IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. VandenElsen, 2004 NSPC **44**

Date: 20040809
Case No.(s): Finck
1430353, 1430355, 1430357,
1430359, 1430361, 1430363,
1430365, 1430367, 1430369
VandenElsen
1430352, 1430354, 1430356
Registry: Halifax

Between:

Her Majesty the Queen

v.

Carline VandenElsen and Lawrence Ross Finck

Judge:	The Honourable Judge C. H. F. Williams, JPC
Heard:	Partial Transcript of Preliminary Inquiry Judge's Opening Remarks of August 9, 2004 in Halifax, Nova Scotia
Counsel:	Eric R. Woodburn, for the Crown Leonard J. MacKay, for the Crown
	Burnley Allan "Rocky" Jones, for the Defence (For Carline VandenElsen)
	Lawrence Ross Finck, for the Defence (For Lawrence Ross Finck)

By the Court

Introduction

[1] It seems to me that in the interest of the preservation and the repute of the administration of justice, there are certain legitimate societal values supporting the principle concerning the right of the accused to be dealt with fairly and in a manner that does not prejudice the public interest. At the Preliminary Inquiry stage, it is not my function to weigh the evidence, to test it's quality or reliability if it is admissible.

[2] According to s.535, once the accused is before me and charged with an indictable offence, I am entitled to enquire into the charge and any other indictable offence in respect to the same transaction, founded on the facts that are disclosed by the evidence taken in accordance with the procedures at a Preliminary Inquiry.

[3] Here, I am guided by s.537. In particular, I note that in subsection.1(i), I am empowered to regulate the course of the Inquiry in any way that appears to me to be consistent with the ***Criminal Code*** and that I can do so if I am satisfied that it would not be contrary to the best interest of the administration of justice.

[4] Additionally, I note that pursuant to subsection.(1.1), it is mandatory that I order the cessation of any part of an examination of a witness if, in my opinion, it is abusive, too repetitive or otherwise inappropriate.

[5] I bear in mind that the accused persons, in compliant with s.549, have consented to committal to stand trial in the court having criminal jurisdiction, on the charges on the Information before me. The Crown has refused to consent to the committal on the grounds that it wishes to lead evidence, that could persuade me that on that evidence I could make committals to stand trial on other serious charges arising out of the same transaction.

[6] When I consider that one of the principal purposes of the Preliminary Inquiry is to protect the accused from an unnecessary and improper exposure to a public trial when the authorities have not presented the requisite evidence to warrant a committal on the charges proffered and where, as here, the accused have consented to committal to stand trial during the proceedings, it would, at first blush, seem inappropriate to continue the process. By consenting to committal to trial, the accused have signified that having had the opportunity to discover and to appreciate the case to be made against them at trial, they have made an informed decision to proceed to trial on the charges proffered, without the need of hearing or the court taking further evidence.

[7] On its face, there appears to be no reason, in principle, that a committal under s.549 should not consider provisions of s.548. However, I think that a distinction exists as to when all the evidence is heard and a sufficient case is made out to put the accused to trial on the offences charged, and any other indictable offence in respect to the same transaction and a case when during the proceeding, when all the evidence is not heard and the accused waives the right to complete the hearing and consents to stand trial on the charges on the Information.

[8] In the absence of any agreements under s.536.5, it seems to me that the Crown is left with the charges stated on the Information, and to which the accused have signified their consent to stand trial. However, I think that if the Crown, before the beginning of the Preliminary Inquiry had clearly stated its intention to lay new charges and, pursuant to s.581 had specified those charges so that the accused would have knowledge of the substantive offence or the acts or conduct that allegedly formed the basis of those new allegations and it presented, at the beginning of the Preliminary Inquiry, a draft copy of the Indictment containing the new allegations, I would find it difficult to conclude that the accused were prejudiced in the preparation of their defence and did not know that a consent to stand trial would not include all the allegations. See ***R.*** v. ***Cancor Software Co.*** (1990), 79 C.R. (3d) 22 (Ont.C.A.) leave to appeal to the S.C.C. refused (1991) 3 C.R. (4th) 194 (note) 61 C.C.C.(3d) vi (note) (S.C.C.).

[9] Here, there is no suggestion that the accused have been informed pursuant to s.581 what new charges are to be pursued against them. They know what they already face and have consented to committal on all those charges. Therefore, I think that it could be an inappropriate use of the Preliminary Inquiry process for the Crown, having proffered an Information as the subject matter of the Hearing and which the accused are prepared to defend, to withhold its consent to a committal to trial on those very charges because it ostensibly wants to have the court hear evidence only for the purpose of attempting to have a committal to trial on charges other than and in addition to those addressed in the Information. If the Crown was aware of the new charges before the beginning of the Preliminary Inquiry it should have presented a new Information that spelled out the charges on which it sought a committal rather than relying on the unpredictable outcome of the Preliminary Inquiry.

[10] Thus, I think that in the absence of the circumstances as I have alluded to, the appropriate approach ought to be consistent with the provisions of the ***Code*** concerning the laying of Informations and of Indictments, for the Crown to proceed as therein prescribed.

[11] Having said that, however, I should also say that upon the first consideration it would seem that the application of s.548 is not diametrically opposed to the principle that when an accused consents to committal to stand trial pursuant to s.549 he or she is consenting to stand trial on any other charge arising from the same transaction as disclosed by the evidence. By consenting to the committal, the accused expect a suspension or a cessation of further evidence on the charges that are on the Information.

[12] However, a certain parallelism exists. First, there is a cause and effect which, as we observed, may not be absolute. The accused expectation may be countered by the Crown who may not consent to the accused's desire to stand trial on the charges that the Crown has proffered on the Information. This, on its face, would result in a suspension and frustration of the accused's desire to abandon the Preliminary Inquiry process and proceed to trial in the court having criminal jurisdiction on the charges proffered on the Information.

[13] Second, notwithstanding the Crown's position, it is always the court, pursuant to s.537(1)(i) that controls the course of the Inquiry that, in the court's opinion, is desirable and consistent with the ***Criminal Code***. It appears that I have no power to prevent the prosecution from calling certain witnesses, although I am satisfied that there is sufficient evidence to order that the accused stand trial, ***R.*** v. ***Schreder*** (1987), 36 C.C.C. (3d) 216, 59 C.R. (3d) 183, [1987] N.W.T.R. 240 (S.C.). Here, however, when the accused consent to stand trial, in my view, the power of the court can be exercised to diminish or control the effect to the Crown's lack of consent to permit the accused to stand trial, and such power can be applied to bring about the effect that is consistent with the ***Criminal Code*** and which would also have a positive effect on the repute of the administration of justice.

[14] If the rationale behind the Crown's lack of consent is, as stated, that it wants to lead more evidence so it could be in a position to seek committals over and above the charges it has proffered on the Information that is the subject of this Inquiry, it could, in my view, change the fundamental reasons for the holding of a Preliminary Inquiry as determined in authorities such as ***Patterson*** v. ***The Queen***, (1970) 2 C.C.C. (2d) 227 (S.C.C.) at page 230; ***Caccamo*** v. ***The Queen*** (1975) 21 C.C.C. (2d) 257 at 275 (S.C.C.) and ***Re Skogman*** v. ***The Queen*** (1984) 13 C.C.C. (3d) 161 (S.C.C.) at 171.

[15] I must therefore strike a balance that is not opposed to the basic rationale for the holding of a Preliminary Inquiry to which I have referred. The Crown, if it so desires may proceed, but I think that its progression is attenuated severely in light of the accused stated consent to stand trial on the charges proffered. Consequently, I think that any further evidence that the Crown would desire to lead must not only be material but pursuant to s.537 (1.1), not be abusive, too repetitive or inappropriate.