

CANADA / JUDGMENT

R. v. J.H.

2023 BCSC 1391

COURT

Supreme Court of British Columbia

DECIDED

9 August 2023

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2023 BCSC 1391 R. v. J.H.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. J.H.,

2023 BCSC 1391

Date: 20230809

Docket: 36814

Registry: Fort St. John

Rex

v.

J.H.

Restriction on publication pursuant to the Court's inherent jurisdiction: These reasons are not to be published before the conclusion of the trial unless initials are used in place of the name of the accused person. The following reasons have been revised accordingly. The reasons will be further revised, to include the full name of the accused person, after the trial concludes.

Before: The Honourable Associate Chief Justice H. Holmes

Oral Reasons for Judgment

re: whether the Court lost jurisdiction at the first appearance because no indictment was filed

Counsel for the Crown:

J.A. Michaels

Counsel for the Accused:

M.M. Hajivandi

Place and Date of Hearing:

Prince George, B.C.

July 21, 2023

Place and Date of Judgment:

Prince George, B.C.

August 9, 2023

INTRODUCTION

- [1] J.H. contends that this Court lost jurisdiction over his alleged offences and his person because the Crown did not file an indictment before he made his first appearance in this Court after a Provincial Court judge ordered him to stand trial.
- [2] The Crown denies that the Court lost jurisdiction, and asks that the Court so find and order J.H. to attend to fix a date for his trial. Alternatively, the Crown seeks a warrant for J.H.'s arrest.
- [3] Mr. Hajivandi, who is counsel for J.H. designated under s. 650.01 of the Criminal Code, advised that neither he nor J.H. will make any further appearances until the Court takes the appropriate steps to regain jurisdiction.
- [4] The main issue thus relates to the Court's jurisdiction in these circumstances.

BACKGROUND

- [5] The materials filed on this application include much more detail, but can be distilled to the following.
- [6] An information was sworn on December 27, 2020 in Fort St. John, charging J.H. with offences approximately a year earlier. That four-count information was replaced on January 22, 2021 by a five-count information, which was identical to the four-count information except that one count was divided into two.
- [7] A Provincial Court judge held a preliminary inquiry on April 25 and 26, 2023, based on the five-count information, and, on April 26, ordered J.H. to stand trial on all five charges. The judge also directed J.H. to make his first appearance in this Court on May 29, 2023 in Prince George.
- [8] The parties agree that J.H. so appeared, on May 29, through an agent for designated counsel Mr. Hajivandi. The Court adjourned the case to June 12, 2023 in Dawson Creek.

- [9] No indictment had been filed by the time of the May 29 appearance. The indictment was filed approximately two hours afterwards. It charged the same offences as in the five-count information in almost exactly the same language.
- [10] When I speak of the "filing" of an indictment, I am using the term loosely, to mean giving the indictment to the court registry for the court's use. Later, I will be discussing when, in the course of proceedings in this Court, an indictment is or must be "preferred", a term used by the Criminal Code. I will avoid using the term "preferred" before I embark on that discussion (except when quoting from communications between counsel, immediately below) so as not to cloud or confuse the discussion.
- [11] Some hours before J.H.'s court appearance on May 29, Mr. Hajivandi had sent an email to Ms. Michaels challenging the Crown on several points, including for failing to "prefer" an indictment. Ms. Michaels responded, "[w]e have an indictment before the court". Ms. Michaels was in error in this statement, because, as I said, the indictment was not filed until later that day.
- [12] Ms. Michaels realized her error not long after the court appearance, and she advised Mr. Hajivandi of it, and apologized, early the following day. She explained to him that she had confused this indictment with the indictment for another file.
- [13] J.H. contends that, with no indictment on file at the time of the May 29 appearance, the Court's adjournment of the case to June 12 was a nullity because the Court had no jurisdiction to act, and that there was therefore no juristic reason for him to appear on June 12.
- [14] True to this position, J.H. did not appear on June 12, either personally or through Mr. Hajivandi or an agent.
- [15] The agent who had appeared for Mr. Hajivandi on May 29 was present in the courtroom on June 12, and he spoke up and gave some information when J.H.'s case was called and neither J.H. nor Mr. Hajivandi appeared. The parties dispute whether on that occasion he did so as Mr. Hajivandi's agent, or, rather, to informally assist the Court, but this is unnecessary to determine, given my conclusion on the main issue concerning the Court's jurisdiction.
- [16] No matter that person's status, the case was adjourned to the July 17, 2023 assize, including the Crown's application for a warrant for J.H.'s arrest.
- [17] Ms. Michaels and Mr. Hajivandi appeared on July 21, 2023, during the July 17 assize, and made their submissions concerning the Court's jurisdiction.

ANALYSIS

- [18] At the first stage of his submission that the Court lacked jurisdiction, Mr. Hajivandi starts with the definition in s. 2 of the Criminal Code, by which "indictment" includes an "information or a count therein". He reasons that indictments and informations are therefore effectively interchangeable.
- [19] At the second stage, Mr. Hajivandi relies on the abundant jurisprudence that makes clear, expressly or by necessary implication, that the Provincial Court lacks jurisdiction to act unless an information is on file with the court.
- [20] The second stage of that submission is sound. Much of the jurisprudence that grounds it concerns whether an information must be physically present in the courtroom in order for the court to have jurisdiction, with the weight of authority indicating that it need not so long as the information exists. See, for example, *R. v. Veltri*, [1986] O.J. No 894 (C.A.), where the Ontario Court of Appeal said, "it is well established that, provided that there is an information in existence, the Court's jurisdiction does not depend on the information being physically present in the courtroom".
- [21] There can be no doubt, therefore, that a provincial court lacks jurisdiction to deal with criminal charges unless an information has been sworn or affirmed and given to the court or its staff.
- [22] It is the first stage of the submission that founders. For the reasons that follow, the submission is incorrect in assuming, on the strength of the inclusion of "information" within the s. 2 definition of "indictment", that the two documents are effectively interchangeable for all purposes, and that the jurisprudence in relation to the former applies equally to the latter.
- [23] Informations and indictments have different roles at some stages of the criminal process, although their roles coincide at others. (I exclude from this discussion direct indictments preferred under s. 577, which are of a different character from indictments preferred under s. 574, as I will briefly discuss later.)
- [24] An information initiates a charge and the ensuing criminal process. Since there is no criminal charge until an information is sworn or affirmed, it is no surprise that, as the jurisprudence indicates, a provincial court lacks jurisdiction to deal with a criminal charge until an information is in the court's possession.
- [25] Direct indictments aside, an indictment, by contrast, does not initiate the criminal process. Rather, the process that began in the provincial court with the charge sworn or affirmed by information continues in the superior court after a provincial court judge makes an order to stand trial under s. 548. The source of the superior court's jurisdiction at that stage to deal with the charge - indeed its responsibility - is the order to stand trial. There is no need for the process in relation to the charge to be re-initiated in the superior court by way of an indictment, valuable though that document is in serving other purposes in the process, as I

will later mention.

- [26] The Criminal Code includes various indications that it intends the process initiated in the provincial court to flow through, in this way, to the superior court. Section 551 requires a provincial court judge who makes an order to stand trial to "immediately" transmit the information, evidence, exhibits, and bail documents to the superior court; a release order made in the provincial court continues in effect. Subsection 548(2.1) permits the provincial court judge to fix the date on which the accused person must appear in the superior court to fix a date for their trial - the Provincial Court judge in this case did exactly that, in ordering J.H. to appear in this Court on May 29, 2023.
- [27] The Criminal Code thus provides for the passing of the case (where an order to stand trial is made), and jurisdiction over the offence(s) and the accused person, from the provincial court to the superior court. And significantly, the Criminal Code says nothing to require the Crown to file an indictment before the date when the accused person is to appear in the superior court, or to suggest that the accused person need not appear unless the Crown has done so.
- [28] Indeed, while the Criminal Code in effect requires an indictment to be filed before the start of a trial (s. 566 - "the trial . . . shall be on an indictment in writing"), it says nothing to expressly require an indictment to be filed at any earlier time.
- [29] In accord with this situation, it was customary in this Court in earlier decades for Crown counsel not to file the indictment until shortly before the trial, unless there was a reason to do so earlier (such as to give early notice to the accused person that the indictment would describe the offences differently from in the information, or would charge different offences from those in the order to stand trial).
- [30] These days, this Court generally expects the Crown to file the indictment when or shortly after a case reaches the Court after proceedings in the Provincial Court. But this is not because the Code so requires. It is, rather, because criminal cases have generally increased vastly in length and complexity, and early case management, based on the charges as described in the indictment, is often necessary to identify issues requiring determination before the trial, and to schedule and hold the necessary pre-trial applications and voir dire hearings in advance of the trial.
- [31] I spoke earlier of roles common to both indictments and informations. Both play an important role in setting forth the charge or charges to be tried, and giving the accused person reasonable notice of the alleged acts or omissions (s. 566(1), s. 581). It is in the context of this role that the s. 2 definition is significant, because it has the effect of making the Code provisions concerning the sufficiency of indictments apply also to informations as well as to counts within indictments or informations.

- [32] However, the definition does not reach, in its words or its effect, as far as the first stage of J.H.'s submission assumes. In particular, the definition does not purport to recharacterize the jurisprudence that examines and interprets the jurisdiction of provincial courts to proceed without an information, or to extend that jurisprudence to superior courts proceeding without an indictment.
- [33] Apart from any other reason for this conclusion, it is the definition of "indictment" that includes an "information", not the converse. "Information" itself is not a defined term.
- [34] But more fundamentally, the jurisprudence relating to loss of jurisdiction by a provincial court for lack of an information is specific to provincial courts and to informations. It derives mainly from the fundamental purpose of an information in initiating the criminal process, as I have discussed. The inclusion of "information" within the s. 2 definition of "indictment" does not remove the differences between the fundamental roles of the two documents in their early stages in the respective courts, although, as I have noted, the documents serve very similar roles at later stages in the two courts.
- [35] This is evident from the Supreme Court of Canada's decision in *R. v. Chabot*, [1980] 2 S.C.R. 985. One of the issues in that case was at what point in the criminal process an indictment operates to bar an accused person from seeking certiorari to challenge their committal for trial. Dickson J. for the Court accepted, at 990, the Ontario Court of Appeal's conclusion that "at some point the indictment becomes the operative document in the criminal process", and, at that point "provides 'a fresh starting point'" such that the accused person can no longer attack the regularity of the committal for trial (and instead may move to quash the indictment). He explained that, at that point, "[t]he indictment in effect becomes the foundation upon which the further proceedings are built": at 990.
- [36] Dickson J. then determined when that point arises by asking when an indictment is "preferred" under the then s. 507 of the Criminal Code (now s. 574), as opposed to merely "filed". After reviewing the somewhat divergent jurisprudence, he concluded that an indictment is not "preferred" until "it is lodged with the trial court at the opening of the accused's trial, with a court ready to proceed with the trial" (at 999), or is "before a trial court constituted to dispose of the case" (at 1000) [emphasis added]. He concluded that the simple act of filing an indictment does not operate as a barrier to an accused person's rights to challenge their committal by way of certiorari, particularly since "in many jurisdictions there is no formal procedure for informing the accused as to when the indictment has been filed with the court": at 997. An accused person may therefore challenge their committal by way of certiorari "down to the time when [they] may be called upon to answer the indictment": at 998.
- [37] Subsequent jurisprudence makes clear that, where pre-trial applications or voir dres precede the trial proper, the indictment may be preferred, as contrasted with merely filed, before those proceedings begin. In *R. v. Litchfield*, [1993] 4 S.C.R. 333, the Supreme Court of Canada considered its jurisdiction to review the decision of a superior court judge, who was

not the trial judge, to sever and divide the counts on an indictment. Justice Iacobucci, for the majority, concluded that the judge, not being the trial judge, had no jurisdiction to make the order, because the indictment had not been preferred: according to the Chabot test, the indictment was not preferred until it was lodged with the trial judge at the opening of the trial: at 352.

- [38] However, Justice Iacobucci went on to note that this did not mean that an application for severance must always wait until the trial date. Rather, the indictment may be preferred earlier, by lodging it with the assigned trial judge, so that the application may be heard by that judge at that time, before the trial: at 352.
- [39] I note that the introduction of s. 551.1 has given courts even greater flexibility over the scheduling of pre-trial applications and voir dres by allowing for the appointment of a case management judge, who does not necessarily preside over the trial. A case management judge appointed under s. 551.1 may determine a wide range of issues traditionally reserved for the trial judge. Logic requires that the Chabot test be further adapted to recognize that the indictment is preferred when a s. 551.1 case management judge embarks on the hearing relating to such an issue.
- [40] Since, for the reasons I have given, an indictment is not preferred until the opening of the accused person's trial, or the start of pre-trial applications or voir dres heard by the trial judge (or a s. 551.1 case management judge), and the Code includes no requirement that an indictment be filed or otherwise produced to the court or the defence before that time, the absence of an indictment during the earlier stages of the process in a superior court can have no significance to the court's jurisdiction, whether over the accused or the offence(s).
- [41] The absence of an indictment at the time of J.H.'s first appearance on May 29, 2023 did not deprive this Court of jurisdiction.
- [42] The Court properly adjourned the proceedings to June 12, and J.H. was obliged to appear then, whether in person or through his designated counsel.

ORDER

- [43] J.H. must appear, either in person or through designated counsel, on the next scheduled date for this case.
- [44] If he fails to do so, a warrant will issue for his arrest.
- [45] Without pronouncing in any way on the responsibility for the delay, a matter which is not properly the subject of these reasons, I note that much time has elapsed since the information was sworn or affirmed in December 2020. Crown and defence counsel are therefore to use their best efforts in advance of the next scheduled date to discuss any potential pre-trial applications or voir dres, and to arrange dates for those and the trial, subject to the Court's approval.

"The Honourable Associate Chief Justice H. Holmes"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/23/13/2023BCSC1391.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-j-h-2023>

Prepared on 26 October 2026 · Esheria