SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Colpitts*, 2017 NSSC 22

Date: 20170124
Docket: CRH 346068
Registry: Halifax

Between:

Robert Blois Colpitts

v.

Her Majesty the Queen

MID-TRIAL RULING
TRIAL MANAGEMENT

Judge:	The Honourable Justice Kevin Coady
Heard:	January 18, 2017
Written Decision:	January 24, 2017
Counsel:	James Martin, Mark Covan and Scott Millar, for the Crown Robert Blois Colpitts, Self-Represented Jane O'Neill, for Daniel Frederick Potter

By the Court:

Introduction and Background:

[1] Robert Blois Colpitts and Daniel Frederick Potter are jointly charged with a series of frauds. The Crown alleges that between January 1, 2000 and September 13, 2001 they acted to fraudulently affect the public market price of shares of Knowledge House Incorporated (KHI). Mr. Potter was the President/CEO of KHI, while Mr. Colpitts was legal counsel.

[2] The Crown has closed their case and presently Mr. Colpitts is calling evidence. It has become apparent he is unable to garner his witnesses such that all scheduled trial dates are utilized. Concerns over lost time during this lengthy trial were raised by the Court and the parties were invited to make submissions. This is my ruling.

[3] On January 12, 2017, the CBC announced a study with the following byline: "Nova Scotia Records 192% Jump in Inmates Presumed to be Innocent and Awaiting Trial." The study indicated that Nova Scotia has the highest proportion of inmates (68%) who are in jails on remand waiting for a judge, a jury or an open courtroom.

[4] The wait time for trials in this Court is lengthy. The earliest date for a three-day trial is December 27, 2017. The earliest date for a two-week trial is February 16, 2018. The recent Supreme Court of Canada decision in *R.* v. *Jordan,* 2016 SCC 27 has placed tremendous pressure on this Court to complete criminal trials within 30 months from charge. These pressures require this Court to operate efficiently.

[5] On November 1, 2016, and after 95 days of trial, the Crown closed its case. On that same day Mr. Colpitts elected to call evidence and gave his opening address. His first witness was Mr. Carrière. Due to issues surrounding a document, his evidence was adjourned until November 7, 2016. On November 3, 2016 administrative issues consumed much of the day. On that date Mr. Colpitts called Mr. Boilard, a former compliance officer with National Bank Financial. On November 7, 2016, Mr. Carrière returned and completed his testimony.

[6] On November 8, 2016, Mr. Colpitts called Dr. Schelew. He testified on direct on November 8th and 9th and was cross-examined on November 10th and 14th. On November 15th Mr. Colpitts called Mr. Marcotte whose testimony ended on November 16th. On November 17th Dr. Schelew's testimony was completed.

[7] The first block of sitting days (11 days) ended on November 17th with four of Mr. Colpitts' witnesses testifying. While there were several interruptions, for the most part all 11 days were generally well-utilized. The Court did not sit the weeks of November 21st and November 28th, 2016.

[8] This trial was scheduled to sit the weeks of December 5th and December 12th, 2016. The Court did not sit on December 5th and 6th because Mr. Colpitts did not have witnesses available and, as a result, those two days were lost. On December 7th Mr. Colpitts called Ms. Goudreault. On December 8th he called Mr. Gagnon, whose testimony extended into Friday, December 9th. Mr. Gagnon's testimony did not finish, so he returned on Tuesday, December 13th. As a result, Monday, December 12th was lost.

[9] On December 14, 2016, Mr. Colpitts called Mr. Peters. Clearly Mr. Peters' evidence was ill-prepared and his testimony had to be interrupted mid-day, resulting in the loss of a further one-half day. In the thirteen trial days available in December, 2016, Mr. Colpitts completed two witnesses and almost four days were lost.

[10] The Court and the Crown proposed sitting on December 19th and 20th, 2016, to complete Mr. Peters' testimony. Mr. Colpitts was undecided on how to proceed with Mr. Peters (expert or lay witness) and advised he could not be ready for these dates. While these two days were informally scheduled, they were available yet lost. The Court and the Crown proposed returning on January 3rd to 5th to complete Mr. Peters' testimony. Mr. Colpitts advised the Court he could not sit that week as he had scheduled those days to prepare his January witnesses. The Court acceded to his request on the understanding the January witnesses would proceed in a more efficient fashion given time to prepare. The result was the loss of five days of potential testimony.

[11] Mr. Peters returned on January 9, 2017. He testified on January 10th, 11th and part of the 12th. Ms. Orlup testified on the afternoon of January 12th. Mr. Colpitts did not have available witnesses for January 16, 17th or the morning of January 18th and, as a result, a further 2 ½ days were lost.

[12] Mr. Colpitts indicates he will be calling Mr. Loridon on January 18, 2017, but acknowledges he has not been served formally. He further indicates he has a local witness who will consume one-half of January 18th. Mr. Colpitts advises he will be calling a Mr. Lecat on January 19th but acknowledges service has not been effected. He suggests a local witness will be available on January 20th.

[13] The first three weeks of January's scheduled sitting days will likely result in a loss of at least five days. Mr. Colpitts has provided an informal list of witnesses for the week of January 23 to 26, 2017. He proposes calling a Mr. Theroux on January 26th but is unable to confirm service. Mr. Theroux is also scheduled for January 30/31. That leaves February 1st and 2nd open. Mr. Colpitts proposes calling a Mr. Balser and a Ms. Menard but is unable to confirm service on these individuals at this time.

[14] The Court is not scheduled to sit the week of February 6th. Mr. Colpitts advises he will have other witnesses scheduled for the next three-week slot but has not provided any proof that their attendance has been secured. The bottom line is that in seven plus weeks we have only heard from eight witnesses.

[15] The past seven weeks do not provide any evidence that future trial dates will be fully utilized by Mr. Colpitts. The reason for the above delays is very apparent. Mr. Colpitts did little to issue timely subpoenas or to prepare his witnesses until after the Crown closed its case. To this date I continue to sign out-of-province subpoenas. If this were a relatively short trial this problem would be less alarming. However, we are 115 days into this trial with no indication of when the evidence will be completed.

[16] This state of affairs cannot go on forever. The time has come for me to control this process which is presently chewing up massive judicial resources and blocking

others from accessing the justice system. I have been sensitive to the fact Mr. Colpitts is a self-represented Defendant. This Court has made every effort to assist him throughout this trial. There is little else I can do without affecting the integrity of this trial. I must attempt to create some degree of efficiency over the days to come with respect to Mr. Colpitts' evidence.

In 1995, some 22 years ago, then Chief Justice Lamer gave the following address to the Empire Club in Toronto:

> Some trials are so long that one wonders whether the process will not collapse under its own weight. I think our greatest challenge over the next several years will be to cope with complexity and prolixity in legal proceedings. We must find ways to retain a fair process, but in the context of a process that can achieve practical results in a reasonable time and at reasonable expense. If we cannot find ways to do this, I fear that our legal system will become simply irrelevant for most purposes.

These concerns were again addressed by the Supreme Court of Canada in *R*. v. *Jordan*, *supra,* at paragraphs 114 and 139:

> 114. The new framework makes courts more accountable, too. Absent exceptional circumstances, the ceiling limits the extent to which judges can tolerate delays before a stay must be imposed. Indeed, courts are important players in changing courtroom culture. Many courts have developed robust case management and trial scheduling processes, focussing attention on possible sources of delay (such as pre-trial applications or unrealistic estimates of trial length) and thereby seeking to avoid or minimize unnecessary delay. Some courts, however, have not.
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> 139. For the courts, this means implementing more efficient procedures, including scheduling practices. Trial courts may wish to review their case management regimes to ensure that they provided the tools for parties to collaborate and conduct cases efficiently. Trial judges should make reasonable efforts to control and manage the conduct of trials. Appellate courts must support these efforts by affording deference to case management choices made by courts below. All courts, including this Court, must be mindful of the impact of their decisions on the conduct of trials.

[17] In the case of *R.* v. *Bordo,* 2016 QCCS 477 that Court commented on a Trial Judge's power to manage a criminal trial. *Bordo* relied on the Appellate Decision in *R.* v. *Auclair,* 2013 QCCA 671. In that case Doyon, J.A. referenced a paper by Justice Casey Hill in which he stated:

> Originally cast in terms of inherent authority to control the processes of the court and prevention of abuse of the process, it is today recognized that a trial judge has a duty to *manage* the trial process balancing fairness to the parties as well as efficient and orderly discharge of court process. Judicial management of litigation recognizes that 'there is more at stake than just the interests of the accused'. Management involves control, direction and administration in the conduct of a trial. This power, settled within a broad discretion, relates to the entirety of the trial proceeding extending beyond the scope of pre-trial case management rules designed for 'effective and efficient case management'.

And further in *Auclair*:

> 55 A presiding judge has an inherent power to manage the trial, and a judge's powers of intervention in a criminal trial are considerable. This is understandable at a time when trials lasting several months or even years are relatively common, not to mention the impact on the *Charter* on the complexity of the files. A judge's role should no longer be limited to that of a mere arbitrator allowing parties to conduct their case as they see fit. A judge must have the power to make the orders necessary to ensure an orderly trial, without which the administration of justice risks being be [sic] thrown into disrepute.

[18] This issue was also dealt with in *R. v. Schneider,* 2004 NSCA 99. In that case Justice Cromwell stated that limiting the examination or cross-examination of defence witnesses, or the right to call defence witnesses will only be justified in clear and compelling circumstances. Justice Cromwell further stated at paragraph 57:

> 57 The main duty of a trial judge is to do everything he or she can reasonably do to ensure that the trial is fair. Where, as here, the accused persons are not represented by counsel, this duty includes providing a measure of assistance to the accused to the extent that this is possible and consistent with the judge's role as an impartial decision-maker. But how these duties ought to be undertaken in the course of a trial cannot be reduced to a series of rules or a list of 'do's" and "don't's'. The trial judge must be left a large measure of discretion as he or she responds to the particular challenges of a specific case. At the end of the day,

> what counts is that a trial be free of legal error and conducted with fairness: see for example, R. v. Taylor (1995), 142 N.S.R. (2d) 382; N.S.J. No. 290 (Q.L.) (C.A.) at paras. 21 – 30; leave to appeal dismissed [1998] S.C.C.A. No. 186.

[19] In essence the S.C.C. has recognized that for our justice system to operate, Trial Judges must have some ability to control the course of proceedings before them and the means of ensuring that the proceedings remain focused and on track. The Court makes it clear that, notwithstanding these management powers, an unfair trial can never be the price of trial efficiency. Nothing that I might order can compromise Mr. Colpitts' ability to make full answer and defence.

[20] The Court in *Bordo, supra,* referenced the LeSage/Code Report of 2008 at Paragraphs 145 to 147:

> 145 The LeSage/Code Report described the attributes of successful case management and the importance of time limits:
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> The subject of judicial case management has been extensively studied, especially in the United States. It is widely accepted as a key factor in successful delay reduction initiatives and increased justice system efficiency. Although there is no monolithic definition or form for what we mean by the term 'judicial case management', successful regimes generally exhibit four main features: early and continuous judicial control over the case; time limits for each step in the process; constant monitoring to ensure compliance; and firm dates for judicial proceedings with strict controls on adjournments.
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> 146 The authors made the following observations on time limits:
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> All of the leading studies of trial delay have noted that establishing time limits for each step in the judicial process is one of the most effective ways of reducing delays and improving efficiency. We all know from personal experience that we generally work diligently and efficiently when we are facing deadlines. If no deadlines are imposed, we put things off or give other things priority. Not surprisingly, the studies have found that the same common sense proposition applies to the underlying causes of trial delay.
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> 147 They address the issue of whether it is possible for a trial judge to impose time limits:
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> The more difficult issue is whether a trial judge can impose time limits. It is clear that time limits can be imposed on legal argument. The experience of the courts and the bar has generally been that time limits encourage better advocacy as long as they are reasonable. Every argument has its weak points and its strong points. Time limits force counsel to focus on the strong points. They also provide a built-in deterrent against repetition.

> We believe the same general principles apply to examinations and cross examinations of witnesses. Every examination and cross-examination will have strong points and weak points and most counsel engage in some degree of repetition. As with time limits on legal argument, time limits on examinations and cross-examinations would encourage counsel to focus on the strong points and avoid repetition.

Similar comments respecting the imposition of time limits can also be found in *R.* v. *West,* 2010 NSCA 16.

[21] I wish to offer a few observations about factors that keep witnesses on the stand for extensive periods of time given the quality of evidence they have to offer. Mr. Colpitts' direct examinations are often repetitious and fail to get to the point. More time should be spent on inquiring questions that reflect his theory of the case rather than an often-confusing trip through a stack of documents.

[22] Ms. O'Neill seeks to firm up much of the same evidence given on direct and attempts to package it more efficiently. I have not found her cross-examinations to be unfocused or excessively long.

[23] The Crown's cross-examinations appear to be quite lengthy given the evidence elicited during direct and Ms. O'Neill's cross. I accept that the Crown has not always known who or what was coming and felt compelled to paint the entire canvas. *R.* v. *Jordan, supra,* reminds us that all trial players have a role, if not a responsibility, to achieve trial efficiency.

[24] Mr. Colpitts has been unable to advise the Court just how long he will need to complete his case, or precisely how many witnesses remain to be called. I suspect this is the result of not having prepared future witnesses. Mr. Colpitts has articulated reasons for this state of affairs but it is obvious he has not anticipated these impediments. By his own admission he has not taken advantage of the time granted to him for preparation. When witnesses are served in a timely manner, situational factors can be accommodated, as they arise, without the loss of valuable Court time and

resources. An example is Ms. Menard's unique childcare needs and Ms. Gueto's Board meeting. Mr. Colpitts' approach has deprived him that flexibility.

[25] Mr. Colpitts has produced an informal list of who he wishes to call starting today, January 18, 2017, at 2 p.m. There appears to be eight National Bank individuals, three local witnesses (Balser, Locke and Mack) and possibly five more unidentified witnesses. Mr. Colpitts has informally advised he will testify before closing his case.

Conclusion

[26] I am not going to put time limits on Mr. Colpitts' individual witnesses, as he may consider some witnesses more important than others. Instead I am directing that Mr. Colpitts complete his witnesses' evidence by the end of the day on February 2, 2017. Adding Friday, January 20th and Friday, January 27th provides him with 12 days. This time allocation does not include Mr. Colpitts' testimony should he elect to testify.

[27] In the event Mr. Colpitts fails to complete his witnesses by February 2nd and wishes to call others, he will have to apply to the Court for permission to do so. I, at that time, will determine what rules will apply to any such application for leave. I expect I would allow Mr. Colpitts two hours of direct to satisfy the Court they have something to add to existing testimony. If the witness has nothing to add the examination will be over without further examinations.

[28] If the witness has something to add I will permit full examination. I reserve the right to place time limits on direct and cross-examinations in such cases. Time limits will be firm but subject to variance should the circumstances so dictate. In the event Mr. Colpitts seeks leave to call more witnesses, those applications will be heard the week of February 6th to 10th, 2017.

[29] I place no time restrictions on any aspect of Mr. Colpitts' personal evidence should he elect to testify. If the February 6th to 10th dates are not utilized as above, then Mr. Colpitts will testify in that time slot, or on whatever day the leave witnesses

complete their applications or testimony. Should Mr. Colpitts not finish testifying on Friday, February 10th, he will resume his testimony on the week of February 13th.

[30] This ruling affects only Mr. Colpitts. However, I will expect Mr. Potter to elect and call evidence immediately after Mr. Colpitts' closing. Should there be a compelling reason that a short break is necessary between Mr. Colpitts' closing and Mr. Potter's opening, I will hear submissions from Ms. O'Neill. Any recess will be brief.

[31] I am also directing Mr. Colpitts to provide the Crown and Mr. Potter with his proposed witness schedule from today until February 2nd by Monday, January 23, 2017.

[32] In the event I determine cross-examinations are unduly long, I reserve the right to adjust this schedule such that Mr. Colpitts' 12 days are not significantly compromised.

[33] Stepping up the efficiency of this trial is the responsibility of all parties and the Court and I am expecting all to respect that responsibility.

Coady, J.