**IN THE PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R. v. Burke*, 2015 NSPC 90

**Date:** 2015-12-22
**Docket:** 2738839-40
**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

Lee Francis BURKE

**Revised Decision:** The text of the original decision has been corrected according to the attached erratum dated January 6, 2016.

**Judge:** The Honourable Judge Marc C. Chisholm, J.P.C.

**Heard:** December 14, 2015

**Charges:** That he, on or about the 26th day of May, 2014, at or near Halifax, Nova Scotia, did have the care or control of a motor vehicle while his ability to operate a motor vehicle was impaired by alcohol or drug, contrary to Section 253(1)(a) of the Criminal Code.

AND FURTHER that he at the same time and place aforesaid, did unlawfully have the care or control of a motor vehicle having consumed alcohol in such a quantity that the concentration there of in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, contrary to Section 253(1)(b) of the Criminal Code.

**Counsel:** Christopher Nicholson, Crown Attorney
Patrick Eagan, Defence Attorney

**By the Court**:

Background

[1] On May 26, 2014 the accused was arrested and charged with offences of impaired operation of a motor vehicle and having care or control of a motor vehicle with a blood alcohol above 80 milligrams percent. The accused was issued an Appearance Notice to attend court in Halifax on July 8, 2015.

[2] On May 27, 2014 the accused retained counsel, Mr. Eagan, and on that day Mr. Eagan wrote to the Crown requesting disclosure.

[3] By letter dated June 23, 2014 the Crown provided disclosure to the defence.

[4] On June 4, 2014 an Information charging the accused with offences contrary to s.253(1)(a) and 253(1)(b) was sworn.

[5] On July 8, 2014 Mr. Eagan appeared in Court on behalf of the accused. The Crown elected to proceed summarily. On Defence motion, plea was adjourned to August 13, 2014.

[6] On August 13, 2014 Mr. Eagan presented a written request to Crown counsel for additional items of disclosure, namely:

1) the last annual maintenance certificate and the log of the maintenance on the machine since that time up to May 26, 2014, including any maintenance logs for the simulator;
2) personal log (going back to one(1) year which documents all the breath tests conducted by BAC Technician Cst. Joe Farrow, transcribed from the breath test tickets of all breath tests he's done on all subjects;
3) BAC proficiency test log for Cst. Farrow;
4) the alcohol standard change documents from the last alcohol standard solution change before the accused's BAC analysis on May 26, 2014;
5) the certificate of analyst verifying that the alcohol standard solution used during the accused's breath tests was suitable;
6) the analytical results of the analysis of the alcohol standard solution determining its suitability for use;
7) the designation of Cst. Farrow as a qualified technician;

8) the breath test log for this BAC Datamaster machine (serial no. C 955500) recording tests done monthly done by any technician

[7] The items were in the possession of the police. In directing his request to Crown Counsel, he relied upon the case of *R. v. Phagura*, 2010 BCSC 944. He requested a further adjournment of plea until after the Crown responded to his disclosure request.

[8] The Crown did not respond to the Defence request for additional disclosure until February 10, 2015. On that date the Crown agreed to request from the Police and disclose items 6 and 7 (having previously disclosed item 7). The Crown denied the request for items 1, 2, 3, 6 and 8. In the Crown's cover it is clear the Crown's position was informed by the decision in *R. v. Sutton [2013] A.J. No. 1266 Alb. P.C.* and a letter of opinion of Josette Hackett, (toxicologist with the RCMP forensic laboratory). The Crown's stated reason for the denial of items 1, 2, 3, 6 and 8 was: "Based on the opinion letter (referencing Ms. Hackett's letter which was enclosed) and the *Sutton* case, we could suggest items 1, 2, 3, 6 and 8 are irrelevant".

[9] Items 4 and 5 were requested from the police and provided to the Defence on May 21, 2015.

[10] On June 15, 2015 Defence counsel gave notice in Court of an intention to make a disclosure application and a Charter application for unreasonable delay. The Court scheduled the disclosure hearing for August 4, 2015. The Court also set a tentative trial date of October 22, 2015 and October 14, 2015 for the Charter motion.

[11] On motion of the Crown, the disclosure application was adjourned to August 26, 2015 to accommodate the schedule of the expert witness the Crown proposed to call at the hearing. This adjournment did not result in a change to the trial date.

[12] On August 26, 2015, on joint motion, the hearing was again adjourned to September 9, 2015. On September 9th the hearing did not proceed as the Crown changed its position and agreed to provide disclosure of items 1, 2, 3, 6 and 8. On September 9th both Counsel agreed that the trial could not

proceed on October 22nd as the Crown would require time to obtain the additional disclosure material from the Police, and the Defence would need time to engage an expert to review the disclosure material. Due to the uncertainty of the speed with which the Crown could provide the additional disclosure, the case was adjourned to September 24, 2015 to then set a new trial date.

[13] On September 24th a new trial date of December 22nd was set with the same date for the Charter application. The Crown gave notice that they would not prosecute the s.253(1)(b) count. Subsequently, the date of the Charter application was advanced to December 14, 2015.

[14] This is the decision of the Court on the Charter application.

[15] Transcripts of the Court proceedings were not submitted on this application. The history of the proceedings as set out in Defence counsel's brief dated November 6, 2015 were accepted by the Crown. That history does not reveal any concern having been raised by the Defence regarding any delay

until June, 2015. Neither does the record indicate any waiver of the accused's s.11 Charter right to a trial within a reasonable time.

Applicable Law

[16] Section 11(b) of the Charter of Rights and Freedoms provides that any person charged with an offence has the right (b) to be tried within a reasonable time.

What is reasonable?

[17] The Court's analysis is guided by three decisions of the Supreme Court of Canada: *R. v. Askov* [1990] 2 S.C.R. 1199; *R. v. Morin*, [1992] 1 S.C.R. 771; and *R. v. Godin*, [2009] 2 S.C.C. 26.

[18] The Court must consider:

(a) the length of the delay,

(b) any waiver by the accused,

( c) the reasons for the delay, which have been categorized by courts into

(i) inherent time requirements for the case;

(ii) the actions of the accused,

(iii) the actions of the crown,

(iv) limits on institutional resources,

(v) other reasons; and

(d) prejudice to the accused.

Length of Delay and Reasons for Delay

[19] The length of delay to be considered is from the date the charge is laid until the date of trial. (*R. v. Kalanj*, [1989] 1 S.C.R. 1594). In this case, that is from June 4, 2014 to December 22, 2015. This is a total of 18 months and 18 days.

[20] The Crown does not dispute that this period between charge being laid and the trial date warrants review and analysis by the Court.

[21] The normal period of delay in the Provincial Court of Nova Scotia from charge to trial is 8-10 months (*R v. Morin* (1992) 71 CCC (2d); *R v. A*bbass, [2004] N.S.J. No. 154(NSPC); *R v. Hartlen*, [2014] NSSC 456).

[22] In assessing the length of delay, there is a period of time after the laying of the charge when matters such as the accused engaging counsel, counsel requesting and obtaining disclosure, Defence counsel speaking to Crown counsel, Defence counsel meeting with the accused to review the disclosure package, Defence counsel conducting legal research, etc. routinely occur. These are inherent delays and not normally considered when assessing the length of delay for the purpose of a s.11(b) Charter motion. In this case I consider the period from June 4, 2014 to August 13, 2014 to be inherent delay.

[23] At the other end of the continuum, both Crown and Defence require time to prepare for trial. Consequently, the entire period of time from when the matter is set down for trial until the trial date ought not be considered institutional delay. ( See *R. v. Burns,* 2014 NSSC 317).

[24] The length of time reasonably necessary to prepare for trial will vary depending on the nature of the case, needs of witnesses, etc. In the present case, Defence counsel indicated that had the Crown not decided to withdraw

the s.253(1)(b) count, the Defence may have sought an adjournment of the trial to permit a Defence expert time to review the disclosure material and prepare for trial. With the Crown's decision not to proceed on s.253(1)(b) count that time for Defence preparation was not necessary.

[25] In the present case, I consider a period of two months a reasonable period for trial preparation given the nature of the charges, evidence and witnesses. In my view, in this case, none of the delay was institutional, that is, resulting from court back log.

[26] The principle cause of the delay in this case was the defence application for additional disclosure and the Crown's responses to that request. I find it useful to divide the delay into three parts: August 13, 2014 to February 10, 2015; February 10, 2015 to June 15, 2015; and June 15, 2015 to December 22, 2015.

August 15, 2014 to February 20, 2015

[27] In 2009 the Federal Government passed an Act amending section 258 of the Criminal Code eliminating the "Carter" defence.

[28] In *R. v. St. Onge Lamoureaux* [2012] 3 S.C.R. 187, the Supreme Court of Canada upheld the law implementing the changes to s.258. Since the St. Onge decision there has been a wave of litigation across the country on the issue of whether material such as was sought by the Defence in this case, was first or third party disclosure, what process ought be followed to obtain the material, what test(s) are to be applied, etc. The jurisprudence is conflicting. The Defence relied on a trial level decision from British Colombia. The Crown relied on a trial level decision from Alberta. The issue has not been considered by a court in Nova Scotia.

[29] On December 2, 2015 the Ontario Court of appeal issued its decision in the matter of the *Queen* and the Ottawa Police Service and David Jackson (2015) ONCA 832. This decision is consistent with the decision in *R. V. Sutton* [2013] A.J. No. 1266 relied on by the Crown. I accept the David Jackson decision as a correct statement of the law of disclosure.

[30] In my respectful opinion, the items requested by the Defence were not subject to disclosure by the Crown pursuant to the principles set out in *r R*

*V. Stinchcombe* [1991] 3 S.C.R. 326 and *R V. MacNeil [2009] 1 S.C.R. 66.* In my view, these were items subject to a third party disclosure application as in *R V. O'Connor* [1995] 4 S.C.R. 411. Such an application is to be initiated by the issuance of a subpoena duces tecum served upon the party in possession of the records sought, with notice to the Crown.

[31] Consequently, although understandable given the conflicting jurisprudence, Defence counsel initiated the wrong process in seeking the additional disclosure set out in the letter dated August 13 2014.

[32] The Crown would have been on solid legal ground to deny the Defence request of August 13, 2014 as the material requested was not subject to first party disclosure. Again, understandable given the conflicting jurisprudence, the Crown took time to consider the Defence request and to seek an expert opinion to aid in that analysis.

[33] I find that it was appropriate and reasonable for the Crown to take time to review and assess the case law, in response to the Defence request of August 13, 2014. Further, I find it was reasonable and appropriate for the

Crown to seek an expert opinion on the relevance of the material requested by the Defence, as was done by crown Attorneys in other provinces. (See *R. v. Phagura*, supra; and *R. v. Sutton*, supra.)

[34] Upon having decided to consider the Defence request, the Crown was obligated to respond to the Defence request promptly. On the evidence I am not satisfied that a delay of six months was reasonable to obtain an expert opinion and review the jurisprudence. There was no evidence before the Court why it took six months to obtain an expert opinion. I find the delay of six months has not been satisfactorily explained.

[35] In summary I find that the cause of the delay between August 13, 2014 and February 10, 2015 was multi-faceted. First, the material sought by the Defence ought to have been pursued by a third party disclosure application, not a first party disclosure request to the Crown. Second, the Crown did not promptly deny the request as non first party disclosure. Third, the process of the Crown obtaining an expert opinion took longer than I consider reasonable, without some explanation.

February 10, 2015 to June 15, 2015

[36] On February 10, 2015 the Crown agreed to disclose items 4 and 5 in the Defence letter of August 13, 2015. These items were in the possession of the police. The Crown obtained them from the police and disclosed them to the Defence on May 21, 2015. There is no evidence why it took three months and 11 days for the Crown to complete this process. This time period, in my view, was longer than I consider reasonable without some explanation.

[37] As previously stated, the documents sought by the Defence were not part of the "fruits of the investigation" of Mr. Burke and Defence ought to have sought the documents by the third party disclosure process. Although Defence counsel was successful in persuading Crown counsel to agree to disclosure of some of the information at this point (and later in 2015, persuading Crown counsel to disclose all of the items in the August 13, 2014 letter) the process followed by the Defence contributed to the delay.

[38] Furthermore, the Court was not provided an explanation why the Defence did not proceed with a first or third disclosure application after the Crown's

denial of five of the requested items on February 10, 2014. I see no reason why such an application need await the disclosure of items 4 and 5 which occurred in May, 2015.

[39] Again, I view the delay during this period as attributable to more than one factor. The Defence were not following the correct process to access disclosure of the material sought. Defence did not make application to the Court for disclosure upon the material being denied by the Crown. The Crown, having agreed to provide items 4 and 5, took more time than reasonable to do so.

June 10, 2015 to December 22, 2015

[40] Again, several factors contributed to the delay during this period. The time from June 15, 2015 to August 4, 2015 was for Counsel to prepare evidence and submissions on the disclosure application. The adjournment of the disclosure application from August 4, 2015 to August 26, 2015 was on Crown motion, due to the unavailability of a Crown witness. This delay is attributable solely to the Crown. It did not delay the trial date. The adjournment of the trial from October 22, 2015 to December 22, 2015 was on joint motion to allow time for additional

disclosure to be made and Defence to prepare for trial. A period of perhaps two months was inherent delay to allow Counsel time to prepare for trial.

Waiver

[41] There was no clear and unequivocal waiver of the accused's s.11(b) right.

Actions of the Crown

[42] I find that the actions of Crown counsel were undertaken in good faith to attempt to respond appropriately to the Defence disclosure request and the Crown's disclosure obligation, the scope of which was uncertain.

[43] I find Defence Counsel, in good faith, purported to proceed according to legal precedent.

Prejudice

[44] Defence introduced an affidavit of Lee Francis Burke, the defendant. Mr. Burke is employed as a ship's captain with the Department of National Defence. His position requires him to hold a valid driver's licence. The potential loss of his driver's licence and employment has been stressful for

he and his wife. The uncertainty of his career future has caused him to forego opportunities for better jobs in government and the private sector.

[45] The accused was diagnosed with PTSD following his work on the Swiss Air disaster. He has great difficulty dealing with stress. The current charge and possible consequences if convicted has caused increased anxiety.

[46] In August, 2015 the accused contracted Shingles. His doctor opined that the stress of the upcoming trial may have contributed to his contracting shingles. The accused lost one month of work. The fact of his being charged and any delay in the case being finalized would undoubtedly have caused the accused some prejudice. It is the additional prejudice caused by the longer than normal delay that is most important.

[47] I accept the Defence evidence and find that the delay in this case coming to trial has caused actual prejudice to the accused.

Conclusions:

[48] The delay in this case coming to trial was months longer than the normal. This additional delay caused actual increased prejudice to the accused. The vast majority of delay was caused by the disclosure process. Both experienced counsel purported to follow case authority in pursuing and providing additional disclosure beyond the fruits of the investigation. In the Court's view the process followed was incorrect. Historic data such as maintenance record is not first party disclosure which must be disclosed by the Crown. It is subject to a third party disclosure application. The Court's assessment of the reasons for the periods of delay and the attribution of responsibility for such delay is affected by the Court's view of the Crown's disclosure obligation and the process by which the defence challenged the Crown's decision not to disclose the requested information. In the Court's view only the unexplained length of time to obtain an expert opinion and the unexplained length of time to obtain items four and five from the Police may be attributed to the Crown and then only partly so as those actions were caused by defence disclosure request which ought to have been directed to the Police.

[49] I find that the delay in this case coming to trial was indeed much longer than the norm in the Provincial Court but, given the Court's attribution of the cause of the delay, I am not satisfied that the delay was unreasonable nor that it has violated the accused's s.11(b) right to a trial within a reasonable time, even when taking into consideration the actual prejudice to the accused resulting from the delay.

[50] Had I concluded that a breach of the accused's s.11(b) Charter right had been establish, I would not have been satisfied that the Court ought enter a stay of proceedings given the Court's view of the actions of the Crown, the actions of the Defence, the impact of the breach on the accused's Charter right and the public interest in seeing charges of impaired operation of a motor vehicle being determined on their merits.

[51] Charter motion dismissed.

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**
**Citation:** *R. v. Burke*, 2015 NSPC 90

**Date:** 2015-12-22
**Docket:** 2738839-40

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

Lee Francis BURKE

**Judge:** The Honourable Judge Marc C. Chisholm, J.P.C.

**Heard:** December 14, 2015

**Erratum:** January 6, 2016

**Charges:** That he, on or about the 26th day of May, 2014, at or near Halifax, Nova Scotia, did have the care or control of a motor vehicle while his ability to operate a motor vehicle was impaired by alcohol or drug, contrary to Section 253(1)(a) of the Criminal Code.

AND FURTHER that he at the same time and place aforesaid, did unlawfully have the care or control of a motor vehicle having consumed alcohol in such a quantity that the concentration there of in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, contrary to Section 253(1)(b) of the Criminal Code.

**Counsel:** Christopher Nicholson, Crown Attorney
Patrick Eagan, Defence Attorney

ERRATUM:

At the  end of paragraph 23 ( See *R. v. Barnes* [2014] NSSC 317) change this to (See *R. v. Burns*, 2014 NSSC 317)