PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Thompson*, 2013 NSPC 124

Date: 20131218
Docket: 2642440, 2642441
Registry: Pictou

Between:

Her Majesty the Queen

v.

Glenn Smith Thompson

DECISION REGARDING APPLICATION TO VARY UNDERTAKING

Judge:	The Honourable Judge Del W. Atwood
Heard:	18 December 2013 in Pictou, N.S.
Charges:	Paras. 266(b), 264.1(1)(a) of the *Criminal Code*
Counsel:	Andrew O'Blenis for the Nova Scotia Public Prosecution Service Ian A. (Sandy) MacKay Q.C. for Glenn Smith Thompson

By the Court:

[1] This is an application brought by Mr. Thompson pursuant to the provisions of section 515.1 of the *Criminal Code* to vary a Form 11.1 undertaking which requires, among other things, that Mr. Thompson remain within the Province of Nova Scotia. Mr. Thompson's job requires him to travel outside this province; the prosecution has very fairly consented to the deletion of the remain-within condition to allow Mr. Thompson to pursue his work.

[2] The Court hears many of these types of applications, with almost all of them being consented to by the prosecution as the applicants pose no flight risk whatsoever.

[3] The authority of policing services to release persons arrested with or without warrant, upon terms of Form 11.1 undertakings, is set out in sub-ss. 499(2) (when the arrest is warranted) and 503(2.1) (covering arrests without warrant) of the *Code*. The two provisions are identical, and state as follows:

> . . . [T]he peace officer or officer in charge may, in order to release the person, require the person to enter into an undertaking in Form 11.1 in which the person undertakes to do one or more of the following things:

(a) to remain within a territorial jurisdiction specified in the undertaking;

(b) to notify the peace officer or another person mentioned in the undertaking of any change in his or her address, employment or occupation;

(c) to abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the undertaking, or from going to a place specified in the undertaking, except in accordance with the conditions specified in the undertaking;

(d) to deposit the person's passport with the peace officer or other person mentioned in the undertaking;

(e) to abstain from possessing a firearm and to surrender any firearm in the possession of the person and any authorization, licence or registration certificate or other document enabling that person to acquire or possess a firearm;

(f) to report at the times specified in the undertaking to a peace officer or other person designated in the undertaking;

(g) to abstain from

(i) the consumption of alcohol or other intoxicating substances, or

(ii) the consumption of drugs except in accordance with a medical prescription; or

(h) to comply with any other condition specified in the undertaking that the peace officer or officer in charge considers necessary to ensure the safety and security of any victim of or witness to the offence.

[4] Curiously omitted from the *Code* is any requirement that a Form 11.1 undertaking be confirmed judicially, unlike other forms of less restrictive police-issued process, namely promises to appear, appearance notices and recognizances; these must be confirmed judicially under para. 508(1)(b)(i) in order to have compulsory effect.

[5] The basic law of bail is spelled out in para. 11(e) of the *Charter*:

> Any person charged with an offence has the right not to be denied reasonable bail without just cause.

[6] Sub-section 515(10) of the *Code* sets out the only permissible grounds for bail denial when the issue is before a court for adjudication:

> (10) For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:
>
> (a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;
>
> (b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and
>
> (c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including

> (i) the apparent strength of the prosecution's case,
>
> (ii) the gravity of the offence,
>
> (iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and
>
> (iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

[7] In my view, these grounds must be applied by police when making a decision whether to release an accused on Form 11.1 terms.

[8] The purposes of a constitutional bail system were described by Lamer J. (as he then was) in *R. v. Morales*.[1] They are not hard to grasp: bail is structured to get the accused to return to court as required, prevent the commission of further offences, and prevent the commission of offences against the administration of justice; public safety and evidence preservation are implicit in this.

[9] In order for bail to be reasonable, it makes sense that the conditions of bail must be reasonable. A condition imposed upon the liberty interests of a person admitted to bail that is not connected reasonably to one of the constitutional purposes of the bail system is, in effect, not constitutionally compliant. As was

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[1] [1992] S.C.J. No. 98 at paras. 35-40.

underscored recently with great clarity by Moir J. of the Nova Scotia Supreme Court, the automatic inclusion in bail-admission orders of terms not connected rationally to the individual case is not in harmony with the presumption of innocence.[2]

[10] It follows that the automatic inclusion in Form 11.1 bail of a condition that the accused remain within the territorial jurisdiction of the province is not lawful, as it has the effect of making mandatory a condition that is clearly optional under paras. 499(2)(a) and 503(2.1)(a) of the *Code*. The imposition of such a condition would be constitutionally compliant only if the officer processing the release were to have sufficient grounds to believe that the accused would pose a flight risk. In none of the Form 11.1 bail-variation applications that I have heard has that been the case, which leads me to have concern that this condition is being imposed in many cases improperly.

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[2] *R. v. Doncaster*, 2013 NSSC 328 at para. 17.

[11] In any event, with the consent of the prosecution, this application is granted. Para. A of your undertaking, order 1580119, is deleted. Please wait outside Mr. Thompson, and the paperwork will be ready for you to sign in just a little while, and you're free to go.

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J.P.C.