PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v Graham*, 2022 NSPC 10

Date: 20220330
Docket: 8365516, 8365517
Registry: Pictou

Between:

Her Majesty the Queen

v

Angela Michelle Graham

LIBRARY HEADING

Judge:	The Honourable Judge Del W Atwood
Heard:	February 2, 2022 in Pictou, Nova Scotia
Charge:	Sections 140 and 334 of the *Criminal Code of Canada*
Subject:	Constitutional law: trial within a reasonable time.
Summary:	The accused was charged with public mischief and theft. Following a number of adjournments, defence counsel applied for a stay of proceedings, alleging a breach of ¶ 11(b) of the *Charter*.
Issues:	(1) Application of *R v Jordan*, 2016 SCC 27. (2) Determination of defence delay/waiver. (3) Determination of discrete, exceptional circumstances.
Result:	Application granted. Charges stayed judicially.

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DECISION REGARDING APPLICATION FOR STAY OF PROCEEDINGS

Judge:	The Honourable Judge Del W Atwood
Heard:	February 2, 2022 in Pictou, Nova Scotia
Charge:	Sections 140 and 334 of the *Criminal Code of Canada*
Counsel:	T William Gorman for the Nova Scotia Public Prosecution Service Hector MacIsaac for Angela Michelle Graham

By the Court:

Summary

[1] Angela Graham has been charged with making a false report to police of having been robbed; it is alleged that she did this to cover up a theft from her employer.

[2] Counsel for Ms. Graham alleges a breach of her right to be tried within a reasonable time, as guaranteed constitutionally in ¶ 11(b) of the *Charter*.

[3] There is an earlier decision related to this matter, 2020 NSPC 59, pertaining to an application for disclosure.

[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.

[5] These are my reasons.

Procedural history

[6] 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, § 140(1) of the *Criminal Code* (case 8365516); and,
- theft of money from her employer in an amount not exceeding five thousand dollars, ¶ 334(b) of the *Code* (case 8365517).

[7] The prosecution elected to proceed summarily, and Ms. Graham pleaded not guilty.

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—online: https://www.courts.ns.ca/News_of_Courts/documents/NSPC_Measures_03_16_20.pdf.

- 18 March 2020: further restrictions imposed on in-person proceedings in Provincial Court—online: https://www.courts.ns.ca/News_of_Courts/documents/COVID_Prov_Court_Update_03_18_20.pdf

- 22 March 2020: originating declaration of a state of emergency in the Province of Nova Scotia under the *Emergency Management Act*, SNS 1990, c 8, § 12—(2020) NS Gaz I, 531.

- 23 March 2020: issuance of first order by the medical officer of health under § 32 of the *Health Protection Act*, SNS 2004, c 4, § 1—(2020) NS Gaz I, 563.

- 14 May 2020: Provincial Court to resume trials for persons in custody effective 1 June 2020—online:

https://www.courts.ns.ca/News_of_Courts/documents/NSPC_Resumption_of_Trials_NR_05_14_20.pdf.

- 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—online: https://www.courts.ns.ca/News_of_Courts/documents/NSPC_Expansion_of_Services_NR_05_16_20.pdf.

- 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—online: https://www.courts.ns.ca/News_of_Courts/documents/NSPC_Suspension_of_In_Person_Proceedings_Extended_01_25_2022.pdf

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

Specific legal rules and provisions

[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.

Calculation of delay

Total delay

[15] The court is currently holding on reserve for this trial (projected by counsel as requiring two days for hearing) the dates of 20 and 24 June 2022. As discussed earlier in this judgment, the court must measure delay from the time of the laying of a charge until the anticipated end of trial—*Jordan* at ¶ 47-49, 60, 82.

[16] Ms. Graham was charged on 19 July 2019. The time from that date to 24 June 2022 evidences ***a total delay of 1071 days.***

Defence delay or waiver

[17] I reckon the following to be defence delay: 25 August 2020-19 October 2020 due to the delay in defence counsel completing the preparation of the draft

disclosure order for submission to the court. This led to a delay in scheduling a new trial date for Ms. Graham. This is a period of ***55 days is to be deducted from total delay***.

[18] The following is not reckoned as defence delay or waived delay, and so not to be deducted from total delay, as it resulted from actions taken legitimately to respond to the charges:

- 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.

Complex case

[19] The prosecution has not advanced a complex-case argument. This was to have been a two-day trial.

Exceptional circumstances

[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***.

Adjusted delay

[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.

[36] The court is indebted to counsel for their extensive submissions throughout.

JPC