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ONTARIO COURT OF JUSTICE

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NOTICE TO THE PROFESSION

TO: Judges and Justices of the Peace of the Ontario Court of Justice, Crown and Defence Counsel, Legal Aid Ontario, Lena Papadopoulos (Trial Coordinator), Tiffany Anderson (Assistant Trial Coordinator), Susan Burton and Lore Ming (Judicial Assistants), All Justice System Participants

FROM: Justice J. Fiorucci, Ontario Court of Justice, Local Administrative Judge-Hamilton

DATE: November 29, 2023

RE: *Jordan*-Compliant Trial Scheduling

On November 1, 2023, Chief Justice Sharon Nicklas issued a Province-wide *Jordan*-Compliant Trial Scheduling Practice Direction (which is attached). The objective of this initiative is to ensure the Ontario Court of Justice offers a criminal trial date that complies with *R. v. Jordan* and applies to accused persons who are represented by counsel and self-represented accused.

This Notice to the Profession provides details regarding the implementation of the directive in the Ontario Court of Justice in Hamilton. **Effective January 2, 2024, Courtroom 302 on Wednesday mornings (and part of the afternoon if available) will be used for the purposes set out in this notice. Youth Court will be moved to Courtroom 306 on Wednesday mornings. Once Youth matters are completed on Wednesdays, Courtroom 306 will continue as the regular Guilty Plea Court.**

Part I: Information sworn on or after November 1, 2023:

For cases with an Information sworn on or after November 1, 2023, the Court will offer a trial or preliminary inquiry date that is expected to result in the trial or preliminary inquiry being completed within 15 months of the date the Information was sworn. If either the Crown or Defence ask to waive or decline the *Jordan* compliant date offered by the Court, the matter will be scheduled as soon as possible into Courtroom 302 at 10:00 a.m. on any Wednesday before a Judge.

When the matter is addressed at that Wednesday appearance in Courtroom 302, the explicit waiver must be clearly stated on the Court record. The explicit waiver will also

be documented in e-mail communications between Counsel/self-rep accused and the Trial Coordinator (TC) or Assistant Trial Coordinator (ATC).

The Court retains the discretion to insist on the scheduling of the trial or preliminary inquiry on dates which comply with the 15-month Province-wide directive, notwithstanding the explicit waiver offered by the accused and/or counsel.

The Provincial directive mandates that within six (6) months of the date the Information is sworn, the parties will have addressed disclosure, conducted a meaningful Crown pre-trial and judicial pre-trial (JPT), if a JPT is necessary. In Hamilton, for cases in which a preliminary inquiry has been requested, if a Focus Hearing is required, the Focus Hearing will have been conducted within six (6) months of the Information sworn date.

The Hamilton Mandatory JPT policy implemented in April 2021 (which is attached) remains in effect. A JPT is mandated for any case which is estimated to require 2 or more days for trial defined as: 8 hours of trial time or more, 8 or more witnesses or 6 or more witnesses with either a *Charter* application or application(s) to introduce presumptively inadmissible evidence that require adjudication in advance of the trial (ex. s. 276, ss. 278.3 to 278.7, ss. 278.92 to 278.94, *O'Connor* Third Party records etc.). As the Province-wide practice direction states, if the parties anticipate a JPT will be required, the parties should schedule the JPT within four (4) months of the Information sworn date, even if substantial disclosure has not been received within that four-month period.

The June 20, 2022 Notice to the Profession Re: Preliminary Inquiries and Focus Hearings in Hamilton (which is attached) also remains in effect. For all cases involving charges that are eligible for a preliminary inquiry that counsel estimate will take two (2) or more days to complete, other than cases of First or Second Degree Murder, if the accused elects to be tried by a Judge alone or a Judge and Jury in the Superior Court of Justice, and the accused or the prosecutor makes a request for a preliminary inquiry, a focus hearing will be scheduled in lieu of a JPT.

Within six (6) months of the Information sworn date, both the Crown and Defence are expected to be prepared to either resolve the matter or schedule a trial or preliminary inquiry date. *Unless otherwise directed by the Court, at the first court appearance after the six (6) month mark of the swearing of the Information, in the case management court before the presiding Justice of the Peace, the parties will be ready to do one of the following:*

- i. Resolve the matter, or identify the courtroom and date on which the matter should be adjourned to implement the resolution; or*
- ii. Set a trial or preliminary inquiry date.*

Trial and preliminary inquiry dates will continue to be obtained by e-mail correspondence with the TC or the ATC. The parties should obtain these dates before attending the first court appearance after the six (6) month mark so that the dates can be confirmed on the court record at that appearance.

As stated in the Province-wide practice direction, if at the six (6) month mark, the parties are not ready to resolve the matter or have not yet determined whether it will be resolved, the Court will expect them to set a trial or preliminary inquiry date pending further resolution discussions. The trial or preliminary inquiry dates will be scheduled based on discussions at the Crown pre-trial. The trial or preliminary inquiry dates will be set even in cases where specific items of disclosure are outstanding, counsel have not yet been retained, or the parties are continuing to discuss a potential resolution. Where such issues remain outstanding, when the TC provides the trial or preliminary inquiry dates, the TC will also provide a date for the parties to attend an “issue specific confirmation date” before a Judge on a Wednesday in Courtroom 302.

When the trial or preliminary inquiry dates are scheduled at the next court appearance, the “issue specific confirmation date” provided by the TC will also be scheduled. The parties must identify the outstanding issues on the Court record and the presiding Justice will document the outstanding issue(s) on the Judicial Endorsement Form. The parties will be expected to take the steps necessary to address the outstanding issues prior to the “issue specific confirmation date”.

If the trial time estimate needs to be adjusted after the trial date has been set due to subsequent developments, the parties must advise the TC’s office in writing at the earliest opportunity. The case may need to be brought forward to be addressed on the record on a Wednesday in Courtroom 302 or may need to be scheduled for a JPT.

Part II: Transitional Cases with Information sworn *before* November 1, 2023:

For “transitional cases” with an Information sworn before November 1, 2023, where possible, the Court will offer a trial or preliminary inquiry date that results in the case being completed within 15 months of the Information sworn date. Where this is not possible, the Court will offer a trial or preliminary inquiry date that is expected to be completed as close as possible to 15 months from the Information sworn date.

For “transitional cases” over six (6) months that are appearing in case management court before a Justice of the Peace, a brief adjournment may be required to obtain a trial or preliminary inquiry date from the TC by e-mail correspondence (ex. where a JPT is required and has not yet been conducted). The Justice of the Peace will adjourn these cases to a future case management court before a Justice of the Peace and direct all parties to complete the necessary steps to enable them to obtain a trial date from the TC. Currently, the following timelines are required to complete these steps:

Time for Counsel to get a trial date from the TC: **2 to 3 days** (once Counsel have submitted the Trial Scheduling Form to the TC).

Time to conduct a Crown pre-trial and obtain a date from the TC (where no JPT required): **1 to 2 weeks**

Time to conduct a JPT or Focus Hearing and obtain a trial or preliminary inquiry date from the TC: **4 to 6 weeks (when directed by the Justice of the Peace to schedule a JPT or Focus Hearing, Counsel must submit an e-mail request for a JPT or Focus**

Hearing to the TC or ATC by the end of the court day to avoid delay in the scheduling of the JPT or Focus Hearing).

It is expected that by the next case management appearance before the Justice of the Peace, the trial or preliminary inquiry date will be scheduled as all necessary steps will have been completed.

There will be “transitional cases” over six (6) months which require enhanced case management by a Judge. It is expected that these cases will include the following:

- a) Cases where a Justice of the Peace has directed the parties to complete the necessary steps to schedule a trial or preliminary inquiry and the parties attend at the next case management court without having complied with the direction of the Justice of the Peace; and
- b) Cases in which there is a dispute about outstanding disclosure where the Defence claims that the outstanding disclosure is required for the accused to elect their mode of trial.

“Transitional cases” that require enhanced case management by a Judge will be adjourned to a Wednesday in Courtroom 302.

Part III: Province-wide Practice Direction re: Section 11(b) Charter Applications:

Attached is the November 1, 2023 Province-wide practice direction of Chief Justice Nicklas regarding s. 11(b) *Charter* applications.

Section 11(b) applications will be canvassed during the JPT and the Defence (counsel, authorized agent, or accused, if self-represented) is required to advise the JPT Judge if they intend to bring a s. 11(b) application.

When corresponding with the TC by e-mail to arrange a trial date, the TC will canvass the issue of s. 11(b). If the trial date is anticipated to end more than 18 months after the Information was sworn, the TC will provide a s. 11(b) application date *unless the Defence indicates to the TC that they are not bringing a s. 11(b) motion*. In such cases, when the trial date is scheduled in the case management court, *the Defence must confirm on the Court record that they are not bringing a s. 11(b) application*.

Section 11(b) applications will be heard at least four (4) months before the trial and the parties must comply with the service and filing of materials as outlined in the Province-wide practice direction.

Justice J.P.P. Fiorucci
Local Administrative Judge
Hamilton

Ontario Court of Justice Practice Direction

Jordan-Compliant Trial Scheduling

Effective date: November 1, 2023

Locations: Province-wide

The objective of this practice direction is to ensure the Court offers a criminal trial date that complies with the obligations set out in *R. v. Jordan*, in accordance with the Court's authority over scheduling and its obligation to ensure an accused person's constitutional right to a trial within a reasonable time is respected.

Application

1. Part I of this practice direction applies to all criminal cases in the Ontario Court of Justice with an Information sworn date of November 1, 2023, or later.
2. Part II of this practice direction applies to all criminal cases with an Information sworn date before November 1, 2023.
3. This practice direction applies, with any necessary modifications, to self-represented accused.

Part I – Cases entering the system on or after November 1, 2023

Jordan-compliant trial dates

4. When a criminal matter is scheduled for trial, the Court will offer a trial date that complies with the timelines set out in *R. v. Jordan*. The Court will offer a trial date that is expected to result in the trial being completed within 15 months of the date the Information was sworn.
5. Nothing in this practice direction precludes the Court from offering trial dates that are anticipated to result in a criminal case being completed in less than 15 months from the Information sworn date. Cases involving accused persons who are in custody and young persons, as defined in the *Youth Criminal Justice Act*, will continue to receive scheduling priority.
6. Either the Crown or Defence may request to waive or otherwise decline the trial date offered by the Court. Any such waiver must be clearly stated on the record or otherwise documented in the court record. In scheduling the trial date, it will be up to the Court whether to grant the request.

Setting trial dates within six months of the Information sworn date

7. The 15-month trial scheduling directive is only feasible if cases are scheduled for trial sufficiently early in the 15-month period.
8. Within six (6) months of the Information sworn date, both the Crown and the Defence are expected to be prepared to either resolve the matter or set a trial date.

9. More particularly, the Court's expectation is that, unless otherwise directed by the Court, at the first court appearance following the six-month Information sworn date, both parties will, at minimum, have addressed disclosure, conducted a meaningful Crown pre-trial and judicial pre-trial (if necessary), and be ready to do one of the following:
 - i. resolve the matter, or identify the courtroom and date on which the matter should be traversed or adjourned to implement the resolution; or
 - ii. set a trial or preliminary inquiry date.
10. Where possible, the parties should obtain a trial date through the Trial Coordinator's office before the court appearance, which can be formally set at the next court appearance.
11. If the parties are not yet ready to resolve the matter or have not yet determined whether it will be resolved, the Court will expect them to set a trial date pending further resolution discussions.
12. The parties will be expected to set a trial date based on their discussions at the Crown pre-trial, even though certain matters, such as discrete items of disclosure, retainer issues or potential resolution discussions, remain outstanding. The parties must identify any such outstanding issues at the time the trial is set, so that an intervening confirmation hearing date may be scheduled. The parties will be expected to take the necessary steps to address the outstanding issues before the confirmation date, which may include one or more of the following:
 - i. bringing the matter forward; and
 - ii. scheduling a judicial pre-trial to seek direction from the Court.
13. If the trial time estimate needs to be adjusted after it has been set due to subsequent developments, parties are required to advise the Trial Coordinator's office in writing, at the earliest opportunity. These cases may need to be brought forward to be addressed on the record or to schedule a judicial pre-trial.
14. Nothing in this practice direction prevents a judicial officer from directing or ordering the parties to take any step(s) in a proceeding earlier than six months from the Information sworn date, where the judicial officer considers it warranted in the circumstances, for example, in a matter involving accused persons in custody.
15. If the parties anticipate that a judicial pre-trial is going to be required in a case, the parties should schedule the judicial pre-trial within four months of the Information sworn date. A judicial pre-trial must be scheduled if substantial disclosure has not been received within four months of the Information sworn date. If necessary, the parties can schedule the judicial pre-trial before the Crown pre-trial has been conducted, if they undertake to conduct the Crown pre-trial before the date of the judicial pre-trial.

Part II - Transitional cases (i.e., cases already in the system as of November 1, 2023)

16. This part applies to “transitional cases”, *i.e.*, criminal cases with an Information sworn before November 1, 2023.
17. Where possible, the Court will offer a trial date in transitional cases that is expected to result in the trial being completed within 15 months of the date the Information was sworn.
18. However, applying the 15-month trial scheduling directive will not be feasible in a number of transition cases due to the length of time that has already lapsed since the Information sworn date. In such cases, the Court will offer a trial date that is expected to result in the trial being completed as close as possible to 15 months of the Information sworn date.
19. Paragraphs 4 to 15 apply to transitional cases, with any necessary modifications. More particularly, the Court expects that, if more than six months have elapsed since the Information sworn date, the Crown and Defence will be prepared to either resolve the matter or set a trial date at the next court appearance.

Chief Justice Sharon M. Nicklas
Ontario Court of Justice

Mandatory JPT Policy – April 2021

The mandatory Judicial Pre-trial policy in Hamilton is being amended at the direction of the Local Administrative Judge. The previous policy mandated a JPT where counsel estimated a trial or PH would take one day or more. During the pandemic, in order to facilitate the resolution of criminal cases before trial, counsel were permitted to set a JPT for resolution purposes only.

Effective immediately counsel must set a JPT for any matter where it is estimated the trial will take 2 days or more. Anything estimated to take less than 2 days may be set for trial or PH without a mandatory JPT. Resolution may be discussed at a JPT aimed at estimating trial time for cases where the trial estimate is 2 days or more.

2 days or more is defined as 8 hours of trial time or more, 8 or more witnesses or 6 or more witnesses with either Charter applications or applications to introduce presumptively inadmissible evidence. These would include 3rd party records applications and 276 applications and other applications that require adjudication in advance of the trial.

JPTs for resolution only can only be set with the permission of the Local Administrative Judge or a designate. The LAJ or designate will consider the seriousness of the charge, whether the defendant is in custody and the amount of trial time that would be saved by a resolution of the case as factors in granting permission for a resolution JPT. Resolution JPTs may be requested through the trial coordinator but will not be set until the LAJ or designate approves the setting of a JPT.

NOTICE TO THE PROFESSION RE: PRELIMINARY INQUIRIES AND FOCUS HEARINGS IN THE HAMILTON OCJ AS OF JULY 4, 2022

As of July 4, 2022, the Hamilton Ontario Court of Justice will be initiating a new procedure relating to all cases for which a request has been made for a preliminary inquiry, with the exception of First or Second Degree Murder cases.

For all cases other than First or Second Degree Murder, where counsel estimate that the preliminary inquiry will take 2 days or more, a focus hearing will be held (s. 536.4 of the *Criminal Code*) before dates are scheduled for the preliminary inquiry. A focus hearing will be conducted for these matters in lieu of a Judicial Pre-trial (JPT).

Therefore, before scheduling a JPT for any charges that are eligible for a preliminary inquiry, an accused must elect their mode of trial. If the accused elects to be tried by a judge alone or a judge and jury in the Superior Court of Justice, *and the accused or the prosecutor makes a request for a preliminary hearing*, a focus hearing will be scheduled.

If an accused does not make their election as to mode of trial for indictable offences that are eligible for a preliminary inquiry, a JPT cannot be scheduled, and the matter will be scheduled before a judge for case management. No JPT or focus hearing will be scheduled until the accused makes an election, or where the accused is put to their election and does not elect, is deemed to have elected to be tried by a court composed of a judge and jury.

A statement of issues and witnesses (s. 536.3 of the *Criminal Code*) must be filed in advance of the focus hearing. The focus hearing judge will have the discretion to adjourn the focus hearing if the statement of issues and witnesses is not filed.

If either the Crown or the Defence intends to introduce evidence at the preliminary inquiry by way of s. 540(7) of the *Criminal Code*, the party must give the other party reasonable notice of his or her intention to tender such evidence, *in advance of the focus hearing*, together with a copy of the statement that is made by a witness in writing or otherwise recorded. The party seeking to tender s. 540(7) evidence will also file with the Court, *in advance of the focus hearing*, a precis of the evidence it intends to introduce by way of s. 540(7) so that the judge can conduct a meaningful focus hearing pursuant to s. 536.4.

If the party who receives notice of the other party's intention to tender s. 540(7) evidence seeks to have an order made under s. 540(9) that the witness appear for examination or cross-examination at the preliminary inquiry, counsel for the party making this application under s. 540(9) must be prepared to make their submissions to the focus hearing judge, who will decide this issue at the focus hearing.

If no s. 540(7) evidence is being tendered at the preliminary inquiry, *in advance of the focus hearing*, the Crown must provide to the Defence and the Court a summary of the evidence it anticipates tendering at the preliminary inquiry to assist the preliminary inquiry judge to regulate the course of the inquiry including limiting the scope of the preliminary inquiry to specific issues and limiting the witnesses to be heard on these issues, pursuant to s. 537(1.01) of the *Criminal Code*.

A JPT will continue to be scheduled for First and Second Degree Murder cases. The judge who is scheduled to conduct the preliminary inquiry on a murder case may conduct a focus hearing pursuant to s. 536.4 of the *Criminal Code* on application of the prosecutor or the accused or on the judge's own motion.

June 20, 2022

Justice J.P.P. Fiorucci

Local Administrative Judge

Hamilton

Ontario Court of Justice Practice Direction:

Section 11(b) *Charter* Applications

Effective date: November 1, 2023

Locations: Province-wide

This practice direction is issued pursuant to rule 5 of the Criminal Rules of the Ontario Court of Justice. It replaces the Provincial Practice Direction regarding Time Limits for Oral Arguments on s.11(b) *Charter* Applications in Criminal Proceedings (issued July 1, 2019), which is hereby revoked).

The objective of this practice direction is to provide for fair, timely and efficient determination of s. 11(b) *Charter* applications. This includes hearing the applications at least four months before trial so that, if the application is granted and a stay of proceedings is imposed, the scheduled trial dates may be utilized for other matters.

- 1) The procedures set out in this practice direction apply to s. 11(b) *Charter* applications in the Ontario Court of Justice as of November 1, 2023.
- 2) Unless the Court directs otherwise, section 11(b) applications shall be heard at least four months before trial, to allow the scheduled trial dates to be utilized for other matters should the proceedings be stayed.
- 3) Section 11(b) applications will be scheduled at the same time the trial is set. To facilitate this procedure:
 - (i) s. 11(b) applications will be canvassed during judicial pre-trials and the defence (counsel, authorized agent or accused, if self-represented) is required to advise the pre-trial judge if they intend to bring a s. 11(b) application; and
 - (ii) s. 11(b) applications will be canvassed when trial dates are canvassed in the trial scheduling court or in the Trial Coordinator's office. If the trial date is more than 18 months from the Information sworn date, a s. 11(b) application date will be set unless the defence confirms on the record that they are not bringing a s. 11(b) application.
- 4) The s. 11(b) Notice of Application (Form 1) and any supporting materials must be served and filed at least 30 days in advance of the application hearing date, in accordance with Rule 3.1 of the Criminal Rules of the Ontario Court of Justice.
- 5) Wherever possible, the s. 11(b) application will be heard by the judge who will preside over the applicant's trial. However, given that the application and trial are heard months apart, there may be cases where it is necessary for the proper administration of justice for different judges to hear the application and trial. In such situations, the s. 11(b) application judge is appointed a case management judge under s. 551.1 of the *Criminal Code* for the purpose of hearing and determining the s. 11(b) application.

- 6) Unless directed otherwise by the Local Administrative Judge, the judicial pre-trial judge or the presiding judge, s. 11(b) applications shall be scheduled for up to one hour for oral argument, allocated as follows:
- Applicant – 25 minutes
 - Respondent – 25 minutes
 - Applicant's reply – 10 minutes.
- 7) The s. 11(b) application should clearly identify any periods of delay within the case that the party submits should be characterized as attributable to the defence or to "exceptional circumstances", as defined in *R. v. Jordan*. The information describing periods of delay must be set out in a chart (or charts) attached to the application setting out the history of the proceeding from the date of charge until the anticipated disposition of the proceeding.

Chief Justice Sharon M. Nicklas
Ontario Court of Justice