

CANADA / JUDGMENT

R. v. Desjarlais

2017 BCSC 1412

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 1412 R. v. Desjarlais

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Desjarlais,

2017 BCSC 1412

Date: 20170811

Docket: 51071-1

Registry: Vernon

Between:

Regina

Appellant

And

Baxter James Desjarlais

Respondent

Before: The Honourable Mr. Justice Meiklem

On appeal from: A decision of the Provincial Court of British Columbia, dated June 29, 2016, (R. v. Desjarlais, unreported, Vernon File Nos. 51071-1; 50943-1-A).

Reasons for Judgment

Counsel for the Crown (Appellant):

M.Y. Cissell

Counsel for the Respondent:

N.C. Jacob

Place and Date of Hearing:

Vernon, B.C.

June 12, 2017

Place and Date of Judgment:

Vernon, B.C.

August 11, 2017

- [1] The Crown appeals a judicial stay of proceedings granted by a Provincial Court judge (the "PCJ") on his own motion on June 29, 2016, the date set for the appearance of the accused to deal with his judicial interim release on the charges in these two files.
- [2] The reasons for the decision, in their entirety, are as follows:
 - [1] THE COURT: Mr. Desjarlais is currently in custody on two matters; Information 51071 is an allegation of obstructing a peace officer on 12 May 2016; and Information 50943-1-A is an allegation that on 9th of March 2016, he failed to comply with a condition on a recognizance of bail by failing to report.
 - [2] The record indicates that he made his first appearance on the 13th of May and he has made subsequent appearances on the 18th day of May, the 25th day of May, the 8th day of June, the 15th day of June, now the 29th day of June. On each occasion he has been attempting to get counsel so that he could determine whether to proceed with a show cause hearing as to why he should be detained or to deal with these matters in some other way.
 - [3] He is in an institution. He apparently is in segregation. The institution is unable to produce him and he apparently is unable to access counsel from the institution.
 - [4] Accordingly, on both informations, I am directing a judicial stay.
- [3] The grounds of appeal pursued at the hearing were:
 - 1. The PCJ presiding over a judicial interim release hearing was not a court of competent jurisdiction to order a Charter remedy such as a stay of proceedings under s. 24 (1); and
 - 2. The PCJ erred in ordering a stay without making an explicit finding of abuse of process or finding any facts that could amount to the "clearest of cases" of abuse of process such that a stay of proceedings was the only available remedy.
- [4] Although not set out as a specific ground of appeal the Crown also argued, on the basis of R. v. Sheppard, 2002 SCC 26, that the learned PCJ's reasons are insufficient for meaningful appellate review of the correctness of the decision.

- [5] Before getting into the substance of the issues, I will note that the respondent's factum sets out as a fact that the respondent was in custody on the subject charges for 49 days from his arrest on May 12, 2016 to June 29, 2016. While this was technically correct, it is not the whole picture. The Crown submitted evidence on this appeal documenting the fact that Mr. Desjarlais' recognizance on previous and more serious charges was cancelled on May 24, 2016 at a judicial interim release hearing where he was represented by counsel. Thus, following May 24, 2016, and as of June 29, 2016, Mr. Desjarlais was also being detained on the other charges. He remained in custody on those charges until they were dealt with on the trial date of August 26, 2016 by pleas on some counts and sentences allowing credit for time served.
- [6] Unfortunately, Crown counsel erroneously advised the PCJ on June 29, 2016 that Mr. Desjarlais was on a recognizance for the previous serious charges. This undoubtedly was why the learned PCJ commenced his reasons with the statement that Mr. Desjarlais was currently in custody on two charges. That shared misapprehension was undoubtedly a significant factor in the PCJ's considerations on June 29, 2016.
- [7] The following exchanges took place, which provide insight into the circumstances that the PCJ perceived that he was dealing with:

MS. [CISSELL]: Mr. Baxter, Desjarlais Baxter, what time have we set for him? Do we have a set time now?

THE CLERK: Your Honour, apparently that's the one from Surrey pre-trial, but he's in segregation and apparently they cannot move him to a video screen, is that correct?

MS. [CISSELL]: [Inaudible response/traffic noise]

THE CLERK: So --

THE COURT: Is he represented by somebody?

MS. [CISSELL]: No, he is not unfortunately, Your Honour.

THE COURT: And what's it on the list for?

MS. [CISSELL]: It's on the list -- he was in custody on May the 13th. He did have Surrey counsel; there's an indication on our file on the 25th of May. He thought he had counsel, wasn't sure of their name and he wanted it adjourned over to seek -- either to have counsel or to have an agent appear, and that was on the 8th of June at 10:00 a.m. by video, and then on that day he was put over to the 15th of June by video, and then to today's date the 29th of June. I've not had contact with any counsel on the record.

THE COURT: And the problem is that he's in Surrey pre-trial and they can't get him to a video screen?

THE CLERK: Now the sheriffs actually have sent me a message saying they can possibly move him this afternoon to a video screen.

MS. [CISSELL]: Did you want to stand the matter down til two o'clock and see if we can call it at that time?

THE COURT: Well we could deal with it by telephone as well. I don't know if that's any easier for them.

THE CLERK: I can let the sheriffs know that, Your Honour.

(OTHER MATTERS SPOKEN TO)

THE CLERK: Your Honour, apparently it cannot go by telephone, but they say they could put it to two o'clock but there's just no guarantee that they can get him at two o'clock, but a better chance then; not right now.

THE COURT: Okay; well we'd better put it down til two then.

THE CLERK: Okay; thank you.

MS. [CISSELL]: My apologies, Your Honour. So it's been -- Mr. Desjarlais' matter will stand down til two o'clock?

THE COURT: Til two o'clock, and there's no guarantee apparently at two o'clock, so I don't know whether it's short-staffing or just too many bodies in Surrey pre-trial.

MS. [CISSELL]: Right. Thank you, Your Honour.

(OTHER MATTERS SPOKEN TO)

(PROCEEDINGS ADJOURNED FOR NOON RECESS)

(PROCEEDINGS RECONVENED)

(OTHER MATTERS SPOKEN TO)

UNIDENTIFIED SPEAKER: Your Honour, I can't get a hold of Surrey pre-trial centre either for Desjarlais, so. . .

MR. JACOBS: I can advise the court that I know that they're doing videos from institutions that are not KRCC on Thursdays. I'm here tomorrow. If we put it over for one day I could appear on the video with him. I don't know what else to do.

MS. [CISSELL]: I know that Mr. -- one of the reasons that Mr. Desjarlais was here, Your Honour, today in front of a judge was that he didn't have counsel, and we were becoming concerned that it was sort of just going from day to day, so Crown's not opposed to putting his appearance over to tomorrow but --

THE COURT: What are the charges?

MS. [CISSELL]: His charges are a breach and then wilfully resisting arrest. I don't --

THE COURT: And is he in custody on these matters?

THE CLERK: He's not had a bail hearing.

MS. [CISSELL]: He's not had a bail hearing yet, and I'm not --

THE COURT: Unless they --

MS. [CISSELL]: -- entirely sure, Your Honour, of -- of why he's in solitary. That doesn't have anything to do with our charges.

THE COURT: I'm perilously close to entering a judicial stay for --

MS. [CISSELL]: That would make --

THE COURT: -- I mean if we can't produce somebody in custody for a bail hearing, that's simply inexcusable and it's now 2:20 and we don't know where he is or what's going on.

So I'll stand it down til 2:45 and we'll see where we stand then.

MS. [CISSELL]: Thank you, Your Honour.

MR. JACOBS: Thank you.

THE COURT: Okay, thanks.

(OTHER MATTERS SPOKEN TO)

THE CLERK: So, Your Honour, I've just heard back from the sheriffs again and segregation in Surrey pre-trial said that if we try in 10 minutes we can try unit 17 which is on our screen and hopefully he will be in there, and if he's not in there they said to just leave it up and they will bring him in.

MS. [CISSELL]: I have to say, Your Honour, he is in -- he is -- I'll provide you with the -- the Vernon matters are not serious. They include a breach of an allegation and a resist arrest, however the matter that he has on Chilliwack that he's on a recognizance for, is.

THE COURT: Yes, I was more concerned with the fact that he hadn't had a bail hearing on this matter --

MS. [CISSELL]: Yes.

THE COURT: -- and they were not -- they were summary matters and you know --

MS. [CISSELL]: Yeah.

THE COURT: -- that was my real worry.

MS. [CISSELL]: Yeah; and I don't know, Your Honour, the state of where those Chilliwack matters are. I know that he had -- he believed, because I was the Crown when he was on bail, that he thought that a lawyer by the name of Jessop was dealing with those matters in Chilliwack.

THE COURT: How many times have these matters been before the court that he's trying to get a lawyer? What's troubled me is that the last two times I've been here and the last couple of times I've been in remand court in Kelowna, there seems to be a significant amount of trouble for the -- for any individual in custody to get to a phone and to get legal aid approved, and I -- I don't know what the reason for that is but there just seems to be an inability to move forward, and you know, it goes on week to week to week to week and --

MS. [CISSELL]: And I have to say that we're hearing the same thing here from individuals on video which is, you know, "I haven't been able to talk to counsel," and I know that we've facilitated it here in terms of, you know, standing down and allowing them to talk over the video because that's the first time they've had a chance to speak with their client.

THE COURT: Right.

MS. [CISSELL]: Right; and get instructions. He's been in court here the 13th of May, 25th of May, 8th of June; I think it's the 15th of June, and then today's date.

THE COURT: So I've got him on the 13th of May, 18th of May, 25th of May, 8th of June, 15th of June, 29th of June.

As I indicated earlier --

MS. [CISSELL]: It's just terrible.

THE COURT: -- it's -- it's just almost inexplicable because the ability to allow them to meet with lawyers via video has been available to corrections for at least seven years and it's just getting nothing but worse. I mean the technology is there to allow them to connect by video with their lawyer in the lawyer's office and you know, via internet, and be properly interviewed in a way that's every bit as good as if the lawyer attended the institution, so why aren't we there?

MS. [CISSELL]: And I know attending the institution has been becoming more and more problematic. In fact some of the counsel here I know have experienced going down to the institution and discovering that they've been moved.

THE COURT: Yes.

MS. [CISSELL]: Yes.

THE COURT: Well they're moving prisoners all over the place --

MS. [CISSELL]: Yeah.

THE COURT: -- you know, frequently, so if you don't need to make a long distance phone call you can use an internet that's already available and make that connection then.

MS. [CISSELL]: It certainly seems to make more --

THE COURT: Makes more sense.

MS. [CISSELL]: --rational sense than what we're currently working with.

THE CLERK: Would you like me to dial in just to see, or. . .

Still five minutes to go, but you never know.

THE COURT: Let --we'll give it tile three --

THE CLERK: Okay.

THE COURT: -- and in the meantime I think we'll just go off the record and hopefully counsel on the Small Claims matter will be available.

THE CLERK: Okay.

(PROCEEDINGS ADJOURNED)

(PROCEEDINGS RECONVENED)

THE CLERK: Okay, we're back on the record, Your Honour.

MS. [CISSELL]: Your Honour, calling the matters of Mr. Baxter Desjarlais. It's Files 50943-A and 51071-1 and he's currently housed in Surrey pre-trial as I understand.

THE COURT: Okay; and for the record, Mr. Desjarlais was scheduled to appear this morning at 9:30. We were then told 10:30; we were then told 11:00; we were this told 11:30; we were then told two o'clock; we were then told 2:45; the sheriff has been at my request making numerous phone calls until finally I'm told Surrey are literally not pleased to hear from him enquiring on my behalf yet again.

THE CLERK: Sorry, Your Honour; the sheriff just messaged me right now saying he has a number that we can try.

THE COURT: Okay; well we'll try that number.

THE CLERK: Okay.

[CLERK DIALING]

THE COURT: Well at least it's ringing.

THE CLERK: Yes.

Disconnected.

THE COURT: Let's try one more time.

THE CLERK: Okay.

[CLERK DIALING]

THE COURT: So the record will indicate we have tried twice and both times the number provided by the sheriffs to the clerk via computer, has rejected our call and the line has been disconnected. Can I see the record of proceedings again, please?

[REASONS FOR JUDGMENT]

MS. [CISSELL]: Thank you, Your Honour.

THE COURT: Okay; and I take it Ms. Cissell that you don't have anything to add from the Crown's perspective to that?

MS. [CISSELL]: No, I do not.

THE COURT: Okay.

(PROCEEDINGS CONCLUDED)

- [8] It is clear from the transcript of the proceedings that Crown counsel shared the PCJ's concern that a bail hearing on these minor summary conviction matters had not proceeded, notwithstanding four previous court appearances. It was Crown counsel that characterized the repeated appearances due to difficulties experienced by detained accused generally in contacting counsel as "just terrible". In the absence of the accused, and the correct information on his release status on the previous serious charges, it appears that Crown counsel and the court were unaware of the circumstances that meant a bail hearing on these minor charges was probably not a matter of urgency for Mr. Desjarlais in this case after his recognizance on the prior charges was cancelled.
- [9] Dealing with the first ground of appeal, the respondent agrees with the Crown's submission that a PCJ presiding at a judicial interim release hearing is not a court of competent jurisdiction to hear or consider applications for Charter remedies. This was decided in *R. v. Menard*, 2007 BCSC 838, (upholding Gulbransen P.C.J.), affirmed in *R. v. Menard*, 2008 BCCA 521. The courts in *Menard* applied the "functional and structural approach" to determine whether a court is one of competent jurisdiction that was adopted in *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575 ("Dunedin").
- [10] The respondent argues that although the PCJ's reasons did not state whether he was judicially staying the proceedings under the Charter, or to remedy an abuse of process under the common law doctrine, it should be presumed that he was doing the latter, and was therefore not jurisdictionally incompetent under *Menard*. The respondent then presses the argument that there is a residual category of abuse of process outside the Charter, and a residual common law discretion for a PCJ to enter a stay of proceedings for an abuse of process, which, notwithstanding *Menard*, may be exercised at any stage of a proceeding. The respondent goes on to assert that this is one of the clearest cases of abuse of process, meeting the test set out in the leading authorities of *R. v. O'Connor*, [1995] 4 S.C.R. 411, and *R. v. Babos*, 2014 SCC 16.

- [11] The first question I will address is whether the court should presume that the PCJ was addressing an abuse of process. The learned PCJ's brief reasons do not mention the doctrine of abuse of process, and there are no clues in the preceding transcript of the proceedings as to whether he was considering a Charter breach, possibly relating to s.7 of the Charter, or an abuse of process.
- [12] I note that much of the dialogue between Crown counsel and the court was not case specific to this accused, but dealt with their broader experiences with other detained accused and their counsel having reported communication difficulties that seemed to be a pattern that this accused might be part of. It is not clear to me that the PCJ was focussing solely on the specific reasons for Mr. Desjarlais' non-appearance in the video room at the institution, as he would necessarily have done if he was considering whether this was one of the clearest cases of abuse of process. He did mention the possibilities of the institution being either short-staffed or having too many bodies, and the fact of Mr. Desjarlais being detained in segregation, but there was a dearth of evidence as to the specific reasons that Mr. Desjarlais was not produced in a video room for this court appearance, or as to why Mr. Desjarlais had been unsuccessful in contacting counsel on prior occasions.
- [13] In my view, a specific instance of a frequently occurring failure of a detention facility to accommodate court appearances by accused persons or to facilitate counsel contact, would not be a matter outside the ambit of the Charter.
- [14] The Supreme Court of Canada, in O'Connor, noted the significant degree to which the Charter has subsumed the subject matter of the common law abuse of process doctrine, and the court held that abuse of process should only be separately considered in cases to which the Charter does not apply. The conclusion of the court's analysis of the topic, authored by L'Heureux-Dube J., (and expressly concurred with on this subject by the majority) was contained in paras. 68 - 71.
- [68] I also recognize that, despite these strong parallels, the common law and Charter analyses have often been kept separate because of the differing onus of proof upon the accused under the two regimes. In *R. v. Keyowski* (1986), 28 C.C.C. (3d) 553 [[1986] 5 W.W.R. 150] (Sask. C.A.), at pp. 561-62, for instance, it was noted that while the burden of proof under the Charter was the balance of probabilities, the burden under the common law was "the clearest of cases". It is important to remember, however, that even if a violation of s. 7 is proved on a balance of probabilities, the court must still determine what remedy is just and appropriate under s. 24(1). The power granted in s. 24(1) is in terms discretionary, and it is by no means automatic that a stay of proceedings should be granted for a violation of s. 7. On the contrary, I would think that the remedy of a judicial stay of proceedings would be appropriate under s. 24(1) only in the clearest of cases. In this way, the threshold for obtaining a stay of proceedings remains, under the Charter as under the common law doctrine of abuse of process, the "clearest of cases".

[69] Remedies less drastic than a stay of proceedings are of course available under s. 24(1) in situations where the "clearest of cases" threshold is not met but where it is proved, on a balance of probabilities, that s. 7 has been violated. In this respect the Charter regime is more flexible than the common law doctrine of abuse of process. However, this is not a reason to retain a separate common law regime. It is important to recognize that the Charter has now put into judges' hands a scalpel instead of an axe -- a tool that may fashion, more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system. Even at common law, courts have given consideration to the societal (not to mention individual) interests in obtaining a final adjudication of guilt or innocence in cases involving serious offences. In *Conway*, supra, at p. 1667, for instance, I elaborated upon the essential balancing character of abuse of process in the following terms:

[Abuse of process] acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings. [Emphasis added.]

I see no reason why such balancing cannot be performed equally, if not more, effectively under the Charter, both in terms of defining violations and in terms of selecting the appropriate remedy to perceived violations. See, by analogy, *Morin*, supra.

[70] For these reasons, I conclude that the only instances in which there may be a need to maintain any type of distinction between the two regimes will be those instances in which the Charter, for some reason, does not apply yet where the circumstances nevertheless point to an abuse of the court's process. Because the question is not before us, however, I leave for another day any discussion of when such situations, if they indeed exist, may arise. As a general rule, however, there is no utility in maintaining two distinct approaches to abusive conduct. The distinction is one that only lawyers could possibly find significant. More importantly, maintaining this somewhat artificial dichotomy may, over time, create considerably more confusion than it resolves.

[71] The principles of fundamental justice both reflect and accommodate the nature of the common law doctrine of abuse of process. Although I am willing to concede that the focus of the common law doctrine of abuse of process has traditionally been more on the protection of the integrity of the judicial system whereas the focus of the Charter has traditionally been more on the protection of individual rights, I believe that the overlap between the two has now become so significant that there is no real utility in maintaining two distinct analytic regimes. We should not invite schizophrenia into the law.

- [73] As I have already noted, the common law doctrine of abuse of process has found application in a variety of different circumstances involving state conduct touching upon the integrity of the judicial system and the fairness of the individual accused's trial. For this reason, I do not think that it is helpful to speak of there being any one particular "right against abuse of process" within the Charter. Depending on the circumstances, different Charter guarantees may be engaged. For instance, where the accused claims that the Crown's conduct has prejudiced his ability to have a trial within a reasonable time, abuses may be best addressed by reference to s. 11(b) of the Charter, to which the jurisprudence of this Court has now established fairly clear guidelines (*Morin*, *supra*). Alternatively, the circumstances may indicate an infringement of the accused's right to a fair trial, embodied in ss. 7 and 11(d) of the Charter. In both of these situations, concern for the individual rights of the accused may be accompanied by concerns about the integrity of the judicial system. In addition, there is a residual category of conduct caught by s. 7 of the Charter. This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the Charter, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.
- [15] In *Babos*, the Supreme Court of Canada revisited the law of abuse of process in relation to state misconduct that presumably was agreed to fall outside the ambit of s. 7 of the Charter, because there is no mention of that issue in the decision. The misconduct consisted of intimidation by Crown counsel, collusion by two police officers to mislead the court, and using improper means to obtain an accused's medical records.
- [16] In my view, if the learned PCJ decided that the institutional failure in this case fell outside the ambit of the rights protected by s. 7 of the Charter, he would have been in error. I do not conclude that he made that error, because I think that if he had intended to characterize the issue as one of abuse of process in order to avoid the effect of *Menard*, he would have expressly stated that, even in brief reasons.
- [17] I conclude that the learned PCJ erred by exceeding his jurisdiction in the context of a bail hearing, as that jurisdiction is limited by *Menard*. I would allow the appeal on that basis.
- [18] Alternatively, if the PCJ was applying the common law abuse of process doctrine, I would hold that he erred in exercising that jurisdiction at the prospective bail hearing on June 29, 2016, and would allow the appeal on that basis. There is no valid reason for not applying the approach and reasoning of *Menard* to applications for remedies for abuse of process as well as to applications for a Charter remedy. To do otherwise would be to perpetuate what the SCC in *O'Connor* referred to as an "artificial dichotomy" and "schizophrenia" in the law. The prospective harm in perpetuating the dichotomy would of course be confusion and the consumption of strained judicial resources in providing a forum for deciding whether or not alleged misconduct has occurred and whether or not it falls within the ambit of s.7 of the Charter.

- [19] I accept the respondent's argument that a trial judge of Provincial Court has jurisdiction to stay proceedings for an abuse of process, based on the decisions in *R. v. Jewitt*, [1985] 2 S.C.R. 128 and *R. v. Power*, [1994] 1 S.C.R. 601. Jewitt speaks of "trial courts" having the jurisdiction and I do not think that Madam Justice L'Heureux-Dube's use of the word "courts", rather than "trial courts", without any explanatory discussion, signalled any expansion of jurisdiction. The Provincial Court is a trial court in the sense that it conducts trials. It does not follow that Provincial Court judges have trial judge jurisdiction while they are conducting specific non-trial hearings that they are empowered by the Criminal Code to conduct, such as preliminary hearings and judicial interim release hearings.
- [20] It is settled on the authority of *R. v. Mills*, [1986] 1 S.C.R. 863 that a preliminary inquiry judge is not a court of competent jurisdiction to grant a Charter remedy. In *R. v. Stupp* (1982), 70 C.C.C. (2d) 107, 36 O.R. (2d) 206 (Ont. H.C.J.), Craig J., after a thorough review of somewhat divergent cases came to the conclusion that a preliminary inquiry judge did not have jurisdiction to stay proceedings for an abuse of process, in the following paragraph:
- [29] Based on s. 475 of the Code, the decisions in *Doyle* and *Chabot*, and the majority decision in *Rourke* and the obiter statements in *Abitibi*, it is my opinion that a provincial court judge conducting a preliminary hearing lacks jurisdiction to stay criminal proceedings for abuse of process.
- [21] Thus a Provincial Court judge presiding at a preliminary inquiry lacks the jurisdiction to stay proceedings as a remedy both under the Charter and for abuse of process at common law. Such a result is entirely consistent with the approach of the Supreme Court of Canada in *O'Connor* in 1995 in holding that the Charter had nearly completely subsumed the common law doctrine.
- [22] *Menard* is binding authority for the proposition that a PCJ presiding at a bail hearing lacks jurisdiction to grant a Charter remedy, upon an application of the functional and structural analysis from *Dunedin*. Madam Justice Bennett (as she then was) adopted the functional descriptions of bail hearings enumerated by *Gulbransen PCJ* and concluded as follows:
- [16] The bail court at common law did not have the jurisdiction to order costs, nor did the bail court by way of statute have the jurisdiction to order costs. To create such a jurisdiction would not be consistent with the functional and structural approach referred to in [*Dunedin*] and the companion case of *R. v. Hynes*, [2001] 3 S.C.R. 623. The bail court is clearly not suited to grant a remedy under s. 24. It has a single purpose and that is to determine whether an accused person should be released from custody pending trial and, if so, on what terms. There is no fact finding, and no final order with respect to guilt or innocence. There is too little time, given the busy docket of most provincial courts to realistically add another layer of Charter jurisdiction to the bail hearing.
- [23] The conclusory paragraph of the Court of Appeal decision in *Menard* stated:

- [51] In my respectful view, the courts below were correct in concluding that a justice presiding over a judicial interim release hearing is not a court of competent jurisdiction for the purpose of awarding costs as a remedy under s. 24(1) of the Charter. A judicial interim release hearing has a particular function to which the power to grant costs is not essential. The presiding justice is granted no remedial authority by statute and dealing with Charter applications would result in complication and delay in proceedings meant to be quickly and efficiently conducted. Such an application would have to be processed according to rules of evidence expressly inapplicable by the terms of the statute. Given its considerable workload, the bail court cannot reasonably be asked to cope with Charter applications. Nor does that leave some Charter breaches irremediable; where timeliness of the remedy is essential or any other circumstance makes it appropriate, application can be made to the superior court.
- [24] I would hold that all that is said in the three levels of court in *Menard* of seeking a Charter remedy at a judicial interim release hearing could also be said about seeking a remedy for abuse of process. I conclude that the learned PCJ lacked the jurisdiction to stay the proceedings as a remedy for abuse of process at the bail hearing, if that was the basis of his decision, as suggested by the respondent. I would allow the appeal on that basis.
- [25] If I had not allowed the appeal on the above grounds, I would have held that the learned PCJ erred in the application of the test for staying proceedings in abuse of process cases, as set out in *Babos*:
- [30] A stay of proceedings is the most drastic remedy a criminal court can order (*R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297 (S.C.C.), at para. 53). It permanently halts the prosecution of an accused. In doing so, the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits. In many cases, alleged victims of crime are deprived of their day in court.
- [31] Nonetheless, this Court has recognized that there are rare occasions -- "the clearest of cases" -- when a stay of proceedings for an abuse of process will be warranted (*R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.), at para. 68). These cases generally fall into two categories: 1) where state conduct compromises the fairness of an accused's trial (the "main" category); and 2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the "residual" category) (*O'Connor*, at para. 73). The impugned conduct in this case does not implicate the main category. Rather, it falls squarely within the latter category.
- [32] The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
- 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) 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).
- [26] While the brevity of the learned PCJ's reasons do not provide a sound basis for meaningful appellate review or analysis of the factors he considered potentially relevant on the first requirement, it is clear, in light of duty counsel's offer to appear with the accused the following day and Crown counsel's stated concurrence, that one alternative to staying the proceedings that day was to adjourn the matter for one day. If the true facts as to Mr. Desjarlais' previous bail being cancelled had been revealed to the court, Mr. Desjarlais' multiple previous adjournments at his request would have been seen in a different light. The PCJ was not directly responsible for that misapprehension, which falls at the feet of Crown counsel, but in my view, the PCJ erred in proceeding summarily in the absence of the accused and without an adequate evidentiary basis. There was no logical reason to assume the difficulties experienced by Surrey Pre-trial in respect of Mr. Desjarlais on June 29 would be repeated the following day.
- [27] There was no evidence explaining the inability of Surrey Pre-trial to produce Mr. Desjarlais throughout the day on June 29, 2016, but there was also no evidence that it was or would be an ongoing problem the following day. No evidence related that issue to the other generic issue of some accused having ongoing difficulty communicating with counsel. In the absence of such evidence, the number of previous adjournments and the length of time Mr. Desjarlais had been in custody did not aggravate the misconduct of failing to produce Mr. Desjarlais, if indeed there was any state misconduct involved in that failure.
- [28] In my view, the circumstances of this case known to the PCJ were not reasonably capable of amounting to one of the clearest of cases of abuse of process.
- [29] For all of the above reasons, I set aside the stay of proceedings and the matter is remitted to the Provincial Court in Vernon for the resumption of proceedings against Mr. Desjarlais.

"I.C. MEIKLEM J."

MEIKLEM J.

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