IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *R. v. Stone,* 2021 NLCA 55
Date: November 29, 2021
Docket Number: 201901H0091

BETWEEN:

HER MAJESTY THE QUEEN — APPELLANT

AND:

BRIAN FREDERICK STONE — RESPONDENT

AND:

KEVIN BARNES — RESPONDENT

Coram: Welsh, Goodridge and O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador,
General Division 201701G1879
(2019 NLSC 164)

Appeal Heard: September 27, 2021
Judgment Rendered: November 29, 2021

Reasons for Judgment by: Welsh J.A.
Concurred in by: Goodridge and O'Brien JJ.A.

Counsel for the Appellant: Lloyd M. Strickland
Counsel for the Respondent, Stone: Rosellen Sullivan
Counsel for the Respondent, Barnes: Brian D. Wentzell

Authorities Cited:

CASES CITED: *R. v. Parsons*, 2017 NLCA 64, 2 C.A.N.L.R. 294; *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3; *R. v. Reid*, 2021 NLCA 13; *R. v. Tippett*, 2010 NLCA 49, 299 Nfld. & P.E.I.R. 174; *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631; *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659; *R. v. Gubbins*, 2018 SCC 44, [2018] 3 S.C.R. 35; *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66.

STATUTES CONSIDERED: *Canadian Charter of Rights and Freedoms*, section 11(b); *Criminal Code*, sections 380, 122 and 565(2).

Welsh J.A.:

[1] Charges of fraud and breach of trust against Brian Frederick Stone and Kevin Barnes were stayed when the trial judge determined that there had been a breach of their right to be tried within a reasonable time, as guaranteed under section 11(b) of the *Canadian Charter of Rights and Freedoms*.

[2] The Crown appeals that decision on the basis that the trial judge erred in applying the principles of law relevant to entering a stay of proceedings due to delay. In particular, at issue is whether the judge erred in determining which periods of delay should be attributed to the defence and which to the Crown. A related issue is whether first or third party disclosure applies to information that was generated during the Defendants' employment.

BACKGROUND

[3] On May 8, 2015, Mr. Stone and Mr. Barnes (collectively, the "Defendants") were jointly charged with one count of fraud and one count of breach of trust contrary to sections 380 and 122 of the *Criminal Code*. Immediate disclosure was provided by the Crown.

[4] The charges relate to the Defendants' employment as senior managers with the Canadian Coast Guard. The allegation is that, using their signing authority as employees, they used government purchase orders and acquisition cards to purchase components that they used in developing a piece of maritime tracking equipment called the Pathfinder. They later built and sold the machines for profit through a company they had incorporated. It is alleged that they each profited in excess of $200,000 from the sales, and that $171,500 worth of parts and services were charged to the Coast Guard.

[5] The matters proceeded in provincial court from May 8, 2015 when the information was sworn until March 3, 2017 when the Crown laid a direct indictment. This was followed by several months of delays and case management meetings. In February 2019, the Defendants applied for a stay of proceedings on the basis that the presumptive ceiling of 30 months delay had been exceeded, and their right to trial within a reasonable time guaranteed by section 11(b) of the *Charter* had been breached. The application, which was heard on June 25, 2019, was granted and a stay of proceedings ordered by decision dated September 16, 2019 (2019 NLSC 164).

[6] The parties accept the trial judge's conclusion that the total time that elapsed between the filing of charges and anticipated conclusion of the trial was 53 months and 17 days. The question is which periods of time should be deducted from that total in order to determine whether the presumptive ceiling of 30 months delay had been exceeded.

[7] The trial judge attributed delays of 6 months and 6 days to Mr. Barnes when his counsel was unavailable, and 3 months to Mr. Stone when he changed counsel.

[8] The Crown submits that the judge erred by failing to attribute to the Defendants a delay of 15 months and 20 days related to disclosure. The judge, relying on the decision of an applications judge, concluded that information on computer hard drives, which was generated during the Defendants' employment, should have been obtained from the Coast Guard by the Crown because it

constituted first party disclosure, and was, therefore, the responsibility of the Crown. The Crown submits that the information constitutes third party disclosure, which would be the responsibility of the defence.

[9] At trial and on appeal, the Defendants were represented by separate counsel. However, both counsel agreed that a delay occasioned by one of the Defendants would apply to both when calculating the length of delay attributed to the defence.

[10] A question regarding the Court's access to documents that had been ordered sealed by the court appealed from was not pursued following an earlier decision of this Court (2021 NLCA 12). The parties agreed that the documents should be available for purposes of the appeal.

ISSUES

[11] The issues to be considered in this appeal are:

1. (a) Should the Defendants be granted leave to raise an issue regarding the direct indictment when that issue was not raised in the court appealed from, and

   (b) If leave is granted, is the direct indictment a nullity?

2. Did the trial judge err in concluding that obtaining information from computer hard drives used by the Defendants during their employment is properly characterized as first party, not third party disclosure?

3. Did the trial judge err by deducting from the total delay only a portion of the delay occasioned when Mr. Stone changed counsel?

ANALYSIS

<u>The Legislation</u>

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

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

[13] Section 380 of the *Criminal Code* provides for the offence of fraud:

> Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,
>
> > (a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years ...;

[14] Section 122 of the *Criminal Code* provides for the offence of breach of trust by a public officer, which would apply to employees of the Coast Guard:

> Every official who, in connection with the duties of their office, commits fraud or a breach of trust, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person, is guilty of
>
> > (a) an indictable offence and liable to imprisonment for a term of not more than five years; ...

<u>Leave to Appeal a New Issue</u>

[15] The Defendants submit that the direct indictment that was preferred against them should be declared a nullity because charges on direct indictment must be tried by judge and jury, whereas, in this case, the information on the cover page of the indictment stated that trial would be by judge alone. This issue was not raised in the court appealed from. The Crown opposes the granting of leave.

[16] Leave of the Court is required where an appellant raises a new issue on appeal (*R. v. Parsons*, 2017 NLCA 64, 2 C.A.N.L.R. 294, at paragraph 12). Considerations that apply when exercising the discretion to grant leave are discussed in *Parsons*, at paragraphs 12 to 15. The analysis requires "balancing the interests of justice as they affect all the parties" (*Parsons*, at paragraph 12).

[17] Leave will more likely be granted where the issue is one of law that can be determined on the record. In *Parsons*, at paragraph 14, the Court referred to considerations discussed in *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3, "the state of the record, fairness to all parties, the importance of having the issue resolved by this Court, its suitability for decision and the broader interests of the administration of justice." (See also *R. v. Reid*, 2021 NLCA 13, at paragraphs 9 to 12.)

[18] In this case, whether the direct indictment is a nullity, is a question of law which can be determined on the record. Jurisdiction to prefer a direct indictment is an issue of importance suitable for decision by this Court. Consideration of

the issue at this stage would not result in an unfairness to a party, but would serve the broader interests of the administration of justice.

[19] In the result, I would grant leave to make submissions on the validity of the direct indictment.

Validity of the Direct Indictment

[20] The Defendants challenge the validity of the direct indictment on the basis that the indictment included a cover page indicating that the trial would be by judge alone. This, they submit, resulted in a nullity because, in the case of a direct indictment, the *Criminal Code* deems an election to trial by judge and jury unless the accused re-elects to be tried by a judge alone (section 565(2) of the *Criminal Code*).

[21] It is unnecessary to determine what effect, if any, would follow from the reference on the cover page of the indictment to trial by judge alone. On the facts of this case, any defect was cured at the time of arraignment. In *R. v. Tippett*, 2010 NLCA 49, 299 Nfld. & P.E.I.R. 174, Green C.J.N.L., for the Court (a panel of five), concluded:

> [80] I would therefore affirm the conclusion in *Pike* [(1992), 102 Nfld. & P.E.I.R. 1 (Nfld. C.A.)] that preferment of an indictment takes place when the accused enters his or her plea as part of the arraignment process.

[22] Here, before the arraignment took place, the Crown agreed to the Defendants' request for a trial by judge and jury. Accordingly, at the time the indictment was preferred, the Court, the Defendants and the Crown all understood that the trial would be by judge and jury; the deemed election of trial specified in the *Code* was in place.

[23] In the result, I would dismiss the application to quash the indictment or to declare the indictment a nullity.

Presumptive Ceiling for Delay – the Section 11(b) Analysis

[24] In considering the right to be tried within a reasonable time as guaranteed by section 11(b) of the *Charter*, a presumptive ceiling of 30 months delay is discussed in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631. The analysis begins with determining the total delay from the charge to the actual or anticipated end of trial, with delay attributable to the defence deducted from the

total (*Jordan*, at paragraph 60). The majority in *Jordan* cautioned, and explained:

> [60] ... The defence should not be allowed to benefit from its own delay-causing conduct. ...
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> [61] Defence delay has two components. The first is delay waived by the defence (*Askov* [[1990] 2 S.C.R. 1199], at pp. 1228-29; *Morin* [[1992] 1 S.C.R. 771], at pp. 790-91). Waiver can be explicit or implicit, but in either case, it must be clear and unequivocal. ...
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> ...
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> [63] The second component of defence delay is 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" (*Askov*, at pp. 1227-28). ...
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> [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. ... Beyond defence unavailability, it will of course be open to trial judges to find that other defence actions or conduct have caused delay [citations omitted].
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> ...
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> [66] To summarize, as a first step, total delay must be calculated, and defence delay must be deducted. Defence delay comprises delays waived by the defence, and delays caused solely or directly by the defence's conduct. Defence actions legitimately taken to respond to the charges do not constitute defence delay.

[25] In *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, the Court further discussed delay caused by defence conduct, emphasizing that the defence should not benefit from "its own delay-causing action or inaction" (*Cody*, at paragraph 28). The Court added:

> [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 <u>timeliness of defence applications</u> 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.

(Italics in original; underlining added.)

[26] In this case, only the second component of the analysis, conduct of the defence, is engaged.

First Party or Third Party Disclosure

[27] A main focus of the Crown's submission on appeal relates to whether the Crown or the Defendants had the onus of obtaining information from computer hard drives used by the Defendants during their employment with the Coast Guard. This issue involves characterization of the information as first or third party disclosure.

[28] The distinction between first and third party disclosure, and the relevance of the distinction are discussed in *R. v. Gubbins*, 2018 SCC 44, [2018] 3 S.C.R. 35. Rowe J., for the majority, explained:

> [18] In *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, this Court held that the Crown has a duty to disclose all relevant, non-privileged information in its possession or control, whether inculpatory or exculpatory. This is referred to as first party disclosure. The Crown's duty to disclose corresponds to the accused's constitutional right to the disclosure of all material which meets the *Stinchcombe* standard: *R. v. Dixon*, [1998] 1 S.C.R. 244, at para. 22. ...
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> ...
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> [20] The "Crown" for the purposes of *Stinchcombe* does not refer to all Crown entities, but only to the prosecuting Crown: *McNeil* [2009 SCC 3], at para. 22; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 11. All other Crown entities, including police, are third parties for the purposes of disclosure. They are not subject to the *Stinchcombe* regime. This is because the law cannot impose an obligation on the Crown to disclose material that it does not have or cannot obtain: *McNeil*, at para. 22.

[29] Rowe J., in *Gubbins*, went on to discuss the obligations of the Crown and the police insofar as the police, being the investigating body, have a particular obligation to disclose to the Crown "information contained in the investigative file" and "any additional information that is obviously relevant to the accused's case" (*Gubbins*, at paragraph 23).

[30] Regarding disclosure of information in the possession or control of a third party, Rowe J. explained that the appropriate procedure is for the accused to bring an application in which the burden is on the accused to establish the likely relevance of the information, after which, the judge "will examine the record to determine whether, and to what extent, it should be produced to the accused" (*Gubbins*, at paragraph 25).

[31] In determining whether information is properly characterized as first or third party disclosure, and, therefore, whether the Crown or the accused bears the burden of obtaining the information, Rowe J. concluded in *Gubbins*:

> [33] Based on the previous discussion of disclosure regimes, to determine which regime is applicable, one should consider: (1) Is the information that is sought in the possession or control of the prosecuting Crown? and (2) Is the nature of the information sought such that the police or another Crown entity in possession or control of the information ought to have supplied it to the prosecuting Crown? This will be the case if the information can be qualified as being part of the fruits of the investigation or obviously relevant. An affirmative answer to either of these questions will call for the application of the first party disclosure regime. Otherwise, the third party disclosure regime applies. ...

[32] The information sought in this case was information that the Defendants say was contained on the hard drives of the computers they used in their employment. Regarding the first question in the analysis, the hard drives were not in the possession or control of the Crown. It is necessary, then, to consider whether the nature of the information sought is such that the police should have obtained the hard drives or the Coast Guard should have supplied the hard drives to the Crown. In my view, for the following reasons, the second question should also be answered in the negative.

[33] The information on the hard drives was not required by the Crown in order to lay the charges. The police constable conducting the investigation testified that, in addition to approximately 15,000 pages of documents such as emails and business records obtained from the Coast Guard, she collected information through interviews with employees of the Coast Guard and individuals from other agencies and businesses.

[34] As discussed above, it is the responsibility of the Crown to disclose information that is relevant to the case the accused must meet. The Crown also has an obligation to disclose "information in respect of which there is a reasonable possibility that it may assist an accused in the exercise of the right to make full answer and defence", whether the information is inculpatory or

exculpatory (*Gubbins*, at paragraph 22). That is, if, while collecting information in relation to laying a charge, the Crown obtains information that may assist the accused, such as in establishing a defence, that information must be disclosed.

[35] However, it is not the responsibility of the Crown to conduct an additional search for, and obtain for disclosure, information for the purpose of supporting an accused's defence. It is not within the purview of the Crown to know what defences may be available to an accused. It is for this reason that a procedure is available whereby an accused may obtain disclosure from a third party.

[36] In this case, the Defendants claimed that they required information from the hard drives in order to demonstrate that they had the tacit approval of the Coast Guard to use government purchase orders and acquisition cards to purchase components for the Pathfinder. The Coast Guard refused to release the hard drives to the Crown, taking the position that it had provided to the Crown all the information relevant to the charges of fraud and breach of trust. The Crown was satisfied that it had the necessary information to lay the charges and provide disclosure to the Defendants.

[37] Applying the *Gubbins* test, the information sought by the Defendants in relation to a potential defence was not in the possession or control of the Crown. The investigative file and any obviously relevant information had been disclosed to the Defendants. In *Gubbins*, Rowe J. commented on the role of third party disclosure where the defence is seeking additional information which the accused claims is likely relevant, but has not been disclosed by the Crown:

> [24] ... From the foregoing, it is evident that there is an important role for third party disclosure where the records are neither part of the investigative file nor obviously relevant, therefore not part of first party disclosure: *McNeil*, at para. 60.

And further:

> [32] How should the courts determine whether a record in the possession or control of a state entity is subject to first party or third party disclosure? Relevance alone is not determinative. A record may be relevant to the case against an accused and still be a third party record.

[38] In this case, there was no basis on which to conclude that the Crown ought to have obtained or the Coast Guard ought to have supplied to the Crown the information sought by the Defendants. The Defendants sought the information for the purpose of establishing a defence to the charges. This is

properly characterized as third party disclosure which would be obtained from the Coast Guard, subject to the appropriate procedure.

[39] In the result, in order to obtain the information on the hard drives that the defence sought, it was necessary for the Defendants to make an application for an order of the court. The Defendants had the burden to show that the information on the hard drives would likely be relevant. Assuming that threshold was passed, the judge would determine whether and to what extent the contents of the hard drives should be produced. (See *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, at paragraph 27.)

[40] Being third party disclosure, the time taken in respect of the Defendants' pursuit must be assessed in terms of whether the delay, or a part thereof, is properly attributed to the defence, with the result that that period of time would be deducted from the total delay of 53 months and 17 days in order to determine whether the presumptive ceiling of 30 months delay was exceeded.

[41] The Crown takes the position that, if the Defendants had proceeded with an application for third party disclosure when the issue of access to the hard drives arose, the trial could have proceeded on the first date that was set, that is, June 29, 2018. The Crown had provided disclosure immediately after the charges were laid in 2015. Consideration of whether it was necessary for the Defendants to make an application for third party disclosure to obtain additional information from the hard drives was in play from that time. The issue was specifically raised on May 1, 2017 at the time of arraignment. This was 13 months before June 29, 2018, the date set for trial. The issue arose again at a case management meeting on October 13, 2017. In short, there was ample opportunity from when the charges were laid for the Defendants to obtain the additional information they sought in time to be prepared for trial on June 29, 2018. However, they failed to act in a timely way, in fact, showing marked indifference toward the passage of time.

[42] Indeed, their failure to act in a timely way resulted in the trial being re-scheduled to October 19, 2019. In the circumstances, the Crown submits that the period of time between those trial dates, that is, 15 months and 20 days, should be deducted from the total delay of 53 months and 17 days. I accept that submission. Applying the *Gubbins* and *Cody* analysis, it was the responsibility of the Defendants to make a timely application for third party disclosure of the information they sought. In the circumstances, the delay that occurred as a result of their conduct, 15 months and 20 days, would properly be deducted

from the total delay. This would reduce the delay to about 38 months for purposes of the *Jordan* analysis.

Change of Counsel

[43] The trial judge attributed 3 months delay to Mr. Stone's change of counsel from December 7, 2016 to early May 2017. He stated that the "change of counsel caused a delay of six months; three months attributed to Mr. Stone" (decision of the trial judge, at paragraph 13). There is no explanation as to why the judge attributed only a portion of the identified delay to Mr. Stone while he deducted the whole of the 6 months and 6 days delay occasioned when Mr. Barnes' counsel was unavailable earlier in 2016.

[44] In the absence of an explanation for reducing the period of delay, applying the principles in *Gubbins*, at paragraphs 63 and 64, I would attribute to the Defendants the whole of the 5 months delay occasioned by Mr. Stone's change of counsel. That delay, taken with the 6 months delay attributed in respect of Mr. Barnes results in a delay of 11 months to be attributed to the defence.

[45] In summary, the reduction in delay to 38 months occasioned from the third party disclosure issue together with the 11 months reduction related to unavailability and change of counsel results in a total delay of 27 months, which is less than the presumptive ceiling of 30 months delay.

[46] It is unnecessary, then, to consider whether there were exceptional circumstances on the facts of this case that would rebut the presumption that a delay exceeding 30 months is unreasonable. (See *Jordan*, at paragraphs 68 and 69; *Cody*, at paragraphs 64 to 71.)

SUMMARY AND DISPOSITION

[47] In summary, I would grant leave to make submissions on the validity of the direct indictment, but I would dismiss the application to quash the indictment or to declare the indictment a nullity.

[48] The Defendants' request for information on the computer hard drives in the possession and control of the Coast Guard is properly characterized as third party disclosure. Therefore, it was necessary for the Defendants to follow the applicable procedure by filing an application with the court. A delay of 15 months and 20 days resulting from the defence conduct is attributed to the defence.

[49] A total of 11 months delay is attributed to the defence as a result of unavailability and change of counsel.

[50] In the result, a total of 26 months and 20 days is properly deducted from the total delay of 53 months and 17 days. The consequent 27 months delay falls below the presumptive ceiling of 30 months delay.

[51] Accordingly, I would allow the appeal and set aside the stay of proceedings.

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B. G. Welsh J.A.

I concur: ________________________________

W. H. Goodridge J.A.

I concur: ________________________________

F. P. O'Brien J.A.