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Nunavunmi Apiqhuidjutainut Uuktuffaarutit  
Nunavut Court of Appeal  
Cour d'appel du Nunavut

Citation: *R v DeJaeger*, 2017 NUCA 2

Date: 20170316  
Docket: 08-15-002 CAP  
Registry: Iqaluit

Between:

Her Majesty the Queen

Respondent

- and -

Erik DeJaeger

Appellant (Applicant)

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The Court:

The Honourable Mr. Justice Neil Sharkey

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**Memorandum of Judgment**

An Application for Court-Appointed Counsel pursuant  
to s. 684(1) of the *Criminal Code of Canada*

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## Memorandum of Judgment

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(NOTE: This document may have been edited for publication)

### **The Court:**

[1] As of today, the 15<sup>th</sup> of March, 2017, Erik DeJaeger's appeal against conviction and sentence will be spoken-to for the sixth time since he filed a so-called prisoner's appeal 23 months ago on March 26<sup>th</sup>, 2015.

[2] Apart from the Court's receipt of appeal books in January of 2016, the appeal has not progressed in any substantive manner due to Mr. DeJaeger's lack of legal representation.

[3] The Legal Services Board of Nunavut (LSB) advised the Court prior to the July 16<sup>th</sup>, 2016 speak-to appearance that it had declined Mr. DeJaeger's request for legal aid and would not be providing him with counsel to represent him on his appeal.

[4] At the last sitting on November 9<sup>th</sup>, 2016, Mr. DeJaeger advised that he wished to have legal representation to assist with his appeal.

[5] As such, the Court is left with the decision of whether or not counsel should be assigned to act on behalf of the accused on the appeal.

[6] Section 684 (1) of the *Criminal Code of Canada*, RSC 1985, c C-46 [*Criminal Code*] enables the Court of Appeal or a Judge of that Court to assign counsel where, in the opinion of the Court, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.

[7] In such event, counsel's fees and disbursements would be paid, in this case, by the Attorney General of Canada at a tariff set by the Court.

[8] It is clear that the Appellant, Mr. DeJaeger, does not have the financial means to retain counsel and also that Legal Aid has declined to appoint counsel on his behalf.

[9] The Crown has suggested that I either deny Mr. DeJaeger's application for Court-appointed counsel, or at least put the application off to the next speak-to list on 26 July 2017.

[10] I am mindful of the Respondent Crown's reservations that I not make an order appointing counsel, as it were, in haste, and that before making such an order I should be satisfied that a number of conditions precedent are properly satisfied.

[11] Most particularly, and in accordance with a well settled body of case law, the Crown suggests that Mr. DeJaeger has not established his impecunious status to the extent that he could not afford to retain counsel privately.

[12] Nor, says the Crown, do I have anything in writing from the Legal Services Board explaining the reason why they have denied Mr. DeJaeger's request for a lawyer.

[13] The Crown suggests that a paper trail respecting both these areas of concern is required if I am to properly exercise my discretion under section 684 of the *Criminal Code*.

[14] As I consider the Crown's reservations I am confident, on the one hand, that much of the paper trail suggested by the Crown will be easily forthcoming, but that other items (such as income tax returns) might take considerable time to produce.

[15] Mr. DeJaeger was an Oblate Missionary and Roman Catholic Priest and is now serving a lengthy sentence. At the end of the day, I have no doubt Mr. DeJaeger's is impecunious, and so to put him to more formal proof this late in the procedural history of this appeal amounts, in my view, to simply more unnecessary delay.

[16] The case authorities which have considered section 684 of the *Criminal Code* set out a number of criteria or factors which the Court should take into account in determining whether, in the interests of justice, counsel should be appointed.

[17] Firstly, the merits of the appeal itself relate to whether counsel will be assigned. Clearly, appeals which are completely void of merit will not be helped by the assignment of counsel.

[18] This examination of the merits of the appeal, however, should go no further than a consideration of whether the appeal is an arguable one. Indeed, it has been said that an appellant who only has an arguable case is presumably more in need of counsel than an appellant who has a strong grounds of appeal.

[19] So I must also consider, in exercising discretion under section 684, whether an appellant who asks for Court appointed counsel could effectively present his appeal without the help of counsel.

[20] I must also consider whether it would be difficult for the Court to properly decide the case without the assistance of such counsel.

[21] The Crown has reservations respecting these other pre-requisites to the making of an order for Court-appointed counsel on appeal. The Crown says, for example, that in terms of the merits of the appeal, Mr. DeJaeger's has not pleaded any precise "ground" upon which he wants his conviction and sentence set aside. Similarly, says the Crown the seriousness of the penalty to Mr. DeJaeger's is not itself sufficient to establish that the case merits the appointment of counsel. Further, says the Crown, there is little to

suggest that Mr. DeJaeger's is incapable of advancing and arguing his own appeal.

[22] In fairness, the Crown has never suggested that Mr. DeJaeger's appeal is either frivolous or entirely without merit.

[23] The Appeal Books which are before me contain volumes of witness testimony with many contentious legal issues.

[24] The DeJaeger trial was both notorious and lengthy. It was also a complex case.

[25] There are times when an Appellant shows he or she is quite capable of presenting and arguing his or her own case without a lawyer. Mr. DeJaeger's, however, is not such an individual. He may be an educated man, but he is also a relatively old man, with no experience in handling the conduct of a Court case on his own.

[26] I am of the view that Mr. DeJaeger's could not effectively present his appeal in an organized and coherent fashion without the assistance of

counsel.

[27] Similarly, it would be difficult for the Appellate Court to properly assess this testimony and the legal issues which were addressed at trial (and which may well re-emerge on appeal) without the assistance of counsel.

[28] While I consider that there is some merit to the Crown's reservations concerning Court-appointed counsel at this stage, I consider also that after all the delay thus far there is a need for some expediency in getting this appeal heard as soon as possible. Indeed, in the event a new trial is ordered, it is important that the prospective witnesses wait as little as possible.

[29] I consider Mr. DeJaeger's situation before today unique because of the delay to this point and thus this decision has little or no precedential value.

[30] I am persuaded there is merit to Mr. DeJaeger's request for Court-appointed counsel and accordingly, pursuant to section 684 of the



*Criminal Code*, I order that counsel be appointed. Fees and disbursements of counsel shall be determined and paid in accordance with subsections 684 (2) and (3).

Application heard on March 15, 2017

Memorandum filed at Iqaluit, Nunavut  
This 16th day of March, 2017

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Sharkey J.A.

**Appearances:**

I. Nault  
for the Respondent

The Appellant  
appearing on his own behalf