IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Francis, 2007 NSSC 108

Date: 20070405
Docket: CRSK 270243
Registry: Kentville

Between:

Her Majesty The Queen

Plaintiff

v.

Dale Brian Francis

Defendant

Judge:	The Honourable Justice Gregory M. Warner
Heard:	By written submissions, and conference call, at Kentville, Nova Scotia
Final Written Submissions:	March 23, 2007
Counsel:	Donald C. Murray, Q.C., - counsel for the defendant
	Robert C. Hagell, and Richard M. Hartlen, counsel for the Crown

By the Court:

INTRODUCTION:

[1] Dale Brian Francis is charged with the second degree murder of William John Nevin at Indian Brook, Hants County, Nova Scotia, on January 1, 2006. He has elected trial by judge and jury. On October 18, 2006, his trial was set down before a jury, commencing May 1, 2007, at the Courthouse at Windsor, Hants County. He applies to move the trial to Kentville.

The Application

[2] At the pretrial conference on December 15, 2006, counsel for the accused gave notice of an intention to apply for a change of venue of the trial from the Windsor Courthouse. The Court directed him to make a formal application. On December 28, 2006, the accused gave notice in writing of an intention to apply for a change of venue. On March 5, 2007, he filed an application to change the venue of the trial to the Courthouse at Kentville, Kings County, Nova Scotia, pursuant to s. 599 of the Criminal Code, or, if that section does not apply, to relocate the trial by the inherent authority of the Court.

[3] The accused points out that Windsor and Kentville are in the same "jury district", for which there is one jury list, from which one jury panel is selected for all jury trials at both Windsor and Kentville. The substance of the accused's application is that the facilities at the Windsor courthouse are inappropriate for the conduct of a homicide jury trial, and the trial environment compromises both the appearance and the fact of fairness and impartiality.

[4] While acknowledging the lack of decided authority for ordering the relocation of a jury trial based on the inadequacy of courtroom facilities, the accused asks the Court to balance the level of prejudice created by a trial at the Windsor courthouse with any inconvenience from a move, and the relative improvement achieved by moving the trial, and grant the application. He specifies eight complaints with respect to the Windsor courthouse.

Crown's Response

[5] The Crown opposes the change of venue, or trial relocation, for reasons set out in written submissions dated March 9 and March 23, 2007.

[6] The Crown's reply of March 9, 2007, states that the "alleged shortcomings with the Windsor facilities can be addressed by directions from the Court for long needed action to be taken by the Court Administration". It further submits: "This is a matter with far reaching policy implications for rural courthouses throughout this Province with financial implications for the citizens of Hants County and with precedent setting effect such that the transfer of this matter for reasons noted will essentially mean the Windsor courthouse will never again be used as a jury trial venue. . . . The policy implications noted above far outweigh any potential inconvenience caused by the advanced age of this facility and the failure of the appropriate authorities to maintain the infrastructure to appropriate levels".

[7] The Crown's reply makes it obvious that the Crown acknowledges significant deficiencies with respect to the Windsor courthouse which, it says, this Court should order be remedied as an alternative to moving the site of the trial.

[8] The Windsor courthouse is not in risk of under-utilization. The Windsor courthouse facility with its one courtroom is a much used facility. It has scheduled court sittings, between the Provincial and Family courts, on four days per week. Wednesdays and the twice-yearly jury terms are the only dates available to the Supreme Court. Because Hants County lawyers appear in the courts which sit in Shubenacadie on Wednesdays, counsel are usually not available for Supreme Court trials on Wednesdays, except twice-monthly Chambers.

[9] The problems with the use of the Windsor courtroom facility for a homicide or any criminal jury trial are not unique to it. The Chief Justice of Alberta, in **R. v. Koruz,** 1992 CarswellAlta 583 (AltaCA), wrote, at paragraph 67, in respect of delay in a trial caused by the trial judge's decision to move a trial, because of inadequate facilities:

> . . . The government is under no obligation to provide elaborate courtroom facilities in every rural location in this province anticipating that someone there may decide one day to commit a complex crime requiring extensive use of courtroom facilities. To hold otherwise would mean the expenditure of public funds to cover the possibility, no matter how remote, that at some time in the

> future, facilities out of the everyday norm might be required. For the court to impose this obligation would be neither reasonable nor responsible. Indeed, it might very well encourage the elimination of the system of judicial districts, a result which would be counterproductive for those accused living in rural Alberta. Further, this is not a case where some makeshift courtroom facility could have been set up on a temporary basis for either this case or the regular court sittings. A secure facility was required for this case.

[10] Despite the reservation of two jury terms each year at Windsor, only four such trials have occurred in the last fifteen years; the last homicide jury trial was about fifteen years ago.

[11] In its March 23rd submissions, the Crown states that it would suffer significant prejudice by the relocation. The Crown is relying upon the evidence of several civilian witnesses, the majority of whom it classifies as "unwilling". This is based upon their interviews and upon evidence given at the preliminary inquiry. The Crown has compelled their attendance by subpoena. It feels that those witnesses will be less willing to attend a trial at Kentville than at Windsor, and this will result in applications for warrants that would otherwise be unnecessary, delays in the presentation of their case, and potential adjournments.

[12] On March 16th, I advised counsel that I believed that the accused's application did not constitute an application under section 599 of the Criminal Code, since Kings and Hants Counties were a single "jury district" as defined in the Juries Act, with a single "jury list" from which a single "jury panel' is selected for each term, whether held at Windsor or Kentville. On March 23rd, Crown counsel acknowledged that they could not "take issue with the analysis of the Court", and requested that the court apply the section 599 criteria for its decision and provide reasons "on the record". On March 26th, I ordered, and advised counsel, that the trial was being relocating from Windsor Courthouse to Kentville courtroom number 3, with reasons to follow. These are the reasons.

Background Facts

[13] The courtroom at the Windsor courtroom is on the second storey of an older building, accessible by one public stairway. The building is not designed to accommodate those in wheelchairs or others with physical disabilities.

[14] The Kentville Law Courts, the judicial centre for Kings and Hants County, contains courtrooms that are on the ground level and accessible by all, including the physically disabled.

[15] The distance from Indian Brook to Windsor is about 63 kilometres over Highway 14, a paved secondary road. The driving time is approximately one hour. The distance from Windsor to Kentville is about 35 kilometres over limited access Highway 101. The driving time is approximately one-half hour.

[16] The last homicide jury trial held at the Windsor Courthouse occurred about 1992; only three criminal jury trials have been held there since then.

The Complaints

[17] Of the accused's eight complaints, three merit analysis.

First Complaint- Courthouse is not accessible to members of the jury panel with physical disabilities.

[18] The accused says:

> the courtroom is inaccessible to potential jurors who use wheelchairs, as well as those persons who have significant difficulty with stairs. Such persons would, as a result be practically disqualified from being available for selection for jury duty in Windsor, while they would be able to serve in Kentville;

[19] The Crown's reply is:

> Accessibility for disabled people is the most troubling of the issues raised. It is not known whether persons in this category will be members of the jury pool. Until such an event occurs the point is moot. In the event there is a person with a disability who wishes to serve on the jury and is so qualified, the Crown will do everything in its power to accommodate the needs of the jurors with disabilities. Should this continue to be an issue, it is respectfully submitted that appropriate arrangements could be made by administration to secure PCW's or other licensed individuals to facilitate transportation of such people into and out of the court room. Activities, which until late, had been carried out by the Sheriffs.

[20] The courtroom in the Windsor courthouse is on the second floor; it is accessible by a single public stairway (and narrow private stairway). No part of the courthouse is designed to accommodate the physically disabled, except the ground floor entry. Access to the courtroom and related jury facilities constitute an significant obstacle to anyone with physical disabilities.

[21] The **Nova Scotia Juries Act** states in part:

> 7(1) . . . the jury co-ordinator for each district shall cause to be prepared a jury list of names drawn **randomly** from a data base that **to the extent possible shall include the entire population, eighteen years or older, of the jury district.**
>
> 10(1) . . . the jury co-ordinator for each jury district shall **randomly** select from the jury list the number of names determined by the jury co-ordinator in consultation with a judge and the persons whose names are selected shall constitute the jury panel.
>
> 2(1) In this Act
>
> (g) "jury district" means an area referred to in subsection (2);

Jury Regulations, made under Section 27 of the Juries Act, designates Kings and Hants Counties as a jury district for the purposes of ss 2(2) of the Act.

[22] The Act codifies the common law entitlement of an accused to a jury trial picked randomly from his peers. To paraphrase these statutory provisions, an accused is entitled to a jury panel randomly selected from a jury list, randomly drawn, to the extent possible, from the **entire** population of the jury district, including those with physical disabilities. (It may also be the right of those with physical disabilities to serve on a jury.)

[23] Contrary to the Crown's submission, it is not appropriate to wait until the day of jury selection to discover if there is a problem of accessibility for any potential jurors. A review of those on the jury panel who applied for exemption from the March 2007 Kentville jury term, shows that, of about one hundred applications, thirteen claimed physical disabilities restricting mobility that would likely have prevented access to the Windsor courtroom.

[24] Sheriffs are not permitted to assist persons with disabilities; apparently it is a matter of liability.

[25] The possibility of an emergency, and of being trapped, would be daunting to the physically disabled, and would mandate the presence of trained staff to effect a safe evacuation.

[26] The fact that juries have occasionally sat in this facility in the past is not a reason for it to continue, if the facility does not provide reasonable access to persons with physical disabilities.

[27] It is not a matter of the Crown "doing everything in its power to accommodate the needs of jurors with disabilities".

[28] The accused is denied a statutory right to a jury panel randomly selected from the entire adult population of the jury district if the jury panel does not include persons with physical disabilities.

[29] Section 11(d) of the **Canadian Charter of Rights and Freedoms** gives an accused charged with second degree murder, the right to trial by jury. This provision has been interpreted by some courts as entitling accused persons to a representative jury panel. **R. v. F.(A),** 1994 CarswellOnt 81(O.C.J.), and **R. v. Yooya**, 1994 CarswellSask 269 (S.Q.B) are decisions in which the principle that a jury must, as far as possible, represent the broad spectrum of society and not a special part of it. By logic and analogy, the jury must not exclude a spectrum of society, if possible, without that exclusion being based upon a reason logically connected with, and justifiable under, the criminal trial process. This conclusion is consistent with the analysis of Justice Rosenberg for the Ontario Court of Appeal at Part IX of its decision in **R. v. Church of Scientology**, 1997 CarswellOnt 1565 (and **R. v. Sherratt**, [1991] 1 S.C.R. 509, which Rosenberg J.A. quotes at paragraph 150). The selection of the jury panel in accordance with the Juries Act is the primary vehicle for ensuring representativeness. It does not create an entitlement to a panel of all of the many groups that make up Canadian society, although exclusion of certain groups, by statute, may infringe the requirement of a representative cross-section. Exclusion of a group, which has been randomly selected to the jury list or the jury panel in accordance with the statute, whether excluded by intent or by effect, and where accommodation is possible without

undue hardship, negates randomness, breaches the statutory right of the accused, and infringe on trial fairness.

[30] In this case, the accused is not a person with a physical disability, and therefore has no standing to seek an accommodation on behalf of those with physical disabilities under human rights legislation, or a remedy under s. 24 of the **Charter of Rights and Freedoms** for a breach of section 15. That is not the point of this analysis. It is the accused's right, by statute, to have a jury selected from the entire jury panel randomly selected from the jury list, which in turn is randomly selected " to the extent possible [from] the entire population, eighteen years or older, of the jury district". The decisions of the Supreme Court of Canada with respect to the procedures for determination of whether obstacles and standards for access to public facilities constitute justified or unjustified discrimination are relevant to an analysis of whether the exclusion of persons with physical disabilities from the jury panel is justified or not justified in the context of the entitlement of the accused to a fair trial.

[31] The analytical framework is set out, in the context of the workplace, in **British Columbia v. B.C.G.S.E.U.** (called "**Meiorin**") [1999] 3 S.C.R. 3, and was adopted and applied in both the majority and dissenters in **Council of Canadians with Disabilities v. Via Rail Canada Inc., 2007 SCC 15**, released on March 23, 2007.

[32] For the majority, Abella, J., wrote beginning at paragraph 120:

> 120 The same analysis applies in the case of physical barriers. A physical barrier denying access to goods, services, facilities or accommodation customarily available to the public can only be justified if it is "impossible to accommodate" the individual "without imposing undue hardship" on the person responsible for the barrier. There is, in other words, a duty to accommodate persons with disabilities unless there is a *bona fide* justification for not being able to do so.
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> 121 The concept of reasonable accommodation recognizes the right of persons with disabilities to the same access as those without disabilities, and imposes a duty on others to do whatever is reasonably possible to accommodate this right.
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> 122 In *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, this Court noted that it is "a cornerstone of human rights jurisprudence that the duty to take positive action to ensure that members of disadvantaged groups

> benefit equally from services offered to the general public is subject to the principle of reasonable accommodation", which means "to the point of 'undue hardship'".
>
> 128 A factor relied on to justify the continuity of a discriminatory barrier in almost every case is the cost of reducing or eliminating it to accommodate the needs of the person seeking access. This is a legitimate factor to consider. . .
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> 130 . . . undue hardship can be established where a standard or barrier "is reasonably necessary" insofar as there is a "sufficient risk" that a legitimate objective like safety would be threatened enough to warrant the maintenance of the discriminatory standard . . . Where no reasonable alternatives are available . . .and more recently, where an employer or service provider shows "that it could not have done anything else reasonable or practical to avoid negative impacts on the individual" . . .
>
> 131 . . . The size of a service provider's enterprise and the economic conditions confronting it are relevant . . .
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> 151 Based on the Canadian Standards Association . . .which sets out minimum standards for making buildings and other facilities accessible to persons with disabilities, . . . the accessibility paradigm is access by personal wheelchair. . . .
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> 154 . . . being forced to rely on others for assistance gives rise to "human error, inconvenience, delays, affronts to human dignity and pride, cost, uncertainty, and no sense of confidence or security in one's ability to move through the network".
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> 161 Personal wheelchair-based access as the appropriate accessibility paradigm is also consistent with this Court's human rights jurisprudence. . .
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> 162 The accommodation of personal wheelchairs enables persons with disabilities to access public services and facilities as independently and seamlessly as possible. Independent access to the same comfort, dignity, safety and security as those without physical limitations . . .

[33] After reviewing the six "corrective measures" required of Via Rail by the transportation agency, whose decision was the subject matter of the appeal, she wrote at paragraphs 225 and 226:

> 225 The threshold of "undue hardship" is not mere efficiency. It goes without saying that in weighing the competing interests on a balance sheet, the costs of restructuring or retrofitting are financially calculable, while the benefits of

> eliminating discrimination tend not to be. What monetary value can be assigned to dignity, to be weighed against the measurable cost of an accessible environment? It will always seem demonstrably cheaper to maintain the status quo and not eliminate a discriminatory barrier.
>
> 226 But the issue is not just cost, it is whether the cost constitutes undue hardship. . . .

[34] The majority upheld the Transportation Agency's conclusion that there was no compelling evidence of economic impediments to addressing the obstacles to access by persons with disabilities.

[35] For the minority, Deschamps and Rothstein JJ. also set out the **Meiorin** analysis, reformulated it to the circumstances of the **Via Rail** case, and made the following observations:

> 298 . . . the *prima facie* obstacle analysis must commence by assessing the alleged obstacle. For the Agency to conclude that an obstacle exists, it must be of more than minor significance to the mobility of persons with disabilities. Perfection is not the standard . . .
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> 299 Once the Agency determines that an obstacle is of sufficient significance, it must then determine if it constitutes an undue obstacle to the mobility of persons with disabilities.
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> 300 The first stage is to determine whether the obstacle exists owing to a rationally connected legitimate purpose. . .
>
> 302 . . . the Agency must, at the second stage, consider whether the continuing existence of the obstacle is based on an honest and good faith belief that it is necessary for that legitimate purpose.
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> 303 Finally, the third stage of the undueness analysis involves an assessment of whether the carrier's refusal to eliminate obstacles is reasonably necessary to achieve the legitimate purpose relied upon. Whether the existence of an obstacle is reasonably necessary requires an objective assessment of: (a) reasonable alternatives made available by the carrier to persons with disabilities affected by the obstacle; and, (b) constraints that may prevent the removal of the obstacle in question.

> 304 . . . A reasonable alternative must respect the dignity of the person with disabilities. It may be a functional alternative, . . .which enables the obstacle to be circumvented. The search for reasonable alternatives will vary with the circumstances of individual obstacle assessments.
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> 309 . . . At this stage, the Agency must engage in balancing the significance of the obstacle with the cost involved in removing the obstacle. Where the cost of removing the obstacle is disproportionate to the significance of the obstacle to the mobility of persons with disabilities, then the third part of the undueness analysis will be satisfied and the obstacle will not be found to be undue.
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> 310 The consideration of cost in human rights case law is well established. . . .
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> 313 In summary, we can say that the human rights principles that apply in the federal transportation context are essentially the same as those applicable in other human rights cases.

[36] On the facts of that case, the minority found that the Agency had made an error of law in its "undueness" analysis, by failing to determine the total cost for the corrective measures it ordered, when cost restraints were in issue (paragraph 354).

[37] I conclude, from **Via Rail**, that obstacles to access to public facilities for those with disabilities are not justified, unless, after a full assessment of all relevant factors, they impose an undue hardship on the entity or institution maintaining the facility.

[38] The purpose of this analysis is the determination of whether the exclusion of those with physical disabilities from the accused's jury panel is a breach of the accused's right to a randomly selected jury panel; said differently, whether their exclusion is justified by the limitation in the Juries Act of 'randomness' to randomness only "to the extent possible".

[39] There is no justifiable basis for a court to impose a lesser standard for access to justice facilities, than the Supreme Court finds that existing legislation imposes on those entities, whose circumstances warrant consideration of factors, such as economic factors, which are not as cogent to government, as to non-governmental entities.

[40] In this case, it is a matter of balancing lack of access to a second floor courtroom at Windsor, with the accessibility to a ground floor courtroom thirty five kilometres away, within the same jury district. In view of the conclusion of the majority in **Via Rail** on the meaning of "undue hardship", and the fact that the barriers, for the most part, disappear with the relocation of the trial, the decision is obvious.

Jury Independence Complaint

[41] The second complaint is with respect to the location of the jury room vis-a-vis the jury box, and the entrance to the courthouse.

[42] It is a significant concern, in respect of jury trials, that the jury be protected from close contact with the participants and the public. One concern is the protection of the jury from incidental, accidental, inadvertent or intentional contact, communication or messaging from members of the public, witnesses, or others who may have an interest in the proceedings. A second concern is that the independence of the jury not be compromised.

[43] At Windsor, the jury box is at the south-east corner of the courtroom to the left of the judge's podium and witness box. The jury room is at the north-west corner of the courtroom. Its entrance is off a corridor on the west side of the public gallery. The normal and most direct route for a jury, each time it moves between the jury box and the jury room, is to pass through the public gallery. This will occur several times daily - at each scheduled or unscheduled break. This situation creates the unnecessary, but significant, risk of the jury being exposed to contacts and communications that could (1) compromise their independence, and (2) expand their knowledge beyond evidence given under oath. This risk is elevated in this case.

[44] The Crown has suggested that the jury could exit the courtroom by other convoluted routes. It would slow down an already slow process. During a telephone conference call, Crown suggested that possibly the public gallery could be emptied before the jury was required to leave the jury box; such would be no less convoluted nor more expeditious. In addition, it is not a lawful, or appropriate if it was lawful, to close the courtroom while the jury is present.

Washroom Complaint

[45] There are limited washroom facilities in the building. There is one washroom in the jury room, another for court staff and one for the judge. There is only one other public washroom with one working toilet. It is located on the ground floor of the courthouse. The Crown says that there are other washrooms in the basement. They have not been used in a long time, and the fixtures have been removed. I am advised that they cannot be made operable by the trial date. This trial involves many witnesses and participants and will last several days. The washroom facilities are not adequate. As well, the location of the washroom will enhance opportunities for unmonitored frequent contact between witnesses, counsel, the public, and other trial participants.

Balancing the Interests

[46] The Crown's submission constitutes a plea for the upgrading of the Windsor courthouse to a standard that can accommodate jury trials. It does not address the immediate circumstances of a lengthy homicide jury trial involving many witnesses - a rare occurrence to date in Hants County. I agree with the comments of the Chief Justice of Alberta in **Koruz** that the government is under no obligation to provide elaborate courtroom facilities in every rural location of this province in anticipation of a crime requiring more extensive courtroom facilities.

[47] The public access to the Windsor courthouse would create a serious impediment to members of the jury panel with physical disabilities, the paradigm for which is access by personal wheelchair (per both opinions in **Via Rail**). This need not be so. The accused is entitled to a jury chosen from the entire randomly-chosen jury panel.

[48] The courthouse facilities at Kentville are not perfect, but do provide easy access for people with disabilities. In addition, the design of courtroom number 3 reduces the chances of contact between the jury and other participants in the trial, thereby reducing the chances of a mistrial.

[49] The Crown submits that the majority of the civilian witnesses are "unwilling" to be witnesses, and that the relocation of the trial, from a courthouse that is 63 kilometres from their homes to a courthouse that is 100 kilometres from their homes, will cause the Crown to "suffer significant prejudice" at this late stage. It

cites difficulties experienced at the week-long preliminary inquiry held in Shubenacadie (close to Indian Brook).

[50] I have two difficulties with this submission. First, the accused gave verbal notice of his intention to apply for the change on December 15, 2006, gave written notice on December 28, 2006, and made formal application on March 5, 2007. At the December 15th pre-trial, the Crown anticipated that it would not oppose the application. It has changed its mind (as it had a right to do), but the request is not a "late" request. The Crown had no basis for presuming that the request would not be made, or granted. Second, I am concerned about the difficulties that "unwilling" witnesses could cause to the trial process, and do not question the Crown's view of the difficulties that witnesses may cause for its' ability to present its case, but I fail to understand how the moving of the trial to a courthouse which is about 100 kilometres away from their homes from a courthouse which is 62 kilometres away, would make a "significant" difference in their willingness to attend or testify.

[51] The fact that witnesses may be on the highway for thirty minutes longer, is an inconvenience, but it does not overcome (1) the statutory right to a jury selected from all persons on the jury panel, including persons with disabilities, and (2) a courthouse that can afford a much better chance of protecting the jurors from improper contact and communication with the participants.

J.