

**SUPERIOR COURT OF JUSTICE  
(EAST REGION)**

B E T W E E N:

**HER MAJESTY THE QUEEN**

Respondent

-and-

**DEIRDRE MOORE**

Applicant

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**APPLICANT'S FACTUM**

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### Part I. Statement of the Case

1. Ms. Deirdre Moore, the Applicant, stands charged in the Superior Court of Justice with: Unlawfully in a dwelling s. 349(1); Mischief under 430(4); Disobey lawful order s.127(1); Criminal harassment s.264(3); Break and enter into a dwelling s.348(1) (a); Mischief under s.430(4); Criminal harassment s.264(3), contrary to the *Criminal Code of Canada* ("*Criminal Code*").
2. Ms. Moore represented herself at a Judicial Pre-Trial ("JPT") on August 15, 2019, in the Ontario Court of Justice for the aforementioned charges. At the JPT, Her Honour, Justice Bourgeois, and the Crown Attorney, John Ramsey, denied the right of Ms. Moore to a preliminary hearing and informed her that she did not have such right; further, they failed to properly put Ms. Moore to her election of mode of trial.
3. These errors must result in the quashing of Ms. Moore's committal and a stay of the proceedings.

### **(Tabs 2, 5-7 of the Application Record)**

### Part II. Summary of the Facts

4. It is alleged that the Applicant, on July 26 2019, committed a series of offences, including a Break and enter in relation to her matrimonial home at 1244 Lampman Crescent in Ottawa.
5. The Applicant's first court appearance for the charge of Break and enter was on August 15, 2019.

6. The Applicant had a self-represented Judicial Pre-Trial on that date. Since Ms. Moore was unrepresented at the time, the JPT took place on the record.

7. Her Honour, Justice Bourgeois, the Crown, Mr. Ramsay, and the Applicant went through the replacement information before the court together, information number: 19-RD18130, including the Break and enter. This replacement information was the product of joining the two informations 19-5201, 19-5202 and a new charge. The informations 19-5201 and 19-5202 were withdrawn.

8. Her Honour asked the Crown for his election. The Crown elected to proceed by indictment on all counts on page 24:

THE COURT: At – so, at least we have the new information out so that you know that. So, that part I'm glad is done. But as far as – so, I – the entering a dwelling house is a straight indictable matter but is – and everything is on the same information, so I take it the Crown's election will be by indictment on all counts, I would imagine?

MR. RAMSAY: Yes. Yes.

9. At first, Her Honour stated that the Crown proceeding by indictment means that Ms. Moore could ask for a preliminary inquiry; however, Mr. Ramsay indicated that there might no longer be a right to a preliminary inquiry given *Criminal Code* amendments. Her Honour agreed with Mr. Ramsay; it was unclear why.

10. Her Honour then stated to Ms. Moore that she didn't see how it would have benefited Ms. Moore to have a preliminary hearing because she was in custody, and it would "take forever" to have a preliminary hearing heard, at page 33:

THE COURT: Okay? Okay. So, before we go, so the – there's – there are a few options I have to explain to you. So, this is by indictment. This means you could ask for a preliminary inquiry. I don't know if you....

MR. RAMSAY: Your Honour, I think that may have changed with the recent legislation.

THE COURT: Oh, you know what? That's right.

MR. RAMSAY: So, she would have the right, of course, to ask for a jury trial but there are no more preliminary inquiries...

THE COURT: Right...

MR. RAMSAY: ...for this....

THE COURT: ...because this is July – okay. Okay. In fact, I don't – I could not see how this would have been of benefit to you because, first of all, you are in custody and this would take forever, and – but it's not available anymore. So, that's fine. However, you still have – so, let's – Mr. Crown, is there any other – so, I don't have the most recent synopsis to go along with the most recent information but are you in a position to give me an idea as to number of witnesses, for example, or things of that nature? Or should we – I can stand it down to give you a chance to do that because we're asking now both a position and number of witnesses and trial date number days estimation but....

MR. RAMSAY: We're at about eight witnesses...

THE COURT: Okay.

11. Her Honour explained that Ms. Moore would have the opportunity to have a jury trial without a preliminary hearing. Her Honour stated that Ms. Moore could elect this way because the matter is proceeding by way of indictment, as the Break and enter was a straight indictable offence. Ms. Moore stated that she did not understand what indictment meant. Her Honour replied that this means that she chose the mode of trial and put Ms. Moore to that election, at page 53:

THE COURT: The – no, no, no. I'm glad we're back on it now. So, because this is proceeding by way of indictment, as we touched upon earlier, you....

DEIRDRE MOORE: Actually, I don't understand the full definition of the word indictment.

THE COURT: So, there are two....

DEIRDRE MOORE: I know some of them are eligible for summary conviction, so.

THE COURT: Right. But, as we indicated, the – I’m sorry, what’s the first count again?

MR. RAMSAY: The residential break and enter that...

THE COURT: Right.

MR. RAMSAY: ...makes it a straight indictable.

THE COURT: So....

DEIRDRE MOORE: So, that makes everything an indictment?

THE COURT: Right, because it’s all on the same....

12. Justice Bourgeois then attempted to explain the modes of trial to Ms. Moore, *Ibid* :

THE COURT: Okay. So, glad that’s been cleared. So, you have now a choice of being – of having a trial at the Ontario Court of Justice, so here, Ontario Court of Justice. I wouldn’t be the trial judge, of course, because we’re having a pre-trial discussion...

DEIRDRE MOORE: Okay.

THE COURT: ...so, it wouldn’t be me but another judge of the Ontario Court of Justice, or a judge of the Superior Court of Justice or judge and jury, Superior Court of Justice.

DEIRDRE MOORE: Oh, I don’t think there’s really any need to bring a jury into this.

THE COURT: Okay.

DEIRDRE MOORE: It’s far too technical. The intricacies of the variety of Acts involved... THE COURT: Okay.

DEIRDRE MOORE: ...in my defence, clearly, they’re not understood by criminal Crown prosecutor. I wouldn’t expect a civilian to understand.

THE COURT: Okay. So – so, then it leaves you with judge alone...

DEIRDRE MOORE: Yes, Your Honour.

THE COURT: ...Superior Court or judge – Ontario Court of Justice. It’s only judge alone.

DEIRDRE MOORE: Yes, Your Honour.

THE COURT: But – so you have the – the option of the two now. Do you prefer....

DEIRDRE MOORE: So, what are the two options again?

THE COURT: Judge alone Superior Court or judge alone but Ontario Court of Justice.

DEIRDRE MOORE: For the trial?

THE COURT: So, just to give you an idea, so Superior Court is – actually, that's where the Family Court is heard...

DEIRDRE MOORE: Yes.

THE COURT: ...as well, for example. Just to give you some – I don't know how else to explain the distinction between – between the two at this point but....

DEIRDRE MOORE: Yep.

THE COURT: I'm not sure how else to explain that, actually.

MR. RAMSAY: The - if it helps, the Ontario Court of Justice almost – in this jurisdiction, exclusively hears criminal matters.

THE COURT: Criminal matters.

MR. RAMSAY: The Superior Court would hear criminal, family, civil, and – and other matters. And so it's – it's...

THE COURT: Right.

DEIRDRE MOORE: Oh, well then the likelihood of having a judge who actually has some knowledge of the *Courts of Justice Act* and the *Child Youth Family Services Act*, the *Child Reform Act*, that would not, then, obviously be to my benefit at the Ontario level where it's strictly *Criminal Code* and have no knowledge of *Rules of Civil Procedure*.

THE COURT: Right.

DEIRDRE MOORE: Oh, then we'd obviously have to go with Superior.

THE COURT: Okay.

13. The Clerk of the Court then asks if Her Honour was committing Ms. Moore to stand trial on all informations, at page 57:

CLERK REGISTRAR: Are we committing her to stand trial on all three files?

MR. RAMSAY: The – so, there should only be one information heading up there, the relayed information.

CLERK REGISTRAR: Okay.

THE COURT: Right.

MR. RAMSAY: The other two should be marked as withdrawn.

CLERK REGISTRAR: Okay.

THE COURT: Okay.

CLERK REGISTRAR: So – thank you.

14. Finally, the matter is adjourned into assignment court in the Superior Court of Justice.

**(Tab 2, 4-7 of the Application Record)**

### Part III. Issues and Law

#### i) Certiorari

15. In this case, Justice Bourgeois exceeded her jurisdiction by failing to put the Applicant to her election in two ways: she misled the Applicant into accepting that she could not elect to have a preliminary hearing. Secondly, Her Honour failed to properly inform the Applicant about her selection of trial modes.

**(Tab 3 of the Application Record)**

16. One of Ms. Moore's charges was contrary to s.348(1)(a) of the *Criminal Code*, Break and enter with intent to commit an indictable offence in relation to a dwelling house.

**(Tabs 2, 4-7 of the Application Record)**

17. Section 348 (1) states:



Every one who

(a) breaks and enters a place with intent to commit an indictable offence therein,

(b) breaks and enters a place and commits an indictable offence therein, or

(c) breaks out of a place after

i. committing an indictable offence therein, or

ii. entering the place with intent to commit an indictable offence therein, is  
guilty

(d) if the offence is committed in relation to a dwelling-house, of an indictable offence and liable to imprisonment for life, and

(e) if the offence is committed in relation to a place other than a dwelling-house, of an indictable offence and liable to imprisonment for a term not exceeding ten years or of an offence punishable on summary conviction.

18. It is clear that the punishment referred to in 348(1)(d) of the *Criminal Code* provides that Ms. Moore was and is liable to imprisonment for life. By virtue of Ms. Moore being liable to imprisonment for life, she had the right to a preliminary hearing.

19. The *Criminal Code* states at section 535:

If an accused who is charged with an indictable offence that is punishable by 14 years or more of imprisonment is before a justice and a request has been made for a preliminary inquiry under subsection 536(4) or 536.1(3), the justice shall, in accordance with this Part, inquire into the charge and any other indictable offence, in respect of the same transaction, founded on the facts that are disclosed by the evidence taken in accordance with this Part.

20. Ms. Moore then should have put to her election by Justice Bourgeois using the prescribed words set out in the *Criminal Code*.

21. Section 536(2) of the *Criminal Code* states:

If an accused is before a justice, charged with an indictable offence that is punishable by 14 years or more of imprisonment, other than an offence listed in

section 469, the justice shall, after the information has been read to the accused, put the accused to an election in the following words: You have the option to elect to be tried by a provincial court judge without a jury and without having had a preliminary inquiry; or you may elect to be tried by a judge without a jury; or you may elect to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. If you elect to be tried by a judge without a jury or by a court composed of a judge and jury or if you are deemed to have elected to be tried by a court composed of a judge and jury, you will have a preliminary inquiry only if you or the prosecutor requests one. How do you elect to be tried?

22. The *Criminal Code* is clear with respect to what words shall be stated. Instead of reading from the Criminal Code, Justice Bourgeois attempted to explain the difference between the modes of trial; however well-intentioned this was, it resulted in Ms. Moore's confusion. Ms. Moore did not understand the critical choice to be made regarding her liberty.

23. Her Honor did not put Ms. Moore to her election, nor did Ms. Moore waive her election. *R .v. Varcoe* considered how to determine if there was substantial compliance with s.536(2) when putting an accused to their election and whether there was a waiver of that section's requirements. *R .v. Varcoe*, at para 15 affirming *R. v. Mitchell* where Doherty JA said: the election should be put to the accused in the language of s.536(2) and that a failure to do so in terms that at least substantially comply with the section is a procedural error resulting in the loss of jurisdiction to conduct either a trial or a preliminary inquiry. Doherty J.A. went on to consider the waiver question, which he concluded must be "clear and unequivocal" to ensure that the person waiving the

procedural safeguard does so with full knowledge of his right and the consequences of the waiver. One of the considerations here is whether counsel represented the accused.

**(*R. v. Varcoe*, [2007] O.J. No. 1009 at para 15)**

**(*R. v. Mitchell* (1997), 121 C.C.C. (3d) 139 (Ont. C.A.) at pages 8-11)**

24. In *R. v. Spence*, the accused, was not arraigned or put to his election as to the mode of trial. In that case, the accused did have counsel occasionally; however, a waiver was still not found as it could not be confidently concluded that the accused knew his option as to electing mode of trial. The Court stated that the trial judge should have read the words listed in the criminal code provision. The procedural failures led to undermining the proceedings' integrity so completely as to amount to a miscarriage of justice.

**(*R. v. Spence*, [2001] B.C.J. No. 1842 at paras 14-16)**

25. In *R. v. Skogman* and *R. v. Russell* contemplated when certiorari of an accused's committal after a preliminary hearing was appropriate. Both cases affirm that certiorari must be limited to jurisdictional errors.

**(*R. v. Skogman*, [1984] 2 S.C.R. 93 page 5 and 6; *R. v. Russell*, [2001] S.C.J. No. 53 at para 19)**

26. A superior court may grant certiorari if there was a jurisdictional error, which includes failing to abide by the Criminal Code's provisions and denying the principles of natural justice. In the case at bar, Justice Bourgeois exceeded her jurisdiction in committing the accused to trial without putting the accused to her proper election as required and by denying her the right to a preliminary hearing.

27. In Canada, it is accepted law that certiorari may be invoked to quash a committal for trial, as there is no other recourse to quash a committal. The Applicant submits that this court grants the certiorari and quash the order committing Ms. Moore to stand trial.

**(*R. v. Forsythe*, [1980] 2 S.C.R. 268 at page 3)**

ii) Judicial Stay of Proceedings

28. This court may grant a stay of proceedings if the abuse of process would continue to prejudice the Applicant or the justice system without it. If both types of prejudice are present, then the cumulative effect of both can be considered.

29. Further, there must be no other remedy that is reasonably capable of removing that prejudice.

30. If this court finds that the abusive action doesn't affect the fairness of the Applicant's trial but undermines the justice system by proceeding, and it is unclear whether a stay is warranted, the court must consider whether the interests that would be served by the granting of a stay of proceedings outweigh the interest that society has in having a final decision on the merits.

**(*R. v. O'Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411 at para. 75**

**(S.C.C.); *R. v. Regan*, [2002] S.C.J. No. 14, [2002] 1 S.C.R. 297 at paras. 41,**

**54, 56, 57, 105 (S.C.C.))**

31. After considering the cumulative effect of the Applicant and the justice system's prejudice if this prosecution were to continue, it is clear that an order for a stay of proceedings is justified in this case. It is the only remedy that would prevent an abuse of process and further prejudice against the Applicant and the Canadian legal system.

32. It is unclear what would have occurred if Justice Bourgeois correctly informed the applicant of her legal rights; however, it is clear that if this Court grants certiorari and quashes the order committing the Applicant to trial, then the Applicant would have the right to elect. The new election would result in future court dates accompanied by potential s.11(b) *Charter* issues.

33. The Applicant's arrest date was on July 26, 2019; she has spent at least 100 days in pre-trial custody and is still on release conditions. As stated by Justice Bourgeois at the JPT, a preliminary hearing would "take forever." *R. v. Jordan* states that "Timely justice is one of the hallmarks of a free and democratic society." Section 11(b) of the *Charter* guarantees every accused the right to be tried within a reasonable time. The importance of this right is to protect not just the individual but society as well. The effect on the reputation of the justice system is described well at paragraph 25: "Crime is of serious concern to all members of the community. Unreasonable delay leaves the innocent in limbo and the guilty unpunished, thereby offending the community's sense of justice." Paragraph 20 of *R. v. Jordan* describes the effects on the individual:

"Liberty is engaged because a timely trial means an accused person will spend as little time as possible held in pre-trial custody or living in the community under release conditions. Security of the person is impacted because a long-delayed trial means prolonging the stress, anxiety, and stigma an accused may suffer. Fair trial interests are affected because the longer a trial is delayed, the more likely it is that some accused will be prejudiced in mounting a defence, owing to faded memories, unavailability of witnesses, or lost or degraded evidence."

**(*R. v. Jordan*, [2016] 1 S.C.R. 631 para 1-3, 20, 25; Tabs 2, 4 at page 33, 5-7)**

34. The circumstances of this case are exceptional. The continued prosecution of the Applicant would deeply offend society's sense of fairness. The Applicant, who was a self-represented accused person in custody, was misled by a sitting Justice and Crown Attorney. Justice Bourgeois told the Applicant that she did not have the right to a preliminary hearing and that it would not benefit her in any case. If this matter were to continue to trial, any mistrust that society may have of the legal system, specifically amongst unrepresented litigants, would be aggravated. An accused's right to be put to their election, an accused's right to have an impartial judge, who knows the law, are all fundamental elements of a properly functioning judicial system.

35. This was the Applicant's first appearance on her new charge and she was not advised again of her right to counsel and was not provided an opportunity to consult with counsel.

36. The Applicant submits that this court orders a stay of proceedings, as the impugned conduct was so egregious that the mere fact of going forward in light of it would be offensive and bring disrepute upon the administration of justice. The unfairness caused by this prosecution's continuation outweighs any benefit that society may have in trying the Applicant.

#### Part IV. Order Requested

37. The Applicant requests that this Honourable Court grant the motion to quash the committal of Deirdre Moore to stand trial and Order a stay of proceedings.

Schedule A. Authorities to be Cited

1. *R. v. Varcoe*, [2007] O.J. No. 1009;
2. *R. v. Mitchell* (1997), 121 C.C.C. (3d) 139 (Ont. C.A.);
3. *R. v. Spence*, [2001] B.C.J. No. 1842;
4. *R. v. Skogman*, [1984] 2 S.C.R. 93;
5. *R. v. Russell*, [2001] S.C.J. No. 53;
6. *R. v. Forsythe*, [1980] 2 S.C.R. 268;
7. *R. v. O'Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411;
8. *R. v. Regan*, [2002] S.C.J. No. 14, [2002] 1 S.C.R. 297;
9. *R. v. Jordan*, [2016] 1 S.C.R. 631.

**Court File No. 19-RD18130**

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