SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Pike*, 2018 NSSC 12

Date: 20180112
Docket: CRPH 463748
Registry: Halifax

Between:

Jeremy Pike

Applicant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: in respect of *in camera* hearings held in Provincial Court and resulting Transcript (See paragraph 20 herein)

Judge:	The Honourable Justice Patrick J. Murray
Heard:	November 22, 2017, in Sydney, Nova Scotia
Oral Decision:	January 12, 2018
Counsel:	Jeremy Pike, the Applicant, self-represented Mark Gouthro, for the Crown

By the Court:

Introduction

[1] This is a Judicial Review Application. The Applicant is Mr. Jeremy Pike, who now or formerly is a resident of Pleasant Bay, in Northern Cape Breton with his wife and two children.

[2] On November 4, 2016 Mr. Pike swore a private information alleging that the named accused committed the offence of fraud contrary to section 380(1)(b) of the *Criminal Code of Canada*, R.S.C., 1985, c. C-46.

[3] Mr. Pike is asking this Court to review the decision of the Honourable Provincial Court Judge Richard MacKinnon.

[4] At issue is section 507.1 of the *Criminal Code of Canada*, which deals with the procedure involved when a private informant intends to lay a criminal charge.

[5] The matter was brought before the Provincial Court judge for a determination as to whether to "issue process". Issuing process would allow the private prosecution to proceed.

[6] If process was issued, the accused would then be brought before the Court to answer to the charge. This would occur by way of either summons or a warrant for the accused to appear for plea.

[7] In cases where a private citizen (as opposed to the Attorney General) wishes to conduct a private prosecution, the provincial court judge is required to hold what is referred to as a "*pre-enquete* hearing".

[8] Such a hearing is governed by the *Criminal Code* in s. 507.1. Notice of such hearing must be given to the Crown, represented by the Attorney General of the Province, who conducts the clear majority of criminal prosecutions.

[9] In this case the Crown was notified and over the course of several court appearances, advised the Court they were looking into the charge alleged by Mr. Pike.

[10] Ultimately, the Crown informed the Court that it had decided to enter a stay of proceedings pursuant to s. 579, in relation to the charge that Mr. Pike laid.

[11] Mr. Pike argues that the learned judge failed to conduct the mandatory *pre-enquete* hearing required of him, before allowing the Crown to stay the charge.

[12] Mr. Pike as Applicant does not take issue with the authority of the Crown to stay proceedings. At the heart of his argument is that the failure of the judge to inquire into the charge by not hearing Mr. Pike's evidence and that of other witnesses, is contrary to the proper administration of justice.

[13] Mr. Pike therefore seeks an Order in the nature of *mandamus*, requiring the matter to be returned to Provincial Court before another judge, with a direction for that Court to conduct a *pre-enquete* hearing as prescribed by s. 507.1.

[14] Mr. Pike submitted additional arguments seeking relief pursuant to s. 15 of the *Charter of Rights and Freedoms*, 1982 (UK), 1982, c 11, claiming he did not receive equal treatment under the law.

[15] He also argues there was a lack of procedural fairness in the judge's decision, because he was not provided with the opportunity to present evidence supporting the charge he wished to lay privately.

[16] Mr. Pike further alleges there was a breach of natural justice.

[17] At this point, I shall set out some further facts and details in the matter by way of background and to summarize for the record, the proceedings leading up to the decision of Judge MacKinnon.

[18] Sections 507.1 and 579 of the *Criminal Code of Canada* are attached hereto as Appendix "A".

Background

[19] Mr. Pike first appeared in Provincial Court on October 13, 2016. He was properly given direction by Judge MacQuarrie as to the procedure in laying a private information. He was further advised it would be beneficial to consult legal counsel for further advice as to his intended private prosecution.

[20] Mr. Pike next appeared before Judge MacKinnon on November 4, 2016. On that date he swore an information to charge a private individual. The charge alleged was fraud less than $5,000. contrary to s. 380(1)(b) of the *Criminal Code*.

[21] A series of hearings followed that were held in "camera". The Record for the purpose of this review consists of the transcript of those hearings, held on the following dates:

> November 4, 2016 – in camera hearing;
> November 25, 2016– in camera hearing;
> February 2, 2017– in camera hearing;
> February 21, 2017– in camera hearing;
> May 30, 2017– in camera hearing;
> June 20, 2017– in camera hearing; and
> July 18, 2017– in camera hearing.

[22] It is not my intention to summarize each court appearance. I will briefly highlight those matters that are of significance.

[23] At the hearing on November 4, 2017, Mr. Pike was accompanied by his counsel Mr. Wayne MacMillan. The Attorney General was represented at the hearing by Crown Attorney, Mr. Steven Melnick.

[24] The Crown sought an adjournment of the matter on November 4, stating they did not have sufficient information to proceed. Mr. MacMillan suggested that he be allowed to call evidence on behalf of Mr. Pike and if the Crown decided to intervene they could do so at any time. Mr. MacMillan did not feel the Crown would be prejudiced.

[25] Mr. Melnick indicated he would not be prepared to cross-examine given his lack of knowledge. After review the Court granted the Crown's request for an adjournment.

[26] The next scheduled court date was November 25, 2017. Mr. MacMillan appeared on behalf of Mr. Pike. On this occasion Crown Attorney, Mr. Mark Gouthro informed the Court the Crown wished to enter a stay of proceedings. This was to be on an interim basis, pending review and possible intervention by the Attorney General, through the Public Prosecution Service.

[27] Mr. MacMillan had prior notice of the Crown's intentions. Accordingly, Mr. Pike did not appear. The matter was next scheduled for February 7, 2017.

[28] On February 7, 2017 the matter was further adjourned for a 2 week period at the request of the Crown, to allow further review. Mrs. Pike was present by

telephone on behalf of her husband. Mr. Herman Felderhoff was present for the Crown.

[29] On February 21, 2017, Ms. Kathy Pentz appeared for the Crown. She is a senior and the Regional Crown Attorney. This was a substantial hearing in the sense that both Ms. Pentz and Mr. Pike made submissions to the Court. Ms. Pentz discussed the applicable caselaw and *Criminal Code* provisions.

[30] Ms. Pentz stated the Crown had reviewed the matter and were intending to intervene and entering a stay. There was an exchange between the Crown and the Court. There was a discussion as to the timing of the stay and the hearing of witnesses. Ms. Pentz informed the Court that Mr. Martin Herschorn, the Chief Crown Attorney for the Province, would provide advice to the Attorney General and Mr. Pike would be advised in writing.

[31] Mr. Pike made submissions to the Court on February 21, 2017. His argument in part is as follows:

> One observation that the deciding judge made was that the Criminal Code is statutory, the right to privately prosecute is common law. It's a right that's existed for centuries. It has, in one form or another, existed since before the Magna Carta. Indeed, justice normally was exacted by citizens, not by the Crown. The Crown Prosecution Service didn't even develop until the 15th century, and, at that stage, the Crown was an agent for a sovereign matter. Obviously, since then times have changed, laws have evolved and so has society. There is a greater need for the Crown to play a role. However, for the Crown to intervene without giving a citizen of this county the right to at least present his evidence and have the charges considered, have evidence heard by witnesses and have an impact, when the prosecutor himself has also been a victim, I believe, is a gross departure from just process. It's not something I believe Parliament intended when they wrote the statutes or enacted the Criminal Code in 1955. Their intention was not to supersede common law. It was to complement it, I believe.
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> …
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> I don't believe that the Crown has made an honest effort here to apprise themselves of all the facts of the case. I wholeheartedly believe that, based on the case law that we have here – certainly the 2010 ruling – to allow the Crown to stay this procedure at this point in time is, it is not due process and not in the traditional sense, when an accused feels he's been wronged. It's not due process from a prosecution standpoint when you're a private prosecutor, I don't believe.

[32] I will return to discuss subsequent hearings in this matter later in my decision. At this time I turn to discuss the issues as presented by the Applicant.

Issue #1 – Failure of the Judge to carry out his duty at common law and under statute?

[33] The Applicant has framed this issue to include a failure to act judicially. A judge's duty is to apply the law under the statute, as it has been interpreted by caselaw. In addition, there is the common law that has been established over centuries, ours emanating from the laws of England.

[34] The doctrine of *stare decisis* is the thread that runs through the common law. Courts are bound by laws as established in the Courts, and in particular, the Courts of Appeal. In Canada the final authority is the Supreme Court of Canada.

[35] In terms of whether the judge here failed to carry out his duty, there are two decisions from the Ontario Court of Appeal that address the issue before the Court. These are the decisions in ***R v. McHale***, 2010 ONCA 361, and in ***R v. Vasarhelyi***, 2011 ONCA 397, both decided by Justice David Watt.

[36] Before turning to those decisions, it is useful to discuss the remedy sought by Mr. Pike. Under s. 507.1 there is no right of appeal from Judge MacKinnon's decision. His remedy lies in the equitable remedy known as *mandamus*. (***Olympic International Realty Ltd. v. Halifax Regional Municipality***, 2009 NSSC 335)

[37] The remedy of *mandamus* is what is known as a prerogative writ. It is an extraordinary remedy available when a judge (or Court) acts outside its jurisdiction, either by refusing to exercise its jurisdiction or by the judge or court exceeding its jurisdiction. It is not available for example, simply because a judge may have been in error or was wrong about a decision.

[38] For *mandamus* to issue, the reviewing court is not so concerned with the correctness of the decision.

[39] The concern is more whether the court below acted within its authority. There are a number of factors that must be met, including the requirement that there be a clear right to performance of the duty, that the applicant says the judge failed to perform. (Cdn. Admn. Law, 2nd Ed. pg. 559, *Mandamus* by Reginbald)

[40] What is the clear duty here, that Judge MacKinnon should have performed, but failed to perform according to Mr. Pike?

[41] Mr. Pike submits the duty clearly was to conduct a proper *pre-enquete* hearing, and to decide *after* the private informant presents their witnesses, whether process shall issue.

[42] Mr. Pike takes no issue with the Crown's involvement. He does not dispute the Crown's authority to enter a stay of proceeding. His issue is that the hearing must take place in order that due process will be accorded to both the Crown and the private prosecutor. In other words, without the Crown being given priority or precedence over Mr. Pike, as the private prosecutor.

[43] In this way, Mr. Pike seeks accountability within the administration of justice. He says requiring the judge to proceed with the hearing, ensures a just system and preserves the integrity of private prosecutions. That is, a private citizen's right to lay a charge. Under this process the proposed accused is also protected says Mr. Pike. This is the way its supposed to work. This is the way this matter should have proceeded, he submits. Instead, the Court accepted the stay entered by the Crown.

[44] Mr. Pike has submitted several legal briefs on the issues before the Court, with numerous caselaw authorities in support of his legal position.

[45] If one accepts that the Crown has the right to stay proceedings, the question boils down to *when* is it appropriate for the judge to permit or allow a stay of proceedings to be entered.

[46] A plain reading s. 579(1) of the *Code* informs us as to *when,* "the Attorney General or counsel instructed by him for that purpose may enter a stay". It is "at any time after any proceedings in relation to an accused or a defendant are commenced, and before judgment."

[47] The next question is, when do proceedings, (it says "*any*" proceedings) in relation to the accused, "*commence*".

[48] This question was squarely addressed by Justice Watt in ***McHale***, in paragraphs 85 and 86:

> 85 **Section 579(1) permits the direction to enter a stay to be given "at any time after any proceedings in relation to an accused ... are commenced".** The

> predecessor of s. 579(1) was s. 508(1) in the 1970 statutory revision. The comparable wording in former s. 508(1) was "at any time after an indictment has been found", which the *Dowson* court interpreted to mean "as of the moment a summons or warrant is issued" or "once a determination to issue a process is made": see *Dowson*, at p. 157.
>
> **86** The *Criminal Code* provides no definition of the term "proceedings" as it is used in s. 579(1) or elsewhere in the *Criminal Code*. Courts have interpreted "at any time after any proceedings in relation to an accused ... are commenced" in present s. 579(1) as "any time after an information is laid": see *Campbell v. Attorney-General of Ontario* (1987), 58 O.R. (2d) 209 (H.C.J.), at p. 220, aff'd (1987), 60 O.R. (2d) 617 (C.A.); *R. v. Wren*, [1987] B.C.J. No. 1336 (C.A.), at p. 2; *R. v. Pardo* (1990), 62 C.C.C. (3d) 371 (Que. C.A.), at pp. 373-4**. Laying or receipt of an information commences criminal proceedings.** It seems to logically follow from the decisions mentioned that laying an information falls within "proceedings in relation to an accused". The same could be said of a *pre-enquete*, a proceeding to determine whether process should issue. (**emphasis**)

[49] It is not disputed in the present case that Mr. Pike swore the information on November 4, 2016. That is when the information was laid by and received from him. ***McHale*** confirms that *laying or receiving an information* falls within "proceedings in relation to an accused".

[50] In the present case, the learned Provincial Court judge stated at the "in camera" hearing on November 4, 2016, at page 7 of the transcript, that Mr. Pike had sworn an information, and had provided it to the Court and to the Crown on November 4, 2016. Mr. Pike's counsel, Mr. MacMillan made it quite clear Mr. Pike was applying under s. 507.1 and was asking the Court to proceed with a hearing.

[51] Clearly s. 507.1 states that a justice who receives an information laid under s. 504, "shall refer it to a provincial court judge". That is what happened on November 4, 2016. Mr. Pike laid the information by having it sworn and presented to the Court. The *Criminal Code* in s. 504 states the justice (shall) receive the information.

[52] There has been an abundance of caselaw submitted. Considerable time has been spent reviewing the cases and the analysis beginning with ***R v. Dowson***, [1983] 2 S.C.R. 144. ***Dowson,*** a leading case, must now be distinguished because of the amendment to the former s. 508, which read that a proceeding could be stayed at "any time after an indictment has been *found*".

[53] In ***R v. Pardo*** the court held that "a person is an accused as of the laying of the information , which constitutes the beginning of the proceedings". ***Pardo*** was affirmed in decisions such as ***Campbell v. Ontario (Attorney General)***, (1987), 60 O.R. (2d) 617, and ***R v. Wren***, 1987 CarswellBC 971.

[54] With subsequent amendments to the *Criminal Code*, the Attorney General is permitted to direct a stay *any time* after the information is *laid,* as per s. 579(1).

[55] Mr. Pike at page 34 of the transcript addressed some of the cases to which I have referred. He is correct that on the facts in ***McHale***, there was a withdrawal and not a stay. He is also correct that the Ontario Court of Appeal felt the need to decide if a stay of proceedings would have been pre-mature without the Court conducting a *pre-enquete* hearing. The justice did decide that a decision to *withdraw* the information by the Crown was premature.

[56] Mr. Pike indicated in oral argument that the decision in ***McHale*** "was also such that (a stay) would have been premature, before a *pre-enquete* hearing has been allowed to happen".

[57] With the greatest of respect to Mr. Pike, I cannot agree with this interpretation of the decision in ***McHale***. I refer to the following paragraphs of that decision:

> [58] In express terms, s. 507.1 authorizes the participation of the Attorney General in what is usually an *ex parte* and *in camera* proceeding involving only the informant and his or her witnesses. **Nothing in the section curtails the authority of the Attorney General once she or he decides to participate in the *pre-enquete*.**
>
> [70**] It is well-settled that criminal proceedings are instituted or commenced by the laying or receipt of an information in writing and under oath.** Anyone named as a person who committed the offence described in the information is a person "charged" with an offence for the purposes of s. 11(b) of the *Charter*: *R. v. Kalanj*, [1989] 1 S.C.R. 1594, at p. 1607.
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> [89] The application of the principles governing the entry of stays of proceedings under s. 579(1) **permit the Attorney General or an instructed agent to direct entry of a stay at any time after an information has been laid.** Laying an information commences criminal proceedings and is itself a "proceeding in relation to an accused" within the

> meaning of those terms in s. 579(1) of the *Criminal Code*. What occurred here, attendance before a justice to conduct a *pre-enquete also* amounts to "proceedings in relation to an accused" under s. 579(1).

[58] Mr. Pike submitted the case of ***Vasarhelyi*** in support of his positon that Judge MacKinnon made a jurisdictional error and did not exercise his discretion judicially. As stated previously, jurisdiction has to do with the authority to decide an issue or perform a duty.

[59] In ***Vasarhelyi***, the informant brought application for *mandamus* to compel the Justice to issue the process. The offences alleged that a fire had been deliberately set and the charges alleged were perjury, arson and fraud.

[60] A justice of the peace had received evidence at the *pre-enquete* hearing, but refused to issue process. The Appellant then applied to the Superior Court of Justice for an order in lieu of *mandamus* to compel the justice to issue process on the information, This is the same remedy that Mr. Pike is seeking here, except in this case there was no *pre-enquete*. The Superior Court Judge held there was no admissible evidence to support the charges as much of the evidence submitted included hearsay.

[61] The Appellant then appealed to the Ontario Court of Appeal asking that the Justice of the Peace be directed to issue process. Justice Watt stated a review by way of *mandamus* requires proof of jurisdictional error. On a review of the record he concluded that the applications judge committed no jurisdictional error.

[62] In particular, Mr. Pike relies on paragraphs 37 – 38 of ***Vasarhelyi.*** I have review and considered those paragraphs. I adopt paragraphs 33 – 53 and the principles referred to therein.

[63] The ***Vasarhelyi*** case is instructive in that it sets out purpose of the *pre-enquete*, the procedure that governs the hearing, and the principles that govern the extraordinary remedy of *mandamus*.

[64] The Ontario Court of Appeal in ***Vasarhelyi*** observed as follows in discussing the "*pre-enquete*" hearing:

> 49. Unlike a preliminary inquiry to which s. 540 applies directly, a *pre-enquete* is not an adversarial proceeding. The person against whom the informant seeks to have process issued is not present and is not represented by counsel. The Attorney General is entitled to notice of the hearing, an opportunity to attend, to

> cross-examine and call witnesses and to present any relevant evidence at the *pre-enquete* without being deemed to intervene in the proceeding. The Attorney General may also enter a stay of proceedings on a private information as soon as the information has been laid or withdraw the information once a justice has determined that process should issue: *Criminal Code*, s. 579(1); *R. v. Dowson*, 1983 CanLII 59 (SCC), [1983] 2 S.C.R. 144; and *R. v. McHale* (2010), 2010 ONCA 361 (CanLII), 256 C.C.C. (3d) 26 (Ont. C.A.), at para. 89, leave to appeal to S.C.C. refused, [2010] S.C.C.A. No. 290.

Decision on Issue #1

[65] In this case the initial stay was entered on an interim basis on February 21, 2017 when Crown Attorney, Ms. Pentz advised the Court:

> Ms. Pentz: Yes, Your Honour. The Crown has reviewed that matter. We are intending on intervening and entering a stay in relation to this matter.

[66] It was not until June 20, 2017 that the Crown, through Ms. Pentz, advised the Court that a permanent stay would be entered at the direction of the Attorney General. Ms. Pentz stated at page 61:

> Ms. Pentz: Yes, Your Honour, I do have the permanent stay of proceedings that was filed or signed by Martin Herschorn, Director of Public Prosecutions. I would file that with the Court.

[67] This document was signed on June 2, 2017 in Halifax, NS, and filed with the Clerk of the Court. In it, the Attorney General directs the clerk to enter the stay.

[68] As part of my earlier decision on whether to expand the record, I ruled that the Crown's decision to stay, was itself not under review before this Court.

[69] As it is contained within the record, I will comment briefly on the reasons the Crown provided to the Provincial Court. The Crown stated it reviewed a great deal of material including the police investigation. They further reviewed the documentation provided by Mr. Pike's counsel, Mr. MacMillan and his position on the validity of the charge.

[70] When the parties appeared in Court before Judge MacKinnon on June 20, 2017, Ms. Pentz informed the Court that the Crown had proceeded with its analysis assuming the facts as stated by Mr. Pike could be proven.

[71] The Crown were of the view that the evidence did not establish a charge in law. While conceding that Mr. MacMillan held a different view, the Crown advised the Court they were maintaining this position. The Crown was of the view that there was no public interest in proceeding with this matter.

[72] Mr. Pike was again given an opportunity to make further submissions on the law, s. 507.1 and his position and he in fact, did make further submissions and he was also given the opportunity to ask questions.

[73] The matter under review is solely the decision of Judge MacKinnon.

[74] In the end Judge MacKinnon ruled on June 20th as follows:

> Thank you, Mr. Pike. As I indicated earlier, Mr. Pike, it's my view that the Crown is permitted and can enter a stay of proceedings at this point in time, even though the hearing has not been held to determine whether or not there is a prima facie case and to determine whether or not process should issue. The **Criminal Code**, in my view, allows the Crown to enter a stay of proceedings at any point in the proceedings and they have indicated that they are entering a stay of proceedings at this point in time. And in my view, I do not have the right to require the Crown to do anything else after they have entered a stay of proceedings, and I do not have the right to require the Crown to participate or require the Crown to wait until a hearing is held before entering a stay of proceedings. So I am not going to agree with your suggestion or your request, and the stay of proceedings has been entered by the Crown. In my view, there is nothing further to discuss.

[75] Having considered his decision, it is my respectful view, that Judge MacKinnon made no jurisdictional error in allowing the Crown to stay the proceedings. Pursuant to s. 579 the Crown had that authority.

[76] The law as set out in ***McHale*** is clear. In that case, the Ontario Court of Appeal considered this very issue, extensively and carefully. The Crown has the right to stay the proceeding, at any time after an information is laid. The facts here are clear and show that the information was laid on November 4, 2017.

[77] As stated earlier the remedy of *mandamus* is a discretionary one. In this case I find there was no clear duty for the Court to perform once the Attorney General intervened and decided to enter the stay of proceeding. I have provided caselaw in support of this conclusion. The caselaw also suggests that a judge is "*functus*" once a stay is entered, thereby preventing him or her from exercising further authority.

[78] In my respectful view, had Judge MacKinnon proceeded with the *pre-enquete* hearing, in the face of the stay, he would have then have exceeded his jurisdiction.

[79] This concludes my decision on the first issue.

Issue #2 – Was Judge MacKinnon's decision a violation of the Applicant's charter rights under s. 15 of the *Canadian Charter of Rights and Freedoms*?

[80] Mr. Pike believes strongly that Judge MacKinnon's refusal to conduct a *pre-enquete* and his interpretation of s. 507.1 and s. 579 resulted in an unequal application of the law, in these circumstances.

[81] This occurred Mr. Pike submits, by recognizing the Crown's right to stay proceeding without, at the same time, recognizing his rights as a private prosecutor. Under s. 507.1(3)(a) Mr. Pike submits he has the right to call evidence to substantiate the allegation that a crime was committed.

[82] Referring to Martins 2016 at page 1072, Mr. Pike argues s. 507.1(3)(a) makes the introduction of "evidence of witnesses", mandatory.

[83] In order to understand Mr. Pike's argument fully, the Court questioned him on this by pointing out that all that would have occurred, but for the stay.

[84] Mr. Pike agreed this was correct but maintains this is a violation of procedural fairness as per the s. 507.1 requirements that are set out in the *Code*.

[85] In addition to being procedurally unfair, Mr. Pike submits allowing the stay to be entered *before* the mandatory *pre-enquete* hearing, created an unequal application of the law in these given circumstances.

[86] The result he argues was a denial of natural justice that includes the right to be heard.

[87] Mr. Pike submits both matters are of equal importance, the right of a private citizen to lay a criminal charge if they believe a crime was committed, and the right of the Crown to intervene and determine whether a private prosecution will continue.

[88] Mr. Pike submits the unfairness or inequity occurs when the proceeding is stayed *before* due process. Due process he says, is paramount should apply not only to an alleged accused, but to the private citizen as well.

[89] Not only is this procedurally unfair, it prevents a Judge from being allowed to exercise his or her discretion. That, submits Mr. Pike, is not what parliament intended, when they invoked the mandatory procedures contained in s. 507.1.

[90] Mr. Pike pointed out that he is not asking this Court to "impose an all encompassing judgement that declares s. 579(1) and s. 507.1(3) constitutionally invalid in every instance".

[91] He is asking the Court to examine and consider these sections and their specific application in these circumstances.

[92] Mr. Pike's submissions are compelling in that they support an open and transparent approach. He argues that the unequal application of the law results in an unequal benefit to the Crown of s. 507.1. He says the attempt to justify this under s. 579 cannot in these circumstances be saved by Section 1 of the *Charter*.

[93] In my decision given in advance of the review hearing, I permitted the Application to address whether the decision violated s. 15 of the *Charter*.

[94] I have considered Mr. Pike's submission from the case of ***McDonald and The Queen***, (1985) 51 O.R. (2d) 745, as follows:

> …it can be reasonably be said, in broad terms, that the purpose of s. 15 is to require "that those who are similarly situated be treated similarly".

[95] Mr. Pike explains this further in his brief at paragraph 9:

> 9. In other words, a private prosecutor, a crown attorney and a presiding judge in one set of circumstances, should, barring any glaring differences in circumstance, be subject to the same considerations within the law as all other private prosecutors, attorney generals and presiding judges, in a given similar set of like circumstances.

[96] Further at paragraphs 14 and 16 of his brief, Mr. Pike makes the following submissions:

> 14. When the private prosecution matter in question was brought before Judge MacKinnon on Nov. 4, 2016, the record clearly reflects that the private

> prosecutors right that issues from Section 507.1-3(a) was denied, in deference to the Crown request to allow for recognition that 507.1-3(c) – Crown right, had not been properly recognized.
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> …
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> 16. The procedural right afforded in 507.1-3(a) – the hearing, and consideration by the court of the allegations of the informant and the evidence – is a right that should flow equally to all private prosecutors within Canada.

[97] Mr. Pike refers to ***R v. Hardiman***, 1987 CanLII 134 (NS CA), in reference to a quote taken from the case of ***Re Blainey and O.H.A.***, 1986, 54 O.R. (2d) 513, which reads in part:

> It is fundamental in a free and democratic society that all persons should be treated by the law on a footing of equality, with equal concern and equal respect, to ensure each individual the greatest opportunity for his or her enhancement.

[98] I have considered Mr. Pike's submissions which he has placed before the Court so ably.

[99] Having done so, I am of the view that what occurred in these circumstances, does not constitute a violation or infringement of the section 15 equality rights. As was the case with the first issue there is ample case law that has addressed this issue.

[100] The Crown submitted that s. 579 has withstood constitutional challenge. I will grant that these circumstances are somewhat unique. Mr. Pike suggests the two provisions are or appear to be in conflict.

[101] That however, would be the case with any provision which is mandatory, when compared to the stay provision in s. 579(1).

[102] Fundamentally, there must be some form of discrimination, that gives rise to an inequality for a s. 15 infringement to occur.

[103] Mr. Pike is not in a similar situation with Crown Prosecutors who represent the Attorney General. The appropriate comparison is whether he was discriminated or treated differently from other private prosecutors (or informants), when it comes to the Crown's ability to enter a stay of proceedings.

[104] There is no indication before me that he was. Indeed there is ample case law to support the Crown's ability to intervene and direct a stay without such action being considered an unequal application of the law.

[105] In ***R v. Baker***, [1986] 26 C.C.C.(3d) 123, the court held the fact that the Attorney General has broad powers of intervention, including the right to stay proceedings initiated by a private informant, does not violate the equality rights under s. 15 of the *Charter of Rights and Freedoms*.

[106] ***Baker*** involved tragic circumstances. The petitioner swore an information alleging two indictable driving offences, following the death of his 6 year old daughter.

[107] The court held that the rights that all citizens possess to privately prosecute indictable offences " are not absolute or completely unfettered".

[108] In ***Baker*** the court's view was that s. 15(1) deals with equality and whether there is justifiable discrimination between individuals. The court did not categorize the Attorney General's right, duty or function in deciding whether to authorize the initiation of criminal proceedings or the staying thereof as acts or deeds of an individual, such that when compared to the petitioner as the informant, it can be said the latter was discriminated against and therefore entitled to a constitutional remedy under s. 24(1) of the *Charter*. (Toy, J. at page 128)

[109] There are additional authorities that have issued similar rulings.

[110] In ***Attorney General of Quebec v. Chartrand***, 40 C.C.C.(3d) 270, the court held that the private complainant's rights under s. 15 of the *Charter* were not infringed because a stay was entered, stating at paragraph 2 that "Chartrand has not been treated differently from other citizens who might have denounced the commission of an offence".

[111] In ***R v. Osiowy***, 50 C.C.C.(3d) 189, the court held that included in the right to intervene and take control is the power to direct a stay pursuant to s. 508, now s. 579 of the *Criminal Code*. The court held there was no evidence of discrimination or unequal treatment in the application of the section with respect to the Applicant.

[112] Similar rulings have been made in additional cases such as ***Regina v. Hamilton***, 1986 CanLII 2813 (ON CA), and ***R v. Stoddard***, 59 C.R.(3d) 134.

[113] In ***Hamilton***, the court held that neither s. 7 or s. 15 of the *Charter* is strong enough to overcome the specific provision in the *Criminal Code* (to stay proceedings) or the underlying reason which justifies its existence.

[114] In ***Stoddard***, the Ontario Court of Appeal, in a case involving the respective juror selection rights of an accused and the Crown, the court held that s. 15(1) of the *Charter* sets out the right of "every individual". The Court went on to decide that the Crown is not an "individual" with whom a comparison can be made to determine a s. 15(1) violation. (***Holiday Island Motor Lodge Ltd. v. Prince Edward Island***, [1988] P.E.I.J. No. 144, citing ***Baker*** and ***Kostuch***)

[115] The difference between Mr. Pike's case and the cases I have referred to is the introduction of s. 507.1 of the *Criminal Code*. Both ***McHale*** and ***Vasahelyi*** considered s. 507.1 but not in the context of s. 15 of the *Charter*.

[116] Section 507.1(3)(a) states that a judge or designated justice may only issue a summons or warrant if he or she has heard the allegations of the informant and the evidence of the witnesses.

[117] In this case the judge did not issue a summons or warrant. It is therefore arguable that the introduction of evidence was not mandatory in the present case. The Crown submits the hearing of witnesses is not guaranteed under s. 507.1.

[118] The Crown also submits that the various court appearances constituted a hearing under s. 507.1 in this case. I am not persuaded that Judge MacKinnon held the hearing contemplated by s. 507.1 due to the stay that was entered. As he himself said upon the stay being entered, there was nothing further to discuss.

[119] The Crown's position is that s. 579(1) is constitutionally valid. It argues the ability to stay has evolved from common law and is a core prosecutorial function. I concur.

[120] In conclusion, I am satisfied that the Attorney General, in representing the Sovereign, has a distinct and separate role from that of a private citizen who wishes to lay an information. The provisions in s. 507.1 itself confirms the Attorney General has a distinct role which enables them to intervene as necessary to serve the public interest. This includes the power to supervise prosecutions and enter stays.

[121] For these reasons, I find that a comparison between the Attorney General representing the Crown and Mr. Pike as the private informant is not similar in the sense that Mr. Pike has been deprived of equal benefit or application of the law, in these circumstances.

[122] For all of these reasons, I have not been persuaded that there has been a violation of s. 15 of the *Charter*, by virtue of Judge MacKinnon's decision.

Issue #3 – Was Judge MacKinnon's refusal to fulfil all of the statutory procedural requirements of s. 507.1(3)(a), (b), (c) and (d) a violation of procedural fairness?

[123] Mr. Pike alleges there were a number of breaches of the duty of fairness, or procedural fairness committed in this case.

[124] He argues that there was a breach of natural justice, by Judge MacKinnon, in failing to hear his testimony or consider his evidence. (paragraph 36 – 38 of the Applicant's brief).

[125] Mr. Pike submits the initial violation of procedural fairness took place on November 4, 2016 when the Court recognized the Crown's right and denied his, by granting an adjournment and not proceeding with Mr. Pike's request for a hearing.

[126] Mr. Pike further argues that in all subsequent proceedings the Court continually and repeatedly accommodated the Crown by failing to hold a hearing.

[127] In addition, Mr. Pike submits when the Crown did enter the stay, it was procedurally wrong in that s. 579(1) states the Crown must direct the clerk, who shall enter the stay forthwith.

[128] Mr. Pike submitted the case of ***R v. Edge***, 2004 ABPC 55, at paragraph 40 of his brief as to the hearing procedure to be followed in s. 507.1 which he says is clearly laid out.

[129] Notably in ***Edge,*** the court stated a judge must weigh two competing factors: (a) the right of the private informant to seek justice; and (b) the right of the potential accused and that a person not be called before the Court to respond to the charge without just cause.

[130] Mr. Pike also submitted the case of ***Old St. Boniface Residents Assn. Inc. v. Winnipeg (City),*** [1990] 3 S.C.R. 1170, and the requirements for procedural

fairness. Mr. Pike submits he had a legitimate expectation of procedural fairness. The test as set out in paragraph 47 of his brief has four components as follows:

> 47. In this way, the courts have found procedural fairness though a promise.. There are requirements for what constitutes a legitimate expectation. The test, according to "*Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, supra." is:
>
> 1. A public authority makes a promise,
> 2. That promise is to follow a certain procedure,
> 3. In respect to an interested person, and
> 4. They relied and acted upon that promise.

[131] One can see from a review of the ***St. Boniface*** case that the concept of procedural fairness is often used in an administrative law context involving decisions of public authorities and administrative tribunals.

[132] Criminal law has its own procedure, much of which is codified in the *Criminal Code*, but there is also the inherent jurisdiction that a superior court has in criminal matters. There is of course, also case law or common law. Often, in criminal matters, certain procedures are identified by case names that prescribe a certain procedure or section of the *Code*.

[133] There is no question that procedural fairness is an integral part of criminal law. Procedural issues are vitally important and common in almost every case that is before the Court.

[134] In ***St. Boniface***, the court discussed the meaning and content of these principles. It said:

> Both the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case, the statutory provisions and the nature of the matter to be decided.

[135] At paragraph 44 of his brief, Mr. Pike submits that Judge MacKinnon ignored the procedure that was to be followed under s. 507.1(3), when the stay was entered on June 20, 2017, once again, in favour of the Crown's discretionary authority to stay proceedings that issues from s. 579(1).

[136] Mr. Pike makes further reference to the Court being mislead by the Crown and refers to conversations between the Crown and the RCMP. I have earlier decided that the Crown's decision on the stay was a separate issue, and that to consider it would alter substantially the nature of this review, as in the Notice filed on May 23, 2017.

[137] I am satisfied the proper approach of the reviewing court, in terms of procedural fairness, is on the particular statutory provision being invoked and interpreted by the decision maker.

[138] In those terms, then what is the proper procedure required when a stay is entered?

[139] The answer to this question has arguably been given in the decision on the first issue, in reference to the Ontario Court of Appeal's detailed decision, on the required procedure in ***McHale***.

[140] In fairness to Mr. Pike, I think a closer examination of the facts is warranted to ensure a full analysis of his concerns about procedural fairness and his right to be heard.

[141] Having reviewed the entire transcript which included a series of hearings between November 4, 2016 and June 20, 2017, it is apparent there was some delay and indecision on the part of the Crown that resulted in a number of adjournments.

[142] The initial decision to enter a stay on a temporary basis was made early in the process on November 25, 2016. The delay thereafter resulted from uncertainty as to when the final decision to enter the stay had been made.

[143] For example, Ms. Pentz and Mr. Pike made submissions on February 21, 2017 and Judge MacKinnon gave a decision allowing the stay to be entered. In doing so, he noted in his decision the clerk had been directed to enter the stay accordingly.

[144] Following that appearance, was one on May 30, 2017. Mr. Pike in fact, was considering a judicial review of the earlier decision and was seeking transcripts. Mr. Gouthro for the Crown however, reminded the Court that the stay was interim at that point and asked that the matter be put over for two weeks. A date was then set for the ultimate decision on June 20, 2017.

[145] Mr. Pike understandably expressed his frustration with the number of appearances by different Crown Attorneys, and because he was led to believe that a full permanent stay had been made.

[146] As earlier indicated a permanent stay was in fact entered on June 20, 2017. Once again, Judge MacKinnon offered an opportunity for both the Crown and Mr. Pike to be heard.

[147] So in fact, the matter dragged on from November 4th to June 30th, 2017 but in fairness, both sides positions must be considered.

[148] First, there was no delay in the Crown deciding to enter the initial stay.

[149] Second, the Crown did indicate on the record they were reviewing the matter.

[150] As noted in the ***Edge*** decision, the public has an interest in both sides rights being considered and ensuring the process is balanced.

[151] Ensuring the process is balanced would have required a thorough review by the Crown.

[152] Ms. Pentz did request on the record at the February 21, 2017 appearance that the stay not be entered until it was final through the Attorney General's office. This lead to Mr. Gouthro to state at the May appearance that the stay was still on an interim basis.

[153] When the stay was finally entered on the record on June 20th, 2017 Ms. Pentz was open as to the reasons for it. Judge MacKinnon heard again from both sides.

[154] There is little doubt this entire process which lasted 8 months, was procedurally frustrating for Mr. Pike. The question is was it procedurally unfair.

[155] Having considered all of the submissions with a focus on the *Criminal Code* provisions, I am satisfied Judge MacKinnon was in the best position to assess whether adjournments were appropriate or necessary.

[156] Once again, ***Edge*** noted that adjournments can be granted in appropriate circumstances. I am not prepared to "second guess" Judge MacKinnon's decision in that regard.

[157] I have considered whether the learned trial judge should have ordered a halt to the Crown's review and directed a *pre-enquete* hearing, so as to ensure fairness to Mr. Pike.

[158] On balance, I have been persuaded that Judge MacKinnon handled the matter in as fair a manner as possible. The court does not make promises but is expected to follow the law.

[159] In my respectful view, Judge MacKinnon recognized the need to respect the Crown's position, in attempting to determine whether a stay was appropriate. On the other hand, he recognized the duty to hear from Mr. Pike. A significant factor is that on each occasion, the court offered Mr. Pike an opportunity to be heard.

[160] Finally, Judge MacKinnon rendered what he believed was the right decision in law, having regard to the *Criminal Code* provisions in issue.

[161] Before concluding, I will address briefly ground 8 of Mr. Pike's Notice of Statutory Review wherein he pleads a breach of s. 7 of the *Charter*. Essentially, Mr. Pike argues that allowing the stay prevents the Court from getting at the truth and as a result violates s. 7.

[162] Section 7 of the *Charter* is very relevant to a discussion on procedural fairness. It reads:

> 7. Everyone ha the right to live, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[163] The term fundamental justice qualifies the rights contained within s. 7. The principles of natural justice are concerned with but are not limited to solely to procedural guarantees.

[164] I have found the case of ***Kostuch v. Alberta(Attorney General)***, 1996, 43 C.R. (4d) 81, to be instructive on the principles of fundamental justice in relation to s. 7 and the right of a private prosecutor to continue a criminal prosecution.

[165] In ***Kostuch*** an information was sworn alleging an offence under the *Fisheries Act* against persons involved in the construction of the Old River Dam, in the Province of Alberta.

[166] The court referred to the two (2) stage test for the Application of Section 7, 1) a deprivation; and 2) that it occurred in a manner not consistent with principles of fundamental justice. The court held:

> However broadly the right to "liberty and security of the person" in s. 7 of the Charter may come to be interpreted, it is my view that it will not and cannot include the unrestricted right on the part of a private prosecutor to continue a criminal prosecution in the face of an intervention by the Attorney General. The criminal process is not the preserve of the private individual. The fundamental consideration in any decision regarding prosecutions must be

> the public interest. The function of protecting the public interest in prosecution matters has been granted by Parliament to the Attorney General of a province, and in some cases to the Federal Minister of Justice.

[167] Ultimately the court decided that flagrant impropriety on the part of the Crown had not been established. While that is not an issue before me, the decision serves to confirm that the criminal process is not the domain of the private individual. (Judicial Review of Interim Stay, page 49 -51)

[168] On the whole, I am not satisfied that Mr. Pike's application should be granted for lack of procedural fairness or for breach of natural justice.

[169] Once again, I understand the importance of this matter to Mr. Pike and his family and how well he has represented himself, throughout this proceeding.

[170] Mr. Pike has expressed himself eloquently. He has shown himself to be a person of high intelligence. His ability to represent himself and present legal argument has been impressive. He is passionate to say the least about the matter before the Court, which has impacted him and his family. His and their life have been "on hold " while he has pursued "justice" in this matter.

[171] This concludes my decision in relation to the judicial review application before the Court.

Murray, J.

Appendix "A"

Justice to hear informant and witnesses — public prosecutions

507 (1) Subject to subsection 523(1.1), a justice who receives an information laid under section 504 by a peace officer, a public officer, the Attorney General or the Attorney General's agent, other than an information laid before the justice under section 505, shall, except if an accused has already been arrested with or without a warrant,

(a) hear and consider, *ex parte*,

(i) the allegations of the informant, and

(ii) the evidence of witnesses, where he considers it desirable or necessary to do so; and

(b) where he considers that a case for so doing is made out, issue, in accordance with this section, either a summons or a warrant for the arrest of the accused to compel the accused to attend before him or some other justice for the same territorial division to answer to a charge of an offence.

Attorney General may direct stay

579 (1) The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated.

Recommencement of proceedings

(2) Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new information or preferring a new indictment, as the case may be, by the Attorney General or counsel instructed by him for that purpose giving notice of the recommencement to the clerk of the court in which the stay of the proceedings was entered, but where no such notice is given within one year after the entry of the stay of proceedings, or before the expiration of the time within which the proceedings could have been commenced, whichever is the earlier, the proceedings shall be deemed never to have been commenced.