PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Annis*, 2023 NSPC 46

Date: 20231003
Docket: 8525040 - 8525042
Registry: Kentville

Between:

His Majesty the King

v.

Jacob Annis

Restriction on Publication:
PURSUANT TO s. 486.4 Criminal Code of Canada

DECISION – s. 11(b) *Charter* Application

Judge:	The Honourable Judge Ronda van der Hoek
Heard:	May 16, July 24 & 25, 2023 in Kentville, Nova Scotia
Decision:	July 24, 2023 (oral) September 29, 2023 (written), Kentville, Nova Scotia
Charge:	Section 266 Criminal Code of Canada Section 246(a) Criminal Code of Canada Section 271 Criminal Code of Canada
Counsel:	Nathan McLean, for the Provincial Crown Matheiu Boutet, for the Defence

Background

[1] On April 19, 2023, defence counsel filed notice of a s. 11(b) *Charter* application. The application came a little less than a month before the start of a two-day trial that had been set down one year prior in May 2022. While the Court received a copy of the notice, the Crown did not. A courier slip confirmed service of the notice at the Crown's office on April 19, 2023, however that office has never located the notice. As such, the Crown first heard of the application on Friday, May 13, 2023, while engaged in an email exchange with defence counsel in the lead-up to the first day of trial on May 16, 2023.

[2] The Crown sought summary dismissal of the *Charter* application in accordance with *R. v. MacDonald*, 2023 NSPC 9, a decision of Judge Atwood declining to hear a s. 11(b) *Charter* application when counsel failed to comply with the *Provincial Court Rules,* and, quite importantly, did not follow judicial direction to file materials on dates certain; and *R. v. Callaghan-Tucker*, 2022 NSPC 9, a decision of Judge Bégin also declining to hear a *Charter* application for failure to comply with the *Rules* by choosing not to file transcripts related to important dates wherein defence counsel's actions appear to have led to delay; and *R. v. Greenwood*, 2017 NSSC SK 352344 (an unreported decision of Campbell J.) that also addressed the need to provide transcripts of court proceedings in aid of characterizing the nature of any delay.

[3] The Crown argued the Applicant did not comply with the *Rules* as the application came too late to permit scheduling it 60 days before trial. In addition, the Applicant failed to provide transcripts of the relevant court proceedings, instead filing only cd recordings (See *Rules* 2.4(1) and 2.1(3)).

[4] The Crown argued for summary dismissal, and the Applicant responded relying on the test for same recently set out in *R. v. Haevischer*, 2023 SCC 11. That decision post dates the above-mentioned case law and serves to clarify the test applicable on summary dismissal applications in criminal matters. As such, the Applicant argues the *Provincial Court Rules* need not be applied strictly and the matter can proceed on the basis of the notice and the six short audio recordings of the court appearances.

[5] I declined to summarily dismiss the matter on May 16, instead offering the Crown the opportunity to consider and reply to the Applicant's argument. In the

interests of efficiency, I ordered the trial to proceed as scheduled. The Crown called all of its witnesses, save the complainant, whose testimony was pushed ahead to July 25, 2023, the day after the Court would hear the Crown's response to the new summary dismissal test.

[6] On July 24, 2023, the Crown conceded the test in *Haevischer* had been met, rendering it unnecessary for this Court to consider the intersection between it and the *Rules*, and I heard submissions on the s. 11(b) *Charter* application.

[7] This is the written decision on the *Charter* application following my brief oral decision wherein I found the matter did not exceed 18 months and declined the request for a stay.

The Law

[8] Section 11(b) of the *Charter*:

> 11. Any person charged with an offence has the right
>
> (b) to be tried within a reasonable time; ...

[9] It is by now quite clear that the Supreme Court of Canada in *R. v. Jordan*, 2016 SCC 27, determined eighteen months is a reasonable time for completion of trials in this court. In addition, considerations for attributing various deductions were established in that decision and expanded upon in others. This all makes good sense, and the police, where possible, should keep the eighteen-month timeframe front of mind when commencing and completing an investigation, and certainly before choosing to swear the Information that starts the clock ticking and engages the *Charter* right. Doing otherwise risks hamstringing the Crown who also must remain cognizant of protecting the *Charter* right. Likewise, the Court and the Crown who have a role to play in ensuring protection of the right.

[10] The framework establishes that any delay attributable to the defence is subtracted along with delay attributable to exceptional circumstances, including discrete events: *Jordan* at paragraphs 48 and 60; *R. v. Coulter*, 2016 ONCA 704 at paras. 34 - 40.

[11] *Jordan* defines actions that will constitute defence delay at paragraphs 63-65:

> [63] … delay caused solely by the conduct of the defence. This kind of defence delay comprises 'those situations where the accused's acts either directly caused the delay . . . or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial' ... . Deliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests, are the most straightforward examples of defence delay. ... .
> [64] As another example, the defence will have directly caused the delay if the court and the Crown are ready to proceed, but the defence is not. The period of delay resulting from that unavailability will be attributed to the defence. However, periods of time during which the court and the Crown are unavailable will not constitute defence delay, even if defence counsel is also unavailable. … Beyond defence unavailability, it will of course be open to trial judges to find that other defence actions or conduct have caused delay ....
> [65] To be clear, defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay. For example, the defence must be allowed preparation time, even where the court and the Crown are ready to proceed. In addition, defence applications and requests that are not frivolous will also generally not count against the defence. We have already accounted for procedural requirements in setting the ceiling. And such a deduction would run contrary to the accused's right to make full answer and defence. While this is by no means an exact science, first instance judges are uniquely positioned to gauge the legitimacy of defence actions. [Emphasis added]

[12] In *R. v. Cody*, 2017 SCC 31, at paragraphs 32 and 33, the Court expanded upon the foregoing providing additional guidance for assessing whether delay was caused by defence counsel conduct:

> [32] Defence conduct encompasses both substance and procedure — the decision to take a step, as well as the manner in which it is conducted, may attract scrutiny. To determine whether defence action is legitimately taken to respond to the charges, the circumstances surrounding the action or conduct may therefore be considered. The overall number, strength, importance, proximity to the *Jordan* ceilings, compliance with any notice or filing requirements and timeliness of defence applications may be relevant considerations. Irrespective of its merit, a defence action may be deemed not legitimate in the context of a s. 11(b) application if it is designed to delay or if it exhibits marked inefficiency or marked indifference toward delay.
> [33] As well, inaction may amount to defence conduct that is not legitimate ... . Illegitimacy may extend to omissions as well as acts ... . Accused persons must bear in mind that a corollary of the s. 11(b) right "to be tried within a reasonable time" is the responsibility to avoid causing unreasonable delay. Defence counsel are therefore expected to 'actively advanc[e] their clients' right to a trial within a

> reasonable time, collaborat[e] with Crown counsel when appropriate and . . . us[e] court time efficiently'... ."

[13] It is also clear that defence may waive delay and that will be deducted together with any delay caused "solely by the conduct of the defence: *Jordan* at para. 26. Waiving delay "may be explicit or implicit, but must be informed, clear and unequivocal" (paragraph 27). There is also a general rule that the defence is not entitled to wait for complete disclosure before setting a trial date: *R. v. Kovacs-Tatar*, 2004 73 OR (3d) 161 (CA).

Position of the parties

[14] Both parties agree the time that will pass between the date the Information was sworn, **September 13, 2021**, to the agreed upon last day for trial, **May 18, 2022**, will be 20 months and 2 days (612 days). Incidentally, if the trial had been scheduled to conclude on March 13, 2022, the matter would not have exceeded the right to a trial within a reasonable *Charter* compliant time period. I thank the Crown for pointing that out.

[15] The Applicant argues not one adjourned court appearance was waived by the defence, nor did any represent a defence tactic or strategy aimed at creating delay, none were frivolous nor unnecessary, and all were made in aid of obtaining necessary disclosure prior to electing mode of trial.

[16] The Crown disagrees and argues the Court should **deduct a month between January 26, 2022, and February 23, 2022**, when counsel sought to adjourn because he could not meet with Mr. Annis due to Covid, not fully explained. Likewise, the period between **February 23, 2022, and April 20, 2022**, when the defence sought an unnecessarily long two-month adjournment.

[17] Deductible also is the period from **April 20, 2023, until May 24, 2023**, when the matter was delayed for an additional month despite the Crown raising with the Court concerns about delay and pushing for an election. The Crown submits that defence counsel did not require the outstanding DNA disclosure prior to electing mode of trial.

[18] Finally, the Crown argues deducting those three timeframes brings the matter well under the eighteen-month ceiling and the application should be dismissed. Before considering the arguments, I will first set out the chronology of proceedings.

Chronology and Findings

[19] The chronology set out below is based on transcripts, my own review of the recorded record, as well as the briefs and affidavits provided by counsel.

> **September 13, 2021: Information sworn**: Mr. Annis served notice of arraignment for November 9, 2021. Counsel retained after arrest and a request for disclosure was sent to the Crown the next day on September 14, 2021.
>
> **November 9, 2021**: **Arraignment:** Defence counsel attends and the Crown elects to proceed by indictment. The Court is told disclosure was couriered to defence counsel yesterday, and defence counsel seeks a four-week adjournment to receive and review it with client. Court offers three return dates, defence accepts the earliest- December 7, 2021. No comment from the Crown.

[20] The Crown says it disclosed a substantial portion of the complete file in this initial mailing including the complainant's police statement. While a SANE was conducted, only the black and white photographs taken of the complainant were provided in the initial disclosure package. The Applicant did not receive text messages, the SANE report itself, nor the complainant's statement to the nurse as contained in the SANE report.

[21] It is fair to say the Court takes little issue with a defence request of a few months to review disclosure and take instructions in a fairly straight forward case. This often follows a police decision to swear an Information and set the arraignment two months out. Doing so means an accused may be expected to engage counsel in the time leading up to arraignment, and, when retained, counsel could seek disclosure right away. As a result, it is not impossible or imprudent to see four months taken up with those two necessary or inherent requirements before counsel can proceed to elect mode of trial.

[22] In this case there was a two-month delay between charge and arraignment, and despite promptly retaining counsel and seeking disclosure, the Applicant still

did not have it before arraignment, and so had to wait well over two months to receive initial disclosure. The request for an additional month to receive and review disclosure before electing was, I find, inherently reasonable delay.

> **December 7, 2021**: **Second appearance:** Defence counsel, now presumably in receipt of initial disclosure, advises the Court he sent an additional disclosure request to the Crown's office yesterday and now seeks an additional four to six weeks adjournment to January 26, 2022, to receive and review it.

[23] The Crown did not have a record of the request, asked when it was sent, defence counsel confirmed yesterday, and it was accepted by all that the request was still "in transit". The Crown says, "That adjournment works for the Crown".

[24] Arguably this is a reasonable point to expect a defence lawyer to be in position to elect in the absence of a clear explanation for not doing so. It can therefore be inferred the disclosure request was reasonable given the Crown took no issue with it despite the lack of clarity and not having received it. In fact, there were no Crown submissions made to the Court in aid of addressing the merit of the adjournment request or in aid of considering whether it was frivolous. However, there was also no attention paid to reducing the length of the 50-day adjournment given there had already been a four-week adjournment to review the initial disclosure material.

[25] I also note, this is not a case where the defence refused to elect, it simply sought an unopposed adjournment to obtain specified additional disclosure. In such circumstances the Court is not in a position to require an election not knowing whether the defence took a meritorious position to await the sought disclosure. In this case the Crown was silent, and it is therefore difficult to look back and conclude the election should have occurred if the Crown did not say so during the appearance.

[26] The Applicant points out he was still waiting for the SANE report, the complainant's statement to the nurse, and text messages.

> **January 20, 2022:** the Crown disclosed a *General Report*, half page statement of the person who called 911, the first *Forensic Analysis Report* dated January 18, 2022, and related *Biological Services DNA and Semen Information Sheets*. It still had not disclosed the previously sought SANE report, text messages, nor the statement to the nurse.

> **January 26, 2022**: **Third Appearance**: Defence counsel confirms receipt of additional Crown disclosure, but says he needs to meet his client, adding "it's been a little bit difficult due to Covid". He seeks to adjourn election for a month with a return date February 23, 2022. The Crown was silent, and defence did not advise if he had reviewed the recently sent material and found things missing, however the previously mentioned outstanding items would not be disclosed until over a year later in March 2023.

[27] Once again there was no real explanation of just how Covid impacted the ability to proceed to election- did it interfere with a lawyer/client meeting? Did one of the two suffer from Covid? It was also not clear if the necessary client meeting was aimed at addressing the recently received materials including the *Forensic Analysis Report,* the requested but not disclosed items, or those received in January 2022.

[28] The Crown argues on the application that any delay from January 26, 2022, onward should be characterised as defence deductible delay because additional time was not necessary in order to make an election. That position must arise from the conclusion a review of the *Forensic Report* and other items, made just six days earlier, was unnecessary.

[29] Defence accepts that requiring an election before receiving complete disclosure is fair, but not in this case and at this stage. He argues the Crown had still failed to provide the aforementioned items which are fruits of the investigation, and he also needed time to review the new material including the initial *Forensic Analysis Report.* It is difficult to disagree with that position, and the Crown did not express concern about delaying the election at the appearance.

> **February 23, 2022**: **Fourth Appearance**: The Court now expresses concern that the matter has reached five months without an election. Mr. Boutet appeared by agent who advised the Court they were in receipt of a letter from the Crown, dated January 5, 2022, advising it had yet to send some disclosure sought by defence. Crown confirms that disclosure relates to material just received at the Crown's office. Defence seeks an adjournment to April 20, 2022, its longest to date, and the Crown takes no issue with the almost two-month adjournment request, does not comment on the merits of the disclosure request or the length of delay, and accepts the next date.

[30] Once again, it is to be expected that the parties are in the best position to know if a matter can proceed to election. When the Crown advises the Court there is outstanding disclosure, and the defence seeks a month to obtain and review it, the Court can infer the material is relevant to the next step, in this case an election. However, a 56-day adjournment is, I find, excessive in the circumstances. It is unfortunate the Court and the Crown did not address the need for such a lengthy adjournment and the reasons for it on the record.

[31] Given the amount of time the Crown and the defence had been engaging with disclosure, and given the fact the initial disclosure package had been provided many months prior, the Court apportions this 56-day delay at 42 days defence deductible delay. A two-week adjournment was more than sufficient at this point.

[32] It is also worth pointing out that the three items of disclosure sought by the defence also should have been, at this stage, subject to a defence disclosure application. It was clear the items existed, and in order to move the matter along the defence should have sought an order to compel disclosure. Had it done so, the total delay in this matter may have been reduced, and such an application could have aided the Applicant's right to a trial in a reasonable time.

> **April 20, 2022: 5th appearance**: Defence counsel once again appears by agent who advises the Court some DNA results are not yet in and seeks an additional adjournment. The Crown says he does not have any notation about a joint request to adjourn for any reason, and notes initial disclosure has been made, the matter should move forward, and the DNA result is not needed at this point. He suggests the matter could be heard in a day and a half.

[33] Defence asked to return on the May plea day. (Note: The Court attaches the upcoming plea days to the Teams calendar, and I assume that is what counsel was referencing.). The Crown reiterates there was more disclosure on other appearances, the allegations are clear, and the matter should be set down. The Court asks defence counsel's agent if there will be a waiver until the May plea day; defence says there are no instructions to waive delay. The matter is adjourned to May 24, 2022.

[34] The Crown raised delay for the first time, and I readily agree this defence request to adjourn was not required prior to election. By this time the case appeared straight forward, there was plenty of disclosure in hand, and sending an agent meant

it was not practicable for the Court to push the agent to enter an election. As previously mentioned, defence could have brought an application to compel disclosure. Case law makes clear that full disclosure is not needed to proceed to election. Made clear during submissions on this application, I understand this was not a case where identity was in issue, in which case the results of the DNA warrant would have significant repercussions on the decision to elect. The complainant's anticipated evidence was disclosed, and she must, I presume, have alleged facts that supported a charge under s. 271 Cr. C. with or without DNA. I must also note there was no mention at the appearance of the three regularly listed and still outstanding disclosure- SANE report, text messages, and statement to nurse.

[35] The defence decision to seek an additional 34 days of delay could not be attenuated given the counsel of record was not personally present in the courtroom. An election could have been entered at this point, and as a result I find this 34-day period unnecessary defence deductible delay.

[36] Having found 42 and 34 days of delay attributable to the defence, and deducting those 76 days from the total delay, I find the matter is just below the 18-month ceiling. The trial will continue.

[37] Application denied.

van der Hoek PCJ.