examination which were filed as Exhibit 13. An Instruction Guide for SANE nurses was filed as Exhibit 14 as it contained some notes made by Ms. King in relation to the examination of MB on November 30, 2018.

[10] Ms. King's testimony concluded around 11:30 AM on July 3, 2019. At that point, the Crown Attorney advised the Court that MB had recently arrived in the building and she requested a brief opportunity to speak to her before commencing the direct examination. Since the Court had one other unrelated brief matter to address and noting the time of the day, the Court granted the Crown Attorney's request. The Court advised the parties that the trial would continue at 1 PM. MB was directed to return to the court at 1 PM to commence her testimony.

[11] Unfortunately, MB was not present in court at 1 PM. When court resumed a few minutes later to get an update on MB's whereabouts, Defence Counsel pointed out that MB had not attended court the prior day, arrived late in the morning and was late again in the afternoon. Defence Counsel advised the Court that it appeared to them that MB was an uncooperative witness, who was not prepared to comply with the Court's directions. Both Defence Counsel also pointed out that their clients had spent a significant period of time in custody and that the progress of the trial has been affected by MB's failure to attend court at all or attend court at the required time.

[12] MB returned to court shortly after 1:40 PM. When the Crown Attorney commenced her direct examination of MB, the Court was informed that, as a result of the recent meeting with MB, she was seeking an order pursuant to section 486.2(2) of the **Criminal Code** to allow MB to testify in the courtroom, behind a screen.

[13] The Crown Attorney noted that subsections 486.2 (2), (2.1) and (3) of the **Code**, provide the framework for a discretionary application to be made by the prosecutor or a witness, for a testimonial aid of a screen or testifying from outside the courtroom. The Crown Attorney also noted that the application may be made before or during the trial, for a witness who is over the age of 18 years or does not have a mental or physical disability. In making the application, the Crown Attorney confirmed that MB was 39 years old and she was not claiming to have a difficulty in communicating her evidence by reason of a mental or physical disability, but the application was being made on behalf of MB, to allow her to testify behind the screen, so as not to see the two accused persons.

[14] Defence Counsel advised the Court that they had no prior notice of this application and they were opposed to the application. After a short hearing, the Court considered the relevant factors listed in section 486.2(3) of the **Code** and concluded that allowing MB to testify behind a screen and not to see the accused persons was necessary in order to obtain a full and candid account from the witness of the acts complained of. As a result of that decision, a short adjournment was required for the court clerk to obtain the screen and install it in the courtroom.

[15] Court resumed at about 2:15 PM on July 3, 2019 and the Crown Attorney conducted her direct examination of MB. MB confirmed that she had a prior criminal record and the Crown Attorney filed MB's JEIN report as Exhibit 15. As the direct examination continued, it was evident that MB was becoming quite emotional and, on a few occasions, was directed to review her statement to Det/Const. Bergman to refresh her memory.

[16] After about an hour of MB's direct examination, MB asked if it was possible to take a short break to relieve the anxiety that she was feeling at that point in time. Shortly before 3 PM, the court granted a 15-minute adjournment and directed MB to return to court at 3:10 PM.

[17] The direct examination of MB continued at 3:15 PM with the Crown Attorney introducing 3 short clips of video evidence from the security camera at the building where MB lived. The 3 short video clips, which were filed as Exhibit 16, totalled about one minute, had timestamps of 5:58 AM, 6 AM and finally at 6:01 AM on November 30, 2018. MB identified herself in the videos, waiting to get into the apartment building by the outer door wearing a parka jacket, sneakers, but no pants. In addition, during the third video clip at 6:01 AM, MB pointed out the injuries to her face.

[18] After MB was asked questions about several of the Exhibits which had been filed by the Crown, the Crown Attorney concluded her direct examination of MB at about 3:50 PM on July 3, 2019. Immediately thereafter, Defence Counsel for Ms. Williams commenced his cross-examination of MB. Given the time of the day, Defence Counsel for Ms. Williams only had the opportunity to ask questions for approximately 30 minutes, before Court concluded for the day. Defence Counsel for Ms. Allison had not asked any questions on cross-examination of MB.

[19] Since the third day of trial had previously been scheduled and it was evident that the cross-examination of MB would not be completed on July 3, 2019, the trial was adjourned until July 23, 2019. As a result, MB was directed to attend court on

July 23, 2019 at 9:30 AM and was advised not to discuss her evidence with anyone in the meantime.

[20] On the morning of July 23, 2019, the Crown Attorney advised the Court that that MB had contacted her and that she would only be able to arrive in court around 11 AM. The Crown Attorney advised the court that MB was required to obtain her prescription for methadone from the pharmacy around 9 AM and then, she had to travel approximately one hour by car to attend court. Based upon that communication, the Court adjourned the trial continuation until 11 AM. When court resumed, shortly after 11 AM, MB was still not present. The Crown Attorney was not able to provide any update. The trial was further adjourned to 1:30 PM on July 23, 2019.

[21] When court resumed and this matter was called for the trial continuation shortly before 2 PM on July 23, 2019, MB was still not present in court. The Crown Attorney had not been able to contact her and had not received any communication from her as to her whereabouts. After hearing that information, Defence Counsel made a motion to have the Court enter a judicial stay or declare a mistrial. The Court indicated that it was reluctant to grant either application made by Defence Counsel based upon on speculation as to why MB was not present.

[22] As a result of MB's absence and failure to attend court on the third date scheduled for trial, Defence Counsel could not continue and conclude their cross examination of her. Defence Counsel, once again, asked that MB's evidence be struck from the record by virtue of her non-attendance on several occasions and the charges dismissed.

[23] Following brief submissions by the Defence Counsel and the Crown Attorney, the Court concluded that, since MB's absence was unexplained, it would be speculative to find that her absence was an indication of being an uncooperative witness or her lack of interest in proceeding with her testimony. The Court did not grant the request made by Defence Counsel, but instead issued a witness warrant for MB.

[24] MB was apparently arrested on the witness warrant issued by the Court as well as another warrant that had been issued in an unrelated matter. On August 6, 2019, MB was in custody when she appeared in court. During a brief discussion between the Court and MB, prior to directing her to return to court to complete her testimony, the Court stressed the fact that MB had only completed her direct examination and that Defence Counsel were entitled to ask questions of her on

cross examination. After hearing from MB that she wanted to continue with her testimony, the Court stated that she was expected to attend court as and when directed by the Court and to answer the questions posed by Counsel.

[25] With respect to the witness warrant, on August 6, 2019, MB was directed to attend court for the trial continuation, which was scheduled for September 3, 2019 at 1:30 PM. The Crown Attorney and both Defence Counsel, who were present in court when the Court dealt with the witness warrant, had previously confirmed that they were all available to continue with the trial on September 3, 2019.

[26] The Court was later advised that MB had been released from custody in relation to the other matter for which a warrant had been issued. Therefore, it was not a matter of arranging for a pick-up order to be signed to bring MB from the correctional centre to the court on September 3, 2019.

[27] Furthermore, with respect to the trial continuation date, the Court had advised the parties that, as a result of the recent resolution of a case, the morning of September 3, 2019 was also available. However, during the hearing with MB with respect to the witness warrant on August 6, 2019, she had advised the Court that she is required to attend, daily, at a pharmacy to obtain her methadone treatment around 9 AM. Since MB also had to travel about one hour to attend court in Dartmouth and Defence Counsel had estimated that their cross-examination would be about two hours, the Court confirmed the trial continuation for September 3, 2019 at 1:30 PM.

[28] Once again, on September 3, 2019, MB failed to attend court. However, the Crown Attorney advised the Court that, with the assistance of a Mik'maq Legal Support Network (MLSN) court worker, she had received a message from MB that she would like to have the opportunity to have some counselling from the MLSN court worker, before she testified.

[29] The MLSN court worker, Ms. Smiley, who was present in court on the afternoon of September 3, 2019, advised the Court that she had been in conversation with MB. Ms. Smiley also advised the court that the MLSN could provide some "culturally enhanced services" to MB, an aboriginal person, who has suffered from many **Gladue** factors. Ms. Smiley advised the Court that services could be provided to MB which would be "culturally appropriate" as a victim support person but would not involve any discussion of the facts of the case itself. Ms. Smiley also stated that she was prepared to be a support person who would be in the courtroom when MB testified.

[30] Since Ms. Smiley could not attend court before September 11, 2019, the Court granted the adjournment request made by the Crown Attorney and scheduled September 11, 2019 at 1:30 PM as a status date to confirm MB's intentions to attend the trial and to schedule the trial continuation. A further witness warrant was issued for MB and then the Crown Attorney advised the Court that another arrest warrant, in an unrelated matter, had also been issued for MB on August 14, 2019.

[31] The September 11, 2019 hearing, at 1:30 PM, was scheduled to set a trial continuation date, to get an update on MB's status and hear whether the witness warrant or any other warrant for her arrest had been executed. In addition, prior to that date, court staff had contacted and confirmed the earliest possible date for the trial continuation where the Court, a courtroom and all counsel were available.

[32] However, before that trial continuation date could be confirmed on the record, the Crown Attorney advised the Court that the police had not been able to locate MB and execute either one of the two outstanding warrants. The Crown Attorney had not heard from MB and when Ms. Smiley from MLSN attended court that afternoon, she also advised the Court that she has not heard anything further from MB.

[33] Following those developments, both Defence Counsel repeated the request that they had made on each of the previously scheduled trial dates when MB failed to attend court. As a result, both Defence Counsel have, once again, asked that the charges be dismissed or based on the case of **R. v. Dalley**, 2018 NLSC 124, to exclude or strike the evidence of the complainant, MB, from the record, based upon a denial of their right to make full answer and defence.

[34] The Crown Attorney asks the Court, once again, to adjourn the trial and schedule a trial continuation date in order to allow Defence Counsel to have the opportunity to conduct and complete their cross-examination of MB. However, given the circumstances before the court, the Crown Attorney acknowledges that it is uncertain whether there is a reasonable expectation that MB can be procured to attend court on a future trial continuation date, as required by the third criterion established by the Supreme Court of Canada in **R. v. Darville** (1956), 116 C.C.C. 113(SCC).

ANALYSIS:

[35] The application made by both Defence Counsel at this time relies upon the decision of Justice Murphy in **R. v. Dalley**, 2018 NLSC 124, which, in turn, was

largely based on the approach adopted by Cromwell JA (as he then was), in **R v. Hart**, 1999 NSCA 45. In the **Hart** decision, the main issue on appeal was whether the trial was unfair because one of the child complainants was unresponsive during portions of the cross-examination.

[36] The factual background in the **Dalley** case was somewhat similar to the instant case, with some important distinctions. The **Dalley** case involved a single charge of sexual assault contrary to section 271(1) of the **Criminal Code** involving the complainant who was 19 years old at the time of the trial. The Crown Attorney had completed the direct examination of the complainant by midmorning on the second day scheduled for trial and then the defence began its cross-examination. The cross-examination proceeded slowly for several reasons, but it was evident that additional court time would be required to complete the cross-examination.

[37] Towards the end of the second day of trial, the complainant became upset while the Court discussed the trial continuation dates with counsel. She stated that she wished to drop the charge, did not want to come back to the court or ruin any more of her life and did not want to wait another year to come back to court.

[38] The trial judge told the complainant that the court did not have control over the matters that she had raised and reminded her that she was in the middle of her cross-examination and not to discuss her evidence with anyone in the meantime. The judge then scheduled two additional days for trial, about one month later. When the trial was ready to resume on the first of those two days, the complainant did not appear. The Crown advised that it did not want the Court to issue a warrant so as to compel the complainant to attend court.

[39] Defence Counsel took the position that the failure of the complainant to attend for the trial continuation amounted to a violation of his right to make full answer and defence. The remedy sought was either a judicial stay of proceedings or the exclusion of the evidence of the complainant.

[40] The Crown Attorney submitted, in the **Dalley** case, that the right to cross-examination is not limitless and given the cross-examination that had already occurred, the Court should deem it to have been completed and carry on with the trial. Alternatively, the Crown argued that the Court afford the evidence of the complainant less weight or admit the evidence of the complainant from the preliminary inquiry pursuant to section 715(1) of the **Code**.

[41] The factual background in the **Hart** case involved an appeal of convictions for sexual assault and for touching for a sexual purpose, entered after trial by judge and jury. One of the complainants, who was 12 at the time of the trial, became unresponsive during portions of his cross-examination. The appellant submitted that the trial judge should have either directed a verdict of acquittal or entered a judicial stay of proceedings at the end of the Crown's case.

[42] During the cross-examination by Defence Counsel, the witness became unresponsive for a significant number, but by no means all, of the questions asked. The trial judge had intervened when the witness initially became unresponsive and directed him to answer the questions posed.

[43] The defence then moved before the trial judge for a judicial stay or a directed verdict of an acquittal. The trial judge found that there had been a limited right to cross-examine. The witness had been subject to cross-examination at the preliminary inquiry and the trial judge stated that Defence Counsel could point to any inconsistencies in the trial evidence that were raised from that procedure. The trial judge noted that there was other evidence before the jury and found that this was not one of those "clearest of cases" where a verdict should be directed, or a judicial stay granted.

[44] In **Hart**, at the outset of his analysis, Cromwell JA stated at para. 19:

> "The right to cross-examine is a cornerstone of the adversarial trial process. It is an important vehicle for discovery of truth and is central to our understanding of fair procedure. However, even the most important rights have limits. As the **Charter of Rights and Freedoms** makes clear, our constitutionally guaranteed rights are fundamental, but they are not absolute."

[45] Justice Cromwell reviewed several English, American and Canadian common-law evidence cases which dealt explicitly with situations in which a witness either refused or otherwise became unable to complete the cross-examination by the opponent's counsel. He noted, at para. 25, that there was "relatively scarce case law" on the point and that courts had adopted different approaches, depending upon the circumstances for the non-attendance of the witness and whether the loss of the opportunity to cross-examine caused the opposite party no material harm.

[46] Cromwell JA concluded that there was no short, dispositive "test" for whether a trial had been rendered unfair or whether the right to make full answer

and defence had been infringed in a situation where a child witness was unresponsive during portions of the cross-examination. Instead, he concluded that these were matters for the discretion of the trial judge taking into account all relevant considerations.

[47] In considering whether the trial is unfair, or the right to make full answer and defence has been limited, Cromwell JA said that the factors which the trial judge should consider may be grouped under 3 main headings. The factors were listed under the following three main headings, namely:

(a) the reason for the unresponsiveness;

(b) the impact of the unresponsiveness; and

(c) possibilities of ameliorative action.

[48] In terms of "the reason for the unresponsiveness" at paras. 96-101 of **Hart**, Cromwell JA stated that, before evidence is admitted without a full opportunity to cross-examine, there should be a valid and important reason for doing so. The Court should address whether the unresponsiveness could been avoided by reasonable action or whether the evidence could have been available in some other way and within a reasonable time.

[49] The Court must carefully consider any conduct of the witness which has the effect of frustrating the opportunity to cross-examine, but in the case of child witnesses, the court may consider whether the unresponsiveness resulted from the nature of the process and whether appropriate steps had been taken to reduce the embarrassment and discomfort in testifying. In **Hart**, none of the procedures available to reduce the difficulty of testifying for children were used - there was no videotaping readily available to the police, no screen was used, and no support person sat with the witness, as permitted by section 486(1.2) of the **Code**.

[50] In this case, like the **Dalley** case, the issue does not relate to an unresponsive witness, but rather, a witness who has not attended court on trial continuation dates to complete her cross-examination by Defence Counsel. However, in this case, unlike the **Dalley** case, MB has not specifically expressed any intention to not proceed with her testimony or that she has no intention of returning to court, but for reasons unknown to the Court, she has failed to attend on trial continuation dates.

[51] There may be several reasons for MB's failure to attend court as directed and it would be speculative on my part to infer that her absence is for similar or the same reasons as expressed by the complainant in the **Dalley** case. In addition, I note that Cromwell JA referred to the fact that the unresponsiveness of a child witness may be due to many things such as embarrassment or discomfort in testifying and that the Court ought to consider whether appropriate steps were taken to alleviate those concerns.

[52] In this case, prior to commencing her direct examination, the Crown Attorney made an application for MB to testify behind the screen and that application was granted by the Court. Most recently, a MLSN court worker, who had met with MB, appeared in court on a date when MB failed to attend and stated that, in her opinion, MB is an aboriginal woman who has been impacted by many of the **Gladue** factors, which courts regularly take into consideration for aboriginal offenders. In my opinion, those factors in combination with the very serious nature of these charges which by their very nature must involve questions of a highly personal and sensitive nature, have led to MB's anxiety and discomfort in responding to questions posed by counsel.

[53] With respect to the second factor to be considered, namely the impact of the unresponsiveness, Cromwell JA noted, in **Hart** at paras. 102-103, that the trial judge should consider the importance of the evidence to the case and whether there is a satisfactory basis, notwithstanding the unresponsiveness, to evaluate the evidence. He added, the more important the evidence to the prosecution's case, the more reluctant the trial judge should be to allow it to be given without full cross-examination.

[54] Cromwell JA stated that the trial judge should also consider the extent and effect of the cross examination that has been conducted as well as Defence Counsel's submissions on any areas of cross-examination that were not pursued because of the unresponsiveness. In this case, although one of the two Defence Counsel had the brief opportunity to challenge certain areas of MB's direct examination, he estimates that he requires about one hour to complete his cross-examination. The other Defence Counsel has not even commenced his cross-examination, but he also estimates that he would need about one hour to conduct his cross-examination of MB.

[55] While Justice Cromwell noted, at para. 106, that the trial judge should make a "common sense and realistic assessment of the likely impact that the cross-

examination would have had if it had been possible to continue", he also recognized it would be a difficult question to resolve without some speculation. He concluded that the "judge should be slow to conclude that further cross-examination would have been ineffectual."

[56] In this case, there is certainly other evidence before the court in the form of photographs, some agreements between counsel, video clips and physical evidence filed as Exhibits. In addition, there is the testimony of the police officer and a nurse who met with MB very shortly after the alleged incident. However, the statements made by MB to the police officer and the nurse would certainly be regarded as hearsay and they have been tendered as part of the narrative, but not for the truth of their contents.

[57] As a result, there is no doubt that the credibility and reliability of MB's evidence is critical to the case for the Crown. In those circumstances, as Justice Cromwell said in **Hart**, that consideration should normally increase the reluctance of a trial judge to admit the evidence without full cross-examination.

[58] With respect to the third factor, namely, the possibilities of ameliorative action, Justice Cromwell stated, in **Hart** at paras 109-110, that before concluding that the trial has become unfair or whether there has been a denial of the right to full answer and defence, the trial judge should consider whether the limitation on cross-examination can be remedied or at least ameliorated.

[59] For example, Cromwell JA suggested that the trial judge should consider whether the difficulty with the witness is likely to be permanent or if there is a reasonable prospect of the witness becoming responsive within a reasonable period of time. Consideration must also be given to the postponement of a trial, having due regard to the accused's right to an interest in a timely trial.

[60] In the **Dalley** case, the trial judge concluded that a postponement was not a consideration because the complainant had clearly stated that she wanted nothing further to do with the process **and** the Crown had advised that it did not want a warrant to be issued. The Court noted in **Dalley**, at para. 34, that in appropriate circumstances where difficulty with the witness attending is not likely to be permanent, a postponement would be an appropriate course of action.

[61] Under this heading, in several other cases [including **Dalley**] which I found where a similar issue arose after a witness failed to attend court or was or became unresponsive, the Crown then made application to introduce the evidence of the

witness given on a preliminary inquiry pursuant to section 715(1) of the **Criminal Code**. In this case, that is not a relevant consideration since Defence Counsel elected to have their trial in the Provincial Court and as a result, there was no preliminary inquiry evidence nor a previous trial on the same charge where the defence had the full opportunity to cross-examine the witness.

[62] In this case, unlike the **Dalley** case, MB has not specifically stated that she wants nothing further to do with this trial process. In fact, during the August 6, 2019 hearing, after she was arrested on the witness warrant issued by the Court, MB clearly stated that she wished to continue with her trial testimony. In addition, MB stated that she understood the Court's direction that she was required to attend court and that she would be required to respond to the questions posed on cross examination by Defence Counsel.

[63] With respect to the **Darville** test for adjourning a trial, there is no doubt that MB is a material witness and that there has been no neglect on the part of the Crown in attempting to procure the witness. A subpoena was issued, and arrangements were made for her transportation to the court. Since the Court was made aware of her requirement to attend for daily methadone treatments in the morning, trial continuations have been scheduled to commence in the afternoon. While the reasons for MB's failure to attend court have, for the most part, not been explained, as I indicated previously, I do not believe it would be appropriate for a trial judge to speculate as to the reasons for those absences.

[64] Although not specifically requested prior to the trial, the MLSN court worker has now made contact with MB and the court worker is also prepared to act as a support person under section 486(1.2) of the **Code**. While the Crown has not made that specific application in the absence of MB, it seems clear that the MLSN court worker would be willing and able to provide culturally sensitive and appropriate support to MB which might alleviate any embarrassment or discomfort in MB attending court to complete her trial testimony.

[65] In those circumstances, with respect to the third branch of the **Darville** test, in my opinion, there may well be a reasonable expectation that MB will attend court on a future date, if the Crown Attorney's adjournment request is granted.

[66] In conclusion, having considered all of the factors set out by Cromwell JA in the **Hart** case, I am of the view that Defence Counsel should have the opportunity to conduct and complete their cross-examination of MB. There is no doubt that MB's evidence is critical for the prosecution's case and in those circumstances, I

agree with the comments of Justice Cromwell that the trial judge should be reluctant to allow it to be given without full cross-examination.

[67] In addition, given my conclusions with respect to the possibilities of ameliorative action, I am not prepared to strike MB's evidence from the record at this point after having considered all of the factors outlined by Cromwell JA in the **Hart** case.

[68] In my opinion, the appropriate action to take at this time which takes into consideration the right of the accused to make full answer and defence while at the same time taking into consideration the requirement for a fair and timely trial as well as due regard for the pursuit of the truth, is to grant the Crown Attorney's request for an adjournment and set the trial continuation on the date when all of the parties had indicated that they were available.

[69] In addition, I will set a status date for an update on the information relating to the execution of the witness warrant as well as whether the Crown or MB will be making an application for the MLSN court worker to be a support person to be present and close to MB when she testifies.

[70] Given the other evidence which is already before the court and which has either been filed by agreement or subject to cross-examination, I find that it would not be reasonable to conclude that this is one of those "clearest of cases" to direct a verdict or to enter a judicial stay. A judicial stay of proceedings is an extreme remedy to be used in cases where the integrity of the entire proceeding has been compromised. This is not one of those "clearest of cases."

[71] In this case, I find that the failure of MB to appear in court to continue with her cross examination, which has largely been unexplained, has had an obvious impact on the length of the trial. However, I find that MB's failure to appear in court for the continuation of her cross examination has not tainted the integrity of the entire proceeding.

[72] Given all of the factors that I have taken into consideration in granting the Crown Attorney's request for an adjournment, I am also satisfied that, at this time, there are reasonable possibilities for ameliorative action to continue with this trial, without having to strike MBs evidence, declare a mistrial or direct a verdict.

Theodore Tax, JPC