SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Doncaster*, 2013 NSSC 328

Date: 20131001
Docket: CRT 413736
Registry: Truro

Between:

Her Majesty the Queen

Plaintiff

v.

Ralph Ivan Doncaster

Defendant

Decision

Judge:	The Honourable Justice Gerald R. P. Moir
Heard:	September 25, 2013
Written Decision requested, transcribed, and released on:	October 11, 2013
Counsel:	Craig Botterill QC, for the plaintiff Ralph Ivan Doncaster, on his own

Moir J. (Orally):

[1] Mr. Doncaster is under a recognizance that includes the following conditions:

- (a) Cash bail in the amount of $750, to be paid from remaining balance of $2,200 cash bail paid on May 16, 2012.

- (d) Not to contact or communicate with, or attempt to contact or communicate with, directly or indirectly, any employee of or staff member at Enfield District Elementary School, David Lawlor, Tracy Lawlor, Tina Knol, except indirect contact through a lawyer and except indirect contact required in connection with service required in connection with any court documents.

- (i) Keep the peace and be of good behaviour.

[2] He gave notice of his application to vary these conditions as follows:

- (1) reduce cash bail to $100.

- (2) modify condition (d) to read:

> not to contact or communicate with, or attempt to contact or communicate with, directly or indirectly, David Lawlor, Tracy Lawlor, except indirect contact through a lawyer and except indirect contact required in connection with the service of court documents and except for contact incidental to court appearances.

- (3) remove condition (i).

[3] In a written brief and in oral submissions, Mr. Doncaster attempted to expand his application. He sought to set aside the recognizance on account of breach of his *Charter* rights. The alleged breach relates primarily to the fact that he received no disclosure of the discipline record of the police officer who gave evidence against him at the bail hearings.

[4] Mr. Doncaster also wants the recognizance reduced to a simple promise to appear on the basis that many charges against him have been dismissed.

[5] The charge for which Mr. Doncaster is to be tried in this court concerns emails he sent. He is charged with mischief. The people mentioned in condition (d) are witnesses in that case. Apparently, they are also involved in civil litigation that Mr. Doncaster started.

[6] As I said during the hearing, I am not prepared to entertain the expanded claims under the *Charter*, nor am I prepared to entertain the suggestion of a reduction from a release on recognizance to a promise to appear. They are beyond the notice Mr. Doncaster filed.

[7] Of course, I have a discretion to permit an amendment to the notice, but there are two reasons for not doing so. Firstly, we often have to scramble to shoehorn some new issue into a proceeding, but we do not always have to do that. Adding the expanded issue would require evidence and submissions. Likely, it would cause an adjournment. Economy of judicial resources demands that we not always scramble to fit in every issue a person wants to raise as quickly as can be done. People who frequently access judicial resources need to understand that their access displaces time available for others. Frequent access inclines judicial

discretion against quick accommodation when a truly pressing interest is not evident.

[8] Secondly, notice is fundamental to fairness. It is unfair to the other party to give late notice of a complicated issue and expect them either to scramble through a hearing or endure an adjournment.

[9] Mr. Doncaster is free to raise the *Charter* issue about his bail by giving the Crown fair notice of it and producing the evidence upon which he relies.

[10] So, I turn to the three changes for which Mr. Doncaster applied with reasonable notice to the Crown. The Crown agrees to the reduction in bail. Condition (d) is fully supported by the evidence. If Mr. Doncaster wants to litigate with the people he is to stay away from pending trial, and he cannot do so while abiding by the condition, he will have to wait until after his criminal trial.

[11] The requirement to keep the peace and be of good behaviour is in "standard form release orders" of the Superior Court of Ontario and the Ontario Court of Appeal, *R. v. Bosanac*, [1995] O.J. 4303 (O.C.J.) at para. 11. Mr. Botterill says it

is also "the standard form" of release used by the Provincial Court, Supreme Court, and Court of Appeal in this province. He relies on *Bosanac* to support the efficacy of the condition.

[12] Mr. Doncaster relies on *R. v. A.D.B.*, 2009 SKPC 120. In that case, Judge Harradence considered the appropriateness of the "keep the peace and be of good behaviour" provision for release of a young person. Although the judge expressly confined his reasons to the *Youth Criminal Justice Act*, he made some remarks of general application.

[13] At para. 17 he said:

> The inclusion of the conditions keep the peace and be of good behaviour and report to the Court when required to do so, in an undertaking or recognizance, without a consideration of the circumstances of the alleged offence, is redundant at best.

And he concluded in para. 22:

> The conditions keep the peace and be of good behaviour and report to the Court are unnecessary in Court ordered judicial interim release documents given the wording of the prescribed forms of an undertaking and recognizance found in the *Criminal Code*. These two conditions of release are not statutory nor are they mandatory. However a practice has evolved which results in the routine imposition of these two conditions, as if they were statutory. This is a practice which must not continue.

[14] Justice Goodearle supports the keep the peace and be of good behaviour condition in *Bosanac*. There, a Justice of the Peace had imposed the condition and the accused was acquitted of its breach on the basis that a Justice of the Peace has no jurisdiction to impose the condition. The Ontario Superior Court reversed.

[15] In answer to the argument that the condition is too vague, Justice Goodearle quoted at para. 9 from a decision from the Ontario Provincial Court.

> It is my view that the condition 'to be of good behaviour', should be limited in its application to conduct which is alleged to breach some criminal, federal, provincial or municipal law, and should not extend to conduct which, while lawful, violates some 'community standard of behaviour expected of all peaceable citizens', that is, 'to be of good behaviour' cannot be given its ordinary meaning, but must be limited to an alleged violation of some substantive law.

And he quoted further from the Provincial Court decision:

> The primary definition of 'good behaviour' in the quotation from Black's Law Dictionary set out above refers to 'lawful conduct', and 'behaviour such as is proper for a peaceable and law-abiding citizen' and 'conduct conformable to law, or to the particular law ... breached'. The emphasis always is on law. To give 'good behaviour' its 'ordinary meaning' is fraught with uncertainty.

[16] In my view, these quotations tell us exactly what is wrong with the automatic use of this non-statutory condition. It adds a new layer of sanction, not just to criminal behaviour, but to everything from violation of speed limit regulations on federal lands, such as airports, to violation of dog leashing by-laws of a municipality.

[17] Secondly, it is not in harmony with the presumption of innocence. That is why this condition is statutory for probation orders which are imposed after a finding of guilt and not for terms of release. Therefore, a condition to keep the peace and be of good behaviour should not automatically be imposed in cases when the accused bears the onus, or the Crown bears the onus.

[18] In this case, the Provincial Court judge had jurisdiction to impose it as in *Bosanac*. But, on a review, I have latitude not to continue the condition as if it were automatic. Condition (i) will be removed.

J.