NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Cole***, 2010 NSCA 59

Date: 20100707
Docket: CAC 318539
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Stephen John Cole

Respondent

Judges:	Hamilton, Fichaud, and Farrar, JJ.A.
Appeal Heard:	June 17, 2010, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of the Court.
Counsel:	Peter Rosinski, for the appellant Warren Zimmer, for the respondent

Reasons for judgment:

[1] The issue in this appeal is whether Provincial Court Judge Barbara J. Beach erred when she refused the Crown's request to adjourn the respondent's, Mr. Cole's, trial to a date when its proposed witness from China could obtain a visa and come to Canada to testify.

[2] At the hearing we indicated the appeal was dismissed with reasons to follow. These are our reasons.

[3] On April 15, 2008 Mr. Cole was charged with defrauding K & J Trading Inc. of more than $5,000 by shipping to China on its behalf less valuable materials than it had undertaken to ship.

[4] The following court appearances took place before the judge prior to September 18, 2009, the date the Crown's requested adjournment was denied:

> May 6, 2008 - Election and plea adjourned at request of Mr. Cole's counsel who indicated he did not yet have disclosure;
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> June 17, 2008 - Election and plea adjourned at request of Mr. Cole's counsel to give him time to review the disclosed material with his client and get instructions;
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> July 29, 2008 - Mr. Cole's counsel elected trial in Provincial Court and entered a not guilty plea on Mr. Cole's behalf. When he indicated the trial would take four days, the judge ordered the parties to return on September 17 for trial dates;
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> September 17, 2008 - The judge ordered a pre-trial for June 8, 2009, with the trial to follow on October 5 to 8, 2009;
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> June 8, 2009 - When asked by the judge at the pre-trial if four days were still required for the trial, the Crown stated:
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> > **MR. BOTTERILL**: From the Crown's perspective, we have three witnesses who will be coming from China. They have a working knowledge of English, but we'll

> arrange for a Mandarin translator just to be sure there are no language difficulties. And that will complicate matters a bit. Whenever you work with a translator, it doubles the amount of time that you require. But, other than that, there's nothing from our perspective that would take more than the regular amount of trial time.
>
> One of those three witnesses, I mentioned to my friend this morning, I'm going to turn my mind to whether I will seek to have him qualified as an expert, entitled to give opinion evidence in the valuation of plastic recyclables. And if so, I'll get a CV from him, have it translated into English, and provide it in lots of time. There are no voir dires on statements or anything of that sort and it really is just those three witnesses coming from China to put the Crown's case in, ...

[5] On September 18, 2009, approximately two weeks before the scheduled trial, the Crown requested an adjournment:

> **MR. BOTTERILL**: ... I put this matter on the docket now a few weeks before the scheduled start of the trial date because I know an out-of-town judge had been arranged and we had four days set for trial. The Crown has a witness problem and will be seeking an adjournment. I wanted to let the Court know that as soon as possible.
>
> Very briefly, the file involves the shipment of plastic recyclables to China and an allegation that there was some fraud associated with that in terms of the quality of the material that arrived in China. The complainants, who reside in Ontario, had retained a plastic recyclable appraiser in China to meet a shipping container and to ensure that what arrived in the sealed container was what the company had brokered. She took photographs and so on of the container when it arrived and will give an expert opinion as to the value of the materials that were inside the container in China, and so her evidence is essential to the Crown's case.
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> Although we have been working for the last six weeks to try to finalize her travel arrangements to come to Halifax from Beijing, it was only Friday of last week that she contacted my office by email to ask the question, Was I arranging for her visa to be able to enter Canada? I was unaware that a Chinese national required a visa to enter Canada and so my office contacted Visa Services at the Canadian Embassy in Beijing to see how long it would take for us to sponsor her visa to come to this country for the purpose of giving opinion evidence for the Crown at this trial.

> We're told that there's a one-month minimum processing time and she has to begin the process in person by travelling to Beijing to make the application. And then there's supporting documents have to come from my office. So, clearly, she's not going to be available for the scheduled trial dates in October. I think we're still looking at four days for the trial of the matter. ... I don't think either of us have any time available much earlier than next February, but if we could canvass some dates this morning with the Court.

[6] Mr. Cole's counsel objected to an adjournment and the following exchange took place between the judge and Crown counsel:

> **THE COURT**: I'm very reluctant to grant this adjournment. I'm going to take some time to consider it and return to the matter later today. Just for purposes of the record, the allegations relate to dates between October 31st, 2006 and the 1st day of April, 2007. And the matter was first before the Court on May the 6th, 2008. There was an election on July 29th of 2008, so in very short order after the first time the matter came before the Court. There was a not guilty plea entered. And a trial date was set and a pre-trial also set. So that should have, I would have thought, jogged the memory of those involved that this matter needed to be addressed in all its complexities.
>
> The pre-trial proceeded on June the 8th, '09, which is one year after the matter first came before the Court. I was advised at that time that, you know, everything was going ahead. The Crown put on the record at that time that an interpreter was required, I think, at that time, as well. I was notified that there was a witness coming from abroad and the matter was set over again for the trial date. I don't have dates in February, to begin with. I have dates next October and I have an obligation to move these matters forward without delay. So I will further consider the matter between now and 2 o'clock this afternoon.
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> **MR. BOTTERILL**: Just to be quite clear, as Your Honour is considering the matter, it's ... I'll be completely candid so you can make an informed decision. When we were here for the pre-trial the last time and the Crown advised that we had been in contact with our witness in China, she was happy to attend here because, of course, Supreme Court out-of-province subpoena isn't effective in China, so she was going to have to come voluntarily. She was more than happy to come. We were in the process of making travel arrangements for her. They didn't present any problems to us at the time. It was just a matter of finessing some connections.

> The problem was that I was unaware ... my office was unaware that a witness coming to Canada from China required a visa in order to enter China (sic). So it wasn't a matter of our having missed a date or forgotten something. It was a matter of our not knowing that the witness required that visa. **Now perhaps we should have known that.** We do not ...
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> **THE COURT**: Well, I think so. I mean in this day and age, most people are aware that there are visa requirements with respect to many different countries.

(Emphasis added)

[7] Due to the unavailability of counsel, the first opportunity the judge had to give her oral unreported decision denying the adjournment was on September 28, 2009. In her reasons she concluded:

> So the Crown had a significant period of time from the moment when the trial was set back on September 17, 2008, to ready its witnesses for trial. **The Crown, in fact, had a year to ensure that the witnesses were all available, in place, and that would include, with respect to the witness coming from China, I would think, that all appropriate travel arrangements would have been made and discussed with that witness. I do not think it would come as a surprise to anyone that when travelling internationally, visa requirements have to be addressed.**
>
> Now on September 18, when the request for the adjournment was made, the Crown indicated that, yes, indeed, a visa was required and that the necessary arrangements had not been made far enough in advance to permit **this one particular witness who was necessary for the Crown's case** to apply for and get a visa. I do not have any idea why it was left so late. I do not know what discussions may or may not have taken place between the Crown and its witness but, at this point, given the length of time that has intervened since the setting of the trial date and given the reason for the Crown's request for an adjournment, I do not think it is appropriate at this stage to accede to that request, if I can put it that way.

(Emphasis added)

[8] Following her decision, the Crown indicated it would not be offering evidence at trial. The judge dismissed the charge against Mr. Cole for want of prosecution.

[9] The Crown's only ground of appeal is that the judge erred by failing to exercise her discretion, as to whether to adjourn or not, in a judicial manner.

[10] In **R. v Beals**, [1993] N.S.J. No. 436 (Q.L.)(C.A.) this Court considered whether a trial judge erred in refusing to grant an adjournment and stated the following with respect to the judicial exercise of discretionary power:

> 17. In **R. v. Casey** (1988), 80 N.S.R. (2d) 247, at paragraph 8, Macdonald J.A. referred to a statement of Lord Halsbury to explain what is meant by the judicial exercise of a discretionary power:
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> > "In **Sharp v. Wakefield et al**, [1891] A.C. 173, Lord Halsbury expressed what is meant by the judicial exercise of discretionary power in the following terms (p. 191):
> >
> > 'An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and "discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: **Rooke's Case** (1); according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.' "
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> 18. Various factors impact on whether an adjournment should be granted. In **R. v. B. (J.E.)** (1990), 52 C.C.C. (3d) 224 this court recognized that the public interest in the orderly and expeditious administration of justice is a factor that may be considered by a trial judge when determining whether an adjournment should be granted (see p. 229).

[11] Recently, in **Bank of Nova Scotia v. Allen**, 2010 NSCA 47, this Court also commented on our role when reviewing a discretionary decision:

> [9] At the outset, let me briefly consider our appropriate standard of review. The judge's decision to deny the disputed disbursements involved an exercise of discretion thereby commanding deference. That said, this discretion must be exercised judicially. Bateman, J. A. in **Marjen** explains:
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> > ¶ 52 The discretion in determining to refuse a deficiency judgment, or in assigning a value to the property, whether pursuant

> to the Court's equitable jurisdiction or the **Civil Procedure Rules**, must be exercised judicially. (See **R. v. Casey** (1988), 80 N.S.R. (2d) 247, at p. 248, per Macdonald J. A., and **Sharp v. Wakefield et al**, [1891] A.C. 173 at p. 191, per Lord Halsbury regarding the judicial exercise of a discretionary power).
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> ¶ 53 In **Ward v. James**, [1965] 1 All E.R. 563 at p. 570, Lord Denning approved the following comment from **Grimshaw v. Dunbar**, [1953] 1 All E.R. 351 (H.L.), at p.353, where Jenkins, L.R. said:
>
> > ... did the judge here exercise his discretion on wrong considerations or wrong grounds, or did he ignore some of the right considerations? If so, then he decided on wrong principles, his error was a matter of law, and this court can interfere...
> >
> > ... In my view, although no reasons are given by a judge exercising, or refusing to exercise, a discretionary jurisdiction, it may nevertheless, be possible, on looking at the facts, to say that, if the judge has taken all the relevant circumstances into consideration and had excluded from consideration all irrelevant circumstances, he could not possibly have arrived at the conclusion to which he came, because on those facts that conclusion involves a palpable miscarriage of justice....

[12] Thus we are to consider whether the judge considered the appropriate factors and applied the relevant legal principles in exercising her discretion.

[13] The Supreme Court of Canada in **Darville v. R.** (1957), 116 C.C.C. 113 at p. 117, sets out certain conditions that must ordinarily be established to entitle a party to an adjournment due to the unavailability of a witness:

> There was no disagreement before us as to what conditions must ordinarily be established by affidavit in order to entitle a party to an adjournment on the ground of the absence of witnesses, these being as follows:
>
> (a) that the absent witnesses are material witnesses in the case;

> (b) that the party applying has been guilty of no laches or neglect in omitting to endeavour to procure the attendance of these witnesses;
>
> (c) that there is a reasonable expectation that the witnesses can be procured at the future time to which it is sought to put off the trial.

[14] The judge's reasons, set out in para. 7 above, and the exchange between the judge and the Crown on September 18, set out in paras. 5 and 6 above, indicate that while the judge did not specifically refer to the **Darville** case, she considered and applied the principles of law set out therein in light of the information before her.

[15] With respect to the first condition, the judge accepted that the proposed foreign witness "was necessary for the Crown's case." With respect to the third condition, there was no suggestion that the proposed witness would not be prepared to attend a later trial, although there was also nothing indicating she could successfully obtain a visa.

[16] The key **Darville** condition for the judge was the second one, whether the Crown was guilty of laches or neglect with respect to the unavailability of the proposed witness. The judge concluded that the Crown was guilty of laches or neglect. She referred to the fact that the Crown had over a year to prepare for the witness' attendance. She noted the Crown would have been reminded at the pre-trial, held four months before the trial date, that the witness had to come from China. She concluded that a reasonable person would know that visa requirements have to be addressed in a timely manner when a person is coming to Canada from China. The record indicates that the trial Crown appeared to agree with her on this last point, when he said: "Now perhaps we should have known that" (para. 6).

[17] The appellant has not satisfied us that the judge erred in concluding that the Crown was guilty of laches or neglect. It had a year to arrange for the witness' attendance, knew at least four months prior to the trial date that it was necessary to have at least one witness come from China and provided minimal details as to any efforts it made to ensure that the witness would be at the trial. Even without the ability to subpoena the witness, the Crown must take reasonable steps to ensure the attendance of a witness for a trial. The record does not disclose that it did so in this case.

[18] In addition to considering the **Darville** conditions, the judge considered the public interest in the orderly and expeditious administration of justice, including her obligation to move trials forward. She indicated she had no available trial dates for a trial of that length for another year. The judge did not err in considering the potential delay when she exercised her discretion not to grant an adjournment; **Beals**, **supra**, para.18.

[19] The record indicates the judge considered the appropriate factors and applied the relevant legal principles when exercising her discretion. We are therefore satisfied that she exercised her discretion judicially.

[20] The appeal is dismissed.

Hamilton, J.A.

Fichaud, J.A.

Farrar, J.A.