

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R. v MacDonald*, 2023 NSPC 9

**Date:** 20230321

**Docket:** 8450075 8450076 8450077 8455935 8455936  
8455937 8455938 8455939

**Registry:** Pictou

**Between:**

His Majesty the King

v

Justin Stanley MacDonald

***DECISION REGARDING APPLICATION FOR  
STAY OF PROCEEDINGS***

**Restriction on Publication: 486.4**

**Any information that will identify the complainant, victim or witness shall not be published in any document or broadcast or transmitted in any way.**

**Judge:** The Honourable Judge Del W Atwood

**Heard:** 2023: 21 March in Pictou, Nova Scotia

**Charge:** Sections 151, 163.1, 271, 733.1 *Criminal Code of Canada*

**Counsel:** Peter Dostal and Josie McKinney for the Nova Scotia Public  
Prosecution Service  
Pavel Boubnov for Justin Stanley MacDonald

## **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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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).

**By the Court:**

*Case history*

[1] Justin Stanley MacDonald is charged with offences under § 151, 163.1, 271, and 733.1 of the *Criminal Code*. The matters are proceeding indictably.

[2] Mr MacDonald elected trial in this Court and pleaded not guilty.

[3] The Court has reserved for trial the dates of 21, 22, 23 and 28 March 2023. These dates were fixed over a year ago, on 18 January 2022.

[4] On 3 February 2023, counsel for Mr MacDonald filed with the Court an application for a stay of proceedings, alleging a violation of ¶ 11(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 91(24). The application proposed a hearing date of 21 March 2023, the first day set for Mr MacDonald's trial. Although the application as filed made reference to a written brief, none accompanied the application.

[5] On 13 February 2023, the application was called before a judicial colleague and the court ordered the following:

- A defence brief and transcripts of Mr MacDonald's appearances to be filed by 23 February 2023; and
- a reply from the prosecution to be filed by 6 March 2023.

[6] In the result, the court-ordered defence brief was not filed until 27 February 2023, as per the date stamp on the incoming email; it was not accompanied by transcripts. The brief from the prosecution was timely.

***Rules governing pre-trial applications***

[7] An application for a stay of proceedings for unreasonable delay is classified as a pre-trial application under Rule 2.4(2)(e) of the Nova Scotia Provincial Court Rules: online at [https://qweri.lexum.com/w/nsc/pcr-en#!fragment/zoupio-\\_Toc85614739/BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoAvbRABwEtsBaAfX2zgA4BWANgEYALAHYAzAE4A1ABpk2UoQgBFRIVwBPAAHJNUiITC4Ey1Ru279hkAGU8pAEIaASgFEAMs4BqAQQByAYWcpUjAAI2hSdgkJIA](https://qweri.lexum.com/w/nsc/pcr-en#!fragment/zoupio-_Toc85614739/BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoAvbRABwEtsBaAfX2zgA4BWANgEYALAHYAzAE4A1ABpk2UoQgBFRIVwBPAAHJNUiITC4Ey1Ru279hkAGU8pAEIaASgFEAMs4BqAQQByAYWcpUjAAI2hSdgkJIA) [Rule].

[8] Rule 2.4(1) states:

Except with the permission of the Court, a pre-trial application shall be heard at least 60 days before trial.

[9] Rule 2.1(3) states:

A party who wishes to rely upon something that happened in a previous court proceeding shall attach the transcript or audio recording of the relevant part of the other proceeding to Form 1.

[10] The commentary applicable to Rule 2.1(3) states:

Transcripts of court proceedings may be very important to the Court in deciding an application. Transcripts are important where a party seeks a stay of proceedings due to unreasonable delay under s. 11(b) of the Charter. Where a party requires a transcript or audio recording, it is important that the procedures for ordering recordings of court proceedings are followed, so that there is enough time for the transcript or audio recording to be prepared, to be attached to Form 1 and to be served and filed.

[11] Transcripts are a requirement in 11(b) applications to allow the court conducting the hearing to form those fine judgments that might be required regarding attribution of delay.

[12] Rule 5.3 states:

The Court may excuse non-compliance with any Rule at any time to the extent necessary to ensure that the fundamental objective set out in Rule 1.1 is met.

[13] The commentary applicable to Rule 5.3 states:

It is expected that the parties will be familiar with these Rules of Court and will comply with them. It is a professional obligation to do so. However, on rare occasions, there may be circumstances that prevent compliance. The Court, in its discretion, may excuse compliance with the Rules to the extent required to ensure a fair hearing. Consequences may result from non-compliance, including dismissal of the application without a hearing on the merits.

[14] Rule 1.1 is described as a fundamental objective, and states:

### **1.1 Fundamental Objective**

1.1 (1) The fundamental objective of these Rules is to ensure that cases in the Provincial Court of Nova Scotia are dealt with fairly, reasonably and efficiently.

### **Duty of Counsel, Agents and Self-Represented Persons**

1.1 (2) In every case, each counsel, agent and self-represented person shall comply with these Rules and with applicable Practice Directions and other orders made by the Court.

### **Duty of Court**

1.1 (3) The Court shall take the fundamental objective into account when,

(a) exercising any power under these Rules; or

(b) applying or interpreting any Rule or Practice Direction.

### **1.2 Scope of Rules**

1.2 These Rules apply to all cases before the Court.

### ***Relevant cases***

[15] In *R v CD*, 2022 CanLII 54235 (NLPC) [*CD*], the court dealt with a defence application to extend a filing date for materials relating to an application to admit evidence of other activity in a sexual-assault case. Although the court granted the application, the court noted that non-compliance with rules of court was implicated

directly in the culture of delay complacency: ¶ 7-11. The hearing judge noted that the order extending the time for filing would not have an impact on the trial date.

[16] The judge in *CD* referred to *R v Fudge*, 2017 NJ No 103 (SC), aff'g [2016] NJ No 150 (PC) [*Fudge*]; in *Fudge*, the summary conviction appeal court affirmed the decision of a trial judge not to proceed with an application regarding a *Charter*-grounds review of a fisheries statute because of the untimeliness of the application, in circumstances when there was plenty of time to comply with the filing requirements set out in the governing rules: ¶ 53.

[17] That principle is applicable in this case. Especially so, as applications for 11(b) *Charter* relief are justiciable from the moment a trial date is set, if that trial date is beyond a presumptive unconstitutional-delay threshold: *R v Jordan*, 2016 SCC 27 at ¶ 5, 46, 49, 105; and see *R v Fulton*, 2022 NSPC 53 at ¶ 60 and *R v Graham*, 2022 NSPC 10 at ¶ 9, aff'd 2022 NSSC 370. In this case, the court fixed dates for Mr MacDonald's trial over a year prior to the filing by defence counsel of the 11(b) application.

[18] To sum up, the application is not timely; defence counsel should have sought a hearing no later than 20 January 2023, as required by Rule 2.4(1), and could have sought one right after the trial date was set. To this day, the application is

unsupported by transcripts of Mr MacDonald's previous appearances; apart from the fact that Rule 2.1(3) would require them, the fact is that the court made an order over a month ago that defence counsel file them with the court. Finally, the defence brief was filed four days after the filing deadline fixed by the presiding judge on 13 February 2023; this may be a small point, but it seems representative of delay complacency.

[19] In my view, excusing defence-attributable application delays, when the basis for the application is an allegation of constitutionally inexcusable delay, would be incongruous. Further, it would not be fair to the public, given its interest in seeing Mr MacDonald's case decided on its merits, and would be neither reasonable nor efficient. Entertaining the application—or an application to excuse non-compliance with the Rules—would run counter to the fundamental objectives set out in Rule 1.1. This is self-evident: even if, for the sake of argument, the Court were to conclude that the case ought to be stayed, the damaging impact on the docket resulting from the last-minute collapse of a four-day trial—with little likelihood of other accused persons or their counsel presenting themselves as willing to use those dates—would be substantial.

[20] The Court appreciates the challenges faced by defence counsel—particularly those who, as Mr Boubnov, provide invaluable service to persons charged with



serious offences, often on the terms of legal-aid certificates. The caseload-management challenges are manifold.

[21] However, the Rules of the Court are in place precisely to assist counsel in identifying critical timelines and procedural obligations; they must be followed. A court might excuse a near miss; this is not one of them.

[22] The application is dismissed. This is not a decision based on the merits of the application, but on the untimeliness of it.

**JPC**