SUPERIOR COURT OF JUSTICE
(East Region)

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

– and –

DEIRDRE MOORE

Applicant

RESPONDENT'S FACTUM
Re: Application for *Certiorari*

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PART I – OVERVIEW

1. The Respondent stands charged with the following offences:

Offence	Maximum Penalty on Indictment
s. 349(1) – Unlawfully in Dwelling	10 years
s. 430(4) x 2 – Mischief to Property	2 years
s. 127(1) – Disobey Court Order	2 years
s. 264(3) x 2 – Criminal Harassment	10 years
s. 438(1)(a) – Break and Enter Dwelling	Life

2. Pursuant to ss. 536(2) and (3), the Applicant would be entitled to a preliminary hearing on any charge that is punishable by 14 years or more where the Crown proceeds by indictment. On August 15, 2019, the Crown elected to proceed by indictment on all of

the Applicant's charges. As such, the Applicant was entitled to elect to have a preliminary hearing on ONE of the counts she was charged with: s. 438(1)(a) Break and Enter Dwelling. She was not entitled to a preliminary hearing on any of her other counts.

3. Regrettably, on August 15, 2019, when the Applicant was put to her election as to mode of trial, she was erroneously told that she was not entitled to a preliminary hearing. This constitutes an error that affects jurisdiction in relation to ONE count (count 5) on the indictment, the only count that she was entitled to a preliminary hearing on: s. 438(1)(a) Break and Enter Dwelling.

4. The issue before this court is what remedy should be granted, under the prerogative writ of *Certioria*, if any. The Respondent submits that the appropriate course of action is for the Crown to withdraw count 5 on the Indictment which contains the only count which entitled the Applicant to a preliminary hearing. With that count gone, the remaining counts are properly before this court as per the Applicant's election for a trial before a Judge without a Jury in the Superior Court of Justice. With no error in jurisdiction in relation to these counts, there is no basis for *Certioria* or any remedy thereof.

PART II – STATEMENT OF THE FACTS

5. The Applicant has reasonably stated the relevant facts regarding her election for mode of trial on August 15, 2019.

6. The Respondent would add two further factual points:

   a. The factual allegations against the Applicant
   b. Some procedural history

The Allegations

7. The allegations underpinning the Indictment are found in the Prosecution Summary in the Respondent's Materials. They can be summarized as follows:

a. The complainant is the estranged husband of the Applicant. The two have been engaged in protracted and acrimonious Family Court proceedings for several years. They share two young school age children.

b. The Complainant has been diagnosed with Mental Health issues dating back to 2013 which precipitated the family division.

c. The Family Court proceedings deteriorated to the point where the Children's Aids Society (CAS) seized the Applicant's children and placed them in the care of their father, the complainant.

d. On April 8, 2019, the Applicant was placed on a Family Court restraining order which prohibited her from contacting her children except while supervised by, and at the discretion of, the CAS. She was also prohibited from attending at the former family home at 144 Lampman Crescent, which remained the residence for the complainant and the children.

e. On June 26, 2019, the CAS denied the Applicant visitation with her children because of her behavior at their visitation site. Immediately following this, the Applicant began making contact with the complainant in breach of the April 8, 2019 restraining order. She began calling him and emailing him.

f. Over the course of the following weeks, the Applicant attended the complainant's residence, made social media postings, and emailed the compliant in a manner that caused the complainant, and her children, fear. The Applicant's communications variously accused the complainant of conspiring with the CAS to abuse her children and steal them form her. These events are outlined in the Prosecution Summary.

g. These events culminated on July 26, 2019 when the Applicant attended at the complainant's residence, broke a window to gain access into the

residence and wrote “I love you Sean and Cate Love Mummy xoxo Your dad is a bad man and a liar” on the living room wall.

h. The complainant was in the residence on July 26, 2019 with one of his children at the time the Applicant entered the residence. They hid such that the Applicant did not encounter them. Police were called, and the Applicant was arrested exiting the residence.

i. Upon her arrest, the Applicant refused a lawyer. She was interviewed by police where she admitted the acts outlined above, claiming that they were not illegal as the Family Court restraining order was illegally obtained and that the real criminals were her estranged husband and the CAS.

Procedural History

8. As stated above, the Applicant was arrested on July 26, 2019. She was held for show cause and was detained at a bail hearing on July 27, 2019. The Applicant represented herself at this hearing. She then made several appearances in mental health court before appearing on August 15, 2019 before Justice Bourgeous for a self-represented Judicial Pre-trial.

9. As outlined in the Applicant’s statement of facts, and as reflected in the transcript for August 15, 2019, the Applicant was given an election of a trial in the Ontario Court of Justice, or a trial in the Superior Court of Justice with or without a Jury. She was not given the option of a preliminary hearing. The Applicant elected to be tried in the Superior Court of Justice without a Jury. As such the matter was committed to trial in the Superior Court of Justice and a Judicial Pre-trial was set in that court for August 21, 2019.

10. On August 21, 2019, six days after she was committed for trial, the Applicant had a self-represented Judicial Pre-trial in the Superior Court of Justice with Justice Parfett. At this Pre-trial, trail dates were set for December 2-6, 2019. A motion date was also set for October 21, 2019.

11. On October 21, 2019, the Crown brought an application to appoint *Amicus*. This application was granted, and Mr. John Hale was appointed *Amicus* by Justice LaLiberte. A bail review was also set for Oct. 28, 2019. This bail review did not commence, rather, a 90 day detention review occurred on October 30, 2019

12. On October 30, 2019, the Applicant was released on bail by Justice Hackland on her own recognizance under John Howard Society bail supervision and to live at Lotus House, a bail-bed supervision residence.

13. In November, 2019, the Applicant retained Joseph Addelman as counsel. Mr. John Hale was discharged as *Amicus*. On November 27, 2019, the December trial dates were vacated at the defense request with consent of the Crown and a Judicial Pre-trial was set for November 28, 2019

14. On November 28, 2019, the Judicial Pretrial was held with Justice Aitken and a follow-up Judicial Pretrial was scheduled for January 9, 2020. On that date, a Judicial Pre-trial was held with Justice Aitken. Following the Judicial Pre-trial, an Assessment Order pursuant to s. 672.12(3) of the *Code* was ordered on the Applicant's consent. This was an assessment into whether the Applicant was not criminally responsible on account of mental disorder. A follow-up Judicial Pre-trial was scheduled for April 3, 2020.

15. On January 29, 2020, the Applicant was arrested on a Breach charge and held for show cause. She was released on bail again after a contested bail hearing on January 31, 2020. She remained under John Howard Society supervision but was no longer required to live at Lotus House.

16. On February 26, 2020, the matter was back before the court as a result of a complete break down in solicitor client relationship between the Applicant and Mr. Addelman. Mr. Addelman was removed from the record. The Applicant indicated she was uncertain of whether she wished to be further represented by other counsel. The Applicant had brought a number of her own motions that were dismissed by Justice Aitken. Trial dates were set for 5 days starting June 8, 2020. The matter was then remanded back to April 3, 2020 to receive the previously ordered s. 672.12 assessment.

17. The April 3, 2020 appearance never occurred as a result of the shut down of the courts due to COVID-19. The matter began to presumptively remanded as per the order of the Chief Justice. The Applicant next appeared on the record on September 7, 2020 where a Judicial Pre-trial was scheduled for September 11, 2020.

18. On September 11, 2020, a virtual self-represented Judicial Pre-trial was held with Justice Smoji. The Applicant was informed that two warrants existed for her arrest. These warrants related to alleged breaches of her recognizance. A motion date was set for September 22, 2020 for the Applicant to vary her bail conditions. A further motion date was set for September 25, 2020 for the Crown to bring a motion to appoint *Amicus*.

19. The motion to vary the Applicant's bail conditions was not heard on September 22, 2020 because the Applicant had been arrested in Niagara Region on her outstanding warrants. She appeared in bail court in Ottawa on September 24, 2020 at which point, she was remanded in custody to the September 25, 2020 *Amicus* motion date.

20. On September 25, 2020, Justice LaLiberte appointed Ms. Meaghan McMahon *Amicus* and the matter was adjourned to the next assignment court date.

21. On October 13, 2020, the Applicant was released on bail after a contested show cause hearing in the Ontario Court of Justice.

22. In October, 2020, the Applicant retained Mr. Cedric Nahum. On November 5, 2020 a Judicial Pre-trial was held with Justice Maranger. The current motion date for *Certiorai* was set for January 4, 2021.

PART III – ISSUES AND THE LAW

23. The Applicant seeks two remedies. First, she invokes the discretionary remedy of *Certiorari* to quash committal. Second, she requests a stay of proceedings. The Respondent will first address whether the committal should be quashed.

Certiorari

24. The Applicant's argument for quashing committal rests on the fact that she was not properly put to her election pursuant to s. 536(1). Specifically, she was advised that she had no right to a preliminary hearing when in fact she did have such right. This is true in relation to one count on the indictment: count 5. As this count alleged Break and Enter Dwelling, which is punishable by life imprisonment, the Applicant was entitled to a preliminary hearing pursuant to s. 536(1). She was erroneously told that she was not by the presiding Justice and Crown Attorney.

25. This error, however, only affects one count on the Indictment. As outlined at paragraph 1 of this response, the remaining counts are all punishable by 10 years or less. For these counts, the Applicant was entitled to an election pursuant to s. 536(2.1) which reads as follows:

> (2.1) If an accused is before a justice, charged with an indictable offence — other than an offence that is punishable by 14 years or more of imprisonment, an offence listed in section 469 that is not punishable by 14 years or more of imprisonment or an offence over which a provincial court judge has absolute jurisdiction under section 553 —, 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; 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. How do you elect to be tried?

26. The Applicant argues that the failure to give an election under s. 536(1) should cause this court to quash committal on all counts. This should not be the case. The

Respondent submits that the appropriate course of action would be for the Crown to withdraw count 5 on the Indictment. Once that is done, the Applicant is no longer entitled to a preliminary hearing, nor an election under s. 536(1). In this circumstance, the Applicant was put to her proper election under s. 536(2.1) on August 15, 2019. The election was put to her in the following manner[1]:

> CLERK REGISTRAR: Okay. Do we know how many days we're looking for?
> MR. RAMSAY: It'll be four days.
> CLERK REGISTRAR: Okay. And is it trial by the OCJ, Your Honour?
> MR. RAMSAY: And so that's the accused's election...
> THE COURT: Okay, so yes.
> MR. RAMSAY: ...whether it's in the Ontario Court or the Superior Court and by judge alone or by judge and jury.
> THE COURT: Right. So, we – I was about to forget that. Sorry about that. Okay. So....
> MR. RAMSAY: For – for what it's worth, the four day estimate is for a judge-alone trial.
> THE COURT: Right. In the OCJ – in this level of court as well, right? Okay. So, we touched on that and I lost track and I was about to forget.
> DEIRDRE MOORE: I apologize.
> 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...

[1] Transcript of Proceedings, August 15, 2019, Applicant's Materials, at pp 50-53.

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....

DEIRDRE MOORE: Oh, that's why you put it on after the fact. Ah, it wasn't there last week and now we have break and entering so everything's an indictable offence with the maximum penalty versus the fine of $2,000. Got it.

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.

MR. RAMSAY: ...more of a [indiscernible].

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.

27. This manner, when dealing with a self-represented accused, complies with s. 536(2.1) of the *Code*. It clearly laid out the two options available to the Applicant. The Applicant then made a clear election for a judge alone trial in the Superior Court of Justice. There is no jurisdictional error in committing the Applicant to trial in accordance with her election on the counts for which she was not entitled to a preliminary hearing.

The remedy of *Certiorari* is limited to error of jurisdiction[2]. Therefore, committal on those counts should not be quashed.

28. It should be noted that *Certiorari* is a discretionary remedy[3]. Even if the Crown were not withdrawing count 5 of the Indictment, the Applicant is not necessarily entitled to have her committal quashed on that count. One may question whether failure to hold a preliminary hearing in this case is truly detrimental to the Applicant. Or whether the Applicant must demonstrate a clear desire to hold a preliminary hearing. However, by withdrawing count 5, the Crown is acknowledging the error and removing the need for a Judicial remedy. To the extent that this Court may retain an ability to quash the committal of the remaining counts on the Indictment, the Court should not exercise its discretion to do so. The election put to the Applicant on August 15, 2020 was entirely appropriate for the counts that remain on the Indictment. There is no wrong that would be remedied by quashing committal and putting the Applicant to the same election she has already been put to.

Stay of Proceedings

29. The Applicant has also asked for a stay of proceedings by alleging an abuse of process. It is an open question whether a stay of proceedings is an available remedy in this case. By arguing *Certiorari*, the Applicant is claiming that this matter is without jurisdiction before this court. It seems contrary to this assertion to then ask this court to provide a remedy that requires jurisdiction over the matter. Nevertheless, the Respondent submits that the high bar required for a stay of proceedings is clearly not met in this case.

30. The test for a stay of proceedings for abuse of process is conveniently stated in *R. v. Babos*[4]. The Court summarizes the test at paragraph 32 as follows:

> (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (Regan, at para. 54);

[2] R. v. Dubois, [1986] 1 S.C.R. 366.
[3] *R. v. Forsyth*, [1980] 2 S.C.R. 268
[4] [2014] 1 S.C.R. 309

> (2) There must be no alternative remedy capable of redressing the prejudice; and
>
> (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (ibid., at para. 57).

31. On the first stage, the Applicant must establish that there has been an abuse of process. There are two categories of abuse of process. The first is trial fairness. There must be some prejudice to the Applicant's trial that will be carried forward by the continuation of the trial. There is no such prejudice in this case, particularly with count 5 of the indictment withdrawn. The Applicant is in the exact same position as she would have been had count 5 never existed. There is nothing carried forward by proceeding on the remaining counts.

32. The second category is the residual category. This requires that there be some affront to the integrity of the justice system that is perpetuate by the continuation of the trial. While there was an error in the election put the Applicant, an error does not equate to an abuse of process. This is especially so when there are recognized remedies available for when lower courts exceed jurisdiction in committing matters to trial. Furthermore, as with the trial fairness category, there is no continuation of a wrong in proceeding on the remaining counts.

33. The Applicant asserts that the inevitable delay she claims will be caused by this Court quashing committal, assuming that committal is quashed, is relevant to the abuse of process analysis. This would in inappropriate for a number of reasons. Firstly, in the context of this case, the Court cannot predict what future dates might be available for this matter so as to assume an 11(b) violation. Secondly, if the Applicant is alleging an 11(b) violation, they should bring an 11(b) application and argue on its merits. Finally, as there is a separate application and test for stays for delay under 11(b), this should not be addressed under the rubric of an abuse of process.

34. Regarding, the second stage, whether this is another appropriate remedy, the Respondent submits that there clearly is. The appropriate remedy would be a stay of count 5 of the Indictment. This remedy is effectively granted by the Crown withdrawing that count. If further remedy is required, then quashing committal is another appropriate remedy. These remedies are directly focused on the error committed and adequately address any unfairness. A stay of proceedings is far too drastic a remedy.

35. Regarding the third stage, resort to this is only necessary if there is uncertainty remaining after the first two stages. There must be a balancing of interest between denouncing the misconduct and proceeding on the merits of the charge. The Respondent submits that in this case, if a balancing is required, the merits are clearly in favor of proceeding. The allegations are serious and involve harassment and unlawful entry into a residential property. The fact this this occurred in the context of protracted family court proceedings over child custody make the allegations more serious and concerning. The complainant in this case, and society, deserve a trial on the merits.

PART IV – ORDER REQUESTED

36. An order dismissing the Applicants motion to quash committal and to enter a stay of proceedings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Malcolm Savage

Malcolm Savage
Assistant Crown Attorney

Dated at Ottawa, this 15th day of December, 2020.