IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Graham, 2008 NSPC 83

.Date: 2008August 12
Docket: Case No. 1370575
Registry: Antigonish

Between:

Her Majesty the Queen

v.

Steven Gillis Graham

Judge:	The Honourable Judge John D. Embree.
Heard:	August 12, 2008, in Antigonish, Nova Scotia
Decision on Charter Application:	August 12, 2008
Written Decision:	February 11, 2010
Counsel:	Allison Brown, Crown Attorney Daniel MacIsaac, Defence Attorney

Embree, P. C. J. (Orally):

[1] The matter of Mr. Graham. He's facing an allegation under 267(b) of the ***Criminal Code*** from an alleged offence date of the 29th of June, 2003.

[2] In brief summary, the Information in this matter was laid on the 29th of October, 2003. The matter was before Court for the first time on the 28th of November of 2003. The Crown at that time sought a warrant in the public interest, in relation to this matter, and that application was granted, and such a warrant was ordered. The matter remained outstanding and in that state until August 27th, 2007 when Mr. Graham appeared before Court with counsel. That warrant was cancelled and a not guilty plea was entered and trial was scheduled for February 28th, 2008. The Information is endorsed, among other things on that day, "defence making ***Charter*** application". On February 13th, 2008, the defendant wasn't present but, on his behalf, counsel was here and it was communicated to the Court that he was unable to be here on February 28th due to work commitments. An adjournment was sought of the February 28th trial date. Crown was not opposed to that and the trial was adjourned until today. Again, there was an indication that "anticipates ***Charter*** application" is noted on the Information.

[3] Today, Mr. Graham is making an application to the Court, or seeks to make an application to the Court, alleging an infringement of his rights under Section 11(b) of the ***Charter*** and he seeks a stay of the proceedings.

[4] The Court was in receipt yesterday of correspondence from counsel for Mr. Graham, enclosing an Affidavit of his. The Affidavit was sworn August 8th, and I've heard a little bit about that in submissions. Apparently, Mr. Graham returned to the area, either on last Friday or close to that, and spoke to Mr. MacIsaac last Friday, as I understand it, and that affidavit was prepared. That came to the Court's attention yesterday, and as I understand it, came to the Crown's attention this morning. The Crown Attorney who is present here today normally practices out of the Truro office. And what the Court received was Mr. Graham's affidavit and the one line letter, which I think I quoted in its entirety earlier.

[5] Mr. MacIsaac, on behalf of Mr. Graham, and at my invitation, briefly summarized the nature of the ***Charter*** application that Mr. Graham wants to present. The Crown wasn't aware of the nature of the application until today, and wasn't aware of Mr. Graham's affidavit and the contents of that affidavit until today.

[6] The particular Crown Attorney in the matter has had communication by phone with counsel for Mr. Graham, I'm told, a couple of weeks ago, two weeks ago, and this was not a subject of discussion at that time.

[7] The Crown is asking the Court not to entertain Mr. Graham's ***Charter*** application, or, in the alternative, to adjourn the application and allow the Crown an opportunity to research factual matters and respond.

[8] There are no rules of Court presently in the Provincial Court that deal with issues of timing of such matters. However, there's certainly, I would say, a general practice that's developed, that stems from a line of authorities originating in Ontario that have been endorsed by our Court of Appeal. I'm going to refer to the following authorities. Some I'm going to quote from, others I'll just refer to as related and relevant.

[9] The first is the Ontario Court of Appeal judgment in **R v. Kutynec**. It's a 1992 decision, reported in the one I'm referring to at 70 C.C.C. (3d) 289. A companion case from the Ontario Court of Appeal, decided the same day, was **R.**

v. Loveman, reported 71 C.C.C (3d) 123. Similarly, some of the issues in those judgments were also before the Alberta Court of Appeal in **R. v. Dwernychuk**, also a 1992 judgment, reported 77 C.C.C. (3d) 385. I also refer to our Nova Scotia Supreme Court, then Appeal Division, a 1992 judgment in **R. v. Yorke**, 115 N.S.J. (2d) 426, and another Court of Appeal judgment from Nova Scotia, also 1992, **R. v. Firth**, [1992] N. S. J. No. 72. Lastly, I refer to the Ontario Court of Appeal judgment in **R. v. Blom**, a 2002 decision, [2002] O. J. No. 3199.

[10] Most of the earlier decisions, **Kutynec, Loveman, Dwernychuk**, dealt with ***Charter*** applications where evidence was sought to be excluded. So, there's a slight difference in the nature of those applications from the one I'm dealing with here. This is an application to have a stay based on, not on evidentiary issues at trial, but based on an allegation that there's been an unreasonable delay. I quote from **Kutynec** as follows, starting at page 295. This report predates the time when paragraphs were numbered, but at one point in the judgment, the Ontario Court of Appeal there says the following:

> "Litigants, including the Crown, are entitled to know when they tender evidence whether the other side takes objection to the reception of that evidence. The orderly and fair operation of the criminal trial process requires that the Crown

> know before it completes its case whether the evidence it has tendered will be received and considered in determining the guilt of the accused. The ex post facto exclusion of evidence during the trial would render the trial process unwieldy at a minimum."

[11] Again, some of the comments in this case are directed at that issue and not so much at the same type of application, but the thrust of **Kutynec** is to demonstrate, in various contexts, the importance of proper notice. Further, at page 295, the Ontario Court of Appeal says this, and I quote:

> "As a basic proposition, an accused person asserting a Charter remedy bears both the initial burden of presenting evidence that his or her Charter rights or freedoms have been infringed or denied, and the ultimate burden of persuasion that there has been a Charter violation. If the evidence does not establish whether or not the accused rights were infringed, the court must conclude that they were not."

[12] Our Court of Appeal has cited that particular passage in the **Yorke** judgment that I've given the citation of a few moments ago. And further, in **Kutynec,** the Ontario Court of Appeal says this at page 296:

> "In the interests of conducting an orderly trial, the trial judge is entitled to insist, and should insist, that defence counsel state his or her position on possible Charter issues, either before or at the outset of the trial. All issues of notice to the Crown and sufficiency of disclosure can be sorted out at that time. Failing timely notice, a trial judge, having taken into account all relevant circumstances, is entitled to refuse to entertain an application to assert a Charter remedy."

[13] And I also quote further at page 300 and 301 partway through the paragraph where the Court also says:

> "A trial judge, as part of his or her general authority to control a trial proceedings, is entitled to inquire of counsel before the trial what issues will be encountered. This power includes the authority to ask counsel for the accused what Charter issues he or she foresees. Since the accused bears the onus of raising the Charter, no one else can know what Charter issues will be raised. It is basic to any adversarial system that a litigant applying for curial relief advise the court and the opponent of the application."

[14] In **R. v. Firth**, our Court of Appeal was dealing with an application to have a stay entered on an 11(b) breach dealing with the issue of right to trial within a reasonable time. In that matter, a decision of His Honour Judge Carver, staying proceedings on a ***Food and Drug Act*** charge, was being appealed and ultimately that appeal was allowed and a new trial ordered. In summarizing the applicable law, Mr. Justice Hallett, for the Court, refers to a series of authorities in the reported copy that I'm referring to, starting at page 4, and then carrying on at page 5, continues to refer to certain authorities and he says the following on page 5:

> "The second decision I consider relevant to the issues is that of the Alberta Court of Appeal in **R. v. Holt,** [1991] A. J. No. 902, October 1, 1991, where the court

> outlined what it considered an appropriate procedure to follow when an accused applies for a stay of proceedings based on an alleged infringement of his Section 11(b) Charter right. The court stated:"

[15] And he goes on to quote the Alberta Court of Appeal in **Holt**, as follows:

> "In conclusion, we think that a more orderly resolution of these delay cases would take place in the future if the following requisites were observed. Firstly, the Crown is entitled to notice of any application for Section 11(b) judicial stays, unless the delay complained of is so glaring that it is raised by the court itself. Secondly, the application should be made returnable at least thirty days before the date set for trial. This will make some allowance for the possibility of a reserved judgment on the issue. It is also remembered that a careful balancing of interests is required in these cases, and that the relief, if granted, is usually final. It should also be borne in mind that termination for delay of criminal prosecutions that are otherwise valid is relief that is new to the traditions of our law. It is an outcome that is easily resented, or at least misunderstood by many members of the public, and should neither be summarily sought nor granted. It has been said that if the public is led to understand that judges can stop valid prosecutions for a host of different reasons, the belief will soon grow that those provisions which do proceed are going ahead with the judges' permission. Thirdly, the history of the case should be presented to the court, documented by transcripts, where such transcripts are available, as opposed to counsel's giving their memories, often diverging, of why earlier remands or adjournments were granted. Fourthly, while we hesitate to specify what material would serve to allow assessment of local delays with those existing in comparably situated Canadian jurisdictions, we do say that it must be in the form of admissible evidence. That is clear from **R. v. Bennett**, supra. The evidence may take many forms because it may come from many sources. But that comparison could rarely, if ever, be established by the simple repetition of the regional statistics weighed in Cory, J.'s judgment in **R. v. Askov**. That was what was tendered here."

[16] Again, some of those comments are more directly relevant to this case, others are less relevant to this case because many unreasonable delay applications

involve a history of Court proceedings being placed before the Court and what happened on each of those occasions and who consented to what, and who objected to what, and what the reasons for adjournments were, etcetera. So, there are some valid reasons why, in some cases, transcripts are required as is referred to there.

[17] The history of the Court proceedings here is not very complicated. And that, and of itself, doesn't seem to be the basis of the application. It may form some very small part of the application but it is the overall passage of time that would seem to be a relevant issue here and that Mr. Graham points to in his affidavit. From all of that, some general principles are easily discernable.

[18] In some cases, an alleged ***Charter*** breach may not become apparent until proceedings are underway and the Court is in progress and something comes up in the course of the presentation of evidence that makes an application warranted, and that may sometimes come up by surprise. In many cases, that's not true. Knowledge of the issue, whether it's an evidentiary one or whether, as here, it's an issue of alleging unreasonable delay, are known well before the trial date and Court is set to hear the matter.

[19] Notice of an application in the ***Charter*** context, where the circumstances of that application are known, should be made as far in advance as possible, and certainly as far in advance as is reasonable. The ultimate objective is to give the party who is responding, and in this case, and in most cases, the Crown, a fair opportunity to know what the allegation is, know what the basis of the allegation is, and the basis of the application, investigate that where it's necessary to do so, do the necessary research, and come ultimately prepared to deal with the facts and the law that relate to the particular application.

[20] Stating days, weeks or months in advance that a ***Charter*** application is anticipated is, at best, an introductory step in that process. It really doesn't tell the Crown much of anything, except what those words would normally imply.

[21] To start with, a ***Charter*** application should indicate what section is allegedly breached. Every case will be different. Some cases may make it very readily apparent, with some very introductory comments and references, what it is that is an issue. The ***Charter*** has many possible applications. Some, in fact many, are

evidentiary and involve Section 10, Section 8, Section 7 and other possible sections of the ***Charter***. Some are under the provision that I'm dealing with here. At the very least, some information and notification as to what section is allegedly breached is part of the notice process.

[22] The Crown here, at the very least, at the very earliest, I would say, even if I were to count when it got - when the documentation got delivered to the Crown's office here, that was yesterday afternoon, even if I were to consider that as being when the notice of, in any significant way, of this application came forward, that would be the very earliest, and based on circumstances of this Crown Attorney, that information didn't come in to her possession until today. On either standard, yesterday or today, for a trial that's scheduled today and has been scheduled since February, that is not reasonable notice of an application. Even to specify what the application alleges and what remedy is being sought and what the basis of that is. More particularly, to put evidence that's the basis of the application in the hands of the Crown yesterday or today for an application today certainly isn't reasonable notice by any standard.

[23] The affidavit of Mr. Graham sets out certain factual allegations, some of which may already be within the knowledge of the Crown. For example, that he was never served a summons. He indicates where he was for some period of time, how he discovered the existence of the matter, when he came to Court. He suggests methodology by which he could have been notified. He alleges prejudice and certain things that have occurred as a result and things that haven't occurred that could have occurred because of delay in the later paragraphs of the affidavit. The Crown is entitled to, any party is entitled to, get that kind of documentation in a fashion that allows them to read it, assess it, determine whether there are evidentiary issues there that need to be investigated, with an appropriate and relevant time to investigate them, and either confirm some of those things or determine that they can be disputed, and if parties are going to be called to give evidence to properly cross-examine, and that's not present.

[24] I recognize the issue that Mr. MacIsaac raised, and that was Mr. Graham was out of province, presented himself in Mr. MacIsaac's office. This affidavit was composed on Friday. This isn't an issue of the actions particularly of counsel. I'm not here talking about counsel. I'm here talking about the defendant. The defendant is making the application. The defendant has sought counsel and

representation from counsel, and that's fine. But, counsel is speaking for the defendant and acting for the defendant and, ultimately, if the defendant wants to make an application, then the timing of that is something that counsel and the defendant are free to discuss, assess, communicate about, and deal with, as the circumstances of the case suggest is appropriate. In this case, Mr. Graham did not communicate with his counsel and I'm not attributing anything to that. I don't have any explanation for that, other than the bare fact that it happened on Friday, but that's when it happened. And, there are consequences when things of this nature get done that late in this process.

[25] So, firstly, there has not been timely and meaningful and anything close to sufficient notice of this application presented to the Crown, and there are some things that could conceivably need investigation and examination and assessment and Ms. Brown has said that on behalf of the Crown already.

[26] The second part of what I have to assess and determine and deal with is how do I then determine this application should be dealt with. Is it something that I should dismiss at this point, right now, or not allow to go forward, or grant an

adjournment so that the Crown can have proper notice of this and respond properly and fully?

[27] The Court clearly has the jurisdiction to do both. Where a defendant is raising a ***Charter*** issue and is alleging an infringement of his rights, the Court has to take that seriously and ensure that, ultimately, fairness governs, and that where it's appropriate, to allow an issue to proceed and be dealt with on its merits, that that happen. Conversely, fairness is an issue that applies to all parties in the criminal trial process. A defendant is entitled to fairness. The Crown is entitled to fairness. So, it's an issue that applies to all parties to the proceeding.

[28] The history of the proceeding, in my view, is relevant to the way I am going to deal with this. The matter has been outstanding for a considerable period of time. Aside from what's reflected in the Court record, and what's already been stated, the Court doesn't have a lot of information about the intervening period except in very, very general terms and allegations. The matter was outstanding for several years, between 2003 and 2007, with a warrant in existence. Mr. Graham first appeared before the Court August 27th and a trial date was set. He then,

through counsel, sought to have that trial date adjourned, and that was granted, and today's date was set.

[29] When considering the issue of an adjournment, at anytime, that's a discretionary matter. The Court has to exercise that discretion judicially. There are some particular issues that are more relevant in the case of a ***Charter*** application in deciding whether an adjournment of that should be granted or not.

[30] I've referred to the Ontario Court of Appeal judgment in **R. v. Blom**. The facts of that case are definitely different from the facts in this case, but that case did deal with procedure on a ***Charter*** application and the giving of notice. In that case, the trial judge did foreclose the defendant's ability to make a ***Charter*** application. The Court of Appeal in **Blom** determined that the trial judge erred in those circumstances and that the Summary Conviction Appeal Court, which approved of the earlier ruling, also erred in that analysis. So, to that extent, it is a helpful judgment to determine what sets of circumstances is appropriate for the Court to take the action the Crown's asking, and when it's not. There are also some differences in that that case had certain procedural rules which are in place in

Ontario which aren't in place in Nova Scotia, and that case involved an interpretation and application of those rules which don't exist here.

[31] My ruling here is going to be that I don't consider an adjournment to be appropriate. I'm not going to permit the application to proceed. There was not timely notice or sufficient notice, factually or legally, and I would consider that this is a case where there is prejudice in delaying the matter further. The matter has been delayed already for an extended period of time. There are witnesses that are here. The defendant has travelled an extensive distance to get here. The Crown has a witness who has travelled, as I understand it, from the United Kingdom to Alberta, from Alberta to here, and is going to be taking the same indirect route back to the United Kingdom. The trial has already been adjourned on one occasion on the application, specifically, of the defendant. I would consider that this is a proper case for the Court to exercise its discretion, not entertain the application, not grant a further adjournment so it can be undertaken, and direct that the trial go forward, and that's what I am doing.

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John D. Embree

Judge of the Provincial Court

Dated this 11th day of February, 2010, at Antigonish, Antigonish County, Nova Scotia