

1 **CANADA**

2 **PROVINCE OF NOVA SCOTIA**

3 **IN THE PROVINCIAL COURT**

4 **HER MAJESTY THE QUEEN**

5 versus

6 **John Gordon WILLETT-FRENCH**

7
8
9 **DECISION:**

10 **Application for a Stay of Proceedings Pending the Provision of State-funded Counsel**

11 *[Cite as: R. v. Willett-French, 2001 NSPC 30]*

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15 **HEARD BEFORE:** The Honourable Judge Patrick H. Curran, JPC

16 **PLACE HEARD:** Halifax Provincial Court

17 **DATE:** November 1, 2001

18 **COUNSEL:**

19
20 Dennis W. Theman, for the Prosecution

21 Kevin Coady, for the Defence

22

1 (1) This is an application by Mr. Willett-French for a stay of proceedings until state-funded
2 counsel is provided for him. Mr. Willett-French was represented previously on these charges by
3 legal aid counsel who withdrew due to “a breakdown in the solicitor-client relationship” and by
4 private counsel acting on a legal aid certificate whom Mr. Willett-French discharged because of a
5 disagreement about how to deal with the case. Nova Scotia Legal Aid has refused to provide
6 Mr. Willett-French with a further certificate for private counsel.

7
8 (2) Mr. Willett-French is facing charges under sections 273(1), 264.1(1)(a), 267(b), 279(2)
9 and 145(3) of the **Criminal Code**. All of the charges could result in penitentiary sentences. Two
10 of them carry the possibility of life imprisonment. Mr. Willett-French has been in custody in
11 relation to the charges since he was arraigned on August 28th, 2000. He elected trial in provincial
12 court. His trial was scheduled first for February 2nd, 2001, then rescheduled for July 20th and
13 October 19th, 2001, then further rescheduled for August 16th and 17th, 2001 and now has been set
14 for November 13th to 16th, 2001. The first adjournment was granted because legal aid counsel
15 withdrew. The second adjournment occurred after Mr. Willett-French discharged private counsel
16 acting on a legal aid certificate. The third adjournment was granted at the request of Mr. Coady so
17 that this application could be made.

18
19 (3) I heard the application on October 22nd, 2001. I said that because the trial dates were so
20 close, I would try to render my decision by October 26th. However, because of the time needed to

1 consider this decision and the pressure of other matters on the court docket, I was unable to reach
2 a decision until today. As a result, I will state my reasons briefly and with little of the elaboration
3 I would include if time were not a concern.

4
5 (4) I considered most of the issues raised by the facts in this case in **R. v. Anderson**, [2000]
6 N.S.J. No.87 (Q.L.). For the sake of brevity, I will not restate those reasons, but simply adopt them
7 for this case. In this case, unlike **Anderson**, however, Nova Scotia Legal Aid did provide a
8 certificate for private counsel after legal aid counsel withdrew. This application has been made
9 because legal aid refused to provide a second certificate after Mr. Willett-French discharged his first
10 private lawyer.

11
12 (5) In the hearing before me on October 22nd, Mr. Theman for the crown acknowledged or
13 at least did not dispute, that Nova Scotia Legal Aid found Mr. Willett-French to be indigent and
14 unable to afford counsel when these charges came before the court and that Mr. Willett-French's
15 circumstances have not improved during his 15 months in custody. Mr. Willett-French simply does
16 not have the means or resources to hire a lawyer.

17
18 (6) As already noted, the charges facing Mr. Willett-French are serious. They could in
19 theory result in a life sentence, the most severe penalty under Canadian criminal law. According
20 to crown counsel, most of the evidence, including medical testimony, will be straightforward, but

1 the crown does intend to seek to introduce, for possible cross examination of Mr. Willett-French,
2 a statement allegedly made by him to the police. According to Mr. Theman, there will not only be
3 the usual complications of a *voir dire* related to the admissibility of a statement, but also the issue
4 of whether Mr. Willett-French was drunk at the time the statement was allegedly made. Thus,
5 Mr. Willett-French might have even more reason than usual to consider whether he should testify
6 on the *voir dire*.

7
8 (7) In his affidavit, Mr. Willett-French said that he had a grade 12 education and that he
9 understood the nature of the charges against him. According to his testimony on October 22nd, he
10 has faced other charges in court in the past. Nevertheless, Mr. Willett-French says he does not think
11 he can, without counsel, present his case adequately to the court or ask the right questions of
12 witnesses. He says he has been diagnosed with attention deficit disorder and is unable to
13 concentrate for extended periods. He is, of course, and has been for a considerable time, a prisoner
14 in the provincial correctional institutions in the Halifax area, places which are notorious for their
15 lack of clerical or legal facilities for prisoners.

16
17 (8) I have not been presented with any confirmation of Mr. Willett-French's statement that
18 he has been diagnosed with attention deficit disorder. It seems to me that it would be unrealistic to
19 expect confirmation. While in prison, Mr. Willett-French lacks the wherewithal to bring
20 confirmatory documents or witnesses to the court. At the same time, I think it would be expecting

1 too much of Mr. Coady, who already has gone far beyond the call of duty on a *pro bono* basis, to
2 ferret out that information. In any event, the point was made in Mr. Willett-French's affidavit. The
3 crown had the affidavit for about two weeks before October 22nd and chose not to challenge the point
4 during the hearing on October 22nd. I think I can accept the allegation as a fact.

5
6 (9) In the leading case of **R. v. Keating** (1997), 159 N.S.R.(2d) 357, the Nova Scotia Court
7 of Appeal said that for an application of this kind to succeed, there must be clear evidence that,
8 because of the complexity of the case, the accused cannot receive a fair trial without counsel,
9 bearing in mind the duty of the trial judge to assist an unrepresented accused. In my view it is
10 particularly difficult for a trial judge to assist an accused person with the issue of whether he should
11 testify in the trial or on a *voir dire*. That is even more true now than it was in the days before the
12 crown was required to disclose its case to the defence. The trial judge, especially one sitting without
13 a jury, does not and must not know what has been disclosed. The judge cannot properly advise the
14 accused of the risks of testifying as defence counsel might. And yet testifying on a *voir dire*,
15 especially when there is an issue of drunkenness, could be crucial to the accused.

16
17 (10) The stakes are high in this case for Mr. Willett-French. An error in the presentation of
18 his case could have drastic consequences for him. In that context, the already complex issues
19 presented by the introduction of a statement surrounded by the question of drunkenness and the need
20 to decide whether to testify, becomes so difficult that an accused person in the circumstances and

1 with the background of Mr. Willett-French could not receive a fair trial without counsel.

2
3 (11) That, however, is not the end of the matter. Even in circumstances in which otherwise
4 a lawyer is needed for a fair trial, an accused who has discharged earlier publicly-funded counsel
5 for an improper reason or purpose will be disentitled to further state-funded counsel. Improper
6 reasons or purposes could include such things as circumventing the normal legal aid system so as
7 to obtain private counsel or stalling a trial: see **R. v. Howell**, [1995] N.S.J. No.483 (C.A.) (Q.L.) and
8 **R. v. Halnuck**, [1996] N.S.J. No.206 (C.A.) (Q.L.) and my decision in **R. v. Anderson** noted above.
9 In this case, Mr. Willett-French did not “discharge” his original legal aid counsel, Ken Greer.
10 Instead, the court permitted Mr. Greer to withdraw as counsel because of “a breakdown in the
11 solicitor-client relationship.” That breakdown and withdrawal cannot necessarily be attributed to
12 Mr. Willett-French at all, let alone be used as a basis of denying him something he would otherwise
13 be entitled to. As for the discharge of Shannon Ingraham, the private counsel who acted on the
14 earlier certificate, all I have before me is the unchallenged assertion of Mr. Willett-French that that
15 was the result of a disagreement between him and Ms. Ingraham about how the case should proceed.
16 As I noted in **Anderson**, it is not at all unheard of for persons who are paying their own legal costs
17 to discharge lawyers because they disagree on how to proceed. Although it’s not a decision that
18 should be reached lightly, dismissing publicly-funded counsel because of a fundamental
19 disagreement is no more improper than is dismissing privately-funded counsel.

1 (12) In this case, the effect of Mr. Greer's withdrawal was to postpone the trial from February
2 of this year to dates in July and October. The effect of Ms. Ingraham's dismissal has been to move
3 the likely completion of the trial from October to November. Although, as in **R. v. Halnuck**,
4 repeated dismissal of counsel and resulting adjournments would no doubt eventually lead the court
5 to conclude that the real purpose of the dismissals was delay, this case has not reached that point and
6 there is no reason to reach that conclusion here.

7
8 (13) During the course of the hearing on October 22nd, I said I was not in any way attempting
9 to review the decision of the Legal Aid Commission, nor did I think I could direct the
10 Legal Aid Commission to provide funded counsel for Mr. Willett-French. I said my role was, as in
11 **Anderson** and other cases in which legal aid has been refused or discontinued, to deal with the
12 aftermath and effects of the decision and decide whether or not, based on the facts in this case, I
13 should make an order affecting the continuation of the trial.

14
15 (14) The appropriate remedy in this case would be a stay of proceedings until the accused is
16 provided with counsel or adequate funds to retain counsel. I think it would be irresponsible for me
17 to make that order effective immediately. Mr. Willett-French is in custody. His trial is set to begin
18 in 12 days. As I understand it, Mr. Coady is prepared to act for him at that time if he receives
19 funding on something like the legal aid scale, which no doubt should recognize his considerable
20 efforts in relation to this application. Bearing those things in mind as well as comments I made at

1 the end of the hearing on October 22nd, I will postpone ordering a conditional stay until
2 November 13th to give the authorities the opportunity to provide the defendant with counsel or the
3 means to retain counsel for trial.

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5 (15) Because I have learned more about Mr. Willett-French on this application than it would
6 be appropriate for a trial judge sitting alone to know, I will recuse myself and not preside at the trial
7 if it proceeds.

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9 (16) I thank both counsel for their assistance. I also thank Mr. Walter I. Yeadon of the
10 Nova Scotia Legal Aid Commission for the assistance he provided to me with respect to the issues
11 in this case in a letter dated October 18th, 2001.

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13 Dated at Halifax, Nova Scotia on November 1st, 2001.

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15 _____
16 Patrick H. Curran
17 Provincial Court Judge