

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R. v. Marriott*, 2020 NSSC 149

**Date:** 20200422

**Docket:** CRH No. 495446

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

Brian James Marriott

<p><b>Restriction on Publication: Section 517 CC</b></p>
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**Judge:** The Honourable Justice Denise Boudreau

**Heard:** April 22, 2020, in Halifax, Nova Scotia

**Oral Decision:** April 22, 2020

**Written Release of** April 27, 2020

**Oral Decision:**

**Counsel:** Scott Morrison and Rick Woodburn, for the Crown  
Stanley W. MacDonald, QC, for the Defence

NOTE: The restriction on publication in this matter does not apply to this written decision.

**By the Court (Orally):**

[1] The matter before the court is an application made by Brian James Marriott, seeking judicial interim release. Today we are not dealing with the merits of that application. We are today merely dealing with the question of whether the date for that particular hearing should be set now, or at a later date.

[2] The background to that, of course, is that this province and, indeed, the world at large, is dealing with a pandemic in the form of a new virus known as COVID-19. That has created a practically unprecedented situation. Just about all aspects of our life have come to a standstill because of this pandemic. As it presently stands, the Province of Nova Scotia has declared a state of emergency until May 3, 2020.

[3] Most businesses are closed, many government offices are closed, people are working from home in great measure. The effect of the pandemic on all aspects of our life has been severe. Even people with serious medical conditions are being delayed surgery and treatment because of it.

[4] The courts remain open, as they must remain open. The courts in Nova Scotia have adopted an essential services model. That has been done on the advice of Dr. Strang, the Chief Medical Officer in this province. That means that only matters that are deemed to be urgent or essential are permitted to proceed. That requirement of urgency, or that a matter be essential, is to be interpreted strictly; that is to say, the courts are now limited to only those matters that need to be heard on an urgent basis in recognition of the very significant risk that this pandemic poses to the public and, in particular, to the staff that work at this building.

[5] Mr. Marriott is seeking a judicial interim release hearing. That hearing will happen, but the question is whether it can or should happen now, while the courts are operating under this essential services model. If it does happen now, we must consider how could that hearing take place.

[6] I also note that the request of Mr. Marriott is for a first instance bail hearing. That is because the nature of the charges, or at least one of the charges that he faces, brings him within the jurisdiction of the superior court for such a hearing. This is not a bail review situation, which our court often hears.

[7] The charges that Mr. Marriott is facing, and for which he is presently remanded, are serious. They relate to events that are alleged to have occurred in

December 2019, and include charges of conspiracy to commit murder and attempted murder. I am advised that because of the number of co-accused in this particular matter, and the logistics of organizing them and the various counsel that they have, that a preliminary inquiry in this matter is presently scheduled to take place in January 2021. I am further advised that Mr. Marriott has been on remand since February 2020.

[8] The question before me today remains: is this hearing of an urgent nature? That is to say, should we hold the hearing during the present time, of these pandemic restrictions.

[9] I have been made aware of decisions that have been made by my colleagues, Justice Keith and Justice Murray. In those particular cases, those matters were deemed to not be urgent; however, they were matters involving bail reviews. That is not the case today, as we are dealing with a first instance bail hearing.

[10] I do find, and I must agree with counsel for Mr. Marriott, that that is a material difference. In a bail review matter, generally speaking another court has already considered an applicant's request for bail, and has rejected it. In the case before me, no court yet has considered Mr. Marriott's request for bail.

[11] I also note for the record that Mr. Marriott has already made a previous application for a judicial interim release hearing, since we have been operating under the essential services model. He came before Justice Campbell on March 25, 2020, seeking to have a bail hearing date set. Those were early days in our essential services model.

[12] At that time, Justice Campbell decided that the matter was not urgent, but confirmed the matter of judicial interim release would be heard at a later date. I have reviewed Justice Campbell's decision and comments. I agree with all of the concerns that he raised about the holding of bail hearings during this time.

[13] I do note, however, that there are some differences between what Justice Campbell had before him, and what I have before me today. Firstly, I have what I would describe as a more fulsome record, as to how this hearing would proceed. I further note that Mr. Marriott has now put forward a medical issue as a reason that he appears to be particularly concerned about his remand during this pandemic. (I say nothing further about the merits of that issue at this time. I merely indicate that it has been put forward.)

[14] I also note that Justice Campbell had expressed concerns about the logistics of such a hearing at this time; that is to say, how would witnesses be dealt with,

how could people be properly separated, etc. It would appear, based on Justice Campbell's decision, that those issues were not addressed to his satisfaction, so that he did not feel that a bail hearing could safely be held at that time.

[15] Before me, those concerns have been raised, they have been discussed, and we have had a fulsome discussion about how some of those risks could be addressed and contained.

[16] I also want to note that the Provincial Court of Nova Scotia is holding first instance bail hearings during this time of pandemic. They have been doing so with the assistance of virtual technology. Having said that, I have no reason to dispute counsel's comments that they are imperfect. It would appear that they certainly have their challenges and difficulties. However, the fact that the Provincial Court is hearing these matters suggests to me that, from their perspective, they are found to be of an urgent nature.

[17] I also would note from the information that has been put before me, that other provinces appear to be dealing with first instance bail hearings as well. Those provinces have at least similar, if not identical, restrictions to those in our courts; that is to say, they are hearing only urgent matters.

[18] I conclude, as a general proposition, that in my view a first instance bail hearing should be considered an urgent matter for our court. Judicial interim release involves the consideration of the liberty of an accused person, when he has not yet been convicted. Because it is a first instance bail hearing, no court has considered his interim release as of yet.

[19] Obviously every case will have its own particularities, and those have to be explored. Again, as a general rule, in my view, I find that such a hearing should be dealt with quickly, assuming it can be done safely, with as minimal risk to the public, to the participants, and to the staff, as possible. Having discussed this matter at length with counsel this afternoon, I believe that this hearing can be done within our essential services model, and with as minimal risk as possible.

[20] Based on our discussions, I have some commentary on how I think it should be done. Perhaps, once the hearing commences, some adjustments may have to be made. I understand the Crown will be attending by telephone as is their present practice. Mr. MacDonald is free to attend in person if he wishes, or he can attend by telephone if he wishes. I do not think, based on the number of people that will be in the courtroom, that Mr. MacDonald's actual attendance in the room will be a difficulty. If it turns out to be an issue, I may need to review that at that time.

[21] Mr. Marriott himself would be on the video, as he is today, from the Correctional Centre.

[22] I would propose that exhibits that counsel are going to be giving to me be sent in advance. I am leaving it to counsel, in consultation with staff in the building, what is the best format to send exhibits in.

[23] It is my intention to schedule this matter in one of the two largest courtrooms that we have, either 301 or 304. That should allow proper social distancing for anyone who needs to be in the room, certainly to an absolute maximum of five, hopefully less.

[24] With respect to witnesses, we will be using the vulnerable witness room. The room will need to be cleaned before and after each witness. The witnesses will have to be met in the lobby of the courthouse by a sheriff, escorted directly to that room for their testimony, and then escorted from the building once they are finished.

[25] I would ask counsel to please make best efforts between now and the date of the hearing to limit the number of witnesses needed. I cannot stress that enough. I have identified some potential areas of difficulty, and I cannot predict at this point how some of this will work. I do not know enough about the technology. We all



recognize this is going to be somewhat imperfect. In the hopes of having the most efficient use of the time and resources, certainly having agreement on facts or evidence that counsel think I need to have, without needing to bring witnesses into this building, would be appreciated.

[26] Mr. MacDonald had mentioned the possibility of sureties appearing by telephone. I can say that I would not be comfortable with a surety appearing by telephone. They would have to appear from the vulnerable witness room, as I have described, in order to give their evidence.

[27] I want to make a few more comments, to be clear. As we discussed during our hearing today, there will be clearly be elements of this hearing that are going to be less than ideal. We all acknowledge that this is going to be imperfect; for example, cross-examination is not particularly easy to do when you are doing it over the phone, or you are doing it with people in different rooms. There may be awkwardness to some of the elements of this. I acknowledge that there may be some who feel that these types of hearings should wait, until there are less restrictions in place.

[28] I have made it clear on the record during this hearing, and I make it clear again, that I have put that reality squarely to both Mr. Marriott and to his counsel,

Mr. MacDonald. I have noted to them specifically some issues raised by s. 522 of the *Criminal Code*, i.e. the reverse onus issue, as well as possibilities for review. It remains Mr. Marriott's wish, in the full knowledge and in the face of these realities and limitations, for his hearing to be held now. Mr. Marriott will have to accept the consequences, if this hearing does not proceed exactly the way he wishes or hopes because of the limitations we have as a result of this pandemic. Mr. Marriott could choose to wait, but he is accepting of the current reality, and he wishes to proceed.

[29] I also lastly want to say that, although I see this matter as urgent on a *prima facie* basis, I want to put people on notice that during this hearing, there is a possibility that I may put an end to it, at any time, and adjourn it to another date, if certain difficulties arise that cannot be addressed in any other way.

[30] Some examples: if during this hearing I see safety issues (i.e. COVID-19 related issues) arise that cannot be addressed within the context of what we have arranged. As another example, if the technology does not work as we anticipate, or if it does not allow us to have a proper hearing, as we are all hopeful and anticipating it can. Quite frankly, there may be other reasons that I am not predicting at this point.

[31] If any of those things appear to me during the course of this hearing, I very well may adjourn it to continue on another date. That adjourned date might be after the restrictions are lifted, if I deem that to be appropriate. I want everyone to be aware that if difficulties are arising and it appears that this hearing is not workable, either from a safety perspective or a technology perspective, please do not be surprised if I raise that of my own motion.

[32] The hearing is set for May 5, 2020, at 9:30 a.m.

Boudreau, J.