NOVA SCOTIA COURT OF APPEAL

Citation: R. v. Janes, 2011 NSCA 10

Date: 20110117
Docket: CAC 338620
Registry: Halifax

Between:

Derek Scott Janes

Applicant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Duncan R. Beveridge
Motion Heard:	January 13 &17, 2011, in Halifax, Nova Scotia
Written Judgment:	January 20, 2010
Held:	Motion for release pending appeal is granted.
Counsel:	Applicant in person Mark Scott, for the respondent

Reasons for judgment: (Orally)

INTRODUCTION

[1] This is an application by Mr. Janes for bail pending his appeal from conviction and sentence on a charge of common assault. The Crown opposes the application.

LEGAL PRINCIPLES

[2] The application is brought pursuant to s. 679(1)(a) of the *Criminal Code* and *Nova Scotia Civil Procedure Rule* 91.24. The relevant statutory provisions are:

> **679.** (1) A judge of the court of appeal may, in accordance with this section, release an appellant from custody pending the determination of his appeal if,
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> (*a*) in the case of an appeal to the court of appeal against conviction, the appellant has given notice of appeal or, where leave is required, notice of his application for leave to appeal pursuant to section 678;
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> . . .
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> (*c*) in the case of an appeal or an application for leave to appeal to the Supreme Court of Canada, the appellant has filed and served his notice of appeal or, where leave is required, his application for leave to appeal.
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> . . .
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> (3) In the case of an appeal referred to in paragraph (1)(a) or (c), the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that
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> (*a*) the appeal or application for leave to appeal is not frivolous;
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> (*b*) he will surrender himself into custody in accordance with the terms of the order; and
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> (*c*) his detention is not necessary in the public interest.

[3] The onus is on Mr. Janes to satisfy each of these criteria on the balance of probabilities. Before turning to a consideration of these criteria, I will briefly outline the circumstances that lead to this application.

[4] Mr. James is 34 years of age. He grew up in Halifax and graduated from St. Patrick's High School. Over the past 12 years he has worked, off and on, in Alberta. His presentence report prepared for the sentencing hearing indicates that he received training in radiography, which Janes explains is also known as NDT or nondestructive testing. In addition, he completed a course at NSCC towards becoming a fully accredited electrician. His employers in Alberta and in Halifax speak well of him as a reliable and hard-working individual. Unfortunately, over the past 16 years, he has accumulated an unenviable record of over 30 convictions for a variety of offences. Some are driving offences, most are for common assaults, damage to property, uttering threats, breaches of terms of judicial release and probation orders. Including the offences presently before this court, Janes has been sentenced a total of 13 times. However, the types and range of sentence imposed are telling. He has been given suspended sentences, fines, periods of probation and short periods of incarceration, usually ordered to be served intermittently. Prior to the present offences, the longest period of incarceration was four months.

[5] In April 2009, Janes was charged with four offences: assault on Maureen Grant, damage to her property, breach of probation by having contact with her without her prior consent, and breach of probation by failing to keep the peace and be of good behaviour. The Crown proceeded by indictment. He was released on a $5,000 recognizance with the usual conditions of no contact with the complainant and to remain away from her place of residence. Janes' father, Andrew Janes Sr., acted as a surety with deposit of $1,000 cash.

[6] Mr. Janes is presently self represented, and was so for the proceedings that led to this appeal, except for the involvement of a staff legal aid lawyer at his sentence hearing on October 18, 2010.

[7] There was a preliminary inquiry. The complainant testified under oath at that hearing that Mr. Janes had not assaulted her. The Crown withdrew the charge of breach of probation by having contact with the complainant without her consent. Mr. Janes was committed to stand trial on the remaining three charges.

[8] Mr. Janes stood his trial in a court composed of a judge and a jury May 3 to May 10, 2010. At the outset of the trial, Mr. Janes pled guilty to the charges of mischief or damage to property and breach of probation by failing to keep the peace and be of good behaviour by reason the mischief charge. A transcript of the trial proceedings is not yet available, but apparently the complainant told the jury she had lied at the preliminary inquiry due to threats by the appellant. Janes testified, presumably denying issuing any such threats and the assault itself. Following conviction, the trial judge, Moir J., on application by the Crown, remanded Mr. Janes pending sentence.

[9] Charges were then laid against Janes in June 2010 arising out of the complainant's evidence at trial that he wilfully attempted to obstruct justice by threatening the complainant between Apri1 2009 and December 1, 2009. He has elected trial in Provincial Court and pled not guilty. His trial has commenced and is presently set for continuation on April 28, 2011. According to the endorsements on the Information, Janes has been consenting to remand on these charges.

[10] Mr. Janes was sentenced by Moir J. on October 18, 2010. The Crown sought a sentence of 24 months. It acknowledged that Janes was entitled to credit for the more than five months he had spent on remand. The Crown argued for a sentence of an additional 13 months. The defence submitted he should be sentenced to time served or at most an additional two or three months that could be served intermittently to permit him to return to available employment and avoid pending financial ruination.

[11] The trial judge was satisfied that a sentence of 18 months was adequate. After credit for time spent on remand, this equated to an additional period of seven months incarceration, to be followed by three years probation with the only conditions, beyond the statutorily mandated ones, were ones ensuring he have no contact with the complainant and her children. Auxiliary orders requiring a DNA sample, and a prohibition on possession of weapons were issued. He was sentenced to three months concurrent on each of the damage to property and breach of probation charges.

[12] Mr. Janes filed his Notice of Appeal with the Registrar on October 25, 2010. In his materials, he announced his intention to try to obtain bail pending his appeal

and sought direction on what he needed to do. It is obvious from reading the materials that Mr. Janes wanted to appeal from conviction some time prior to that, but due to lack of resources and confusion over the process, his Notice of Appeal did not get perfected until after his date of sentence.

[13] Once Mr. Janes was able to gather the materials required by Rule 91.24, he filed his Motion for bail on December 17, 2010. The Registrar set the Motion down for hearing on December 30, 2010, but this was not communicated in time for Mr. Janes to properly review the Crown's submissions or have his proposed sureties present. The hearing eventually went ahead on January 13, 2010. The Crown cross-examined Mr. Janes and his sureties.

[14] Dates were set for the filing of facta, any proposed fresh evidence by Mr. Janes, and a hearing date. The earliest hearing date that could be achieved was May 13, 2011. I note that according to Mr. Janes he believes his release date from custody, should he serve the remainder of his sentence pending appeal, is March 5, 2011. The Crown has no information to contradict this.

[15] It is with this background I will now turn to the three criteria on which I must be satisfied.

a) appeal is not frivolous

[16] There is limited scope for a detailed examination of the merits of Mr. Janes' appeal. The trial transcript is not available. He complains he was denied a fair trial due to the Crown refusing to provide to him the same information it had during jury selection, and being denied a full opportunity to put contradictory material before the jury when cross-examining the complainant. The appellant also intends to bring an application to introduce fresh evidence on appeal attacking the credibility of the complainant. He says he did not have this material at trial because he was completely unaware that the complainant was going to change her evidence from what she testified to at the preliminary inquiry to her trial version. I will say more about this later.

[17] On the sentence appeal, no details are given, but it is safe to infer he intends to suggest the length of the sentence imposed was excessive. In any event, the Crown acknowledges the appeal by Mr. Janes has arguable merit. In these

circumstances I will say no more at this stage about the grounds of appeal. It is with respect to the second and third criteria that the Crown says Mr. Janes cannot meet his burden.

b) he will surrender himself into custody

[18] Mr. Janes testified that he will surrender himself into custody prior to the hearing of his appeal. He denied the Crown's suggestion that he has more ties to Alberta. Janes explained his only ties to Alberta were for employment. His family, his mother, father, brothers and his 19-year-old daughter, with whom he says he has good relations, all live in Nova Scotia.

[19] Janes owns a mobile home located on a lot in Harrietsfield. It is uncontested that he owns this home. He says it has an appraised value of $89,000 with a chattel mortgage against it of only $37,000. He has been paying the mortgage and lot fee out of savings, but now needs to return to work or lose this property. Janes says he has arranged to have employment with a former employer who is now carrying on business as Dan Paquin Electric.

[20] Mr. Paquin is a proposed surety and was cross-examined by the Crown. Mr. Paquin was an impressive witness. There was no suggestion of any criminal record. He has known Janes for approximately 20 years. Paquin is married with four children, three of which live with he and his wife part time and one full time. He owns his own home and operates his own small electrical business. He says he is confident Mr. Janes is not a flight risk and is willing to put up cash or $10,000 in property to guarantee compliance by Janes with the terms of release that I may set. Although Mr. Paquin may not have been aware of all of the details of Mr. Janes' record prior to January 13, 2011, he knew he had been in trouble with the law. He was certainly aware of the extent of it on January 13, since the Crown made sure during cross-examination that that was the case. Nevertheless, Mr. Paquin is still prepared to act as surety with full knowledge of the risk and consequences that entails.

[21] Importantly, Mr. Paquin is prepared to immediately employ Janes on a full time basis, which he said was at least 40 hours a week, but probably more. Since Janes is an apprentice, Padquin will be with him throughout the working day, 7:00

a.m. to 7:00 p.m., picking him up at his home and returning him at the end of the day.

[22] Andrew Janes Sr. is also prepared to act as surety. Mr. Janes Sr. is obviously not in the best of health, to say the least. He is 61 years of age, hard of hearing and with limited mobility. He is on a disability pension. Mr. Janes Sr.'s last employment was with Canadian Tire as warehouse manager. He acknowledged having one prior conviction in 1997 which seems likely to be a careless storage of a firearm offence, for which he received a fine. Despite being of limited means, he is prepared to post cash bail and act as surety for his son, including live with him in his home in Harrietsfield if bail is granted.

[23] The Crown does not suggest that the appellant has actually failed to show up in court in Nova Scotia. Mr. Janes says he has always done so, including traveling from Alberta to Nova Scotia for court on more than one occasion. The Crown does note that there was a warrant in Alberta for a failure to appear on a s. 253(b) charge. Mr. Janes maintained he had a lawyer in Alberta handling that matter. He has since pled guilty to that offence.

[24] The Crown's real argument is that Mr. Janes cannot be trusted to turn himself into custody as may be required by the terms of bail pending appeal because he has breached so many court orders in the past. The Crown's concerns are well founded. Without sureties the appellant's motion to obtain bail pending appeal would be doomed to failure. With only one, it would be doubtful. But with the two sureties it is not. I am satisfied that Mr. Janes will surrender as required by s. 679(3)(b) of the *Criminal Code*.

c) Detention is not necessary in the public interest

[25] Whether detention is or is not "necessary in the public interest" poses many difficult questions. Amongst others, what is meant by the "public interest", how is it to be measured, and when can it be said denial of bail is necessary as opposed to unnecessary?

[26] Mr. Janes is no longer presumed to be innocent of the charge of common assault against the complainant. The jury found it to be proved beyond a reasonable doubt. But if Mr. Janes is not granted bail pending appeal, he will have

served the remainder of his sentence before this Court can even hear his appeal from conviction and sentence, let alone release reasons. Since the Crown has conceded his appeal has arguable merit, its outcome is in doubt – either party could be successful. It can hardly be considered to be in the public interest if an appellant who will likely comply with terms of release protecting against the commission of further offences and show up in court, is nonetheless kept in custody thereby rendering his statutory right of appeal nugatory.

[27] The competing interests at play in assessing public interest has been the subject of considerable judicial comment. In Nova Scotia, it has been accepted that the Court must be concerned about a number of factors, both from the perspective of public safety in the sense of what is the likelihood of the appellant committing further offences or posing a danger to himself or others if released, and also, what would be the potential impact on the public image of the administration of justice if the appellant was required to remain in custody or is released.

[28] This approach was described by Cromwell J.A., as he then was in *R. v. Ryan*, 2004 NSCA 105:

> [21] I agree with former Chief Justice McEachern when he wrote in **R. v. Nugyen** (1997), 119 C.C.C. (3d) 269 (B.C.C.A. Chambers) at paras. 15 - 16 that the public interest requirement in s. 679(3)(c) means that the court should consider an application for bail with the public in mind. He went on to add that doing so may mean different things in difference contexts:
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> > In some cases, it may require concern for further offences. In other cases, it may refer more particularly to public respect for the administration of justice. It is clear, however, that the denial of bail is not a means of punishment. Bail is distinct from the sentence imposed for the offence and it is necessary to recognize its different purpose which, in the context of this case is largely to ensure that convicted persons will not serve sentences for convictions not properly entered against them. (Emphasis added)
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> [22] I also think it important to remember in applying the public interest criterion that it must not become a means by which public hostility or clammer is used to deny release to otherwise deserving applicants: see Gary Trotter, *The Law of Bail in Canada*, 2nd ed. (Carswell, 1999) at p. 390.

> [23] Underlying the law relating to release pending appeal are the twin principles of reviewability of convictions and the enforceability of a judgment until it has been reversed or set aside. These principles tend to conflict and must be balanced in the public interest. As Arbour, J.A. (as she then was) pointed out in **R. v. Farinacci** (1993), 86 C.C.C. (3d) 32 at 48:
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> > Public confidence in the administration of justice requires that judgments be enforced. ... On the other hand, public confidence in the administration of justice requires that judgments be reviewed and errors, if any, be corrected. This is particularly so in the criminal field where liberty is at stake.
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> [24] Justice Arbour then went on to discuss how these two competing principles may be balanced in the public interest:
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> > Ideally judgments should be reviewed before they have been enforced. When this is not possible, an interim regime may need to be put in place which must be sensitive to a multitude of factors including the anticipated time required for the appeal to be decided and the possibility of irreparable and unjustifiable harm being done in the interval. This is largely what the public interest requires to be considered in the determination of entitlement to bail pending appeal.
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> [25] This statement was cited with approval by my colleague Chipman, J.A. in **R. v. Innocente, supra**.

[29] This approach has been relied upon in numerous cases. See *R. v. Barry*, 2004 NSCA 126, para. 10; *R. v. Cox*, 2009 NSCA 15, para. 11; and most recently by Fichaud J.A. in *R. v. MacIntosh*, 2010 NSCA 77.

[30] Chief Justice MacEachern in *R. v. Nugyen* (1997) 119 C.C.C. (3d) 269 reviewed a number of authorities and concluded:

> [18] ...The principle that seems to emerge is that the law favours release unless there is some factor or factors that would cause “ordinary reasonable, fair-minded members of society” (*per O’Grady* at 4 [p. 139 C.C.C.]), or persons informed about the philosophy of the legislative provisions, *Charter* values and the actual circumstances of the case (per *R. v. K.(K.)* at 54), to believe that detention is necessary to maintain public confidence in the administration of justice.

[31] Factors that should be considered are the circumstances of the offence, as far as they are known, the circumstances of the offender, the seriousness of the offence, and the degree to which the public can feel protected by appropriate terms of release.

[32] The essential circumstances of the offence are described by the trial judge in his sentencing decision. Juries do not give reasons. It is sometimes difficult to discern their line of reasoning in reaching a verdict. In such circumstances, the trial judge is entitled to make his own assessment. Here the judge accepted the complainant's version of the events. This was, the complainant and the appellant began to argue. She pulled into a gas station. She told him to calm down. He said he did not have to and he hit her in the face and arm. She scratched at his eyes to get him to stop, but he hit her harder. The trial judge accepted the appellant did not use full force in his assault on the complainant, but described it as a very serious act of domestic violence.

[33] Mr. Janes has since been charged with very serious offences of threatening the complainant prior to her testifying at the preliminary inquiry. However, as the Crown acknowledges, for these alleged offences, he is presumed to be innocent. No evidence was called by the Crown to establish anything about the circumstances of those offences or probability of conviction. I think it would be fair to say though that the jury, based on the evidence they had before them, believed the complainant’s explanation as to why she testified as she did at the preliminary inquiry. Janes is on remand with respect to these charges with the trial not scheduled to finish until at least April 28, 2011. This begs the question why is he seeking bail pending appeal, since any order I may make will not secure his release from custody. Janes says he has to start somewhere. If he first sought judicial interim release on the outstanding charges in Provincial Court, it might also be said that that application would be labelled moot since he would still be serving a sentence.

[34] I find this to be a close case. The offence in issue is one of common assault. However, it arises out of a domestic relationship which heightens the seriousness of the offence. Although there are significant gaps in the criminal record of the appellant, he has certainly demonstrated an unwillingness in the past to comply with terms of release and probation orders. The domestic relationship at issue in the offence under appeal before me is over. Hence, if Janes is released, he has no

need to be involved or have any contact with the complainant. I note that at the end of his sentence which he estimates to be less than two months hence, he will be subject to a term of probation that he have no contact with the complainant and her children and not to be within 100 metres of any place of employment or residence known to him. I note also that Mr. Janes has already served the equivalent of an approximate 15 month sentence.

[35] The proposed terms of release by the appellant envisage a virtual house arrest. He is prepared to live at home with his father in Harrietsfield, and has confirmed employment for what is likely to be six days a week, 7:00 a.m. to 7:00 p.m. To guarantee his compliance with strict terms of release, he is willing to enter into his own recognizance and have two sureties, his father and his employer and long-time friend, in amounts that are significant.

[36] As observed by Fichaud J.A. in *R. v. MacIntosh*, *supra*, at para 21:

> ...An interim release, pending a conviction appeal, is not a moral judgment that absolves, condones or mitigates the judicial reaction to the reprehensible conduct for which the individual was convicted. Neither is an interim release a reduction of the sentence. If, after a conviction appeal is heard and determined, the Court of Appeal overturns the conviction, then the individual is freed, as any innocent person should be freed, and his imprisonment thankfully will have been reduced by his earlier interim release. If, on the other hand, the Court of Appeal dismisses Mr. MacIntosh's appeal, then the conviction and sentence will stand, and he will serve that full sentence without any reduction for the additional seven months house arrest that I will order here. Should his appeal fail, the house arrest under this ruling will add to his total period of lost freedom from the incarceration ordered by the sentencing judge.

[37] The authorities are clear that I am also entitled to consider the apparent strength of the appeal. See *R. v. Pabani* (1991), 10 C.R. (4th) 381.

> **11** ...There will no doubt be cases where the hearing of an appeal will be so long delayed and the probability of success on the appeal so strong that it would be contrary to the public interest to refuse a release and a fortiori an applicant's detention would not be necessary in the public interest. ...

[38] Here, the concerns raised by the appellant present arguable grounds. In addition, Mr. Janes has announced his intention to bring an application to introduce fresh evidence which includes documentary records he says will refute the

complainant's trial claim of improper contact. This material, he says he did not have at trial because he was unaware that the complainant would testify any differently than from her evidence at the preliminary inquiry until the very time he heard that evidence on the witness stand. Mr. Scott is not in a position to address, in any substantive way, this complaint. What he does say is that trial Crown counsel was also unaware of this drastic change until the complainant testified. If this is correct, it triggers a very serious concern about the impact of the late disclosure of this extremely important evidence on trial fairness in the middle of Mr. Janes' jury trial.

[39] I recognize that there a number of cases where bail pending appeal has been denied where the appellant has possessed a criminal record demonstrating a history of non compliance with terms of release. (See for example: *R. v. Sweet*, 2006 NSCA 141; *R. v. Tattrie*, 2007 NSCA 41; *R. v. Cox*, 2009 NSCA 15.) The facts and circumstances in those respective cases are distinguishable for a variety of reasons. In *Sweet*, the appeal would be heard before his sentence would be served, there was no surety, release plan other than to return home to the same situation that sparked the assault conviction under appeal. In *Tattrie*, the offence was far more serious, there was no release plan with any supervision whatsoever. In *Cox*, the offences were more serious with two separate victims of assault causing bodily harm, he had no firm employment plans on release and no sureties to guarantee his compliance with release conditions.

[40] Were it not for the two sureties present and available here willing to guarantee the appellant's compliance with strict terms of release, it would not be in the public interest to release the appellant. I also take into account the apparent strength of the appellant's complaint that late disclosure during his trial hampered his ability to effectively respond to a very much changed case. The appellant will be required to remain in his residence except for specified exceptions, the principal one being employment, which will be full time and in the presence of Mr. Paquin. I grant the application by the appellant for release pending his appeal upon the following terms:

1. That he enter into a recognizance in the amount of $20,000 with the following conditions, that:

1. He attends court on May 13, 2011 at 10:00 a.m. at the Law Courts, 1815 Upper Water Street, Halifax, Courtroom # 6, and to attend thereafter as required by the court according to law;

2. He keep the peace and be of good behaviour;

3. He reside at 28 Bellwood Drive, Harrietsfield;

4. He remain in his residence at all times except for:

   (a) employment with Dan Paquin Electric;

   (b) in the event of a medical emergency;

   (c) in the event of a regularly scheduled legal appointment;

   (d) in the event of a regularly scheduled medical appointment;

   (e) in the event of a regularly scheduled court appearance.

   (f) for the purpose of attending to personal needs, for a duration not exceeding three hours, on Sundays, between 1:00 p.m. and 6:00 p.m.

5. Should he leave his residence for any of the exceptions listed, except in the case of employment, he is to proceed by the most direct route to and from such places, and prior to leaving shall notify the Halifax Regional Police at 490-5016 that he will be leaving his residence;

6. He present himself at the door of his residence within five minutes of a knock on the door or a telephone call by the police at any time that he is not out of the residence as permitted by the exceptions listed above;

7. He is not to possess or apply for a Canadian passport;

8. No one other than his father, Andrew Janes Sr., is to live or stay overnight at his residence at 28 Bellwood Drive for any reason;

9. He shall not consume, use or possess any alcohol. There will be no alcohol in his residence at 28 Bellwood Drive in Harrietsfield;

10. He will not leave Nova Scotia for any reason;

11. He will have no direct or indirect contact or communication with Maureen Dawn Grant, Brooke Grant and Courtney Grant;

12. He will not be within 100 meters of any place of employment or residence of Maureen Grant known to him.

13. He will provide the Crown with his cell phone number and keep it with him at all times, and provide the Crown with the telephone number of any other phone that he subsequently obtains;

14. He will surrender into the custody of the keeper of the Central Nova Scotia Correctional Facility at Dartmouth, Nova Scotia, by one o'clock in the afternoon of the day preceding the day in which the appeal will be heard, and he will be advised at least 24 hours before the time by which he must surrender into custody, in the event the appeal is sooner dismissed, quashed or abandoned.

15. He will surrender into the custody of the keeper of the Central Nova Scotia Correctional Facility at Dartmouth, Nova Scotia, within 24 hours of the filing of the Registrar of this Court of the Order dismissing or quashing the appeal or the notice of abandonment of the appeal as the case may be.

16. He will surrender into the custody of the keeper of the Central Nova Scotia Correctional Facility at Dartmouth, Nova Scotia, by one o'clock in the afternoon of the day preceding the day in which the appeal decision will be released and he will be advised at least 24 hours before the time by which he must surrender into custody.

2. His release is conditional upon the appeal proceeding on the date scheduled for the hearing of this appeal, which is May 13, 2011, and if the date is to be

changed for any reason this order for release shall be reviewed in Chambers on a date fixed by the Court.

3. Two named sureties must also enter into the recognizance. The first is that of Andrew Janes Sr. on his deposit of $1,500 cash; the second is that of Dan Paquin in the amount of $10,000, without deposit;

[41] I think it important to recognize that imposing these terms of recognizance that Mr. Janes will be subject to far more stringent conditions for a much longer period of time than if he simply finished serving his sentence. He recognized this during submissions on his motion for bail. That is his choice.

[42] I invite comment from the Crown and Mr. Janes with respect to the terms of the recognizance that I have described, and incorporated such changes and clarifications as I considered appropriate. An order will issue accordingly.

Beveridge, J.A.