

Citation: *R. v. Germain*, 2023 YKTC 22

Date: 20230629
Docket: 21-00745
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Phelps

REX

v.

BRENDEN GERMAIN

Appearances:
Kimberly Eldred
David C. Tarnow

Counsel for the Crown
Counsel for the Defence

**RULING ON *CHARTER* APPLICATION AND
REASONS FOR JUDGMENT**

[1] Brenden Germain is before the Court on a two-count Information alleging that on December 22, 2021, he committed offences contrary to ss. 320.14(1)(a) and 320.14(1)(b) of the *Criminal Code*.

[2] The trial began with a *voir dire* on application by Mr. Germain alleging violations contrary to s. 7 of the *Charter*. The parties agreed to proceed with a blended *voir dire*.

[3] Mr. Germain asserts that while he was in police custody his requests to be given the opportunity to urinate were denied, causing him to urinate in his pants. He was then

required to sit in his wet pants and provide a breathalyser sample before being offered the opportunity to change into dry clothing. His position is that this indifference to basic human needs and dignity is offensive and would shock the community's conscience and offend its sense of fair play. The remedy that Mr. Germain seeks is a stay of proceedings.

Facts

[4] On December 22, 2021, Cst. Parent was on duty when he was called to attend a single-vehicle accident on the North Klondike Highway. As he arrived at the scene of the accident, at approximately 22:24, he started the police vehicle Watchguard audio and video recording. The system is equipped with two cameras, one facing forward from the front of the police vehicle, and a second facing back from the front of the vehicle showing the rear seat. The front facing video showed a truck that had gone through a snowbank and into the ditch a short distance from the highway. On arrival, Mr. Germain was seated in the driver's seat of the truck with several passengers also seated in the truck.

[5] The video does not capture the interaction between Cst. Parent and Mr. Germain given the angle of the video where the police vehicle was parked, but it does provide audio from the microphone worn by Cst. Parent as he approached the vehicle. He engaged with Mr. Germain who advised that he got scared and that it was the first time "hitting the ditch". Cst. Parent asked if the people in the vehicle required rides as a second police vehicle was on the way that could assist with transporting people home.

[6] Cst. Parent requested Mr. Germain's drivers licence and insurance, and was advised by Mr. Germain that he only had his learners license. Mr. Germain advised that he was driving his father's truck and a short discussion took place regarding how the truck slid on the ice into the ditch. Cst Parent advised Mr. Germain that he had concerns about his level of sobriety, resulting in him reading the ASD demand. A sample, resulting in a fail, was provided by Mr. Germain at 22:30:45, at the same time as the second police vehicle is seen arriving. During this time, there was a cordial conversation between Mr. Germain and Cst. Parent. At 22:31:40, Mr. Germain was placed in the rear seat of the police vehicle.

[7] Mr. Germain was concerned about his friends being safe and Cst. Parent exited the vehicle, assuring him that the RCMP would take care of his friends. At 22:37, Mr. Germain became agitated and started banging on the rear window with his hand, repeatedly and non-stop, for about two minutes until Cst. Parent returned. He then started crying, bent over with his head in his hands, which was followed by belligerence and yelling. Throughout this time, Cst. Parent was composed and explained to Mr. Germain what was happening with his friends while assuring him that they would be ok.

[8] At 22:40, Cst. Parent began transporting Mr. Germain to the RCMP Arrest Processing Unit ("APU") at the Whitehorse Correctional Centre ("WCC"). During the transport Mr. Germain fluctuated from crying, to being mildly agitated and continuously talking about his circumstances, to engaging Cst. Parent in conversation, to being belligerent towards Cst. Parent, and at one point demanding his name and badge number. Throughout the exchange, Cst. Parent is calm, assuring Mr. Germain that he

would get home safe that evening, providing his name and badge number as demanded, and offering to let Mr. Germain call his brother and his father with Cst. Parent's personal phone.

[9] At 22:55:05, they arrived at the gate to the WCC. As they were waiting for the gate to open, Cst. Parent explained that they would be taking breath samples and then he would drive Mr. Germain home. Mr. Germain advised Cst. Parent that he had to urinate. Cst. Parent responded that he could "make that happen". The conversation immediately shifts by Mr. Germain talking about where he would be going after they were done at the APU.

[10] At 22:56:14, Cst Parent is heard responding to a call on the radio when Mr. Germain states again that he has to urinate and that he had been "holding it" the entire time. At 22:56:40, Mr. Germain is heard saying, "guess what, I just pissed myself" and Cst. Parent responds saying that as soon as they get into the APU he can urinate. Cst. Parent did not hear that Mr. Germain had already urinated.

[11] The gate at the WCC was not operating properly and Cst. Parent exited the vehicle to try and physically move it. He is joined by WCC staff and another RCMP member who come from inside WCC to assist. Mr. Germain is seen in the police vehicle yelling words of encouragement to them.

[12] At 22:58:40, Cst. Parent asked a WCC guard if they could be walked in through the front entrance of WCC as they were not having success opening the gate. This request was denied.

[13] At 22:59, Cst. Parent returned to the police vehicle and asked Mr. Germain what his little brother's phone number was, which Mr. Germain did not know. The gate, at this point, had still not been opened.

[14] At 22:59:35, Mr. Germain said "I pissed my pants in the back seat of your truck" and Cst. Parent responded "Do you want to pee outside?". This is followed by an exchange wherein Mr. Germain confirmed he had already urinated and did not need to anymore. Cst. Parent then exits the vehicle to speak to the WCC guard and Mr. Germain bangs hard on the window a couple of times, swearing.

[15] At 23:01:30, Cst. Parent re-enters the vehicle after he and several individuals successfully opened the gate. Forty seconds later they were parked in the APU garage.

[16] Upon arrival at the APU, Cst. Parent was told by the WCC guard that there was another individual in the APU being dealt with and that he would have to wait five minutes in the police vehicle. Cst. Parent refused to wait, instead advising he would take Mr. Germain into the interview room and stay with him, which he proceeded to do. He testified that this agitated the guard, but that he did not want Mr. Germain to have to sit in the seat where he had urinated any longer. The reason for taking him directly to the interview room was also to restrict the people who would see Mr. Germain.

[17] The Watchguard recording ends prior to their entry into the APU, and the audio of the interactions is captured by a portable recorder that Cst. Parent had turned on prior to exiting the police vehicle. The time references that follow are to lapsed time from exiting the police vehicle at the APU. In addition to the audio recording, there was video of the interview room.

[18] Approximately 2:40 minutes after arriving at the APU, Cst. Parent starts the observation period of Mr. Germain for the breath sample.

[19] The breath technician joins them at about 6:45 minutes and Cst. Parent confirms Mr. Germain's pant size so that the officer can retrieve pants. A casual conversation ensues between Cst. Parent and Mr. Germain, and at about 13:55 minutes Cst. Parent asked a WCC guard for pants. The pants were delivered at 16:30 minutes. Mr. Germain asked to call his dad, which he was permitted to do with Cst. Parents cell phone at the 17-minute mark.

[20] At about 24:00 minutes, Mr. Germain said that he had to urinate again. Cst. Parent explained that there was one minute left in the observation period and if they interrupt the observation they would have to start again. Mr. Germain decided to provide the breath sample before urinating. There was difficulty obtaining a sample from Mr. Germain and he repeated the need to urinate. There is an exchange with Cst. Parent about "holding it" and Cst. Parent makes it clear they will stop so he can urinate if Mr. Germain says cannot wait.

[21] At 29:18, a suitable breath sample was obtained and Mr. Germain was immediately taken to go to the bathroom and to change.

[22] There is watchguard audio and video, showing the time on the 24-hour clock, for the ride that Cst. Parent provided to Mr. Germain after the investigation was concluded from 00:42 to 01:02, during which time there is cordial conversation between Cst. Parent and Mr. Germain. Mr. Germain decides he does not want to go home and

Cst. Parent drives him to two residences before dropping him off at a safe place for the evening.

Law

[23] The Supreme Court of Canada addressed the remedy of a stay of proceedings in

R. v. Babos, 2014 SCC 16 at paras. 30-32:

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, 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, 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).

[24] Mr. Germain's argument falls within the residual category – that the conduct of Cst. Parent risks undermining the integrity of the judicial process.

[25] The Court in *Babos* expands on the residual category at paras. 35-36:

35 By contrast, when the residual category is invoked, the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial - even a fair one - will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency. This harms the integrity of the justice system. In these kinds of cases, the first stage of the test is met.

36 In *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, this Court described the residual category in the following way:

For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. Ordinarily, the latter condition will not be met unless the former is as well -- society will not take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare. [para. 91]

[26] Defence filed a number of cases wherein a stay of proceedings was granted by the Court.

[27] *R. v. Sathymoorthy*, [2014] O.J. No. 3233, wherein the accused urinated in the back of a police cruiser after being left for a considerable time having requested an opportunity to urinate, then was held after the investigation concluded for nine hours without a change of clothes in a cold cell. Mr. Sathymoorthy was ridiculed by multiple officers and testified that he was embarrassed, and that when he told an officer that he

was wet and cold, he was told “what else do you expect in jail?”. The Court summarizes the findings at para 34:

34 As described earlier, I found that the defendant was left in a soiled state for 10 hours because of wilful indifference on the part of persons in authority. I infer on the evidence that Mr. Sathymoorthy endured humiliation, discomfort and jeopardy to his composure during the breathalyser procedure and thereafter. I found this to be avoidable and an abuse of his personal dignity, aggravated by the slight mocking to which he was subject, all of which in my view has led to an egregious *Charter* violation and in the process has diminished the administration of justice.

[28] *R. v. Stoney*, 2015 ONCJ 740, wherein the accused advised the police officer of the need to urinate before being transferred to the police station, and again on arrival when told the wait to get in would be 25 minutes. He held on for approximately twelve minutes before urinating in his pants. He was not provided a change of clothing, despite being available, and was held in a small concrete cell, with a concrete slab for a bed, for nine hours that was described by the judge as being “unreasonably cold”. Mr. Stoney testified that he was hungry during his time in cells, having been in custody for a total of almost twelve hours and not offered any food. The Court concluded at para 16:

16 In my view the totality of this neglect amounted to failure of the police to meet their obligation to ensure fair, humane and dignified treatment of a person held in their custody. It was offensive to societal notions of fairness and decency.

[29] *R. v. Samayoa* (2018), 423 CRR (2d) 268 (ONCJ), wherein the accused being investigated for impaired driving asked to urinate and was not provided the opportunity to do so for over an hour, by which time he had urinated in his pants, but not before requesting the opportunity to urinate two more times and expressing urgency. He was

processed and held in cells until his release for over 5 hours, without a change of clothing, and had to walk home in his soiled clothing. The Court concluded at para. 55:

I am satisfied the factual circumstances attract the same considerations set out in *R. v. Sathymoorthy* [2014 ONCJ 218] and *R. v. Stoney* [2015 ONCJ 740]. I find the totality of events amounted to a failure of the police authorities to meet their obligation to ensure fair, humane and dignified treatment of a person held in their custody.

[30] *R. v. Penfold-Brown*, 2019 ABPC 40, wherein the accused in an impaired driving investigation had urinated in his pants prior to being taken into custody by the police, and was held in custody for a total of seven hours, with the Court summarizing his treatment at para 32:

32 The circumstances of the Accused's detention at APU are extremely offensive. On his evidence, the Accused lay in soiled, wet clothing on a cold cell floor for as much as 7 hours. His pleas to use the toilet facilities and get a blanket fell on deaf ears, thus indicating a wilful indifference on the part of authorities.

[31] *R. v. Macaalay*, [2022] O.J. No. 2443 (ONSC), wherein the accused in an impaired driving investigation urinated in his pants prior to the arrival of the police to the scene where he had been involved in an accident. He was never offered a change of clothing, was “ruthlessly mocked” by police officers and remained in police custody for approximately seven hours. The accused testified “that he was very embarrassed about the situation. He was never offered a change in clothing. He was cold and curled up on a concrete bunk, where he fell asleep.” The Court summarized the police conduct at para. 36:

Both P.C. Alszegi and P.C. Maye were aware that Mr. Macaalay had urinated himself. Both detectives smelled the urine, in addition to seeing the wet spot, and neither one did anything to rectify the situation. Mr.

Macaalay remained in wet, soiled, and pungent clothing for over seven hours while in police custody. He was cold and he was placed in a cell where he was required to lay or stay on a concrete bed.

[32] In addition to *Babos*, the Crown relied on the following cases wherein the Court declined to grant a stay of proceedings:

[33] *R. v. April*, 2018 ONCJ 357, an impaired driving case wherein the accused had urinated on his pants prior to coming into contact with the police and was not offered a change of clothing during the subsequent investigation which included the taking of breath samples. The accused testified that he was embarrassed and uncomfortable at the station for a couple of reasons, including the fact that he had urine on his shorts, and agreed that the police were polite and professional in their interactions with him.

The Court concluded at para. 19:

19 Though it might have been a better idea to at least offer the accused a change of clothes, the failure to do so in all of the circumstances of this case do not amount to a breach of the accused's section 7 or 12 *Charter* rights. The accused made no such request. Indeed, the accused made no complaint whatsoever. The police were polite with the accused and respected requests that were made by him. For example, when the accused asked to have a cigarette P.C. Peters took him out of his cell to accommodate the request. The police provided fair, humane and dignified treatment to the accused while he was in their custody. The Applicant has not demonstrated a deprivation of his right to life, liberty or security of the person . . .

[34] *R. v. Manalo*, [2018] ONCJ 653, a child luring case wherein the accused urinated in his pants during his arrest. He was not offered a change of clothes at any point while in custody, which was summarized at para. 14:

The Applicant was held overnight. The following morning he was transported, along with several other detainees, to the courthouse. He was held in a bullpen type cell with other accused to await his bail hearing. He was granted bail and released 15 hours following his arrest.

[35] The Court in *Manalo* found that the conduct of the police fell short of a s. 7

Charter violation at paras 42-43:

42 I accept the Applicant's evidence that the entire experience following his arrest left him feeling upset, anxious and humiliated. But I find that his emotional state was caused by his arrest on charges of child luring and not by any police misconduct. Throughout the interview process, he expressed concern over how these charges would impact his children, his work and his life in general. I am not satisfied on a balance of probabilities, that the effects of the state conduct, objectively viewed, had an impact on the Applicant's psychological integrity to the degree that it breached his security of the person.

43 I do not want to be seen as condoning the police inaction in this case. Members of the arrest team could have shown greater consideration by, at the very least, informing the Duty Sergeant at the station about the urine on the Applicant's pants. The conduct of the police in this case did not demonstrate the degree of courtesy one would hope for in enforcement personnel, but the failing falls considerably short of a breach of Section 7.

[36] I note that in each of the cases relied on by both Crown and Defence, there was evidence presented through the accused to the Court to describe the impact the specific treatment by authorities had on them. The Court in *Manalo* addressed the psychological integrity of a person protected by security of a person at paras. 25-26:

25 The boundaries that protect an individual's psychological integrity from state interference are ill-defined. The right does not protect an individual from the ordinary stresses and anxieties that any reasonable person would suffer from government action. If this were so, the right would be meaningless [*R. v. Gowdy*, 2016 ONCA at para. 99].

26 To establish a restriction of security of the person, an applicant must demonstrate, on a balance of probabilities, that the state conduct in issue had a serious and profound effect on the applicant's psychological integrity. The effects of the state interference are to be assessed objectively, with a view to their impact

on the psychological integrity of a reasonable person. The effects need not rise to the level of nervous shock or psychiatric illness, but must extend beyond ordinary stresses or anxiety [Gowdy at para. 100].

Application of Law

[37] As noted, Mr. Germain chose not to testify in this matter and the Court does not have evidence regarding the alleged psychological impact on him resulting from the actions of Cst. Parent. The Court does have the audio and video of the investigation from the roadside where the investigation commenced, and to the residence where Mr. Germain was dropped off by Cst. Parent.

[38] It is unfortunate that Mr. Germain urinated in his pants, in the back seat of the police vehicle, while they were waiting to access the APU through the malfunctioning gate. When he told Cst. Parent that he had to urinate, Cst. Parent said that he could do so in the APU. As noted previously, the time to travel from the gate to the APU and to park was 40 seconds. The intended delay in permitting Mr. Germain the opportunity to urinate was very short. After advising Cst. Parent that he needed to urinate, the conversation shifted to Mr. Germain speaking about where he was going to go that night as he could not go home, explaining that it was a forty-minute drive. Cst. Parent assured him that he would drive him home, or wherever Mr. Germain wished to go.

[39] 69 seconds after first advising Cst. Parent that he had to urinate, Mr. Germain expressed some urgency at a time that Cst. Parent was on the radio and did not hear him. 26 seconds later Mr. Germain announced that he had urinated in his pants. The total lapsed time from requesting to urinate to announcing that he had urinated in his pants was 95 seconds. Cst. Parent subsequently offered to let Mr. Germain urinate

outside, but by then it was too late. I disagree with Mr. Germain that Cst. Parent should have responded to him with urgency and permitted him to urinate outside immediately upon his initial request. Cst. Parent believed at that point that they were less than a minute from entering the APU and he was going to provide Mr. Germain the opportunity to urinate inside.

[40] I note the following conduct of Cst. Parent after arriving at the APU:

1. He secured a pair of pants for Mr. Germain 23 minutes after Mr. Germain urinated in his pants, and Mr. Germain was given the opportunity to change 36 minutes after he urinated in his pants.
2. He maintained a polite demeanour and was cordial with Germain throughout their interactions.
3. He provided Mr. Germain with his personal cell phone to give him the opportunity to speak with his father.
4. He refused to follow the direction of the WCC guard to have Mr. Germain return to the seat where he had urinated and wait before entering to APU.
5. He escorted Mr. Germain directly into the RCMP interview room where he would have minimal interaction with people.

6. He started the observation period required for the breath sample shortly after entering the interview room to minimize Mr. Germain's time in the APU.
7. He kept Mr. Germain informed about what was going on and let Mr. Germain decide if he wanted to urinate again and restart the observation period or wait and use the bathroom immediately after giving a sample of his breath.

[41] There is nothing depicted in the interactions between Mr. Germain and Cst. Parent that would suggest that he was anything but kind and responsive to Mr. Germain's needs. This extends after the investigation was concluded by providing Mr. Germain a ride to a friend's home a considerable distance from the APU. Cst. Parent ensured the fair, humane and dignified treatment of Mr. Germain while in police custody and I am not satisfied that his conduct, viewed objectively, had an impact on Mr. Germain's psychological integrity to the degree that it breached his security of the person.

[42] I find that Mr. Germain's s. 7 *Charter* rights were not violated on December 22, 2021, by the conduct of Cst. Parent while he was in police custody.

[43] A Certificate of Qualified Technician was filed confirming that Mr. Germain provided two breath samples, registering 250 and 230 milligrams of alcohol in 100 millilitres of blood, respectively.

[44] I find Mr. Germain guilty on count 2 on Information 21-00745 of the offence contrary to s. 320.14(1)(b) of the *Criminal Code*.

PHELPS T.C.J.