

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Abdella, 2026 ONCA 228

DATE: 20260331

DOCKET: COA-24-CR-0168

Fairburn A.C.J.O., Wilson and Rahman JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Rahim Abdella

Appellant

Nathan Gorham and Breana Vandebek, for the appellant

Amanda Webb and Jennifer Conroy, for the respondent

Heard: September 11, 2025

On appeal from the conviction entered by Justice Clyde Smith of the Superior Court of Justice, on January 22, 2024.

**Fairburn A.C.J.O.:**

**I. OVERVIEW**

[1] This is an appeal from conviction for possession of fentanyl for the purpose of trafficking. The appellant elected to be tried in the Ontario Court of Justice. Despite efforts to schedule earlier dates, his trial was set to conclude over the 18-

month ceiling set in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631. Accordingly, the Deputy Attorney General of Canada<sup>1</sup> (the “Deputy Attorney General” or “Deputy”) preferred a direct indictment, causing the appellant’s trial to proceed in the Superior Court of Justice. In the end, the Superior Court trial was held in advance of when it could have been accommodated in the provincial court.

[2] This appeal turns on whether the Deputy Attorney General held the statutory power to prefer a direct indictment after the appellant had already elected to be tried in the provincial court and, if so, whether the circumstances surrounding that decision constituted an abuse of process.

[3] For the reasons that follow, I would hold that the answer to the first question is yes and the answer to the second question is no.

## **II. BACKGROUND**

### **A. Procedural History Leading to the Direct Indictment**

[4] On June 15, 2022, the appellant was arrested and charged with possession for the purpose of trafficking, along with a conspiracy to traffic charge. The

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<sup>1</sup> The indictment was signed by the federal Director of Public Prosecutions who is the Deputy Attorney General of Canada for the purposes of consenting to direct indictments pursuant to s. 577 of the *Criminal Code*. To this end, s. 3(4) of the *Director of Public Prosecutions Act*, S.C. 2006, c. 9, s. 121, reads: “For the purpose of exercising the powers and performing the duties and functions referred to in subsection (3), the Director [of Public Prosecutions] is the Deputy Attorney General of Canada.” Pursuant to s. 3(3)(g) of the Act, the Director may exercise a power, duty or function “assigned to the Director by the Attorney General that is compatible with the office of the Director.” Section 3(6) of the Act provides that any such assignment must be in writing and published by the Attorney General in the *Canada Gazette*. The relevant assignment in force at the time that this indictment was preferred is found in the *Canada Gazette*, Part I, Vol. 153, No. 11, March 16, 2019, at pp. 890-891.

conspiracy count arose out of a lengthy investigation that resulted in many people being charged. Initially, the appellant's charges proceeded with the group, but by the end of 2022, the Crown had dropped the conspiracy charge against him and was proceeding strictly on the possession for the purpose of trafficking count. By doing this, the Crown was able to proceed against the appellant alone.

[5] On January 18, 2023, the parties appeared before the court. The Crown drew the court's attention to the fact that, unlike the group of accused that was still bound together by the conspiracy charge, the appellant was "one individual" and he was, as his counsel put it, "on his own Information." Crown counsel asked for a global remand date for the other matters, but said that for the appellant, it was time for "election" or to start waiving delay for purposes of his right to a trial within a reasonable time under s. 11(b) of the *Canadian Charter of Rights and Freedoms*. The appellant was not prepared to waive his s. 11(b) interests and said that he wanted his matter remanded to the global resolution date. The matter was then adjourned to a global resolution date.

[6] Later, on February 15, 2023, the parties were to address the matter in court but, owing to inadvertence, the appellant's trial counsel did not appear. The parties eventually appeared on March 1, 2023. The matter was then remanded to March 9, 2023, when the appellant's counsel confirmed that it would not be resolving. He agreed that the trial could be "hived off" from the larger group and was thus ready to be scheduled.

[7] The appellant's election to be tried in the Ontario Court of Justice was noted on the record at a hearing on March 29, 2023. The three-day trial was set down for April 2-4, 2024. Earlier dates in February and March 2024 were offered but could not be accommodated by the parties. This meant that the trial was scheduled to be completed around 22 months after the charge, above the 18-month presumptive ceiling for matters proceeding in the Ontario Court of Justice: *Jordan*, at para. 49.

[8] On June 9, 2023, the appellant filed a s. 11(b) application. The trial Crown then attempted to find earlier dates for trial, including dates that had become available because of the adjournment of other matters. This was all done in communication with the appellant's counsel. In the end, none of those efforts bore fruit. The April 2024 trial dates remained, as did the s. 11(b) application.

[9] Accordingly, on September 7, 2023, the Deputy Attorney General preferred a direct indictment. The prosecuting Crown communicated this fact to the appellant's counsel by email, as follows:

After receiving your 11(b) materials, [co-counsel] and I tried to find earlier dates for Mr. Abdella's matter without success. The vacancy in September created by the adjournment of our agent's matter filled in immediately, and the [trial coordinator] could only offer to book this matter on top. The dates you proposed in November were similarly unavailable. We also inquired with our agents at neighbouring courthouses, to no avail.

Given our inability to accommodate the matter in [the Ontario Court of Justice] within 18 months, the Director of Public Prosecutions has signed the attached direct indictment.

Please let me know what dates you are available to attend Superior Court for a first appearance as well as a [judicial pre-trial]. I will file the indictment and ask that both dates be scheduled according to your availability.

[10] The indictment was then lodged in the Superior Court of Justice.

### **B. The Stay Application**

[11] The appellant brought an application to stay the proceedings, arguing that he had a right to be tried in the Ontario Court of Justice pursuant to s. 7 of the *Charter*, a right that he argued vested upon his election. He maintained that the Crown breached this right by preferring a direct indictment after he made what he characterized as his constitutionally protected election to be tried in the provincial court. He said that nothing short of a stay of proceedings pursuant to s. 24(1) of the *Charter* could remedy that breach.

[12] In the alternative, the appellant argued that it was an abuse of process for the Crown to prefer a direct indictment to “escape the consequences of Crown conduct which caused the delay.” While the appellant accepted that the Crown could prefer a direct indictment from the outset of the prosecution, he objected to the “taking away” of his election to be tried in the provincial court once that election had been made.

[13] The application was dismissed on January 9, 2024.

[14] The application judge found that there is no constitutional right to trial in the provincial court.

[15] He also found that the Attorney General and the Deputy have jurisdiction under s. 577 of the *Criminal Code*, R.S.C. 1985, c. C-46, to prefer a direct indictment where a person has already elected trial in the provincial court. In his view, there is nothing that precludes the Attorney General from exercising powers under s. 577 of the *Criminal Code* to save a delayed provincial court trial by moving the matter to the Superior Court.

[16] Finally, the application judge found that the decision in this case to prefer a direct indictment did not constitute an abuse of process. In this regard, he observed that the trial was set in the Superior Court nearly three months earlier than it would have occurred in the Ontario Court of Justice.

[17] The appellant's jury trial then proceeded on January 15, 2024, 19 months following the charges. When arraigned, he refused to enter a plea. The trial judge's endorsement on the indictment reads: "A motion in relation to the direct indictment was heard and determined by C. Smith J. On today's date, the accused was arraigned and pursuant to s. 606(2), he declined to enter a plea advising that the Superior Court of Justice lacked the necessary jurisdiction. This position is contrary to the decision of C. Smith J."

[18] Given that the appellant refused to enter a plea, the trial judge directed that a plea of not guilty be entered on the appellant's behalf and said the trial would proceed as scheduled. Jury selection commenced. The Crown called its case within three days. A pre-charge conference took place, the jury was charged and returned a verdict of guilty. Everything was done by January 22, 2024, over two months before the trial in the Ontario Court of Justice would have commenced.

### **III. ANALYSIS**

#### **A. Overview**

[19] The appellant maintains that by preferring a direct indictment after he had made his election, the Crown took away his "vested" right to a provincial court trial. While he accepts that he did not have a *Charter* right to a trial in the provincial court, he contends that once his election was made, his statutory right "vested" and the Crown could not displace it without specific statutory authority. The appellant argues that there is no statutory basis upon which to overtake an election that has already been made to be tried in the provincial court.

[20] In advancing this argument, the appellant points to s. 576(1) of the *Criminal Code*, which states that no indictment shall be preferred "[e]xcept as provided in this Act". While s. 577 is said to provide for direct indictments in specifically delineated circumstances, the appellant reasons that these circumstances do not include where an election pursuant to s. 536(2) has already been made to be tried by a "provincial court judge". In the appellant's view, once that election is made, it

“vests” and there is no ability to overtake it with a directed indictment. The appellant maintains that this reading of s. 577 accords with the principles of statutory interpretation, as well as broader principles animating the criminal law. In this regard, he contends that showing respect for the accused’s choice of mode of trial serves to enhance the legitimacy of the legal system.

[21] The appellant also submits that his position is supported by the Supreme Court’s decision in *R. v. Kahsai*, 2023 SCC 20, in which the court reaffirmed the accused’s right to control their own defence. The appellant points specifically to Karakatsanis J.’s observation that control over one’s own defence includes deciding “what mode of trial to elect”: *Kahsai*, at para. 43.

[22] Finally, the appellant argues that the application judge erred when dismissing the abuse of process application. By preferring the indictment, the Deputy Attorney General is said to have inappropriately snatched a provincial court trial from the appellant simply to remedy delay of the Crown’s own making.

[23] The respondent says that the statute is clear. The statute made it possible for the Attorney General, or the Deputy, to prefer the direct indictment. The appellant had no constitutional right to a trial in the provincial court. And there was no abuse of process in proceeding as the Deputy did in this case. This was a matter taking too long to get to trial in the Ontario Court of Justice. By moving the matter over to the Superior Court, the trial was completed well in advance of when it would

have started in the Ontario Court of Justice. This is said to be the antithesis of an abuse of process.

**B. The Direct Indictment Was Not Statutorily Barred**

[24] I agree with the respondent: s. 577 of the *Criminal Code* authorized the post-election direct indictment.

[25] I start by acknowledging that, pursuant to s. 576, no indictment shall be preferred except as provided for under the *Criminal Code*. Therefore, the power to prefer a direct indictment must find its source in the statute. This begs the question: is there a provision allowing the Attorney General, or the Deputy, to prefer a direct indictment after the accused has elected to be tried in the Ontario Court of Justice? The answer is yes, and that provision is s. 577.

[26] The appellant was charged with possession of fentanyl (a Schedule I substance) for the purpose of trafficking pursuant to s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (“CDSA”). The punishment for this offence is up to life in prison: CDSA, s. 5(3)(a).

[27] Given that the appellant was liable to imprisonment for 14 years or more, he was put to his election pursuant to s. 536(2) of the *Criminal Code*:

You have the option to elect to be tried by a provincial court judge without a jury and without having had a preliminary inquiry; or you may elect to be tried by a judge without a jury; or you may elect to be tried by a court composed of a judge and jury. ... How do you elect to be tried? [Emphasis added.]

[28] Pursuant to s. 536.2 of the *Criminal Code*, the appellant filed a notice of election, electing to be tried by a provincial court judge. That election was noted on the record on March 29, 2023, the same day that the provincial court trial was set down for April 2-4, 2024.

[29] The appellant then filed a s. 11(b) application. Having reviewed the record, it is fair to say that the application had some merit. Of course, the proceeding was complex given how it stemmed from a large investigation alleging a conspiracy, but the Crown quickly moved to hive off the prosecution against the appellant and proceed against him separately. Much of the delay occurred because it took over one year to find a trial date that would accommodate all parties. In the end, the delay from charge to completion would have been close to 22 months, a time that exceeded the 18-month *Jordan* ceiling for matters proceeding in the Ontario Court of Justice.

[30] Whether the s. 11(b) application would have succeeded or not, the Crown understood the need to do something and started looking for earlier dates. This included working with the defence to try and coordinate schedules. In the end, it was to no avail and the trial date remained unchanged. Accordingly, the Deputy Attorney General preferred a direct indictment which was later filed in court.

[31] The Deputy purported to exercise jurisdiction under s. 577 of the *Criminal Code*, which reads as follows:

## Direct Indictments

Despite section 574, an indictment may be preferred even if the accused has not been given the opportunity to request a preliminary inquiry, a preliminary inquiry has been commenced but not concluded or a preliminary inquiry has been held and the accused has been discharged, if

(a) in the case of a prosecution conducted by the Attorney General or one in which the Attorney General intervenes, the personal consent in writing of the Attorney General or Deputy Attorney General is filed in court; or

(b) in any other case, a judge of the court so orders.

[32] Where a direct indictment is preferred under s. 577, the accused is deemed to have elected a trial by judge and jury although the accused may re-elect trial by judge alone: *Criminal Code*, ss. 565(2)-(4) and 561(6)-(7). In this case, the appellant never re-elected.

[33] The appellant argues that s. 577 does not provide the specific authority to prefer a direct indictment, as required by s. 576, in circumstances where the accused has elected to be tried by a provincial court judge. Rather, s. 577 is said to be limited to those scenarios specifically noted in the provision. The appellant thus contends that the Attorney General or the Deputy may only exercise their powers under s. 577 where:

(a) the accused has not been given the opportunity to request a preliminary inquiry;

(b) a preliminary inquiry has been commenced but has not concluded;  
or

(c) a preliminary inquiry has been held and the accused has been discharged.

[34] As for the first category under s. 577 – “the accused has not been given the opportunity to request a preliminary inquiry” – the appellant acknowledges that it allows the Attorney General or Deputy to prefer a direct indictment despite the fact that the accused has not yet been put to his election in cases where the accused could request a preliminary inquiry: see e.g., *Criminal Code*, ss. 535, 536(4) and 536.1(3).

[35] In essence, the appellant argues that the operation of s. 577 is limited to an exhaustive list of three scenarios for preferring a direct indictment as set out in the provision. The appellant further submits that none of these scenarios applied to him after he was “given the opportunity to request a preliminary inquiry” but elected instead to be tried in the provincial court. Therefore, the Attorney General and the Deputy’s hands are said to be tied. No direct indictment could be preferred.

[36] Respectfully, I do not read s. 577 in such a limited way.

[37] I start with the principles of statutory interpretation which are well known. The exercise involves reading the words of a provision “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, citing Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87. The goal is to “find

harmony between the words of the statute and the intended objective”: *MediaQMI inc. v. Kamel*, 2021 SCC 23, [2021] 1 S.C.R. 899, at para. 39.

[38] Much has been written about statutory interpretation, but I need not delve further into the principles here given that, in my view, s. 577 of the *Criminal Code* is clear on its face, a clear meaning that accords with its clear legislative objective. Alongside s. 574, s. 577 is intended to provide a complete code with respect to preferring indictments: *R. v. Tapaquon*, [1993] 4 S.C.R. 535, at pp. 551-552.

[39] Notably, s. 577 starts by saying that it operates “[d]espite section 574”. So, what does s. 574 say?

[40] Section 574 sets out what I would describe as the usual circumstances permitting a “prosecutor” to prefer an indictment (as distinct from the Attorney General or Deputy preferring a “direct indictment” pursuant to s. 577). Section 574(1) reads as follows:

**Prosecutor may prefer indictment**

Subject to subsection (3), the prosecutor may, whether the charges were included in one information or not, prefer an indictment against any person who has been ordered to stand trial in respect of

(a) any charge on which that person was ordered to stand trial;  
or

(b) any charge founded on the facts disclosed by the evidence taken on the preliminary inquiry, in addition to or in substitution for any charge on which that person was ordered to stand trial.

[41] Section 574(1.1) governs those situations where any accused has not requested a preliminary inquiry or was not entitled to a preliminary inquiry. Among other things, it permits the prosecutor to prefer an indictment containing any charges set out in the information(s) under which the accused has been charged. The rest of the provision speaks to the combining of charges on an indictment, the accused's consent to include in the indictment charges not referred to in ss. 574(1)-(1.2) and the need for a court order before an indictment may be preferred in a private prosecution: ss. 574(1.2)-(3).

[42] Therefore, as can be seen, s. 574 is the provision authorizing "the prosecutor to prefer an indictment in the ordinary course of events", without any "special consent" of the Attorney General: *Tapaquon*, at p. 544.<sup>2</sup>

[43] The "special consent" of the Attorney General or Deputy is only required for direct indictments pursuant to s. 577(a) of the *Criminal Code*, which are subject to the "personal consent in writing of the Attorney General or Deputy Attorney General". Section 577 grants the Attorney General or the Deputy a robust power to eclipse the accused's ability to elect and, in some scenarios, to eclipse elections already made. So broad is the power that s. 577 makes clear it can be exercised "even if" certain events have happened, are happening or are yet to happen. Specifically, direct indictments are available under s. 577 "even if" the accused has

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<sup>2</sup> One must read *Tapaquon* with care given that there have been amendments to the operative statutory provisions since it was decided. Even so, the overarching principles remain the same.

not yet been given the opportunity to request a preliminary inquiry, “even if” the preliminary inquiry is underway but has not yet concluded, and “even if” a preliminary inquiry has been held and the accused has been discharged.

[44] In my view, s. 577 is drafted in an expansive way, using permissive language: *R. v. Sher*, 2012 ONSC 4783, 291 C.C.C. (3d) 1, at para. 12; *R. v. Jones* (1996), 32 O.R. (3d) 365 (C.A.), at para. 14; *R. v. Ertel* (1987), 35 C.C.C. (3d) 398 (Ont. C.A.), at pp. 422-423, leave to appeal refused, [1987] S.C.C.A. No. 354; *R. v. Charlie* (1998), 126 C.C.C. (3d) 513 (B.C.C.A.), at paras. 31-32; and *R. v. Ahmad*, 2008 CanLII 55132 (Ont. S.C.), at para. 36. As noted by Rutherford J. in *Sher*, at para. 12, the three circumstances listed in s. 577 are “illustrative of the Attorney General’s power, but not exhaustive of it.” In my view, if Parliament had intended to limit the Attorney General or the Deputy’s power to direct an indictment, it would have avoided “even if” language and, instead, used “only if” or “only where” language. Rather, Parliament chose “even if” language when it provided three examples to illustrate the breadth of the Attorney General’s jurisdiction to prefer a direct indictment under s. 577. One might reasonably suggest that the three illustrations provided in s. 577 were selected to demonstrate the span of the provision. That provision remains operative, for instance, even if the accused has never been put to his election and even if the accused was discharged following a preliminary inquiry on the very offence that forms the subject of the direct indictment.

[45] There is good reason for the expansive drafting of s. 577. The Attorney General holds a constitutional role as the Chief Law Officer of the Crown with a whole host of responsibilities: *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, at paras. 26-27; *R. v. Power*, [1994] 1 S.C.R. 601, at pp. 621-623. The Attorney General “has exclusive constitutional responsibility to determine whether to bring the weight of the state to bear in criminal prosecutions and is the first representative of the Sovereign in the courts, in whose name nearly all criminal proceedings are conducted”: *R. v. Varennes*, 2025 SCC 22, at para. 42 (citations omitted). One of those responsibilities is to ensure that prosecutable matters that should be prosecuted are brought to prosecution and seen through to completion.

[46] On the appellant’s interpretation, s. 577 would permit the Attorney General to prefer a direct indictment where the accused had not yet been put to his election but was going to elect trial by a provincial court judge, but not to do so in the immediate wake of that election being made. I can see no principled, logical or legal basis for drawing such a distinction. It would give rise to arbitrary results, especially given that the timing of the election can depend on factors over which the accused and the Attorney General sometimes have little control, including ones as random as the local conventions at the courthouse where the matter proceeds. For instance, in some jurisdictions the accused is put to his election early on, and in others he is put to his election very late in the day. Resort to s. 577 should not

be governed by irrelevant and unpredictable factors such as the speed with which an accused makes their election.

[47] As for the appellant's submission that the right to be tried by a provincial court judge "is vested" upon election, this is not a legal term of art. Although the mode of trial will normally proceed in accordance with the accused's election, that is not always the case. For instance, an election to be tried in the provincial court "may" be declined in certain situations, including where two or more persons are jointly charged on an information and they elect different modes of trial: *Criminal Code*, ss. 567 and 565(1)(a). In these situations, the accused will be deemed to have elected to be tried by a court composed of a judge and jury.

[48] Where the different elections are recorded, this will effectively sever the jointly charged accused. Accordingly, in these situations, other measures can be taken to overtake the recorded election. While it is beyond the scope of these reasons, I note that s. 568 of the *Criminal Code* permits the Attorney General, in the wake of an election to be tried in the provincial court, to "require the accused to be tried by a court composed of a judge and jury unless the alleged offence is one that is punishable with imprisonment for five years or less."

[49] There is a labyrinth of provisions informing elections, deemed elections, re-elections, the declining and recording of elections, and the like. This decision does not purport to address all these rules or delve into any of their nuances. I refer to

some of these provisions, only at a very high level, simply to address the appellant's position that, effectively, once an election to be tried in the provincial court is made, it is for all intents and purposes cast in stone. I do not accept that proposition.

[50] Importantly, the statutory right to elect to be tried in the provincial court pursuant to s. 536 of the *Criminal Code* must not be confused with a constitutional right to be tried in the provincial court. While s. 11(f) of the *Charter* affords a constitutional right to a jury trial "where the maximum punishment for the offence is imprisonment for five years" or more, there is no equivalent provision when it comes to a provincial court trial. Indeed, as Wilson J. clarified in *R. v. Turpin*, [1989] 1 S.C.R. 1296, at p. 1321:

There is no constitutional right to a non-jury trial. There is a constitutional right to a jury trial and there may be a "right", using that term loosely, in an accused to waive the right to a jury trial.

[51] In my view, *Kahsai* provides no assistance to the appellant on this point. *Kahsai* focussed on the power to appoint *amicus curiae* and the appropriate parameters for such appointments. In the context of discussing the limits on the role of *amicus curiae*, Karakatsanis J. addressed the fact that *amicus* should be restricted by the "constitutional right of the accused to conduct their own defence": at para. 43. She went on to note that the right to control one's own defence includes the right to make "key litigation decisions, including whether to proceed with

representation; what mode of trial to elect; whether to plead guilty or not guilty; whether to lead any defence; whether to testify; and what witnesses to call” (emphasis added). The appellant maintains that this reference to a “right” to elect mode of trial imbues the election with constitutional protection, such that it cannot be set aside by a direct indictment.

[52] I do not read *Kahsai* in this way. By referring to a “right” to have “control over key litigation decisions”, such as electing mode of trial, the court simply reaffirmed that those decisions belong to the accused and not to anyone else, including *amicus curiae* and defence counsel. If the court had meant to find in the *Charter* a right to elect mode of trial, specifically trial by provincial court judge, one would have expected the court to address the contrary ruling in *Turpin*. Of course, there was no reason to do that in *Kahsai* given that the decision dealt with the role of *amicus* and not with modes of trial or direct indictments.

[53] In my view, s. 577 of the *Criminal Code* is clear. A direct indictment may be preferred on the personal consent in writing of the Attorney General or the Deputy “in the case of a prosecution conducted by the Attorney General or one in which the Attorney General intervenes”. This may be done “even if” the accused has not yet been given the opportunity to request a preliminary inquiry, a preliminary inquiry is underway or a preliminary inquiry has resulted in the discharge of the accused. There is no basis in the *Criminal Code* or the *Charter* to conclude that an

accused's election to be tried in the provincial court extinguishes the Attorney General's power to prefer a direct indictment under s. 577.

**C. The Direct Indictment Was Not an Abuse of Process**

[54] As his last ground of appeal, the appellant argues that the application judge erred in failing to find that the prosecution's conduct amounted to an abuse of process warranting a stay of proceedings. The Crown is said to have acted upon an improper motive in preferring the indictment because it was done solely to avoid a stay of proceedings based on unreasonable delay caused by the prosecution. The appellant argues that it was abusive to override his choice to be tried in the provincial court simply to avoid a potential stay of proceedings.

[55] I see no error in the application judge's approach.

[56] Of course, as always, the powers of the Attorney General are not without limits. Those limits come in different forms. As recently reviewed in *Vareennes*, certain decisions fall within "core prosecutorial discretion" and are reviewable only on the basis of abuse of process, while other decisions are reviewable on a lesser standard.

[57] The parties appear to agree that the Attorney General's decision to prefer a direct indictment is only reviewable on an abuse of process standard. So do I.

[58] A good deal of jurisprudential space has been allotted to discussing the exercise of Crown discretion and the basis upon which it can be reviewed. In *Krieger*, at paras. 30-32, the court acknowledged the independent decision-making power of the Attorney General in the exercise of “prosecutorial discretion”. This was referred to as a “fundamental principle of the rule of law under our Constitution”, leaving some decisions “beyond the legitimate reach of the court”, and subject only to the abuse of process doctrine: *Krieger*, at para. 32.

[59] While the *Krieger* court was quick to note that not every discretionary decision made by a Crown prosecutor is constitutionally protected, many are. This matters because exercises of “prosecutorial discretion” are owed strong deference and are only reviewable under the abuse of process doctrine: *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at paras. 35-36; *Krieger*, at para. 45. The underlying rationale for this deference was addressed in *Power*, at p. 627:

[T]he Crown cannot function as a prosecutor before the court while also serving under its general supervision. The court, in turn, cannot both supervise the exercise of prosecutorial discretion and act as an impartial arbitrator of the case presented to it.

[60] Exercises of prosecutorial discretion constitute the “core of the Attorney General’s office” (emphasis added): *Krieger*, at para. 43. These core powers envelop a broad category of decision making, essentially decisions that relate to the “nature and extent of the prosecution and the Attorney General’s participation

in it”: *Krieger* at para. 47. Examples of such decisions were provided in *Krieger*, at para. 46, and built upon in *Anderson*, where Moldaver J. included “the decision to prefer a direct indictment” as one that falls within the nature and extent of the prosecution: *Anderson*, at para. 44.

[61] More recently, in *Varennnes*, Karakatsanis J. reaffirmed that preferring a direct indictment is an exercise of core prosecutorial discretion and is thus owed deference in order to respect the “separation of powers and the constitutional role of the Attorney General”: *Varennnes*, at paras. 48-49; see also *R. v. S.J.L.*, 2009 SCC 14, [2009] 1 S.C.R. 426, at para. 24; *R v. Bulhosen*, 2019 ONCA 600, 377 C.C.C. (3d) 309, at para. 88, leave to appeal refused, [2019] S.C.C.A. No. 423.

[62] Accordingly, judicial review of the decision on whether to prefer a direct indictment is subject to the abuse of process doctrine. That doctrine is aimed at “egregious” Crown conduct threatening the right to a fair trial or the integrity of the justice system: *Anderson*, at para. 50.

[63] There are two general categories of cases in which a stay of proceedings for an abuse of process is warranted. The first category concerns state conduct compromising the fairness of an accused’s trial. This is referred to as the “main” category. The second, “residual”, category involves state conduct that does not threaten trial fairness, but “risks undermining the integrity of the judicial process”:

*R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at para. 31. The appellant's argument seems to span both categories. In my view, it fails on both.

[64] The test for both categories is the same. It is a three-step test, but I only address the first step here as it is dispositive of the appeal.

[65] The first question is whether there is prejudice to the accused's right to a fair trial or the integrity of the justice system that will be manifested, perpetuated or aggravated by continuing the trial: *Babos*, at para. 32. In this case, the answer is no under both categories. The appellant's right to a fair trial was not prejudiced: *Babos*, at para. 34. Nor was there conduct offensive to societal notions of fair play and decency such that proceeding with a trial in the face of the direct indictment would be harmful to the integrity of the justice system: *Babos*, at para. 35.

[66] There was no dispute about disclosure in this case. It was complete by the time of the direct indictment. The net effect of the direct indictment was merely to move the trial from the Ontario Court of Justice to the Superior Court. Both courts offer fair trials.

[67] As for the motive, the Deputy Attorney General was entirely transparent about why the direct indictment was preferred. As Crown counsel said in his email to defence counsel, "[g]iven our inability to accommodate the matter in [the Ontario Court of Justice] within 18 months, the Director of Public Prosecutions has signed the attached direct indictment." Clearly, the underlying concern was the pace at

which the matter was moving in the Ontario Court of Justice, meaning the trial could not be accommodated within the *Jordan* ceiling in that court.

[68] As it turned out, the Superior Court was able to provide an earlier trial date than the one scheduled in the provincial court. There is no indication as to whether the Crown knew that at the time the direct indictment was preferred. But it is a fact that the appellant received an earlier trial date because his matter was moved to the Superior Court, a trial date that came much closer to the 18-month ceiling that applied in the Ontario Court of Justice.

[69] The appellant contends that there is something inherently abusive about the Crown having taken steps to avoid what could have been a stay of proceedings for unreasonable delay. Respectfully, I do not share that view.

[70] There would have been nothing wrong with the Crown having preferred a direct indictment right after the charges were laid in this case. Had the Crown done so, the case would have been subject to a 30-month ceiling all along. This is simply a by-product of the ceilings set out in *Jordan*, ceilings that have served to awaken all justice participants to their responsibilities to move matters forward.

[71] It falls directly within the jurisdiction of the Chief Law Officer of the Crown to ensure that prosecutions are moved along as expeditiously as possible and seen through to completion: *Jordan*, at para. 112. In fulfilling its constitutional mandate to avoid unreasonable delay, the Crown may legitimately rely on direct indictments

under s. 577: *R. v. Burg and Khan*, 2021 MBCA 77, 407 C.C.C. (3d) 103, at paras. 55-56, leave to appeal refused, [2021] S.C.C.A. No. 385; *Charlie*, at para. 32; *Bulhosen*, at paras. 89-90; and *Ste-Marie c. R.*, 2022 QCCA 1137, at paras. 100-101, leave to appeal refused, [2023] S.C.C.A. No. 280.

[72] Although the direct indictment obviated the potential for a successful s. 11(b) application in the Ontario Court of Justice, that was precisely the point. The appellant did not have a right to a s. 11(b) stay; he had a right to a trial in a reasonable time. That right aligns with the societal right to a trial on the merits in a reasonable time. In intent and effect, the direct indictment facilitated that right by moving the trial forward.

[73] In sum, preferring the direct indictment afforded the appellant an earlier trial than would have been possible had he remained in the Ontario Court of Justice. There was no prejudice to his fair trial interests or to the integrity of the justice system. There was no abuse of process.

[74] Before concluding, I would observe that an accused is not without recourse under s. 11(b) when a direct indictment increases the applicable ceiling to 30 months. *Jordan* provides a framework for establishing unreasonable delay even if it falls below the presumptive ceiling.

[75] I acknowledge that in such cases the onus will fall to the defence to show that the delay is unreasonable by establishing that (i) it took meaningful steps showing a “sustained effort to expedite the proceedings”; and (ii) “the case took markedly longer than it reasonably should have”: *Jordan*, at para. 82. At the same time, it strikes me that where an indictment is preferred late in the day, adding 12 months to the ceiling, the entire procedural history of the case will have to be considered, including the fact that much of the delay was incurred in a court that has a lower ceiling. This would be an important contextual factor to take into account when considering whether the case took markedly longer than it should have. Such an approach would give full effect to the Supreme Court’s instruction to “step back from the minutiae and adopt a bird’s-eye view of the case”: *Jordan*, at para. 91.

[76] Here, the invocation of s. 577 of the *Criminal Code* afforded the appellant an earlier trial, an outcome entirely consistent with s. 11(b) of the *Charter*. In my view, the Deputy Attorney General had jurisdiction to prefer the direct indictment here and there was no abuse of process.

**IV. CONCLUSION**

[77] I would dismiss the appeal.

Released: March 31, 2026 "JMF"

"Fairburn A.C.J.O."  
"I agree. D.A. Wilson"  
"I agree. M. Rahman J.A."