SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Adam Joseph Drake*, 2024 NSSC 429

Date: 20240126
Docket: CRH 519166
Registry: Halifax

Between:

His Majesty the King

v.

Adam Joseph Drake

Decision on Voir Dire (#2) – Governing Indictment

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	By written submissions
Last Written Submissions:	September 18, 2023
Oral Decision:	January 26, 2024
Released for Publication:	June 17, 2025
Counsel:	Cory J. H. Roberts, for the Provincial Crown Stanley W. MacDonald, K.C. and Allan F. MacDonald, for the Applicant

By the Court (Orally):

[1] The Crown withdrew the indictment against the accused several days before his jury trial was scheduled to begin. As such, the jury had not yet been empaneled, Mr. Drake had not yet been arraigned, and he had not entered a plea to the charge of first-degree murder that he was facing. Several pretrial motions had already been heard by Justice Boudreau, who was the intended trial judge, and the case management judge.

[2] A transcript of the withdrawal of the charge appears in tab D of the affidavit of Jack A. F. MacDonald dated August 25, 2023. The accuracy of that transcript is not in issue:

THE COURT:	Thank you, please be seated. Alright this afternoon we return to the matter of the Queen and Adam Drake. We adjourned from this morning. Mr. Harlen needed some time. Mr. Hartlen, are you ready to proceed?
MR. HARTLEN:	I am My Lady. With regard to the Indictment currently before the Court, CR number 495087 charging Adam Joseph Drake with first degree murder, the Crown at this time upon review of the available evidence, is withdrawing the charge. We are specifically not undertaking not to relay. Thank you.
THE COURT:	I'm taking it Mr. Hartlen and I don't need any details but I'm taking it this is because of brand new information? The only reason I ask is because you recall two weeks ago I had asked about whether this was proceeding. This Courtroom now won't be used because its too late to offer it to someone else.
MR. HARTLEN:	I appreciate that My Lady.
THE COURT:	Alright, thank you. So, the charge is being withdrawn by the Crown. Mr. Drake I believe is on a Recognizance, is that correct?
MR. MACDONALD:	That's correct.
THE COURT:	Alright so that Recognizance then would be vacated unless someone can tell me why it shouldn't be.
MR. HARTLEN:	It should be.
MR. MACDONALD:	No reason why the Recognizance shouldn't be vacated. The only issue that I have to take a look at, is it was issued out of the Nova Scotia Court of Appeal. So, I have to follow up on that. I just don't know off hand whether that, I mean with the Crown withdrawing the charge, no doubt the Recognizance

	I'm sure follows. But just because it's a different situation I just want to make sure of that.
THE COURT:	Alright, so I guess I'll just note for the record that in principle it's understood that that Recognizance would be vacated but you'll double check on that Mr. MacDonald, to make sure the paperwork doesn't, there's no confusion there?
MR. MACDONALD:	Correct. Thank you.
THE COURT:	Alright, is there anything further then on the matter?
MR. HARTLEN:	No, My Lady thank you.
MR. MACDONALD:	One moment, My Lady. No, that's everything. Thank you.
THE COURT:	Thank you. Alright the charge is withdrawn. The matter is concluded. Thank you all.

[3] The Defence has argued that the Crown had no authority to withdraw the indictment in this case because (a) it had been "preferred", and (b) the trial had commenced before the trial judge prior to the withdrawal, hence either leave of the Court, or the defendant's consent, was required.

[4] Consequently, Mr. Drake argues that it is the Indictment of December 13, 2019, as amended on November 6, 2020 ("the first Indictment"), which governs this prosecution, rather than the one dated October 8, 2022/November 17, 2022 ("the second Indictment").

Background

[5] Tyler Ronald Joseph Keizer died on Gottingen Street in Halifax, on November 21, 2016. Adam Joseph Drake has been charged with first-degree murder in relation to Mr. Keizer's death. He was originally charged in an Information sworn on March 7, 2019. Then, on December 13, 2019, a direct Indictment was preferred, which triggered the need for a judge and jury trial. Next, the preferred Indictment was replaced on November 6, 2020, because the original had contained a typographical error. The trial itself, had the first Indictment not been withdrawn, would have commenced on November 2, 2021.

[6] In advance of the anticipated empanelment of the jury on November 2, 2021, Justice Boudreau had heard a number of applications, some of which, the defendant contends, were evidentiary in nature. I will list them sequentially:

A. A third-party records (O'Connor) application, as well as applications pertaining to witness protection program records. They were heard on

November 9, 2020, December 1, 2020, December 11, 2020, and January 11, 2021 (MacDonald affidavit, exhibit A)

B. A Charter application with respect to an alleged breach of Mr. Drake's Charter (s. 8) right to be free of unreasonable search and seizure, in specific relation to his cell phone which had been seized by police. This occurred on August 30 and 31, 2021.

C. Crown applications to introduce certain (presumptively inadmissible) evidence to the jury, including antemortem statements of the victim, and bad character evidence of the accused, on September 1–3, 2021. Justice Boudreau's decision dated September 17, 2021, in relation to these issues appears at exhibit C to the MacDonald affidavit.

D. On October 29, 2021, counsel were addressing Justice Boudreau with respect to some issues tangential to her "bad character" ruling, as well as some jury selection issues. This was when the Crown withdrew the charges in the first Indictment. The transcript associated with that withdrawal has been referenced above.

[7] On October 8, 2022, almost one year later, a second Information was laid. Its terms were identical to the charge contained in the first Indictment. On November 17, 2022, the second direct Indictment was preferred against Mr. Drake.

Issues

I. Did the Crown have the authority to unilaterally withdraw the first Indictment without leave of the court on October 29, 2021?; and

II. If no, does the first Indictment continue to be the governing indictment in these proceedings?

Analysis

I. Did the Crown have the authority to unilaterally withdraw the indictment without leave of the court on October 29, 2021?

[8] Mr. Drake argues that the Crown had no authority to proceed as it did. This was because his trial had already commenced.

[9] In *R v.Wu*, [2002] O.J. No 4758 (Ont. CA), the Court recognized that there are situations in which an accused's trial may be said to have commenced once a

judge makes evidentiary rulings, as has occurred in this case. In *Wu*, the court observed:

> [20] Thus, an accused entitled to a jury trial is tried by a court composed of a judge and jury. For the judge, the trial commences on the hearing of an application pursuant to s. 645(5) of the *Criminal Code* – assuming such application is made. Otherwise it generally commences on the hearing of evidence before the jury: s. 669.1(1) of the *Criminal Code*. For the jury, the trial commences when the accused is put in their charge after the jury has been selected and sworn. In this unique sense, a jury trial may well commence at different stages of the trial proceedings for both the judge and the jury. Only when the trial actually commences for the judge and for the jury do they respectively become seized of the trial.
>
> [21] I agree with this description of the process in a trial involving judge and jury. It is, in a sense, a bifurcated process with the trial judge being seised from the outset and the jury becoming seised once it has been sworn. It follows that there is no logical or legal reason for concluding that a mistrial in the jury selection process seeps back into the judge's jurisdiction to hear and dispose of pre-trial motions.
>
> [Emphasis added]

[10] This point was also canvassed in this court, in the near contemporaneous decision of *R v. Lalo*, 2002 NSSC 21, where the late Justice Heather Robertson stated:

> [25] As to the question of whether the indictment is preferred, upon the court hearing a s. 645(5) application, I would answer in the affirmative.
>
> [26] Matters that can now be heard under s. 645(5) would have earlier required that a jury be empanelled to start a trial before the pre-trial matters could be addressed. The indictment would be preferred at the opening of the trial, the accused asked to plea, the jury sworn and thus the court would be properly constituted and have jurisdiction to deal with the charges. For the trial judge to assume early jurisdiction pursuant to s. 645(5) the indictment must therefore be preferred, notwithstanding that in Nova Scotia there is no formal process of early preferment that occurs at the beginning of a s. 645(5) application. This is the logical application of the law as stated in *Litchfield.*
>
> [27] In my earlier decision on November 7, 2001 I stated:
>
> > The *Litchfield* case cannot be interpreted to mean that the trial has commenced in every case where a trial judge has heard a pre-trial motion pursuant to s. 645(5) or held a pre-trial conference.

> [28] I should have stated that the *Litchfield* case cannot be interpreted to mean that the trial has commenced where a trial judge has heard a pre-trial motion such as (1) application for state funded counsel or (2) held a pre-trial conference.
>
> [29] Further, it is clear from *Chabot* and *Litchfield* that a mere presentment of an indictment to the trial judge does not mean the indictment is preferred. Only a s.645(5) application can trigger preferment. I am also in agreement with both counsel for the Crown and the defence that the setting of a trial date does not trigger the preferment of the indictment. As well, any judge of a Superior Court may make a non-evidentiary ruling prior to the commencement of a s. 645(5) hearing. *R. v. Curtis, supra*; *R. v. Adamson, supra.*
>
> [30] Although it can be said with some certainty that evidentiary matters heard before jury selection, are heard by the jurisdiction granted by s. 645(5); other matters such as procedural matters or even a stay of proceeding would have to be examined in the particular circumstance of each case as to whether they came under s. 645(5).
>
> [Emphasis added]

[11] It is important to note, however, what cases like *Wu* and *Lalo* were addressing.

[12] *Wu* was dealing with the question of whether a mistrial during the jury selection process impacts upon a trial judge's earlier rulings in pre-trial motions (*Wu, para 21).*

[13] In *Lalo*, the questions before the Court were summarized by Robertson, J. in her findings:

> [37] In the result, I find that the six indictments now before the court are operative documents having been preferred effective May 29, 2000, the date of the commencement of the stay application, per *Litchfield* and the jurisdiction of s. 645(5).
>
> [38] I am now seized as the trial judge on all the remaining charges outstanding against Mr. Lalo. In the words of Mr. Justice Lofchik of the Ontario Superior Court of Justice in *Badgerow*, I have "assumed control of the trial process such as by making evidentiary or procedural rulings pursuant to the jurisdiction granted by s. 645(5) of the *Criminal Code*." Having made the foregoing ruling, it is unnecessary for me to address the issue of the rule against collateral attack.
>
> [Emphasis added]

[14] Here, the question is different to those raised in *Wu* and *Lalo.* In this instance, in order to even consider the question which the accused has raised, it is necessary to ascertain whether the accused's trial had already begun. If it could be said to have

begun, then I would also have to consider whether this sufficed to render the Crown unable to withdraw the first Indictment without leave of the Court.

a) Had the accused's trial begun when the Crown withdrew the first Indictment?

[15] Criminal Code, s. 645(5) is reproduced below:

> In any case to be tried with a jury, the judge before whom an accused is or is to be tried has jurisdiction, before any juror on a panel of jurors is called pursuant to subsection 631(3) or (3.1) and in the absence of any such juror, to deal with any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn.
>
> [Emphasis added]

[16] As observed in *Wu*, it is true that seizure may occur at different times for the Judge, and the (later empaneled) jury. However, it must be borne in mind that an accused is not placed in jeopardy until a) the Judge is seized, and b) the Jury becomes seized, too. This later event occurs when she/he enters a plea, after the jury has been empaneled.

[17] In a similar (but not identical) vein, *R v. G.S.*, 2020 NSSC 367, dealt with the specific question of whether a plea of *autrefois acquit* was available to an accused. The Crown had withdrawn the Indictment on the day that the accused's jury trial was scheduled to begin, before he had been arraigned and entered a plea. Justice Brothers said this:

> [15] The first question is whether the accused was ever placed in jeopardy. There are competing lines of authority respecting when an accused is placed in jeopardy. One line holds that an accused is in jeopardy once a plea is entered, before a court of competent jurisdiction: see *Petersen v. The Queen*, 1982 CanLII 200 (SCC), [1982] 2 S.C.R. 493 at 501, and *R. v. Conrad*, (1983), 1983 CanLII 2857 (NS CA), 150 D.L.R. (3d) 331 (N.S.S.C.(A.D.)) at para. 21.
>
> [16] Another line of authority suggests that an accused is not placed in jeopardy until evidence is called: *R. v. Selhi*, 1990 CanLII 130 (SCC), [1990] 1 S.C.R. 277.
>
> [17] In this case, the July 7, 2006, indictment was before the Supreme Court and G. S. had elected trial in the Supreme Court by judge and jury. Instead of proceeding to trial on April 23, 2007, the Crown withdrew the indictment. G.S. was not called upon to enter a plea prior to the withdrawal of the indictment.
>
> [18] Whether the decisions in *Petersen, supra*, and *Conrad, supra*, are followed or *Selhi, supra*, the accused before me was never asked to enter a plea and no

> evidence was called. By either standard, the accused was not placed in jeopardy on the earlier occasion. Accordingly, the plea of *autrefois acquit* is not available.
>
> [Emphasis added]

[18] These comments are apposite here for a number of reasons. First, it is standard practice in Nova Scotia that an accused is arraigned and pleads to the charges in front of the jury, once it has been empaneled. The Crown's withdrawal of the first Indictment, in this case, took place before this had occurred.

[19] Second, the pretrial rulings made by Justice Boudreau to the effect of whether certain evidence is admissible, or whether certain records may be made available to the accused, in this case, were not equivalent (for present purposes) to the calling of evidence. They merely affected which evidence, and/or types of evidence, may be called at trial before the jury. For example, for Justice Boudreau to say that a certain piece of evidence constitutes bad character evidence *simpliciter* is not tantamount to that evidence being "called". The rulings merely determine which evidence may be presented at trial. The rulings may affect whether she became seized with the matter at the applicable time, but the accused's jeopardy does not begin until later, when the Jury becomes seized also. Only at that time can his trial truly be said to have started.

[20] I take some comfort in the above conclusion when reference is had to the following:

> 574(1) Subject to subsection (3), the prosecutor may, whether the charges were included in one information or not, prefer an indictment against any person who has been ordered to stand trial in respect of
>
> (a) any charge on which that person was ordered to stand trial
>
> (b) any charge founded on the facts disclosed by the evidence taken on the preliminary inquiry, in addition to or in substitution for any charge on which that person was ordered to stand trial.

[21] As discussed in Salhaney, *Canadian Criminal Procedure*, 6th edition, 642:

> Prior to the abolition of the grand jury, the Crown was not entitled to withdraw an Indictment once the jury had returned a "true bill" because the indictment was now considered to be the accusation of the grand jury. The only way prosecution could be stopped was by directing the clerk of the court to enter a stay of proceedings i.e. *nolle prosequi*.
>
> Section 574 of the *Code* now provides that an indictment may be preferred by the simple act of filing it with the court. It would seem to follow that the Crown should

> be entitled withdraw an Indictment as of right at any time before the accused is arraigned and his plea taken. However, once the accused's plea is taken, the accused is placed in jeopardy, and the Indictment may not be withdrawn without the consent of the trial judge.
>
> [Emphasis added]

[22] As a consequence, the effect of the above is that, prior to plea, the prosecution may withdraw the Information or Indictment. After plea, the prosecution may require leave of the Court to withdraw it. (*See also R v. Pameolik, 2020 NUCA 13, para 47; and R v. McHale, 2010 ONCA ON, at para 32*)

b) Does it matter anyway?

[23] Even if I were in error on this point, I would have observed that all parties were before Justice Boudreau on October 29, 2021, when the Crown evidenced its intention to withdraw the first Indictment. As a consequence, had I concluded that it was good law that the Crown required leave of the court to withdraw the charges in these circumstances, I would have concluded that what occurred on that date before Justice Boudreau was tantamount to her having provided any requisite leave and/or approval in the absence of an objection by the Defence.

[24] I am also in agreement with the Crown when, in its brief, it points out the obvious incongruity which would ensure if this were not so:

> 14. Indeed, the following [previously referenced] exchange occurred with Mr. Drake's counsel after the Crown announced they would be withdrawing the charge:
>
> > THE COURT: Alright, thank you. So, the charge is being withdrawn by the Crown. Mr. Drake I believe is on a Recognizance, is that correct?
> >
> > MR. MACDONALD: That's correct.
> >
> > THE COURT: Alright so that Recognizance then would be vacated unless someone can tell me why it shouldn't be.
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> > MR. HARTLEN: It should be.
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> > MR. MACDONALD: No reason why the Recognizance shouldn't be vacated. The only issue that I have to take a look at, is it was issued out of the Nova Scotia Court of Appeal. So, I have to follow up on that. I just don't know off hand whether that, I mean with the Crown withdrawing the charge, no doubt the Recognizance I'm sure follows. But just because it's a different situation I just want to make sure of that.

> THE COURT: Alright, so I guess I'll just note for the record that in principle it's understood that that Recognizance would be vacated but you'll double check on that Mr. MacDonald, to make sure the paperwork doesn't, there's no confusion there?
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> MR. MACDONALD: Correct. Thank you.
>
> THE COURT: Alright, is there anything further then on the matter?
>
> MR. HARTLEN: No, My Lady thank you.
>
> MR. MACDONALD: One moment, My Lady. No, that's everything. Thank you.
>
> THE COURT: Thank you. Alright the charge is withdrawn. The matter is concluded. Thank you all.

15. As can be seen, there are important practical implications for the position now taken by the accused.

16. If the Indictment was not properly withdrawn by the Crown as now suggested by Mr. Drake, was he still subject to this strict release order from the time the Indictment was withdrawn? Is that release order still in place?

17. Mr. Drake sought a bail hearing following the Crown re-laying of this first - degree murder charge in October 2022 as well as his release on another unrelated homicide matter. Given Mr. Drake's position now, why was Mr. Drake seeking his release on this charge if the Indictment was never withdrawn and his Court of Appeal Release Order was still in effect?

II. Does the first Indictment continue to govern these proceedings?

[25] It does not, for the reasons noted above.

Conclusion

[26] Mr. Drake's application is dismissed. The second Indictment prevails.

Gabriel, J.