Court File No. 19-RD18130

SUPERIOR COURT OF JUSTICE
(EAST REGION)

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

-and-

DEIRDRE MOORE

Applicant

APPLICANT'S BOOK OF AUTHORITIES

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INDEX

R. v. Varcoe, [2007] O.J. No. 1009

Ontario Judgments

Ontario Court of Appeal

Toronto, Ontario

K.M. Weiler, J.L. MacFarland, and H.S. LaForme JJ.A.

Heard: January 8, 2007.

Judgment: March 21, 2007.

Docket: C44730

[2007] O.J. No. 1009 | 2007 ONCA 194 | 222 O.A.C. 197 | 219 C.C.C. (3d) 397 | 46 C.R. (6th) 299 | 73 W.C.B. (2d) 305 | 2007 CarswellOnt 1544

Between Her Majesty the Queen, Respondent, and Joey Varcoe, Appellant

(40 paras.)

Case Summary

Criminal law — Preliminary inquiry — Appeal by accused from sexual assault conviction allowed — No evidence accused was made aware of his right to preliminary inquiry at time he made his election — Criminal Code, s. 536(2).

Criminal law — Procedure — Election — By accused — Appeal by accused from sexual assault conviction allowed — No evidence accused was made aware of his right to preliminary inquiry at time he made his election — Criminal Code, s. 536(2).

Appeal by the accused from conviction for sexual assault. The complainant, aged 15 at the time of the alleged offence and aged 16 at trial, testified the accused performed oral sex on her and penetrated her without her consent after a party held by her parents for her brother's birthday. The accused was the former boyfriend of the complainant's older sister. He was not invited to the party, but showed up with the intent of reconciling with the complainant's sister. When his attempts to speak to his former girlfriend were rebuffed, he left the party. The complainant arrived at the party later, when everyone else there had had a lot to drink, save for the complainant's father. A mattress had been laid out for the accused to sleep on, but the complainant thought it was for her, having been sleeping on the floor while her room was being renovated. As the complainant lay on the mattress, the accused returned and pulled her blanket and pants down, performed oral sex on her, and penetrated her with his penis. The complainant did not make a sound or complain during the assault. She went to the bathroom and cried, then returned to her mattress and demanded that the accused leave. When he did not, she went to sleep on the couch. The complainant reported the assault to some friends five months later. She claimed she did not come forward because she was afraid, embarrassed, and worried her parents would not believe her. She became depressed and moody after the incident. The accused denied any sexual activity took place between himself and the complainant, although he admitted he would not get off her mattress when she asked him to. The accused was self-represented at trial. The judge did not use the standard words in asking the accused whether

he elected for a trial before a judge alone, or before a judge and jury. No explanation was made to the accused regarding a preliminary inquiry.

HELD: Appeal allowed and new trial ordered.

There was no way of knowing whether the accused was aware of his right to a preliminary inquiry. As such, there was no jurisdiction for the judge to proceed with the trial. No substantial wrong or miscarriage of justice resulted from the judge's failure to appoint counsel for the accused, and permitting him to cross-examine the complainant, despite the complainant's age. The accused had a fair trial overall, with adequate assistance from the judge. The judge's shortcomings did not give rise to a reasonable apprehension of bias. The judge did not err in admitting evidence of the complainant's post-offence demeanor, and did not engage in improper propensity reasoning. The proper standard and burden of proof was applied.

Statutes, Regulations and Rules Cited:

Criminal Code, s. 486(2.3), s. 536(2), s. 686(1)(b)(iv)

Appeal From:

On appeal from the conviction entered by Justice Robert N. Fournier of the Ontario Court of Justice dated August 2, 2005.

Counsel

Joseph Wilkinson, for the appellant.

Tracy Stapleton, for the respondent.

[Editor's note: A corrected version was released by the Court March 28, 2007; the corrections have been made to the text and the corrigendum is appended to this document.]

The judgment of the Court was delivered by

J.L. MacFARLAND J.A.

OVERVIEW

1 The appellant appeals his conviction for sexual assault on August 2, 2005 by the Honourable Mr. Justice Fournier, sitting without a jury, at Haileybury, Ontario.

2 The complainant (K.F.), who was fifteen years old at the time of the offence and sixteen at trial, alleges that, after a party held by her parents for her brother's birthday, the appellant performed oral sex on her and briefly penetrated her without her consent. The appellant was self-represented at trial. He denied that any sexual activity had taken place between him and K.F.

3 On this appeal, the appellant raises numerous grounds of appeal. For the reasons that follow, I would not give effect to the majority of these. However, I do agree that the trial judge erred when he failed to put the appellant to his election under s. 536(2) of the *Criminal Code*. For this reason, a new trial is required.

THE FACTS

4 On September 12, 2004 -- the day of the alleged offence -- the appellant, K.F., K.F.'s older sister (A.F.), and other family and friends gathered at K.F.'s parents' home for a birthday party for K.F.'s older brother. Until shortly before this date, the appellant had been involved in a relationship with A.F. The appellant had not been invited to the party, but showed up in an apparent effort to reconcile with A.F. While his attendance was not welcomed, the family appeared to tolerate it.

5 On the evidence at trial, the appellant made a number of efforts to speak to A.F. during the party, but on each occasion she walked away from him. Eventually A.F. left the party altogether.

6 K.F. arrived at the party at approximately 10:00 p.m., after having worked her shift at Kentucky Fried Chicken.

7 While there was some conflict in the evidence at trial about how much K.F. had to drink at the party, the preponderance of the evidence suggests that she had very little, if anything, to drink. However, with the exception of K.F. and her father, there is little doubt that almost everyone else at the party had a lot to drink that night.

8 When the party wound down, someone had placed a pillow and a blanket on the couch in the living room where it was intended that the appellant would sleep. K.F. had for some time been sleeping on a mattress on the floor in that same room; her bedroom was undergoing renovations at the time. K.F.'s aunt also slept on a love-seat in the living room for part of the night. K.F.'s parents slept approximately twenty-five feet down the hall from the living room.

9 According to K.F., after everyone else had gone to bed, the appellant, who had been on the couch, stood at the end of her mattress. She asked him what he wanted, but he did not answer. The appellant pulled off K.F.'s blanket and pulled her pants down. He then performed oral sex on her and briefly penetrated her with his penis. The appellant then asked K.F. "what are you going to do for me?" K.F. made no sounds and did not resist or complain during the assault.

10 Soon after the alleged assault, K.F. says that she went to the bathroom, where she cried for about five minutes. She then returned to the living room and angrily told the appellant to get out of her bed. He refused. K.F. went to sleep on the couch.

11 The complainant did not report this assault to the police until January 2005, after talking to some friends. She says that she did not come forward earlier because she was afraid, embarrassed, and worried that her parents would not believe her. After the incident, she never smiled; she became depressed and moody.

12 Although the appellant admits that he went to sleep on K.F.'s mattress and that he would not get off her mattress when asked, he denies that he assaulted K.F. He denies that any sexual activity took place between them.

ISSUES

13 The appellant raises seven grounds of appeal. As set out in paragraph 17 of his factum, they are:

1. Was the trial a nullity because the trial judge lacked jurisdiction due to the failure to put the appellant to his election under s. 536(2) of the *Criminal Code*?
2. Did the trial judge err in not appointing counsel on behalf of the appellant under s. 486(2.3) of the *Criminal Code*?
3. Did the trial judge err in failing to give adequate assistance to the unrepresented appellant?
4. Did the trial judge's conduct of the case give rise to a reasonable apprehension of bias?
5. Did the trial judge err in admitting evidence of the complainant's post-event demeanor or in placing improper weight on that evidence, if admissible?
6. Did the trial judge err in engaging in improper propensity reasoning?
7. Did the trial judge err in his application of the burden and standard of proof?

ANALYSIS

Was the trial a nullity because the trial judge lacked jurisdiction due to the failure to put the appellant to his election under s. 536(2) of the *Criminal Code* *of Canada*

14 Section 536(2) of the *Code* provides:

> If an accused is before a justice charged with an indictable offence, other than an offence listed in section 469, and the offence is not one over which a provincial court judge has absolute jurisdiction under section 553, the justice shall, after the information has been read to the accused, put the accused to an election in the following words:

> You have the option to elect to be tried by a provincial court judge without a jury and without having had a preliminary inquiry; or you may elect to be tried by a judge without a jury; or you may elect to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. If you elect to be tried by a judge without a jury or by a court composed of a judge and jury or if you are deemed to have elected to be tried by a court composed of a judge and jury, you will have a preliminary inquiry only if you or the prosecutor requests one. How do you elect to be tried?

15 It is clear from the record that the language of s. 536(2) was not put to the appellant. The only question that remains is whether what was said amounts to substantial compliance with the section. It is the appellant's position that there was neither substantial compliance with s. 536(2) nor effective waiver of the requirements of that section. In such circumstances, the appellant says, the provincial court judge was without jurisdiction to try him. The appellant relies on *R. v. Mitchell* (1997), 121 C.C.C. (3d) 139 (Ont. C.A.) where at para. 28 Doherty J.A. stated:

> If an accused has an election as to the mode of trial, that election should be put to the accused in the language of s. 536(2). Absent waiver of the procedural requirements of that section, a failure to put the accused to his or her election, in terms which at least substantially comply with the section is a procedural error resulting in a loss of jurisdiction to conduct either a trial or a preliminary inquiry[.]

16 Doherty J.A. further concluded at para. 29 that the court could not use s. 686(1)(b)(iv) to cure a failure to put an accused to his election. He reasoned:

> By its terms, [s. 686(1)(b)(iv)] can reach only procedural errors committed by a court having "jurisdiction over the class of offence" for which the accused was convicted. A judge of the Provincial Division has no jurisdiction to try an electable indictable offence unless an accused has made an effective election for trial in that court. As Griffiths J.A. said, in *R. v. Pottinger* (1990), 54 C.C.C. (3d) 246 (Ont. C.A.) at 252:
>
> > The complete want of jurisdiction to conduct the trial is not the kind of procedural irregularity which ... should be cured by invoking s. 686(1)(b)(iv).

17 Doherty J.A. went on in para. 30 to consider the question of waiver:

> Unless there was an effective waiver of the procedural requirements of s. 536(2), the trial was a nullity and the appeal must succeed. Section 536(2) was enacted to assist an accused in making an informed decision as to mode of trial. An accused may personally, or through counsel, waive compliance with a procedure like s. 536(2) which has been enacted for the protection of the accused: *Korponey v. Attorney General of Canada* (1982), 65 C.C.C. (2d) 65 (S.C.C.) at 73. In *Korponey, supra*, at p. 74, a case involving waiver of procedural rights surround a re-election, Lamer J., for the unanimous court, described the elements of an effective waiver of a procedural right in these words:
>
> > ... [T]he validity of such a waiver, and I should add that that is so of any waiver, is dependent upon it being *clear and unequivocal that the person is waiving the*

> *procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process.*

After indicating that the effectiveness of a waiver required a fact-specific inquiry, Lamer J. added, at p. 74:

> However, always relevant will be the fact that the accused is or is not represented by counsel, counsel's experience, and, in my view of great importance in a country so varied as ours, the particular practice that has developed in the jurisdiction where the events are taking place.

18 To begin the factual inquiry to determine whether there has been substantial compliance with section s. 536(2), one must look to the record. In this case, the relevant portions of the record provide as follows:

> CLERK OF THE COURT: Joey Varcoe, you are charged that on or about the 12th day of September, 2004 at the Town of Cobalt in the said region, did commit a sexual assault on [K.F.], contrary to s. 271 of the *Criminal Code*. How does the Crown elect to proceed?
>
> MS. REGIMBAL: As indicated on the screening form, the Crown is proceeding by way of indictment on the charge. Your Honour, I did take a few moments and explain to Mr. Varcoe that the nature of the charge and election means that he has the option to choose whether or not he wishes to proceed to Superior Court or to have his trial here today. Verbally, he indicated his wish was to have his trial here today and get it over with, but perhaps the court can take a moment to explain that option to him. He did indicate this was for trial today. And the Crown has made up its witness list accordingly.
>
> THE COURT: Okay. Thank you. That is the case, sir. You know that you could elect to proceed by way of judge and jury, or a judge of Superior Court alone or this court, and you prefer to proceed in this court here today.
>
> JOEY VARCOE: Yes.
>
> THE COURT: Okay. So that will be your election as noted. And I gather you are entering a plea of not guilty.
>
> JOEY VARCOE: Yes.
>
> THE COURT: Okay. Can I see the information briefly? You may proceed, Crown.

19 The difficulty here is that the record says nothing about a preliminary inquiry. We do not know if the Crown, in her discussions with the appellant, gave him any explanation at all in relation to a preliminary inquiry.

20 We have no information, and certainly nothing on the record, to suggest whether the appellant even knew what a preliminary inquiry was, let alone his entitlement to one. We can make no assumptions about his knowledge of the criminal process. His criminal record tells us nothing about his knowledge of the criminal process such that we can assume he was aware of his right to a preliminary inquiry. It may be that he entered guilty pleas on those other occasions.

We simply do not know, and the record is insufficient to enable this court to make any such assumption.

21 While in recent times there has been discussion about the possibility of eliminating preliminary inquiries from the criminal justice process, today they remain an integral part thereof.

22 In these circumstances, I am of the view that there was no jurisdiction for the trial judge to proceed with the appellant's trial, and on this ground alone there must be a new trial. Because there must be a new trial. I propose to deal with the other grounds of appeal raised only very briefly.

Did the trial judge err in not appointing counsel on behalf of the appellant under s. 486(2.3) of the *Criminal Code?*

23 The complainant was under eighteen years of age at the time of trial. Section 486(2.3) provided:

> In proceedings referred to in subsection (1.1), the accused shall not personally cross-examine a witness who at the time of the proceedings is under the age of eighteen years, unless the presiding judge, provincial court judge or justice is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination, and if the accused is not personally conducting the cross-examination, the presiding judge, provincial court judge or justice shall appoint counsel for the purpose of conducting the cross-examination.

24 While the manner in which section 486(2.3) was considered by the trial judge was less than satisfactory, I am of the view that no substantial wrong or miscarriage of justice occurred in the circumstances of this case as a result of his failure to appoint counsel. The complainant was sixteen years of age at the time of trial and consented to the appellant personally cross-examining her.

25 I would dismiss this ground of appeal.

Did the trial judge err in failing to give adequate assistance to the unrepresented appellant?

26 It is a fine line that trial judges are required to walk in dealing with unrepresented and self-represented accused persons. Trial judges are to avoid any conduct that may be seen to favour one side over the other and to maintain their independence as between the two. This obligation must be balanced against the need to take steps to ensure that no miscarriage of justice occurs as a result of an unrepresented accused.

27 As a majority of the Alberta Court of Appeal stated in *R. v. Phillips* (2003), 172 C.C.C. (3d) 285 at paras. 22-23, aff'd (2003), 181 C.C.C. (3d) 321 (S.C.C.) with respect to unrepresented accused persons:

> Their need for guidance varies depending on the crime, the facts, the defences raised and the accused's sophistication. The judge's advice must be interactive, tailored to the circumstances of the offence and the offender, with appropriate instruction at each stage of the trial.
>
> How far a trial judge should go in assisting an accused is therefore a matter of judicial discretion[.] The overriding duty is to ensure that the unrepresented accused has a fair trial. [Citations omitted.]

28 While this judge certainly could have been of more assistance to the appellant, in my view the appellant had a fair trial overall. This was a short and uncomplicated trial. The appellant was aware that it was important for him to discredit K.F.'s version of the events and he tried to do so, although perhaps not as effectively as counsel on his behalf might have done. For example, he led evidence about his relationships with other women and his lack of sexual aggressiveness in those other relationships. Further, he testified on his own behalf that his feelings for K.F.'s sister made his actions against K.F. unlikely.

29 I would therefore dismiss this ground of appeal.

Did the trial judge's conduct give rise to reasonable apprehension of bias?

30 The test to establish reasonable apprehension of bias is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude": see *R. v. S.* (*R.D.*) (1997), 118 C.C.C. (3d) 353 at para. 31 (S.C.C.). The onus is on the person alleging bias and the threshold for finding its existence is high.

31 In this case, the appellant has not established that the trial judge's conduct gave rise to a reasonable apprehension of bias. Much of this complaint relates to the trial judge's comments to K.F. -- comments I would consider to be perhaps a somewhat overzealous effort to put her at ease. I do not see these comments as giving rise to a reasonable apprehension of bias.

32 I would dismiss this ground of appeal.

Did the trial judge err in admitting evidence of the complainant's post-offence demeanor or in placing improper weight on that evidence, if admissible?

33 K.F.'s emotional upset was manifest the day following the assault; it was apparent to and noted by her family. Such evidence is admissible and may be used to support a complainant's evidence of a sexual assault. See *R. v. Boss* (1988), 46 C.C.C. (3d) 523 (Ont. C.A.). The weight to be given this properly admissible evidence was exclusively a matter for the trial judge's discretion.

34 I would dismiss this ground of appeal.

Did the trial judge err in engaging in improper propensity reasoning?

35 In my view, there is nothing in the trial judge's reasons or the trial transcript to indicate that the trial judge viewed the appellant as the sort of person who would commit a sexual assault.

36 I agree with the respondent's submission on this point:

> Though the Learned Trial Judge characterized the appellant's behaviour and attitude on the night of the party as "arrogant", it is submitted that this does not demonstrate that the Judge employed impermissible propensity reasoning.

37 I would dismiss this ground of appeal.

Did the trial judge err in his application of the burden and standard of proof?

38 In my view the trial judge's reasons, when considered in their entirety, demonstrate that he clearly understood the burden and standard of proof. He was well aware that his task involved more than simply choosing which version of events he preferred.

39 I would dismiss this ground of appeal.

40 In the result, I would allow the appeal and order a new trial.

J.L. MacFARLAND J.A.
K.M. WEILER J.A.:— I agree
H.S. LaFORME J.A.:— I agree

* * * * *

Corrigendum

Released: March 28, 2007

The corrections are as follows:

[Appeal From statement]: preamble "R." should read "Robert"

13 : under the heading "ANALYSIS" the number "1" in the first question has been removed; and

38 : para. [38] reference was made to she/her and it has been corrected to he/his.

Regina v. Mitchell[Indexed as: R. v. Mitchell], 36 O.R. (3d) 643

Ontario Reports

Court of Appeal for Ontario

Morden A.C.J.O., Osborne and Doherty JJ.A.

December 17, 1997

Docket No. C25273

36 O.R. (3d) 643 | [1997] O.J. No. 5148

Case Summary

Criminal law — Appeals — Procedural errors — No prejudice to accused — Arraignment and plea — Failure to read charges to accused or to take accused's plea constituting procedural irregularities — Accused aware of exact nature of charges when asked to elect and at trial — Trial judge recording plea of not guilty be entered and clear that was accused's plea — Procedural errors resulting in no prejudice to accused — Section 686(1)(b)(iv) of Criminal Code applied — Appeal by accused dismissed — Criminal Code, R.S.C. 1985, c. C-46, ss. 536(2), (3)(b), 686(1)(b)(iv).

Criminal law — Procedure — Election — Waiver — Failure to put accused to his election constituting procedural error resulting in loss of jurisdiction unless procedural requirement waived — Election not put to accused in language which complied with s. 536(2) of Criminal Code but defence counsel nevertheless stated that accused elected trial by provincial court judge — Procedural requirements of s. 536(2) waived — Criminal Code, R.S.C. 1985, c. C-46, s. 536(2).

Criminal law — Procedure — Hybrid offences — Accused charged with five hybrid offences and one indictable offence in single information — Crown not expressly choosing to proceed by indictment and trial proceeding in provincial court — Presumption that Crown elected summarily unless demonstrated to contrary — Strong indication existing that Crown intended to proceed by indictment — Presumption that Crown chose to proceed summarily rebutted.

The accused was charged in a single information with five dual procedure offences and an indictable offence. The Crown did not expressly choose to proceed by indictment on the dual procedure charges. The charges were not read to the accused, and the accused was not put to his election in the language of s. 536(2) of the Criminal Code. Defence counsel did state on the record that the accused elected trial by provincial court judge. The accused later attempted to re-elect trial by judge and jury. The trial judge held that the accused could not re-elect unless the Crown consented. The Crown refused to consent. The trial judge then directed that not guilty pleas be entered on behalf of the accused, rather than calling on the accused to enter his pleas. The accused was convicted of the five dual procedure offences and acquitted of the indictable offence. He appealed, arguing that the proceedings were rendered a nullity by the failure to properly comply with the Criminal Code provisions

relating to arraignment, election and plea. The Crown submitted that, given the failure by the trial Crown to expressly choose to proceed by indictment, the Crown was deemed to have proceeded summarily on the five dual procedure charges, so that the appeal should be quashed, as an appeal from conviction in a summary conviction proceeding goes to the Ontario Court (General Division).

Held, the appeal should be dismissed.

Where no express election is made by the Crown and a dual procedure offence is proceeded with through trial to a verdict in a court having jurisdiction to hear a summary conviction proceeding, it will be presumed, in the absence of any indication to the contrary, that the Crown chose to proceed summarily. In this case, there was a strong indication to the contrary. The entirety of the record left no doubt that the Crown proceeded by way of indictment.

The failure to arraign an accused is a procedural irregularity which can be cured by s. 686(1)(b)(iv) of the Criminal Code if the failure did not prejudice the accused. It was clear that the accused and his counsel were well aware of the exact nature of the charges when counsel was asked to elect a mode of trial and when the trial actually commenced. There was no reason to think that the proceedings would have gone any differently had the charges been read to the accused. The failure to read the charges to the accused did not cause him any prejudice and should not vitiate the convictions.

If an accused has an election as to the mode of trial, that election should be put to him in the language of s. 536(2) of the Criminal Code. Absent waiver of the procedural requirements of that section, a failure to put the accused to his or her election in terms which at least substantially comply with the section is a procedural error resulting in a loss of jurisdiction. The accused was not put to his election. However, Crown counsel expressly asked that the accused make his election and that the election be recorded on the information. Defence counsel did not respond to Crown counsel's request for an election. He did, however, indicate that the accused elected trial by provincial court judge. This response was in the exact terms contemplated by s. 536(2). Counsel had full authority to elect on behalf of the accused, and did so knowing both the nature of the procedural rights he was waiving and the effect of his election on his client's rights. That waiver gave the Provincial Division jurisdiction to conduct the trial.

The failure to take the accused's pleas to the charges constituted a procedural irregularity which could be rendered harmless by s. 686(1)(b)(iv) of the Code if no prejudice resulted. It was clear throughout the proceedings in the Provincial Division that the accused intended to plead not guilty and contest the charges. The failure to give the accused the opportunity to say the words "not guilty" in response to the charges was of no consequence in the trial that followed.

Korponey v. Canada (Attorney General), [1982] 1 S.C.R. 41, 132 D.L.R. (3d) 354, 44 N.R. 103, 65 C.C.C. (2d) 65, 26 C.R. (3d) 343, consd

Other cases referred to

R. v. Ashoona, [1985] N.W.T.R. 83, 19 C.C.C. (3d) 377 (S.C.); R. v. Cloutier (1988), 27 O.A.C. 246, 43 C.C.C. (3d) 35 (C.A.); R. v. Clunas, [1992] 1 S.C.R. 595, 134 N.R. 268, 9 C.R.R. (2d) 79, 70 C.C.C. (3d) 115, 11 C.R. (4th) 238; R. v. Dosangh (1977), 35 C.C.C. (2d) 309 (B.C.C.A.); R. v. Gougeon (1980), 55 C.C.C. (2d) 218 (Ont. C.A.); R. v. Kalkhorany (1994), 71 O.A.C. 39 (C.A.); R. v. Kapoor (1989), 52 C.C.C. (3d) 41, 19 M.V.R. (2d) 219 (Ont. H.C.J.); R. v. Lewis (1978), 43 C.C.C. (2d) 479 (Ont. C.A.); R. v. M. (F.H.) (1984), 30 Man. R. (2d) 190, [1984] 6 W.W.R. 158, 14 C.C.C. (3d) 227 (Q.B.); R. v. Marcotullio (1978), 39 C.C.C. (2d) 478 (Ont. C.A.); R. v. N. (C.), [1992] 3 S.C.R. 471, 144 N.R. 293, revg (1991), 144 N.R. 294 (Que. C.A.); R. v. Pottinger (1990), 37 O.A.C. 262, 54 C.C.C. (3d) 246, 76 C.R. (3d) 393 (C.A.); R. v. Robert

(1973), 13 C.C.C. (2d) 43 (Ont. C.A.); R. v. St-Pierre (1994), 97 C.C.C. (3d) 93 (Que. C.A.); R. v. Wiseberg (1973), 15 C.C.C. (2d) 26 (Ont. C.A.)

Statutes referred to

Criminal Code, R.S.C. 1985, c. C-46, ss. 536(2), (3)(b), 606(2), 686(1)(b)(iv)
Interpretation Act, R.S.C. 1985, c. I-21, s. 34(1)(a)

APPEAL by the accused from conviction.

Michael Code, for appellant. Shelley M. Hallett, for respondent.

The judgment of the court was delivered by
DOHERTY J.A.: — This appeal raises two issues:

- Did the Crown proceed by indictment on the five dual procedure charges contained in the six-count
- information?

- Assuming the Crown proceeded by indictment on all charges, were the proceedings rendered a nullity by the
- failure to properly comply with the Criminal Code (R.S.C. 1985, c. C-46) provisions relating to arraignment, election, and plea?

The appellant was charged with six offences in a single information. All of the charges arose out of the same incident. Five of the charges were dual procedure offences on which the Crown could choose to proceed by indictment or by summary proceedings. If the Crown proceeded by indictment on those charges, the appellant had an election as to his mode of trial. The sixth charge, forcible confinement, could be tried only by indictment and the appellant had an election as to his mode of trial. The appellant was tried in the Ontario Court (Provincial Division) on all counts. He was acquitted on the forcible confinement charge and convicted on the other five charges. Only the convictions are before this court.

I. Did the Crown choose to proceed by indictment on the dual procedure charges?

Crown counsel counters the appellant's procedural arguments with one of her own. Crown counsel submits that the Crown failed to expressly choose to proceed by indictment and is, therefore, deemed to have proceeded summarily on the five dual procedure charges. If she is correct, this appeal must be quashed since an appeal from conviction in a summary conviction proceeding goes to the Ontario Court (General Division). Counsel takes this position even

though two of the sentences imposed at trial exceeded the maximum allowed if the Crown proceeded summarily.

Dual procedure offences are deemed to be indictable unless, and until, the Crown elects to proceed summarily: Interpretation Act, R.S.C. 1985, c. I-21, s. 34(1)(a); R. v. Gougeon (1980), 55 C.C.C. (2d) 218 (Ont. C.A.). The Crown election should be made expressly and recorded on the information. Where no express election is made by the Crown, and a dual procedure offence is proceeded with through trial to a verdict in a court having jurisdiction to hear a summary conviction proceeding, it will be presumed, in the absence of any indication to the contrary, that the Crown chose to proceed summarily: R. v. Robert (1973), 13 C.C.C. (2d) 43 (Ont. C.A.); R. v. Marcotullio (1978), 39 C.C.C. (2d) 478 (Ont. C.A.); R. v. Dosangh (1977), 35 C.C.C. (2d) 309 (B.C.C.A.); R. v. Ashoona (1985), 19 C.C.C. (3d) 377, [1985] N.W.T.R. 83 (S.C.); R. v. Kapoor (1989), 52 C.C.C. (3d) 41, 19 M.V.R. (2d) 219 (Ont. H.C.J.). This "presumption" is best understood as a somewhat strained application of the "rule" that in applying the criminal law, ambiguities should be resolved in favour of the accused. Summary proceedings expose the accused to a lesser penalty than do proceedings by way of indictment: R. v. Dosangh, supra, at p. 312; R. v. M. (F.H.) (1984), 14 C.C.C. (3d) 227, 30 Man. R. (2d) 190 (Q.B.).

The appellant was tried by a judge of the Ontario Court (Provincial Division). Judges of that court can sit as a summary conviction court under Part XXVII of the Criminal Code. Since the Crown made no express election, the presumption in favour of summary proceedings applies "in the absence of evidence or any other indication to the contrary": R. v. Ashoona, supra, at p. 379.

In this case, there is a strong indication to the contrary. At an appearance on February 28, 1995, Crown counsel observed that there had been no election made by the appellant and asked that he be put to his election. Defence counsel said "trial by provincial court judge" and the proceedings were adjourned to the next date. The effect of defence counsel's purported election for trial by provincial court judge will be considered under the second ground of appeal. The significance of this exchange, for present purposes, rests in Crown counsel's request that the appellant be put to his election. The appellant has no election if the Crown chooses to proceed summarily. Crown counsel's request that the appellant be put to his election and that it be endorsed on the information are clear indications that the Crown was proceeding by indictment.

There is no merit in the submission that Crown counsel's request that the appellant be put to his election related only to the forcible confinement charge. Crown counsel's request suggests no such limitation. Certainly, the clerk of the court did not understand Crown counsel's request or defence counsel's response as limited to only one of the six charges. The clerk endorsed the information in these terms: "Provincial judge counts 1 to 6 inclusive."

Subsequent proceedings confirm the Crown's intention to proceed by indictment on all counts. On August 17, 1995, the matter came on for trial. Counsel for the appellant argued that the appellant was entitled at that stage to elect trial by judge and jury. The trial judge, after looking at the information, determined that the appellant had already elected trial in provincial court and could not re-elect trial by judge and jury unless the Crown consented to that re-election. Crown counsel refused to consent to a re-election. Crown counsel's refusal is a further clear indication that the Crown had chosen to proceed by indictment. Had the Crown proceeded summarily, any purported re-election by the appellant would have been of no consequence on five of the charges. If the Crown was proceeding summarily, I would have expected the Crown to so

indicate and to take the position that the appellant had no election and consequently no re-election on five of the six counts. Crown counsel's apparent acknowledgement that the appellant could re-elect his mode of trial if the Crown consented made sense only if the Crown was proceeding by indictment.

Furthermore, had the Crown chosen to proceed summarily on the five dual procedure offences, it could not have jointly tried those counts with the one purely indictable offence unless the trial judge was satisfied that the appellant was not prejudiced by the joinder: R. v. Clunas, [1992] 1 S.C.R. 595 at p. 610, 70 C.C.C. (3d) 115 at pp. 124-25. The trial judge was not asked by Crown counsel to make any such inquiry and I take this as a further indication that the Crown was proceeding by way of indictment.

It is unfortunate that the Crown failed to expressly indicate the manner in which it chose to proceed on the charges. The entirety of the record, however, leaves no doubt that the Crown proceeded by way of indictment on all charges.

II. Were the proceedings a nullity?

The trial proceedings stretched over almost two years and involved over 30 court appearances before various judges in the Provincial Division. In the end result, the appellant received a fair and error-free trial. The proceedings were, however, procedurally flawed. The appellant was not arraigned on the charges or put to his election as required by s. 536(2) of the Criminal Code, and assuming the Provincial Court had jurisdiction to try the appellant, he did not plead to the charges as required by s. 536(3)(b). In order to appreciate the nature and effect of these procedural failings, it is necessary to review the events leading up to the appellant's trial.

A: The Proceedings

On the appellant's first appearance (October 3, 1994), the justice outlined the nature of the charges to the appellant but did not read them to him. The appellant was not represented at that time. By October 5, 1994, the appellant was represented by counsel. That same counsel (not Mr. Code) acted for the appellant throughout the subsequent proceedings in the Provincial Division. On the appellant's appearance on October 28, 1994, the presiding judge indicated that he understood that the case would be proceeding as a trial and that two days were needed to complete that trial. He adjourned the case on consent to February 28, 1995. Prior to that date, the Crown learned that a material witness, who had been subpoenaed, could not be located. On February 28, the presiding judge acceded to a Crown request for an adjournment and issued a warrant for the arrest of the missing witness. Counsel for the appellant suggested that the matter go over for a month to set a new trial date. The appellant was in custody on other matters. The following exchange occurred at the conclusion of this appearance:

> MR. PERLMUTTER [Crown counsel]: Your Honour, I know that the Information doesn't appear -- I don't believe it has an indication of an election being made. To avoid any problems in the future he should be put to his election today -- if it is going to be put to court the next time or a preliminary hearing. I am quite content that a formal arraignment be waived, but an election be made and put on the record.
>
> THE COURT: Put to 205 court today to set a date.

MR. PERLMUTTER: Can we place the election before we do that?

MR. DUNGEY [counsel for the appellant]: Trial.

MR. PERLMUTTER: By provincial court judge?

MR. DUNGEY: By provincial court judge.
MR. PERLMUTTER: If that could be put on the Information today, please?

(Emphasis added)

In accordance with Crown counsel's request, the information was endorsed to indicate that the appellant had elected trial in the Provincial Division on all counts in the information. Later that day, the trial was fixed for July 17, 1995.

The witness did not appear on July 17, 1995. She had been arrested on the warrant and released on bail, but failed to appear as required on July 17. The Crown requested a further adjournment. When asked by the court, counsel for the appellant acknowledged that the case was a "trial matter". Later in this appearance, the appellant personally asked the court to fix an early trial date as he was anxious to get out of the local jail and back to the penitentiary where, in his view, conditions were much better. The trial judge was concerned about further delay and put the case over to August 3 with a view to fixing a trial date.

On August 3, the Crown had still not located the material witness. The presiding judge quite properly took the position that a firm trial date had to be fixed. He selected August 17, 1995. Crown counsel advised that one police witness was not available on that date. The presiding judge reviewed the history of the matter and reaffirmed August 17 as the trial date. He asked counsel whether the matter was "marked for preliminary hearing or a trial?" Counsel for the appellant replied "trial". Counsel for the appellant then asked that the matter be marked for trial on August 17 on the counts involving the material witness and that it be marked to be spoken to on the other counts. The court agreed with this suggestion but made no endorsement on the information.

On August 17, the material witness was present. There was a dispute as to whether all of the charges should proceed on that day. Counsel for the appellant, based on the judge's statements on the previous appearance, understood that only the charges involving the material witness would proceed. He was prepared to proceed to trial on only those counts. Crown counsel wanted to proceed on all counts but one of the police witnesses was unavailable. The presiding judge decided that the trial would proceed before him and that he would deal with the issues raised by counsel in due course.

Counsel for the appellant made further submissions reiterating his position that he was prepared for trial on only the counts involving the material witness. Crown counsel suggested that the trial could proceed with the evidence of the material witness and then be adjourned to a later date.

After a brief adjournment, counsel for the appellant said:

My position is this: I spoke to my client, and what has transpired over the period and history of this case, my client advised me that he is going to be electing judge and jury, as is his

> right before you, because you are a trial judge. There is an indication, I believe there was an election for trial. The judge was not seized by it. At this time he elects judge and jury. . . . There has to be an arraignment. The time of the arraignment is when the election is taken. At that time and only at that time is the election effective. Not at any time, not on a prior occasion. It is when he puts in his plea on the arraignment and pleads not guilty, and his election will be judge and jury.

(Emphasis added)

After examining the information, the trial judge concluded, no doubt based on the February 28, 1995 endorsement, that the appellant had already elected trial in the Provincial Division and could only re-elect under the applicable Criminal Code section if the Crown consented to the re-election. Counsel for the appellant said that his client wished to re-elect trial by judge and jury. The Crown refused to consent to the re-election and the trial judge said, "I will direct that a plea of not guilty be entered in counts one to six".

There was a further discussion about which witnesses would be heard that day. Counsel for the appellant observed that the court was only available for one day. He said:

> If that is the case obviously it is going to go over. He may as well be arraigned on everything proceed on everything and just hear the one witness and put it over.

The trial judge replied, "He has been arraigned." The trial judge was in error. There had been no arraignment. Counsel for the appellant said:

> Okay, then to proceed on everything, and just hear the one witness. Thank you very much.

The trial proceeded. The material witness's evidence was not completed and the trial was adjourned. It proceeded intermittently over the next ten months.

B: Analysis

Each of the procedural errors alleged by the appellant can be analyzed using the same three-step format.

- Was there a failure to comply with a statutory procedural requirement?
-
- If there was a non-compliance, is it rendered harmless by s. 686(1)(b)(iv) of the Criminal Code?
-
- If there was non-compliance and s. 686(1)(b)(iv) cannot be applied, did the appellant waive compliance with
- the procedural requirement?

It is appropriate to address waiver last since it becomes determinative on this appeal only if any procedural error would otherwise necessitate reversal of the convictions.

(i) The failure to read the charges to the appellant

The information was not read to the appellant as required by s. 536(2) and nothing approaching substantial compliance with that section occurred. The failure to properly arraign the appellant was a procedural error. Section 686(1)(b)(iv) of the Criminal Code provides that the court may dismiss an appeal where:

> . . . notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby.

It has been authoritatively established that the failure to arraign an accused is a "procedural irregularity" which can be cured by s. 686(1)(b)(iv) in the appropriate circumstances: R. v. N. (C.), [1992] 3 S.C.R. 471, 144 N.R. 293, reversing (1991), 144 N.R. 294 (Que. C.A.); R. v. St-Pierre (1994), 97 C.C.C. (3d) 93 (Que. C.A.). The application of s. 686(1)(b)(iv) in these cases is consistent with the careful analysis of the scope of that section provided by Goodman J.A. in R. v. Cloutier (1988), 43 C.C.C. (3d) 35 at pp. 46-51, 27 O.A.C. 246 (C.A.), in which he held that serious procedural errors going to jurisdiction are within the curative reach of s. 686(1)(b)(iv) as long as those errors do not go to the court's jurisdiction over the type of offence charged. Section 686(1) (b)(iv) can be applied in this case if the failure to read the charges to the appellant did not cause him any prejudice.

Arraignment is intended to ensure that an accused is aware of the exact charges when he or she elects and pleads. Arraignment also ensures that all parties to the proceeding have a common understanding of the charges which are to be the subject-matter of the proceedings which follow. The appellant was told in summary form of the charges against him on his first appearance. More importantly, he made numerous appearances between his first appearance and his purported election on February 28, 1995; and several more before his trial started in August 1995. He was represented by the same counsel throughout. Disclosure had been made by the Crown and in some of the appearances before August 1995 there was reference to the substance of the charges. I have no doubt that the appellant and his counsel were well aware of the exact charges in February when counsel was asked to elect a mode of trial and in August when the trial actually commenced. There is no reason to think that the proceedings would have gone any differently had the charges been read to the appellant in February or August. The failure to read the charges to the appellant as required by s. 536(2) did not cause the appellant any prejudice and should not vitiate the convictions.

(ii) The failure to put the appellant to his election

If an accused has an election as to the mode of trial, that election should be put to the accused in the language of s. 536(2). Absent waiver of the procedural requirements of that section, a failure to put the accused to his or her election, in terms which at least substantially comply with the section is a procedural error resulting in a loss of jurisdiction to conduct either a trial or a preliminary inquiry: R. v. Wiseberg (1973), 15 C.C.C. (2d) 26 (Ont. C.A.); R. v. Lewis (1978), 43 C.C.C. (2d) 479 (Ont. C.A.); R. v. Kalkhorany (1994), 71 O.A.C. 39 at p. 41 (C.A.).

The purported election on February 28 bore little resemblance to the procedure set out in the Criminal Code. This is a case of non-compliance with the procedural requirements of s. 536(2).

Section 686(1)(b)(iv) cannot assist the Crown. By its terms, the section can reach only procedural errors committed by a court having "jurisdiction over the class of offence" for which the accused was convicted. A judge of the Provincial Division has no jurisdiction to try an electable indictable offence unless an accused has made an effective election for trial in that court. As Griffiths J.A. said, in R. v. Pottinger (1990), 54 C.C.C. (3d) 246 at p. 252, 76 C.R. (3d) 393 (Ont. C.A.):

> The complete want of jurisdiction to conduct the trial is not the kind of procedural irregularity which . . . should be cured by invoking s. 686(1)(b)(iv).

I turn next to the question of waiver. Unless there was an effective waiver of the procedural requirements of s. 536(2), the trial was a nullity and the appeal must succeed. Section 536(2) was enacted to assist an accused in making an informed decision as to the mode of trial. An accused may personally, or through counsel, waive compliance with a procedure like s. 536(2) which has been enacted for the protection of the accused: Korponey v. Canada (Attorney General), [1982] 1 S.C.R. 41 at p. 48, 65 C.C.C. (2d) 65 at p. 73. In Korponey, supra, at p. 49 S.C.R., p. 74 C.C.C., a case involving waiver of procedural rights surrounding a re-election, Lamer J., for the unanimous court, described the elements of an effective waiver of a procedural right in these words:

> [T]he validity of such a waiver, and I should add that that is so of any waiver, is dependent upon it being clear and unequivocal that the person is waiving the procedural safeguard, and is doing so with full knowledge of the rights the procedure was enacted to protect, and of the effect the waiver will have on those rights in the process.

(Emphasis in original)

After indicating that the effectiveness of a waiver required a fact-specific inquiry, Lamer J. added, at p. 50 S.C.R., p. 74 C.C.C.:

> However, always relevant will be the fact that the accused is or is not represented by counsel, counsel's experience, and, in my view of great importance in a country so varied as ours. The particular practice that has developed in the jurisdiction where the events are taking place.

The waiver inquiry required on this appeal turns on what occurred on February 28, 1995 and specifically on the exchange quoted earlier in these reasons. Crown counsel wanted to know the nature of the future proceedings in this case. He expressly asked that the appellant make his election and that the election be recorded on the information. Crown counsel recognized that the appellant was entitled to have the charges read to him before making his election and stated that he was prepared to waive that requirement.

The word "election", as used by Crown counsel, has a very specific and well-known meaning in the criminal procedure context. It would be recognized by any counsel, with even a fleeting acquaintance with the criminal law, as a request that the accused exercise the right given to him by s. 536(2) and choose his mode of trial. The request that the election be noted on the

information would also have meaning to those involved in the criminal law process. Endorsements on the information are relied on in subsequent appearances which are often before different judges. Crown counsel was looking for a commitment from the appellant as to his mode of trial.

Counsel for the appellant did not respond directly to Crown counsel's suggestion that the reading of the charges be waived. He did, however, respond to Crown counsel's request for an election. He indicated that his client elected a "trial". When asked to clarify this response, counsel for the appellant said, "by provincial court judge". This response was in the exact terms contemplated by s. 536(2). Counsel effectively answered the question required to be put to the appellant by s. 536(2).

In considering whether counsel's conduct amounted to a waiver of the procedural requirements in s. 536(2), it is helpful to compare this case to the facts in Korponey. In Korponey, the accused had initially elected trial by judge and jury. He subsequently decided to re-elect trial by judge alone. The matter was placed in the appropriate court and counsel, in response to a request for a plea, indicated "judge alone". There had been no compliance with the statutory notice requirements applicable to a re-election and the appellant was not put to his re-election in the terms of the applicable Criminal Code provision. In holding that the appellant had waived compliance with the statutory procedural requirements for a re-election, Lamer J. said, at p. 52 S.C.R., p. 76 C.C.C.:

> The Judge had before him an attorney whose knowledge of the law and of the practice of the criminal law does not appear to be in issue. He was, in my view, amply justified in assuming, since everyone was there to proceed with the trial, that the attorney had discussed the matter with Korponey and that Korponey made an informed decision, on the advice of his attorney, to proceed to trial, not before a jury, but before that Judge sitting without a jury, and that the attorney was fully authorized to do anything necessary to that end. The Judge was therefore in my view amply justified in considering that the attorney's saying "judge alone" was an informed waiver of the requirement of putting to his client the words of the section. The accused's attorney knew what those words were, he knew what they meant and what effect his answer "judge alone" would have on his client's rights.

The words of Lamer J. have direct application to this case. As in Korponey, I conclude that counsel had full authority to elect on behalf of his client, and that he did so knowing both the nature of the procedural rights he was waiving and the effect of his election on his client's rights.

Nothing in the events of August 17, 1995 causes me to doubt my interpretation of the events of February 28. Counsel for the appellant acknowledged that a previous election had been made on behalf of the appellant. He took the position that the prior election was ineffective because there had been no arraignment. This argument sheds no light on whether there had previously been a waiver of the requirements of s. 536(2), but proceeds from the premise that absent compliance with s. 536(2), there can be no effective election. That position was rejected in Korponey.

Mr. Code, for the appellant, relying on Korponey, argued that the events of February 28, 1995 had to be viewed in the context of "the particular practice in the jurisdiction": R. v. Korponey, at p. 50 S.C.R., p. 74 C.C.C. He informed the court that when dates are set for "trial" on electable matters in the Provincial Division, defence counsel often indicate the proposed election so that

Crown counsel will know whether to prepare for a trial or a preliminary inquiry. Mr. Code indicated that the actual election is made on the trial date and if that election differs from the proposed election then Crown counsel is entitled to an adjournment.

I am sure Mr. Code has accurately represented the practice as he understands it. In fact, in this case, it would appear that counsel for the appellant had provided such an indication prior to October 28, 1994 when the matter was adjourned to February 28. The information was marked for trial ("trial (2 days)"), although no election was made on October 28. I think that what occurred on February 28 was quite different. Crown counsel, perhaps because one trial date had been missed, wanted a firm indication from the appellant as to choice of mode of trial. He asked for an election, got one and took pains to make sure that it was endorsed as an election on the information for future reference. This was more than a tentative indication of a proposed future election. It was a firm exercise by counsel on behalf of the appellant of the appellant's right to choose his mode of trial. Considering the events of February 28 in light of the practice described by Mr. Code does not change my conclusion that counsel for the appellant chose the appellant's mode of trial on February 28 and waived compliance with s. 536(2). That waiver gave the Provincial Division jurisdiction to conduct the trial which commenced on August 17, 1995.

(iii) The failure to take a plea to the charges

The last of the procedural flaws which plagued these proceedings occurred on August 17, 1995. The presiding judge, having decided that the appellant had elected trial by a provincial court judge and that he would commence the trial on that date, directed that not guilty pleas be entered on behalf of the appellant. The information was so endorsed.

It is not clear to me why the trial judge directed that not guilty pleas be entered instead of calling upon the appellant to enter his pleas. The trial judge may have taken it that the appellant's submission that he had a right to elect trial by judge and jury amounted to a refusal to plead to the charges. If an accused refuses to enter a plea, the court must direct that a plea of not guilty be entered (Criminal Code, s. 606(2)). I do not think that the appellant's position before the trial judge could, without further inquiry by the trial judge, support the conclusion that he was refusing to plead to the charges. Section 606(2) should be invoked only after the accused has refused to plead in answer to a direct request that a plea be entered. The failure to take the appellant's pleas to the charges constituted non-compliance with s. 536(3)(b).

The failure to comply with the Criminal Code provisions requiring that an accused plead to the charges is a procedural irregularity which may be rendered harmless by s. 686(1)(b)(iv) if no prejudice resulted: R. v. N. (C.), supra; R. v. St-Pierre, supra.

It was clear throughout the proceedings in the Provincial Division that the appellant intended to plead not guilty and contest the charges. That is exactly what occurred. The failure to permit the appellant the opportunity to say the words "not guilty" in response to the charges was of no consequence in the trial that followed. That failure in no way affected the conduct of those proceedings or compromised the appellant's rights at trial. I have no hesitation in applying s. 686(1)(b) (iv) to the failure to take the plea as required by the Criminal Code.

Conclusion

Some who read this judgment may suggest that it condones sloppy practice and undermines important procedural safeguards. I do not intend to convey any such message. The provisions in the Criminal Code should be followed. Deviations from those procedures put the end product of the proceeding in doubt. In response to the suggestion that this judgment undermines important procedural safeguards, I can only observe that s. 686(1)(b)(iv) empowers this court to dismiss appeals where sloppy practice causes no prejudice. In enacting that section, Parliament recognized that reversals of convictions which are the product of fair and error-free trials is not the answer where there has been some procedural flaw in those proceedings. Some would see this as the triumph of substance over form.

I would dismiss the appeal.

Appeal dismissed.

R. v. Spence, [2001] B.C.J. No. 1842

British Columbia Judgments

British Columbia Court of Appeal

Victoria, British Columbia

Finch C.J.B.C., Rowles and Low JJ.A.

Oral judgment: September 7, 2001.

Released: September 12, 2001.

Victoria Registry No. CA028272

[2001] B.C.J. No. 1842 | 2001 BCCA 521 | 159 B.C.A.C. 171 | 46 C.R. (5th) 387 | 51 W.C.B. (2d) 49

Between Regina, respondent, and Douglas Robert Spence, appellant

(23 paras.)

Case Summary

Criminal law — Appeals, indictable offences — Grounds of appeal — Miscarriage of justice — New trials — Grounds, lack of appearance of justice — Power of Court of Appeal — Power to order stay of proceedings — Mental disorder — Dispositions by court or review board — Appeals.

Appeal by Spence from a finding that he was not criminally responsible by reason of mental disorder. Spence was charged with 11 offences when he tried to escape from police who were attempting to arrest him for breach of parole. He was not formally arraigned, charges were not read to him, and he was not required to elect as to the mode of trial. He never entered a plea. It was not clear whether he understood the charges or his options for mode of trial. The Crown applied to have him found NCRMD on the basis of a psychiatrist's letter, and Legal Aid counsel for Spence agreed to that issue being heard. Spence was found to be NCRMD. Spence was hospitalized for a year. New evidence was received by this Court from the Legal Aid lawyer that he did not discuss with Spence his options for trial. Evidence was received that Spence could not be kept in hospital against his will, and that he was mentally stable.

HELD: Appeal allowed.

A new trial was ordered, but stayed. The failure to comply with procedural requirements constituted a miscarriage of justice. To proceed to a new trial would be an abuse of process, and would serve no good purpose for society or Spence.

Statutes, Regulations and Rules Cited:

Criminal Code, ss. 536(2), 672.34, 672.47, 686(1)(b)(iv), 686(4), 686(8).

Counsel

Martin F. Allen, for the appellant. Robert A. Mulligan, Q.C., for the Crown respondent.

The judgment of the Court was delivered by

LOW J.A. (orally)

1 In proceedings in Provincial Court the appellant was found to be not criminally responsible by reason of mental disorder ("NCRMD") for a total of 11 offences contained in 2 informations. In my opinion, the proceedings were procedurally defective to the point of amounting to a miscarriage of justice.

2 On April 20, 2000 the appellant was convicted in Provincial Court of one count of threatening a man with death or bodily harm and a second count of assaulting the same man. On May 30, 2000 the judge sentenced the appellant to time served plus probation. The probation order included terms that the appellant report to a probation officer by noon on May 31st and that he "take reasonable steps including counselling to maintain [himself] in such a condition that [his] psychological condition will not likely cause [him] to conduct [himself] in a manner dangerous to [himself] or anyone else."

3 The Crown alleges that the appellant did not present himself to a probation officer on May 31st. As a consequence, on June 1st a justice of the peace issued a warrant for his arrest. On June 12th out-of-uniform police officers encountered the appellant in Campbell River and sought to arrest him on the warrant. What followed was a bizarre series of events in which the appellant, claiming that he did not know the encounter was with police officers and that he was not subject to a probation order in any event, fled. It is not necessary to go into the details of the police chase. Before being taken into custody, the appellant came into physical contact with different officers, did not succumb to pepper spray, climbed into and then fell a considerable distance through a ceiling, waved a piece of metal and went through a law office onto an outside second-story ledge where extended negotiations took place.

4 The Crown charged the appellant on one information with 2 counts of breach of probation, and on a second information with 9 counts including 1 count each of obstructing a peace officer in the execution of his duty, escaping lawful custody, uttering threats, 2 counts of possession of weapons for a purpose dangerous to the public peace, and 4 counts of assaulting different peace officers.

5 The appellant's first court appearance was on June 13th. The judge then presiding acceded to the Crown's request that the appellant be remanded for 30 days under s. 672.11 of the Criminal Code to determine his fitness to stand trial and whether, during the events of the previous day, he was suffering a mental disorder so as to be exempt from criminal responsibility. The judge made this order over the objections of the appellant who was represented by Legal Aid duty counsel. On July 13th another judge found the appellant fit to stand trial, on the report of a psychiatrist, Dr. Elisabeth Zoffmann, dated July 11th. After a couple of other appearances, the same judge who made the order now appealed from made a detention order denying the appellant judicial interim release.

6 By July 31st, a lawyer, Robert Yeo, had agreed to represent the appellant but he was away on holiday. On that date, no counsel appeared for the appellant who complained to the court that he did not know what the charges were against him and he had not had a chance to plead. The judge said: "I am directing a not guilty plea on all matters." Crown counsel then told the court that the Crown was proceeding by indictment and, in response to an enquiry from the judge, said that the Crown would not oppose a re-election to expedite the proceedings if there was an election for trial by a judge and jury. The appellant again expressed concern that he had not entered a plea. The judge said he understood and then said: "The election will be judge and jury with a preliminary inquiry." He set the preliminary inquiry for September 18th and observed that the Crown had advised that it would consent to "any re-election if that is advised by Mr. Yeo." As the case was adjourned, the appellant twice said that he had not entered a plea but his concern was ignored.

7 On September 18th the case was called late in the day. Mr. Yeo told the court that the appellant did not want him as counsel. Mr. Yeo remained to assist. Crown counsel suggested trial in Provincial Court and Mr. Yeo told the court that he had discussed re-election with the appellant but without resolution. The appellant declined to discuss the matter of re-election with the judge, preferring instead to complain that he was "locked down" for 23 hours per day. The judge told the appellant that he would be detained pending his trial and asked him if he wished to stay in custody for "a shorter or a longer period". Again the appellant voiced complaints about how he was treated in custody. The judge adjourned the matter for a short while so the appellant could consider whether he wished to re-elect his mode of trial.

8 Court was reconvened and the appellant was granted another short adjournment to confer with Mr. Yeo. When court was reconvened, Mr. Yeo told the court he had advised the appellant on the matter of possible re-election but could not advise the court as to what the appellant wished to do. The appellant wanted to speak to Crown counsel. The judge adjourned the case to the next day.

9 On September 19th the appellant appeared without counsel. Eventually on that date the court made the order appealed from but there were various twists and turns before that came about. When the case was first called, Crown counsel told the court that he wanted to put it off until after the morning break to give him a chance to talk to the appellant. He wanted to explain to him the evidence the Crown would call and let him hear the tape recording of the making by the court of the probation order on May 30th. He said he understood that the appellant "did discuss

with counsel the possibility of disposition." He said that October 4th was available for trial and that Mr. Yeo was available on that date.

10 The judge expressed concern about delays and said if the appellant "... for any reason delays this matter intentionally or unintentionally for very long, he may be in the difficult situation of spending more time in custody before the hearing is concluded than he might have received as a sentence if he is convicted or pleaded guilty, so plug that into your thinking." Then the judge said that he was disqualifying himself from "hearing any further matters relating to [the appellant]." I presume this was because he had been the judge who sentenced the appellant on May 30th.

11 When court reconvened Legal Aid duty counsel, Mr. Browne, was present. It is obvious from the transcript that his role was limited. A letter from Mr. Browne that is part of the fresh evidence we have received is to the effect that he did not know the procedural history of the case and did not recall discussing with the appellant his three options as to mode of trial. In the trial court, Crown counsel advised that the appellant was prepared to deal with the matter under the NCRMD procedure set out in s. 672.34 of the Criminal Code. He said there would be an admission of facts and an admission of the (July 11th) report of Dr. Zoffman, after which both Crown and defence would invite the NCRMD finding. Mr. Browne stated that the appellant had no objection to the judge hearing the matter.

12 At this point there had been no re-election from the election the court had purported to make for the appellant the previous day. Nor had a plea been taken. Nevertheless, Crown counsel presented the May 30th probation order and gave the particulars of the non-compliance with it alleged in the 2 counts in the first information. Then the question of re-election came up. Mr. Browne said that the appellant waived the reading of his choices of election and sought leave to elect to be tried in Provincial Court. However, this related only to the first information. There was no such discussion with respect to the 9-count information and no pleas were taken on either information. Thereafter the Crown gave the circumstances of the 9 counts, Mr. Browne stated that the appellant admitted the allegations and the appellant confirmed that admission. Then the Crown tendered Dr. Zoffman's letter and it was marked as an exhibit. After stating the contents of the Zoffman letter, Crown counsel said it was the Crown's position that the appellant should be found NCRMD. Mr. Browne said the appellant did not oppose such a finding. Then the judge made the NCRMD finding. After hearing an additional joint submission he made no disposition, leaving the matter instead for disposition by the review board under s. 672.47 of the Criminal Code. That was a year ago and the appellant continues to be hospitalized.

13 Although I have considerable concern as to whether the psychiatric evidence, the concurrence of the appellant notwithstanding, supported a finding of not criminally responsible by reason of mental disorder, I do not find it necessary to resolve that issue in order to dispose of this appeal.

14 I have set out the history of these proceedings at some length to demonstrate their irregularity. The court never arraigned the appellant as required by s. 536(2) of the Criminal Code. Nowhere in the transcripts before us did the court cause the two informations to be read to the appellant. There is no indication in the record that the offences were described to him in

substance until the Crown read out the circumstances that formed the basis of the NCRMD hearing on September 19th. Nor did the court ever put to the appellant his rights of election as to mode of trial as required by the same sub-section. It might be argued that the appellant had the assistance of counsel from time to time and should be taken to have waived the formal requirements of arraignment, election and plea. But it is clear from the transcripts that there was no waiver. The appellant had only brief contact with counsel. It is apparent that he rejected the assistance of counsel and when counsel addressed the court they made it known to the court that they had been able to give little assistance to the appellant and were in a position to give little assistance to the court. It cannot be said with any confidence that the appellant knew the charges against him or understood his options as to electing a mode of trial. The court should have formally arraigned the appellant and should have put him to his election in the words of the Criminal Code. It seems to me that, from the point of view of the appellant, the situation was confused by the trial judge first entering not guilty pleas and then directing that the election was for trial by judge and jury on September 18th. On that day and on the following day there were discussions about re-election that must have confused things even more. In light of all this, in my opinion it was incumbent upon the judge to ensure that the appellant knew precisely the charges he was facing and what his options were as to mode of trial.

15 In R. v. Mitchell (1997) 121 C.C.C. (3d) 139 (Ont. C.A.) Mr. Justice Doherty dealt with the same issue as arises in the present case. He stated the issue this way: "... were the proceedings rendered a nullity by the failure to properly comply with the Criminal Code provisions relating to arraignment, election, and plea?" In his analysis he posed three questions:

1. Was there a failure to comply with a statutory procedural requirement?
2. If there was a non-compliance, is it rendered harmless by s. 686(1)(b)(iv) of the Criminal Code?
3. If there was a non-compliance and s. 686(1)(b)(iv) cannot be applied, did the appellant waive compliance with the procedural requirement?

16 In the present case, as I have already noted, there was an almost complete failure to comply with the procedural requirements of s. 536(2) of the Criminal Code. Neither information was read to the appellant, there was an apparent election of mode of trial on the shorter information, there was no election of mode of trial on the longer information and no plea was taken on either information. In my opinion, these failures undermined the integrity of the proceedings so completely as to amount to a miscarriage of justice. The defects are not curable by the application of s. 686(1)(b)(iv). I do not conclude that there was a waiver by the appellant of compliance with the procedural requirements. I do not fault duty counsel who were given limited instructions by the appellant, but the record does not persuade me that anything said to the court by or on behalf of the appellant amounts to an informed waiver by the appellant of his rights under the procedural provisions that have been breached.

17 Under s. 686(4) of the Code, on an appeal from an NCRMD verdict, this court can allow the appeal, set aside the verdict and order a new trial. That is what I would do in this case.

18 Under s. 686(8) this court can make any additional order that justice requires. I think a new trial would be an abuse of process in the circumstances of this case. The appellant spent three months in custody prior to the date of the NCRMD verdict. Although the charges were numerous and serious in nature, they arose because the appellant was trying to get away from the police, not because he was out to cause harm. It is unlikely, had he been convicted of the offences in the 2 informations, that he would have received a much greater sentence than the time already served. He has been detained under the NCRMD order for a further year. Before us is fresh opinion evidence that seriously questions whether the appellant was fit to stand trial on September 19, 2000. In addition, the Crown concedes on this appeal that with respect to both counts in the 2-count information and at least 2 counts in the other information, the facts asserted by the Crown during the NCRMD hearing do not support the charges. With respect to those counts there was no basis for finding that the appellant "committed the act ... that formed the basis of the offence charged" as required by s. 672.34 of the Code.

19 Finally, Crown counsel has provided us with a letter dated August 31, 2001 from a psychiatrist at the Forensic Psychiatric Hospital which says, in part:

> Mr. Spence is currently clinically stable, free of psychosis, and passively compliant with his psychotropic medications. He is not certified, nor certifiable, as an Involuntary patient under the Mental Health Act. Although still without insight into his mental illness, he is competent to make decisions regarding his clinical care should he be released from the Forensic Psychiatric Hospital. He has declined any arrangements for community living resources or clinic follow-up. His stated plan if he was no longer under the authority of the Criminal Code or the Director, Adult Forensic Services, would be either to return to Campbell River or to move to Calgary, Alberta.

20 In all the above circumstances, it is apparent that a new trial, with or without advancement of an NCRMD defence, would serve neither the interests of society nor the mental health well-being of the appellant. Therefore, I would direct a judicial stay of proceedings on all counts in both informations.

LOW J.A.

FINCH C.J.B.C.

21 I agree.

ROWLES J.A.

22 I agree that this appeal should be allowed and I agree with the disposition Mr. Justice Low

has stipulated.

FINCH C.J.B.C

23 There will be an order in the terms described by my colleague.

R. v. Skogman, [1984] 2 S.C.R. 93

Supreme Court Reports

Supreme Court of Canada

Present: Dickson, Beetz, Estey, McIntyre, Chouinard, Lamer and Wilson JJ.

1982: November 22 / 1984: July 26.

File No.: 17031.

[1984] 2 S.C.R. 93 | [1984] 2 R.C.S. 93 | [1984] S.C.J. No. 32 | [1984] A.C.S. no 32

Larry Cliff Skogman, appellant; and Her Majesty The Queen, respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Criminal law — Preliminary hearing — Committal for trial — Charge of conspiracy — Whether any evidence of conspiracy involving the accused — Whether certiorari available to quash committal if no evidence on an essential ingredient of the charge — Criminal Code, R.S.C. 1970, c. C-34 (as am. by R.S.C. 1970 (2nd Supp.), c. 2, s. 8), s. 475.

Certiorari — Committal for trial — Charge of conspiracy — Application to quash committal for trial — Whether evidence supporting the committal — Whether certiorari available if no evidence on an essential ingredient of the charge — Criminal Code, R.S.C. 1970, c. C-34 (as am. by R.S.C. 1970 (2nd Supp.), c. 2, s. 8), s. 475.

Appellant with two others was charged with conspiracy to use a forged document contrary to s. 326 of the Criminal Code. At the preliminary hearing, the Provincial Court Judge was satisfied that there was sufficient evidence upon which a jury properly instructed could convict and accordingly committed the appellant for trial. Appellant successfully petitioned the Supreme Court of British Columbia for certiorari to quash the committal for trial on the ground that there was no evidence before the Provincial Court Judge of his membership in the conspiracy, an essential ingredient of the offence charged, and that therefore, it was beyond the Provincial Judge's jurisdiction to commit in the circumstances. On appeal, the Crown conceded that there was no evidence of a conspiratorial agreement but argued that, in any event, certiorari did not lie to review a committal order under s. 475 of the Code in circumstances where there was no evidence to support that order. The Court of Appeal set aside the order to quash. Hence this appeal.

Held (Beetz, McIntyre and Chouinard JJ. dissenting): The appeal should be allowed.

Per Dickson, Estey, Lamer and Wilson JJ.: The committal of an accused for trial in the absence of evidence on an essential ingredient of the charge constitutes jurisdictional error reviewable on certiorari. Under section 475 of the Criminal Code, a judge sitting on preliminary inquiry is called upon to form an opinion as to whether or not the evidence is sufficient to put the accused on trial. "No evidence" on an essential element of the charge can never amount to "sufficient evidence" under s. 475. The Court must independently assess the record to determine whether there was any evidence to support the committal: it is not bound to accept the Crown's view of the

evidence or its submission. The parties cannot alter the record nor convert the appeal into a request for an advisory opinion. Here, where there was some evidence of the accused's membership in the conspiracy, the reviewing judge erred in quashing the committal order. The Crown, however, in the exercise of its enforcement discretion, took as its sole position both here and below that even in the absence of any evidence of an essential element of the charge no review of the decision to commit lay by certiorari; and which position was tantamount to a submission of a reference on point of law. Instead of seeking a reversal of the order on a ground known to law, the Crown is trying to extend a principle or even to establish new law. This Court, in finding that the order of the reviewing judge should not have been invalidated by the Court of Appeal on the basis advanced by the Crown, is free to restore that order and so leave the Crown in the same position as if it had elected not to appeal the order of the reviewing judge. The prosecutorial arm of the state holds the view that there is no evidentiary basis for the charge against this accused and accordingly he should not be put on trial.

Cases Cited

Re Martin, Simard and Desjardins and The Queen (1977), 20 O.R. (2d) 455, affirmed sub nom. Martin v. The Queen, [1978] 2 S.C.R. 511; Re Guttman and The Queen (1981), 64 C.C.C. (2d) 342; Procureur général du Québec v. Poirier, [1981] C.A. 228, sub nom. Re Poirier and The Queen (1981), 62 C.C.C. (2d) 452; Re Leroux and The Queen (1978), 43 C.C.C. (2d) 398; Re Robar and The Queen (1978), 42 C.C.C. (2d) 133; Re Mackie and The Queen (1978), 43 C.C.C. (2d) 269; Stillo v. R. (1981), 22 C.R. (3d) 224; Forsythe v. The Queen, [1980] 2 S.C.R. 268; Patterson v. The Queen, [1970] S.C.R. 409; R. v. Nat Bell Liquors Ltd., [1922] 2 A.C. 128; R. v. Botting, [1966] 3 C.C.C. 373; R. v. Norgren (1975), 27 C.C.C. (2d) 488; United States of America v. Shephard, [1977] 2 S.C.R. 1067; Douglas Aircraft Company of Canada Ltd. v. McConnell, [1980] 1 S.C.R. 245; Hodgkinson v. Fernie (1857), 3 C.B. (N.S.) 189; Re King and Duveen, [1913] 2 K.B. 32; Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association, [1975] 1 S.C.R. 382; Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation, [1979] 2 S.C.R. 227; City of Toronto v. Polai (1969), 8 D.L.R. (3d) 689; R. v. Kopan (1975), 3 B.C.L.R. 102, referred to.

APPEAL from a judgment of the British Columbia Court of Appeal (1982), 66 C.C.C. (2d) 14, [1982] 3 W.W.R. 367, allowing the Crown's appeal from a judgment of Bouck J. (1981), 62 C.C.C. (2d) 385, allowing appellant's application for certiorari to quash his committal for trial. Appeal allowed, Beetz, McIntyre and Chouinard JJ. dissenting.

B.A. Crane, Q.C., and Christopher Brennan, for the appellant. A.M. Stewart, for the respondent.

Solicitor for the appellant: Christopher Brennan, Victoria. Solicitor for the respondent: The Ministry of the Attorney General of British Columbia, Victoria.

The judgment of Dickson, Estey, Lamer and Wilson JJ. was delivered by

ESTEY J.

ESTEY J.:— The essential characteristic of this appeal is derived from the stance adopted by the Crown here and below, namely that certiorari does not lie for the review of a committal order under s. 475 of the Criminal Code even where there is no evidence to support the order committing the accused for trial. The Crown factum on this point in this Court stated:

> In the Court of Appeal, the Crown took the position that this case should be viewed as a case in which there was "no evidence" to support the justice's opinion that the accused should be committed for trial (A.B. 283). The issue before the Court of Appeal, said the Crown, was the scope of the remedy available by way of an application for an order in the nature of certiorari.

This was the ultimate response of the Crown to the grounds upon which the appellant-accused brought his motion in the Supreme Court of British Columbia for an order in the nature of certiorari to quash the order of committal.

> THAT proof of an "agreement" is an essential ingredient of the charge alleged against LARRY CLIFF SKOGMAN; that there was no evidence led at the preliminary inquiry to prove such an "agreement" and that without such evidence it was beyond the jurisdiction of His Honour Judge Giles to commit LARRY CLIFF SKOGMAN to stand trial.

This litigation has proceeded, since the order of Bouck J., on the footing that there was no evidence of the conspiratorial agreement which, of course, is the bedrock requirement in a charge of conspiracy.

The following is the history of these proceedings in the courts below.

a) The appellant was committed to trial, after a preliminary inquiry, on a conspiracy charge. The committing judge was "satisfied that there [was] sufficient evidence to put to a jury and sufficient evidence upon which a jury properly instructed could convict". In his reasons for committal, the learned judge adopted the submissions of Crown counsel including the submission that there was evidence from which an inference could be drawn that the appellant had joined the common purpose of tendering forged bonds.

b) The appellant petitioned the Supreme Court for an order in the nature of certiorari to quash the committal for trial. The ground upon which relief was sought was that the committing judge exceeded his jurisdiction by committing the appellant to trial when there was no evidence of an essential element of the offence with which he was charged, that is, of a conspiratorial agreement.

c) Bouck J., who heard the petition to quash, held that:

i) there was no evidence that the accused was a member of the conspiracy alleged;

ii) a committal order can be quashed by certiorari when there is a loss of jurisdiction during the preliminary inquiry;

iii) in this case the committing judge lost his jurisdiction when he committed the accused for trial when there was no evidence of his membership in the conspiracy alleged.

Bouck J. accordingly quashed the committal order.

d) The Crown appealed to the British Columbia Court of Appeal from the order quashing the committal for trial. The Crown formally abandoned, before the Court of Appeal, the ground of appeal as to whether there was sufficient evidence before the committing judge to support a committal for trial. The appeal was then argued on the basis that Bouck J. was correct in finding that there was no evidence that the appellant had joined the conspiracy.

e) The British Columbia Court of Appeal allowed the Crown's appeal and restored the committal for trial. One cannot be certain whether the majority opinion proceeded on the basis that, in fact and in law, there was 'no evidence' or 'some evidence' in relation to the essential elements of the charge. On the one hand, it is stated by the majority:

If, as is assumed for the purposes of this appeal, there was no evidence to support the Provincial Court Judge's opinion that the evidence was sufficient to put the respondent on trial, the Judge made an error in the exercise of a jurisdiction which he did possess.

On the other hand, this statement is followed by the statement:

I think the Chambers Judge erred in substituting his opinion of the sufficiency of the evidence for the opinion of the Provincial Court Judge on that questIon.

The concurring opinion by Lambert J.A. on this point includes the statement:

This is not a case where there is no evidence at all in the sense of an entire absence of proper material as the basis for the foundation of a judicial opinion that the evidence was sufficient to put the accused on trial. Nor is this a case where there is no evidence to provide a platform for the committing Judge's exercise of his powers, or for his assumption of jurisdiction in accordance with the jurisdictional prescriptions of s. 475 of the Criminal Code.

In restoring the committal order, the British Columbia Court of Appeal held that the committing judge did not lose his jurisdiction in committing the appellant and that certiorari does not lie in the circumstances. Lambert J.A. concurring, did not wish to adopt what the learned justice took to be obiter in the decision of this Court in Martin v. The Queen, [1978] 2 S.C.R. 511, that a committal order, unsupported by any evidence on each essential issue of the charge, can be quashed by writ of certiorari. The learned justice preferred to follow R. v. Kopan (1975), 3 B.C.L.R. 102, in allowing the appeal.

f) Argument before this Court, by all counsel, proceeded on the basis that Bouck J. was correct in finding that there was no evidence of an essential element of the offence. In its factum, at p. 4, para. 5, the Crown stated that it was proceeding "on the basis that the issue before this Court is whether or not certiorari should be granted in such circumstances."

This calls into question the reach of the writ of certiorari as a tool for the review of committals for trial at preliminary hearings. In its earliest application by the courts, the prerogative or royal writs, including certiorari, were a mechanism whereby the Royal Courts of Justice maintained a surveillance over the conduct of the inferior tribunals of the land. Gradually, as the organization of justice and the judiciary developed, these review mechanisms were broadened in their reach and refined in the degree of control until, by 1878, certiorari was available not only for the review of jurisdictional transgressions by statutory tribunals, but also for errors committed by those tribunals in the course of the discharge of their assigned function, where such errors were apparent on the face of the record. See Williams J. in Hodgkinson v. Fernie (1857), 3 C.B. (N.S.) 189. During this same epoch, there developed a parallel procedure by way of application to a court of general jurisdiction for the judicial control of non-statutory tribunals and emanations of the state which did not have the attributes of an inferior court. Limitations, as will be seen in Re King and Duveen, [1913] 2 K.B. 32, per Channell L.J., were gradually introduced whereby certiorari review was precluded in the case of a tribunal determining a question of law submitted to it for determination as the primary issue by the parties to the proceeding. Other refinements in this branch of the law have come and gone; for example, the concept of collateral issues whereby the doctrine of certiorari review was limited to calling into question in the court of general jurisdiction decisions made by the lesser tribunals which were a prelude to the exercise of the primary or principal jurisdiction of the body whose conduct was under review. We are no longer concerned with such matters: Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association, [1975] 1 S.C.R. 382; Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation., [1979] 2 S.C.R. 227.

In the result, certiorari, or the newer term of judicial review, runs largely to jurisdictional review or surveillance by a superior court of statutory tribunals, the term 'jurisdiction' being given its narrow or technical sense. In the absence of a privative clause, the Court may also review for error of law on the face of the record. However, even then, under the most recent authorities, the error must assume a jurisdictional dimension. These authorities and the development and Darwin-like elimination of sub-doctrines are reviewed in Douglas Aircraft Company of Canada Ltd. v. McConnell, [1980] 1 S.C.R. 245, particularly at pp. 265-78. It is clear, however, that certiorari remains available to the courts for the review of the functioning of the preliminary hearing tribunal only where it is alleged that the tribunal has acted in excess of its assigned statutory jurisdiction or has acted in breach of the principles of natural justice which, by the authorities, is taken to be an excess of jurisdiction (see Forsythe v. The Queen, [1980] 2 S.C.R. 268). It need only be added by way of emphasis that such certiorari review does not authorize a superior court to reach inside the functioning of the statutory tribunal for the purpose of challenging a decision reached by that tribunal within its assigned jurisdiction on the ground that the tribunal committed an error of law in reaching that decision, or reached a conclusion different from that which the reviewing tribunal might have reached.

This brings me to the question of the reviewability by the writ of certiorari of the conduct of a judge sitting in preliminary hearing under s. 475 of the Criminal Code. Section 475 states:

> 475. (1) When all the evidence has been taken by the justice he shall,
>
> (a) if in his opinion the evidence is sufficient to put the accused on trial,
>
> (i) commit the accused for trial, or
>
> (ii) order the accused, where it is a corporation, to stand trial in the court having criminal jurisdiction; or
>
> (b) discharge the accused, if in his opinion upon the whole of the evidence no sufficient case is made out to put the accused on trial.

At minimum, this section calls upon the presiding justice to form an opinion as to whether evidence is "sufficient" or whether "no sufficient case is made out" so as to justify a conclusion by the presiding justice "to put the accused on trial" or not to commit the accused to trial. There is no rule within the statutory framework adopted by Parliament for arbitrary action by the tribunal. The question therefore arises as to whether or not the reviewing judge can commit an accused for trial where there is no evidence on an essential element on a charge with which the accused is faced. In applying the test of the applicability of certiorari in such circumstances, we are not concerned with the older test of the presence or absence of an error of law on the face of the record, but rather we are concerned with ascertaining whether the preliminary hearing tribunal has discharged its assigned jurisdiction under s. 475. This Court, speaking through Judson J. in Patterson v. The Queen, [1970] S.C.R. 409, stated at p. 411 with reference to the review of preliminary hearing:

> ... there is only one ground for action by the reviewing Court and that is lack of jurisdiction.

This is the starting point, the theorem of review applicable in determining the availability of the prerogative writ of certiorari for the purpose of calling into question a committal for trial under s. 475. Spence J., in dissent, agreed, however, with regard to the availability of certiorari when he said, at p. 419:

> I am, however, of the view that certiorari does lie to quash a magistrate's committal for trial when he has exceeded his jurisdiction or when he has refused to exercise his jurisdiction.

Patterson emerged from this court after an extensive review of the subject in the provincial Courts of appeal; vide R. v. Botting, [1966] 3 C.C.C. 373 (Ont. C.A.) and R. v. Norgren (1975), 27 C.C.C. (2d) 488 (B.C. C.A.). All of these authorities draw their principal support from the judgment of Lord Sumner in R. v. Nat Bell Liquors Ltd., [1922] 2 A.C. 128. While that judgment of the Privy Council deals with the review of a conviction under a provincial statute, it has long been regarded as applicable in determining the review jurisdiction in the superior court of the proceedings at preliminary hearing: Re Martin, Simard and Desjardins and The Queen (1977),

20 O.R. (2d) 455, at p. 486. Lord Sumner, at p. 144 in the Appeal Cases, said in part:

> On certiorari, so far as the presence or absence of evidence becomes material, the question can at most be whether any evidence at all was given on the essential point referred to. Its weight is entirely for the inferior Court: ...

Some complication has, on occasion in the past, resulted from the presence in the Nat Bell judgment, supra, of observations which were directed at the position of the reviewing tribunal where the action below consisted not of a preliminary hearing committal or discharge but rather a conviction in a quasi-criminal process conducted in a tribunal of restricted jurisdiction, which was the actual case before the Privy Council in Nat Bell. The Ontario Court of Appeal in Martin, supra, in examining a certiorari review of a preliminary hearing, stated at pp. 486-87:

> ... we conclude that the learned Provincial Court Judge here acted within his jurisdiction, unless it can be said that he committed these respondents on the counts specified without any evidence at all, in the sense of an entire absence of proper material as a basis for the formation of a judicial opinion that the evidence was sufficient to put the accused on trial. That is quite a different question from the question "whether in the opinion of the reviewing tribunal there was evidence upon which a properly instructed jury acting judicially could convict". It remained, therefore, to examine the excerpts of evidence, as placed before this Court from the lengthy transcript taken at the preliminary hearing, in order to determine whether there was any evidence at all on which the committing tribunal was able to base its opinion to commit, as required by the terms of the Code ...

The Court of Appeal of Ontario then concluded:

> ... in the case of each of the three respondents there is sufficient evidence relating to the charges and the counts in issue to call upon the learned Provincial Judge to form an opinion as to whether there was sufficient evidence to commit the accused for trial, pursuant to s. 475 .... Having properly directed his mind to the evidence and to the question of whether there was "sufficient evidence" to commit, his decision is not subject to review.

(Emphasis added.)

An appeal was dismissed by this Court, [1978] 2 S.C.R. 511, the Chief Justice concluding as follows, at p. 514:

> ... the review on sufficiency must be a review to determine whether the committal was made arbitrarily or, at the most, whether there was some evidence upon which an opinion could be formed that an accused should go to trial.

More recently, this Court engaged the problem of review of the preliminary hearing process in Forsythe v. The Queen, supra. Again it was Chief Justice Laskin, speaking for the Court, and in

reference to Patterson, supra, who stated at pp. 271-72:

> In speaking of lack of jurisdiction, this Court was not referring to lack of initial jurisdiction of a judge or a magistrate to enter upon a preliminary inquiry. This is hardly a likelihood. The concern rather was with the loss of this initial jurisdiction and, in my opinion, the situations in which there can be a loss of jurisdiction in the course of a preliminary inquiry are few indeed. However, jurisdiction will be lost by a magistrate who fails to observe a mandatory provision of the Criminal Code: see Doyle v. The Queen, [1977] 1 S.C.R. 597. Canadian law recognizes that a denial of natural justice goes to jurisdiction: ...

A helpful comparison was drawn by Ritchie J. in United States of America v. Shephard, [1977] 2 S.C.R. 1067, at p. 1080, between the standard applied by the tribunal under s. 475 (s. 475(1)) and the function performed by a judge sitting at trial with jury:

> I agree that the duty imposed upon a 'justice' under s. 475(1) is the same as that which governs a trial judge sitting with a jury in deciding whether the evidence is 'sufficient' to justify him in withdrawing the case from the jury and this is to be determined according to whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty.

The Ontario Court of Appeal in Stillo v. R. (1981), 22 C.R. (3d) 224, was faced with the issue of reviewability of a committal where there was no evidence capable of corroborating a minor's testimony in a charge of indecent assault. The reviewing court, the High Court of Justice of Ontario, had quashed the committal because of the jurisdictional error committed by the tribunal at the preliminary hearing in committing the accused. Morden J.A., speaking for the Court of Appeal of Ontario, stated, at p. 227:

> In our view, there was no evidence in this case satisfying these requirements. There was, in law, no evidence at all upon which a finding of guilt could be made. Mr. Watt conceded, accurately and fairly, in our view, that if failure to meet a mandatory corroboration requirement has to result in a case being taken from a jury, which it does, then he could not reasonably argue that a different result should occur with respect to a preliminary inquiry, unless it could be said that the error fell short of being of a jurisdictional nature. In our view, it is established that complete absence of evidence does amount to jurisdictional error.

The courts of this country have, since the judgment in Martin, supra, generally adopted the rule that a committal of an accused at a preliminary, in the absence of evidence on an essential ingredient in a charge, is a reviewable jurisdictional error. See: Re Guttman and The Queen (1981), 64 C.C.C. (2d) 342 (Que. S.C.); Procureur général du Québec v. Poirier, [1981] C.A. 228, sub nom. Re Poirier and The Queen (1981), 62 C.C.C. (2d) 452; Re Leroux and The Queen (1978), 43 C.C.C. (2d) 398 (Que. S.C.); Re Robar and The Queen (1978), 42 C.C.C. (2d) 133 (N.S.C.A.), leave to appeal to the Supreme Court of Canada refused, October 3, 1978, [1978] 2 S.C.R. x; Re Mackie and The Queen (1978), 43 C.C.C. (2d) 269 (Ont. H.C.); Stillo v. R., supra. "No evidence" on an essential element of the charge against the accused cannot amount to "sufficient evidence" under s. 475. In my view, this is the state of the law in this country on this issue.

I return, therefore, to the essential characteristic of this proceeding, accepting for the moment the concession by the prosecutorial authority that there is no evidence whatever of the involvement of the accused in the allegedly conspiratorial agreement which underlies and sustains, if it be sustainable, the charge before the preliminary hearing tribunal. In my view, with all respect to those including the courts below who may hold the view to the contrary, a committal cannot survive in these circumstances. The purpose of a preliminary hearing is to protect the accused from a needless, and indeed, improper, exposure to public trial where the enforcement agency is not in possession of evidence to warrant the continuation of the process. In addition, in the course of its development in this country, the preliminary hearing has become a forum where the accused is afforded an opportunity to discover and to appreciate the case to be made against him at trial where the requisite evidence is found to be present. The status of the preliminary inquiry in the United Kingdom is discussed by Patrick Devlin in The Criminal Prosecution in England (1960), at p. 10:

> The preliminary inquiry before the magistrates is now a purely legal proceeding; it was designed as an instrument of the prosecution for finding the culprit and preparing the evidence against him; it has become a shield for the defence, allowing the defendant to ascertain precisely what the material is that is to be used against him and relieving him from the expense and odium of a trial if in the judgment of impartial persons there is not enough evidence to justify it.

The development of the institution of the preliminary hearing has taken a slightly different course in our country:

> The Canadian preliminary inquiry stems from an inquisitorial system of criminal investigation and prosecution in England, in which justices of the peace originally performed all of the investigative functions now performed by the police. The role of the justice of the peace gradually changed and eventually began to take on judicial characteristics. At the same time the inquiry over which the justice of the peace presided also changed, becoming mainly a judicial examination of the justification and need for pre-trial detention of the accused as well as an examination of the need for a trial itself. In this proceeding the prosecution was required to present its case, or at least to present sufficient evidence to establish a prima facie case. [Footnotes omitted.]

(Law Reform Commission of Canada Study Report: Discovery in Criminal Cases (1974), at p.8.)

It is interesting to go back to a description applied by G. Arthur Martin, Q.C., to the preliminary hearing in Canada:

> The preliminary hearing has two aspects. Its primary purpose, of course, is to ascertain whether or not there is sufficient evidence to warrant the accused being placed upon his trial. In determining this, a magistrate, who is conducting a preliminary hearing is not determining whether or not the accused is guilty or not guilty. His function is to ascertain whether or not there is sufficient evidence to induce the belief in the mind of a cautious man that the accused is probably guilty. Therefore, considerations of reasonable doubt have no application at this stage of the proceedings.

...

> From the point of view of defence counsel the preliminary hearing has another aspect. It affords counsel an opportunity of ascertaining the nature and the strength of the case against his client and it may be likened in that respect to an Examination for Discovery.

(G. Arthur Martin, Q.C.: "Preliminary Hearings", Special Lectures of the Law Society of Upper Canada, 1955, p. 1.)

In the course of a preliminary hearing, evidence may be adduced through witnesses, exhibits, or admissions. The purpose of adducing evidence is to enable the judge to exercise his jurisdiction by making determinations of fact, applying the law to those facts, and finally, to exercise his discretion to commit or discharge the accused. Where the record established in the preliminary hearing does not include evidence relating to each essential element of the charge brought against the accused, a committal of the accused to stand trial can be brought forward by way of a writ of certiorari to a superior court and can be quashed. I return then to explore the precise effect on these proceedings of the Crown's concession made here and in the Court of Appeal.

The argument, agreement or undertaking, as the case may be, of a Crown agent as to the consequence to be drawn from testimony taken at trial is not in any way binding upon the Court. Indeed, quite the opposite is true. The Court still must be satisfied that the evidentiary test has been passed or failed, as the case may be, as a matter of law. This includes a burden of proof in some cases and in others the presence or absence, as here, of some evidence to support a committal under s. 475. Neither party, separately or jointly, can alter the record nor convert the appeal into a request for an advisory opinion. It follows that the court is not in any way bound to accept the Crown's view of this evidence nor the Crown submission of law based upon the Crown's view of that evidence. Rather, the Court must independently assess the record to determine whether there was any evidence to support the committal for trial.

In my view, here there was some evidence of the essential element of an agreement. The evidence at the preliminary hearing reveals that the accused came into possession of the bogus bond which had been prepared by others alleged to be the accused's co-conspirators. The evidence further revealed that at an earlier time a person alleged to be a co-conspirator had caused the counterfeit bond to be created and had unsuccessfully attempted to persuade an employee at a branch of a trust company to cash the counterfeit bond. The accused, according to the evidence, later took the bogus bond to the same branch of the trust company where the aforementioned employee worked, and cashed the bond. It should here be noted that the evidence includes a denial by the unindicted co-conspirator and by the employee of the trust company, unsuccessfully importuned as aforesaid, of any knowledge of or relationship with the accused. The evidence further reveals that the accused, in presenting the bond at the trust company, did not approach that employee for the purpose of cashing the bond. From this evidence it is remotely but nonetheless possible, in my view, to distil an agreement between the accused and the creators of the counterfeit bond to convert the bond to cash by presenting it to a trust company or a bank. This evidence approaches the traditional expression "a scintilla of evidence" but falls short of what may be classified as fanciful. Consequently, there can be gleaned from the record 'some evidence' to support the action of committal. In so stating, it must

always be added that the "some evidence" and "no evidence" rules must relate to all the essential elements of the charge in question.

The conclusion which I have reached, that there was a scintilla of evidence to support the committal of the appellant to trial, brings us back full circle to the unusual procedural history of this case. On appeal, the Crown did not seek to impeach the finding of Bouck J. that there was 'no evidence' of a conspiratorial agreement. Rather, it was argued that in any event certiorari was not available to review for 'no evidence' at all on the essential elements of the charge. The executive branch of government has assumed primary responsibility for the enforcement of the criminal law. The historic ascendency of the executive branch as the agency for the enforcement of criminal law in the community is recognized in Canada today, in fact and in law, in the Criminal Code where it is given an ascendency at critical junctures of a prosecution over the private prosecutor. This branch may, in its wisdom, decide to lay or not to lay a charge. It might decide at any stage in the process to withdraw the charge. The Attorney General of the province, as represented by the Crown agent in the courtroom, might, for example, decide to withdraw a charge in the course of a preliminary hearing. Similarly, the charge might be withdrawn with the permission of the Court in the course of a trial. The following dicta of Schroeder J.A. in City of Toronto v. Polai (1969), 8 D.L.R. (3d) 689 in a different context, accurately, in my view, reflects the importance of the role assumed by the executive with respect to criminal prosecutions (at p. 697):

> The decision whether or not the Attorney-General should prosecute or sue is a matter for him, and the Courts have no power to question his right to do so or to refrain from doing so as distinct from his right to relief.
>
> The Attorney-General is in a different position from the ordinary litigant, for he represents the public interest in the community at large; ...

The Crown agent in this case might have decided, in its exclusive discretion as the public enforcement agency of the community, the executive branch, not to oppose the application for an order to quash; or the Crown might have decided not to appeal from the quashing order. Here the Crown exercised its enforcement discretion by asking the Court of Appeal, and this Court as well, to set aside the quashing order on a ground not known to the law. No other request was made by the Crown, and indeed, the Crown expressed its agreement that the Court should dispose of the appeal on the one ground selected by the Crown. The sole position taken by the Crown on this appeal in this Court, and apparently in the court below, is tantamount to a submission of a Reference on a point of law to this Court. The Crown does not here seek a reversal of the order of the reviewing judge of first instance on a ground known to the law. Rather the Crown seeks to establish a new or extended rule of law.

Whether there is, in the judicial sense, 'no evidence' revealed in the record, is a question of law. In finding there was 'no evidence' in the record at the preliminary hearing, the learned reviewing judge committed an error of law. Such a finding, unsupported by the record, is, in my view, a reversible error which, in the absence of other overriding considerations, would dispose of the appeal.

There now remains to be examined the question as to whether these proceedings reveal a further and finally controlling factor which ordains another disposition of the proceeding. This Court, on the review of the proceedings below, must conclude that, while the committing judge

was in law correct in his order under s. 475, and the reviewing judge was wrong in law in quashing the committal, the quashing order was attacked by the Crown on a basis unknown to the law. The Crown in its executive role can, at that point, elect not to appeal or to appeal on a limited basis, or to appeal from the order on all possible grounds known to the law. The Crown role continues at this stage in the same way as in the earliest stages of the process when it determines whether to lay a charge, against whom the charge should be laid, and if so, whether to proceed to or by way of the preliminary hearing.

In determining the proper disposition to be made of this appeal, one should not overlook the effect the position taken by the Crown in the appellate process has had, not only upon the criminal process itself but upon the accused. The accused has not been called upon to address the issue of 'no evidence' in either the Court of Appeal or in this Court. He has not been called upon to meet the 'no evidence' or 'some evidence' issue because of the quasi-reference approach taken by the Crown in the form of an appeal from the order of Bouck J.

As a result of all these proceedings and steps, this Court, making the order which is respectfully found to be the order which the Court of Appeal should have made, finds that this appeal should be allowed and the order of the reviewing judge restored. This is the disposition which must, in law, follow from the course chosen by the executive branch in the discharge of its function as an agency charged with law enforcement in the province. The Crown having pursued this course, as in its wisdom it is free to do, the result must be the restoration of the order quashing the committal. The focus of this entire process is on the liberty of the subject. The appellant stands accused under the criminal law. The agency charged with the administration of justice on behalf of the Crown in the right of the province has, upon its investigation and initial prosecutorial steps, determined that the community is possessed of no evidence that the accused is guilty of the conspiracy charged. Can the community be expected to tolerate, let alone support, a law which permits a person, against whom the state enforcement agency claims possession of no evidence of guilt as charged, to be prosecuted on such a charge with the full power and resources of the state? This is not an absence of process; it is an abandonment of process. It is fundamental to our criminal law traditions that no citizen shall be called upon to answer a charge in this stark circumstance. Any other criminal law technique is but organized tyranny focused on the wrongly accused in the view of the arm of the state empowered to initiate and process that accusation. Section 475 cannot, in my opinion, be properly construed in the tradition of statutory interpretation of criminal statutes as requiring such a startling result in a free society.

It follows that in doing so, the Court has not treated itself as bound by, nor indeed in any way has it acted upon, the submission by the Crown that there was no evidence of each essential element of the charge. Rather, the Court has responded to the only position taken by the prosecution.

I therefore would allow the appeal and restore the order of Bouck J. in Chambers in the Supreme Court of British Columbia.

The reasons of Beetz, McIntyre and Chouinard JJ. were delivered by

McINTYRE J. (dissenting)

McINTYRE J. (dissenting):-- This appeal again raises the question of an application in the nature of certiorari to quash a committal for trial after preliminary hearing where it was agreed between the Crown and the appellant that there was no evidence adduced before the committing Provincial Court Judge on an essential ingredient of the offence charged.

The appellant was charged with two others named Grenon and Pellerin, and others unknown, with conspiracy to use a forged document as if it were genuine, contrary to s. 326 of the Criminal Code. At the opening of the preliminary hearing a stay of proceedings was entered in respect of Grenon, who gave evidence for the Crown, and Pellerin did not appear. The hearing proceeded in respect of the appellant Skogman.

The evidence revealed that Grenon worked in the office of the Queen's Printer in Victoria. Early in the year 1980 he stole an unnumbered British Columbia School District's Capital Financing Authority debenture having a face value of $25,000. The debenture was dated May 1, 1966 and it had coupons attached, each in the amount of $781.25, dated November 1 and May 1 for each year up to 1986. He retained it in his possession until October, 1980 when he mentioned it to his co-accused, Pellerin. They decided to negotiate the bond or the coupons or both. The two, Grenon and Pellerin, went to the office of the Queen's Printer where Grenon made a casting of a serial number so that it could be stamped on the debenture and its coupons. He gave the casting to Pellerin who by this time had the debenture. Pellerin then spoke to a woman friend who was employed by the Royal Trust Company at its branch on Grant Street in Victoria. He endeavoured to make arrangements with her to negotiate the debenture, but she refused.

At about the end of October the appellant Skogman opened an account at the Grant Street Branch of the Royal Trust Company in the name of one Brune who was an acquaintance, but who knew nothing of the account. The appellant then handed over for negotiation the coupons from the debenture. The coupons bore a fictitious number and had a face value of $14,843.75. On surrender of the coupons the appellant received from the trust company $2,500 cash, and the remaining $12,343.75 was deposited to the account he had opened in the name of Brune.

There was evidence identifying the appellant as the person who handed over the coupons to the Royal Trust Company on October 31 at the Grant Street branch, but there was no direct evidence of any association between the appellant and the other alleged conspirators. However, in argument at the preliminary hearing, counsel for the Crown said:

> Mr. Pellerin gained access and custody of the coupons. He showed them to Heather Robb and Heather Robb says, "Yes, those are the items and I told him that they wouldn't pass muster because they look smudged and they are obvious forgeries."
>
> The coupons then go from Mr. Pellerin somehow to Mr. Skogman [sic] and an inference can be drawn -- and I suggest it is the only inference that can be drawn -- that Mr. Skogman [sic] then joins the common purpose.
>
> We have the identification of the coupons in Pellerin's hands and we next have Mr. Skogman [sic] showing up at Royal Trust.

And at the conclusion of the hearing, the Provincial Court Judge said in part:

> I am adopting, as my reasons for committing, the submissions made by Crown counsel, Mr. Macdonald, who summarized the case. He summarized the facts very succinctly and I can do no better than merely adopt them as reasons.
>
> I therefore am satisfied that there is sufficient evidence to put to a jury and sufficient evidence upon which a jury properly instructed could convict.
>
> I therefore commit the accused for trial before Judge and Jury at the next court of competent jurisdiction and I am referring to the accused, Larry Cliff Skogman [sic].

The appellant petitioned the Supreme Court for an order in the nature of certiorari to quash the committal for trial. Essentially, the grounds upon which relief was sought were that evidence of an agreement between the appellant and one or more of his co-conspirators, a necessary ingredient of the charge of conspiracy, had not been tendered. It was contended that there was no evidence before the committing Provincial Court Judge of any such agreement between the appellant and the others and, therefore, there was not sufficient evidence to justify a committal. It was therefore beyond the jurisdiction of the Provincial Court Judge to commit in the circumstances.

The Chambers Judge in the Supreme Court who heard the petition wrote a detailed and carefully considered judgment in which he reviewed many of the authorities on this question and concluded that the relief sought should be granted. He quashed the committal. At the conclusion of his reasons for judgment the Chambers Judge conveniently summarized his conclusions under six headings. The second conclusion he reached was in these terms:

> (2) At the preliminary hearing, there was no evidence the accused was a member of the conspiracy alleged in the information. Put another way, there was an entire absence of evidence as a basis for the formation of a judicial opinion that the evidence was sufficient to put the accused on trial. There was only circumstantial evidence which gives rise to rational inferences other than his membership in the conspiracy.

The fourth, fifth and sixth conclusions were in these terms:

> (4) The Supreme Court of Canada has approved the practice of quashing committal orders by certiorari when there is a loss of jurisdiction during the preliminary enquiry. Examples of how this can occur include denial of natural justice and failure to observe a mandatory provision of the Criminal Code.
>
> (5) There was no breach of the rules of natural justice by reason of the committal proceedings.
>
> (6) The Provincial Court Judge lost jurisdiction at the preliminary inquiry when he failed to observe s. 475 of the Criminal Code because he committed the accused for trial when there was no evidence of his membership in the conspiracy which justified the committal order, or put another way, there was an entire absence of evidence as a basis for the formation of a judicial opinion by him that the evidence of his membership in the conspiracy was sufficient to put the accused on trial.

The Court of Appeal was unanimous in allowing the Crown's appeal. McFarlane J.A. wrote reasons with which Craig J.A. concurred. Lambert J.A. concurred in the result but wrote separate reasons. McFarlane J.A., after outlining the facts, said:

> The appeal by the Crown to this Court is presented on the assumption that there was no evidence to support the Provincial Court Judge's opinion. It is, of course, not conceded or assumed that the circumstances did not require the Provincial Court Judge to apply his mind to the question whether he should or should not be of opinion that the evidence was sufficient to put the accused on trial. It is not suggested that there was such a complete absence of evidence that s. 475(1) could not be invoked or applied at all. The contrary is the case. There can be no doubt that at the conclusion of hearing of the evidence presented by the Crown, the Provincial Court Judge was required to form his opinion on the application of s-s. 1(a) and 1(b), i.e., to commit or discharge. The distinction is important because it points up the difference between the acquisition of jurisdiction by the Provincial Court Judge and the loss of a jurisdiction once properly acquired.

After reviewing the authorities, including Re Martin, Simard and Desjardins and The Queen (1977), 20 O.R. (2d) 455 (C.A.), affirmed sub nom. Martin v. The Queen, [1978] 2 S.C.R. 511; R. v. Norgren (1975), 27 C.C.C. (2d) 488 (B.C.C.A.); Patterson v. The Queen, [1970] S.C.R. 409; R. v. Kopan (1975), 3 B.C.L.R. 102; Attorney General of Quebec v. Cohen, [1979] 2 S.C.R. 305; Forsythe v. The Queen, [1980] 2 S.C.R. 268, he went on to say:

> In the present case there was clearly no lack of jurisdiction to enter upon the preliminary inquiry. If, as is assumed for the purposes of this appeal, there was no evidence to support the Provincial Court Judge's opinion that the evidence was sufficient to put the respondent on trial, the Judge made an error in the exercise of a jurisdiction which he did possess. I think the Chambers Judge erred in substituting his opinion of the sufficiency of the evidence for the opinion of the Provincial Court Judge on that question. The question whether circumstantial evidence is equally, or more consistent with innocence than with guilt, is a question for the trial Judge or jury.

As has been said, Lambert J.A. reached the same conclusion and expressed disagreement with certain dicta from Re Martin, Simard and Desjardins and The Queen and Forsythe v. The Queen, as argued by counsel for the accused, and he followed R. v. Kopan which had held that a total lack of evidence on a preliminary hearing would not go to jurisdiction and permit a quashing by certiorari.

In this Court argument proceeded on the basis that there was no evidence before the Provincial Court Judge of association by the appellant with either of his co-accused, an essential ingredient of the crime of conspiracy, and therefore no basic existed for a committal for trial. The appellant argued that while there was no case directly on point in this Court, the weight of authority established that certiorari was available in Canada to quash a committal for trial and that an absence of evidence on an essential point was a ground for such relief. The Court was referred to many authorities, including Re Robar and The Queen (1978), 42 C.C.C. (2d) 133 (N.S. C.A.); Procureur général du Québec v. Poirier, [1981] C.A. 228, sub nom. Re Poirier and The Queen (1981), 62 C.C.C. (2d) 452; Stillo v. R. (1981), 22 C.R. (3d) 224 (Ont. C.A.); R. v.

Boylan (1979), 8 C.R. (3d) 36 (Sask. C.A.); Re Leroux and The Queen (1978), 43 C.C.C. (2d) 398 (Que. S.C.); Re Mackie and The Queen (1978), 43 C.C.C. (2d) 269 (Ont. H.C.); Re Harrigan (1977), 17 N.B.R. (2d) 478 (C.A.); Chromium Mining and Smelting Corp. v. Fortin, [1968] Que. Q.B. 536; R. v. Gibbon, Bell and Faryon (1965), 45 C.R. 314 (Man. Q.B.) Particular reliance was placed on the case of Re Martin, Simard and Desjardins and The Queen.

Counsel for the Crown argued that the point had been settled sixty years ago in R. v. Nat Bell Liquors Ltd., [1922] 2 A.C. 128, and that sound grounds of policy and law supported the proposition that had been established in the British Columbia Court of Appeal to the effect that an absence of evidence will not be grounds for review of a committal for trial by certiorari. He reviewed many of the cases on the subject which illustrate the different views that have been adopted in different appellate courts in Canada and submitted that this Court should set the matter at rest with a clear pronouncement.

In approaching the case at bar I refer, firstly, to Patterson v. The Queen where, at a preliminary hearing into a charge of using an instrument to procure a miscarriage, the committing magistrate refused to order the production of statements made by two Crown witnesses. The accused was committed for trial and on application for a writ of certiorari the committal was quashed. The committal was restored in the Court of Appeal and the accused appealed to this Court. Judson J., speaking for himself, Abbott, Martland, Ritchie, and Pigeon JJ., Spence J. dissenting, said at pp. 411-12:

> I intend to confine these reasons within the very narrow issues raised by the case and to repeat what has been emphasized so often that if it is sought to review a committal for trial, there is only one ground for action by the reviewing Court and that is lack of jurisdiction. The refusal by the magistrate, on this hearing, to order production of these statements does not go to the question of jurisdiction. In the first place, I think that his ruling was correct and, further, even if it was in error that there would still be no problem of jurisdiction.

Hall J. concurred in the result. This case I take to be clear authority for the proposition that an error in law during the course of exercising a jurisdiction is not itself jurisdictional and will not be reviewed on certiorari. The Patterson case was followed and approved in this Court in Attorney General of Quebec v. Cohen. Pigeon J. wrote the judgment in this Court in the Cohen case and referred with approval to the case of Norgren in the British Columbia Court of Appeal which dealt with the same point. The British Columbia Court of Appeal later followed and approved Norgren in the case of Kopan. These cases all have their roots in the judgment of Lord Sumner in the Nat Bell case and carry the authority of this Court.

The two cases upon which most of the argument centred in this appeal are Re Martin, Simard and Desjardins and The Queen in the Ontario Court of Appeal and in this Court, and Forsythe v. The Queen in this Court. It was argued that these cases had modified, or at least cast doubt on, the earlier cases relied upon by the Crown. In the Martin case orders of committal had been made after a preliminary hearing and then quashed in the High Court on certiorari. The basis of the quashing order in the High Court was that there was error of law on the face of the record. The issue in the Court of Appeal then became, in the words of Estey C.J.O (as he then was), "whether certiorari is available to quash a committal for trial where there is an error of law on the

face of the record" (p. 484). He went on to say that the Court of Appeal of Ontario had already applied the principle that excess or want of jurisdiction was the only ground upon which certiorari might apply and referred on this point to the Ontario cases of R. v. Botting, [1966] 3 C.C.C. 373 and Re Stewart and The Queen (No. 2) (1977), 35 C.C.C. (2d) 281, and to the Norgren case in the British Columbia Court of Appeal. He then observed, as I have done, that these cases find their roots in the Nat Bell case. As to the extent of review on jurisdictional grounds, he referred to the words of Lord Sumner in the Nat Bell case to the effect that:

> On certiorari, so far as the presence or absence of evidence becomes material, the question can, at most, be whether any evidence at all was given on the essential point referred to. Its weight is entirely for the inferior Court: ...

Estey C.J.O. then went on to say, at pp. 486-87:

> The Code asserts this principle. Where there is any evidence at all upon a charge or issue arising thereunder, the Provincial Court Judge is called upon by s. 475 of the Code to hear it and determine "if in his opinion the evidence is sufficient to put the accused on trial ..."; and his decision is not subject to review.
>
> Applying these judgments, some of which are binding upon this Court, we conclude that the learned Provincial Court Judge here acted within his jurisdiction, unless it can be said that he committed these respondents on the counts specified without any evidence at all, in the sense of an entire absence of proper material as a basis for the formation of a judicial opinion that the evidence was sufficient to put the accused on trial. That is quite a different question from the question "whether in the opinion of the reviewing tribunal there was evidence upon which a properly instructed jury acting judicially could convict". It remained, therefore, to examine the excerpts of evidence, as placed before this Court from the lengthy transcript taken at the preliminary hearing, in order to determine whether there was any evidence at all on which the committing tribunal was able to base its opinion to commit, as required by the terms of the Code already cited. There is, of course, a considerable volume of evidence, testimonial and documentary, and it is my view that in the case of each of the three respondents there is sufficient evidence relating to the charges and the counts in issue to call upon the learned Provincial Judge to form an opinion as to whether there was sufficient evidence to commit the accused for trial, pursuant to s. 475. Having properly directed his mind to the evidence and to the question of whether there was "sufficient evidence" to commit, his decision is not subject to review.

The order to quash was reversed. The appeal to this Court was dismissed.

In the Martin case Estey C.J.O. went far to rationalize the conflicting case law on this question. As I read his judgment in that case, he recognized that the remedy of certiorari was jurisdictional and that it could be invoked only to cure jurisdictional error. He went on to say that it would lie to quash a committal for trial on this basis only where there was a total absence of evidence before the committing justice on which he could commit. He went on to state the test of sufficiency of evidence for a committal and drew a distinction between that amount of evidence which would warrant a committal for trial, and that lesser amount which, though not being sufficient to warrant a committal, would be sufficient to compel the committing justice to examine

the evidence and reach a judicial opinion as to its sufficiency. He concluded by saying that there was such evidence, that is, evidence sufficient to put the committing justice to a decision as to its sufficiency and that, after the committing justice had addressed his mind to the evidence and reached his conclusion, the decision was not reviewable on certiorari even though wrong in law. This judgment was affirmed in this Court and is, in my view, consistent with the judgment of this Court in Forsythe in which case it was held that only a denial of natural justice or a failure to obey the jurisdictional prescriptions of s. 475 of the Criminal Code would justify a review and quashing of a committal by certiorari.

To apply the above proposition to the case a bar, it should first be recognized that the parties argued the case before us on the basis that there was no evidence before the trial judge. Counsel for the Crown put it that there was no evidence of an essential ingredient of a charge of conspiracy, that is, evidence of agreement. While it could be said then that there was no evidence sufficient to meet the test for a committal--evidence which, if believed by a properly instructed jury, would justify a conviction--it could not be said that there was no evidence at all. The evidence disclosed that Grenon had stolen the debenture and the coupons. He had then given them to Pellerin and made a moulding from which a false serial number was made and put on the documents. The evidence also showed that Pellerin had approached an employee of the Royal Trust Company branch office on Grant Street in Victoria and had attempted to arrange for the negotiation of the debenture or coupons. She refused to cooperate but, after a day or two, the appellant went to the same branch of the Royal Trust Company, opened an account and negotiated the debenture coupons under a false name.

Now the parties have conceded that there was no direct evidence of association. Whatever one might think of the validity of such a concession by the Crown, it is abundantly clear that the committing justice, having heard the evidence described above, was confronted with the task of deciding whether or not there was evidence of association, and whether or not there was evidence to warrant a committal. There was no absolute lack of evidence, as described by Estey C.J.O. in Martin. The formation of a judicial opinion by the committing justice was therefore required under s. 475 of the Criminal Code. The justice's words in giving judgment reveal that he addressed the evidence and formed his opinion as to its sufficiency. His judgment then is not reviewable in proceedings by certiorari. It should be remembered that there were no concessions as to sufficiency of evidence made before the committing justice. He was required to address the question and reach his own conclusion. He did so, and, even though it may have been wrong in law, it is, in my view, unreviewable.

This question came to this Court again in the case of Forsythe v. The Queen. In that case, on a preliminary inquiry concerning a charge of rape, the appellant was denied the right to question the complainant with respect to her past sexual conduct with persons other than the accused in the in camera hearing held under s. 142 of the Criminal Code. He was also refused the right to examine the notes of a police officer made during an interview with the complainant and to cross-examine on them. He was committed for trial. He applied for an order quashing the committal which was denied in the Supreme Court of Ontario and his appeal to the Court of Appeal was dismissed. He appealed to this Court. The Chief Justice wrote the judgment for a unanimous Court and held that certiorari may be involved to quash a committal. He referred to the Patterson case and said, at pp. 271-72:

> In speaking of lack of jurisdiction, this Court was not referring to lack of initial jurisdiction of a judge or a magistrate to enter upon a preliminary inquiry. This is hardly a likelihood. The concern rather was with the loss of this initial jurisdiction and, in my opinion, the situations in which there can be a loss of jurisdiction in the course of a preliminary inquiry are few indeed. However, jurisdiction will be lost by a magistrate who fails to observe a mandatory provision of the Criminal Code: see Doyle v. The Queen [1977] 1 S.C.R. 597. Canadian law recognizes that a denial of natural justice goes to jurisdiction: see Alliance des Professeurs catholiques de Montréal v. Labour Relations Board of Quebec [1953] 2 S.C.R. 140. In the case of a preliminary inquiry, I cannot conceive that this could arise otherwise than by; complete denial to the accused of a right to call witnesses or of a right to cross-examine prosecution witnesses. More disallowance of a question or questions on cross-examination or other rulings on proffered evidence would not, in my view, amount to a jurisdictional error. However, the judge or magistrate who presides at preliminary inquiry has the obligation to obey the jurisdictional prescriptions of s. 475 of the Criminal Code.

He went on to comment on the case of Attorney General of Quebec v. Cohen. The Forsythe appeal was dismissed.

It is evident then that this Court has held that only a denial of natural justice or a failure to "obey the jurisdictional prescriptions of s. 475 of the Criminal Code" will serve to permit the quashing of a committal for trial by certiorari.

How would this apply to the case at bar? It had never been suggested that there was any denial of natural justice. The inquiry was conducted in a normal open fashion and the appellant was in no way impeded in the conduct of the case. What of the jurisdictional prescriptions of s. 475? Section 475 is reproduced hereunder:

> 475. (1) When all the evidence has been taken by the justice he shall,
>
> (a) if in his opinion the evidence is sufficient to put the accused on trial,
>
> (i) commit the accused for trial, or
>
> (ii) order the accused, where it is a corporation, to stand trial in the court having criminal jurisdiction; or
>
> (b) discharge the accused, if in his opinion upon the whole of the evidence no sufficient case is made out to put the accused on trial.

The committing judge is required upon the conclusion of the evidence to form an opinion either that the evidence is sufficient for a committal or that it is not. If, in his opinion, it is sufficient, he must commit, and if, in his opinion, it is not, he must discharge. In his reasons the Provincial Court Judge clearly addressed this issue and complied with the jurisdictional prescriptions of the section by forming a judicial opinion as to the sufficiency of the evidence. His words in this respect have already been referred to. Even if he was wrong in forming his opinion, it cannot be said that he lost jurisdiction in the last act of a heretofore properly conducted hearing merely by making a mistake in law. There was clearly before him enough evidence, in the words of Estey C.J.O., to require him to address the question and to form a judicial opinion as to its sufficiency

for a committal. This he did with no suggestion of bias or other improper motive. Even if he was wrong, he addressed his mind to the issues and his determination is not reviewable on certiorari.

I would dismiss the appeal and I would say that where, in a preliminary hearing, there is no denial of natural justice then, even in an absence of evidence on an essential point in an offence charged, where the committing magistrate has addressed his mind to the requirements of s. 475 of the Criminal Code and decided that in his opinion there is sufficient evidence to commit, the resulting order of committal is unreviewable on certiorari. If it is thought necessary to provide a means of appeal or a review of committals, Parliament may do so.

Appeal allowed, BEETZ, McINTYRE and CHOUINARD JJ. dissenting.

R. v. Russell, [2001] S.C.J. No. 53

Supreme Court of Canada Judgments

Supreme Court of Canada

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

2001: April 19 / 2001: September 14.

File No.: 27732.

[2001] S.C.J. No. 53 | [2001] A.C.S. no 53 | 2001 SCC 53 | 2001 CSC 53 | [2001] 2 S.C.R. 804 | [2001] 2 R.C.S. 804 | 203 D.L.R. (4th) 1 | 274 N.R. 247 | J.E. 2001-1732 | 150 O.A.C. 99 | 157 C.C.C. (3d) 1 | 44 C.R. (5th) 231 | 50 W.C.B. (2d) 509 | 2001 CarswellOnt 3085

Donald Bruce Russell, appellant; v. Her Majesty The Queen, respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO (50 paras.)

Case Summary

Criminal law — Preliminary inquiry — Certiorari — Whether preliminary inquiry judge's committal of accused to trial reviewable on certiorari where it is alleged that judge erred in setting out elements of offence.

Criminal law — Elements of offence — Constructive first degree murder — Whether s. 231(5) of Criminal Code requires that victim of murder and victim of enumerated offence be same person — Criminal Code, R.S.C. 1985, c. C-46, s. 231(5).

The accused was committed to stand trial for several offences, including forcible confinement and first degree murder. The events took place at the home of S with whom the accused was romantically involved. The accused threatened her with a knife, allegedly sexually assaulted her and tied her up in the bedroom. He then left S and went to the basement where, a few minutes later, he stabbed S's tenant to death. The preliminary inquiry judge held that the accused could be committed to trial for first degree murder, rather than second degree murder, on the basis of s. 231(5) of the Criminal Code, which states that murder is first degree if the accused caused the death of another person while committing an offence enumerated under that provision -- in this case, forcible confinement. The committal was quashed on certiorari, and a committal for second degree murder was substituted on the theory that s. 231(5) requires the victim of the murder and the victim of the enumerated offence to be the same person. The Court of Appeal restored the preliminary inquiry judge's order committing the accused to trial for first degree murder. The court held that, even if the preliminary inquiry judge had erred in his interpretation of s. 231(5), the error constituted an error within his jurisdiction and accordingly was not reviewable on certiorari.

Held: The appeal should be dismissed.

If the preliminary inquiry judge erred in holding that s. 231(5) of the Criminal Code may apply even where the

victim of the murder and the victim of the enumerated offence are not the same person, such an error is reviewable on certiorari. The scope of certiorari is very limited, permitting review only where it is alleged that the tribunal has acted in excess of its assigned statutory jurisdiction. It is jurisdictional error for a preliminary inquiry judge to commit an accused to trial where there is no evidence on an essential element of the offence or, as here, in the absence of evidence as to an essential condition of a sentence-classification provision like s. 231. The "while committing" requirement is an essential condition to the application of s. 231(5).

The preliminary inquiry judge did not err in finding that s. 231(5) may apply even where the victim of the murder and the victim of the enumerated offence are not the same. If the ordinary meaning of the words is consistent with the context in which the words are used and with the object of the Act, then that is the interpretation that should govern. The language of s. 231(5) is clear. The provision does not state that the victim of the murder and the victim of the enumerated offence must be one and the same. It requires only that the accused have killed while committing or attempting to commit one of the enumerated offences. If Parliament had intended to restrict the scope of s. 231(5), it could have done so explicitly. Judgments from this Court dealing with s. 231(5) never intended to foreclose its application to multiple-victim scenarios. None of those previous cases involved multiple-victim scenarios, and the issue was simply not addressed by the Court. Section 231(5) reflects Parliament's determination that murders committed in connection with crimes of domination are particularly blameworthy and deserving of more severe punishment. The expression "while committing or attempting to commit" requires the killing to be closely connected, temporally and causally, with an enumerated offence. As long as that connection exists, it is immaterial that the victim of the killing and the victim of the enumerated offence are not the same.

In this case, there was sufficient evidence to warrant committing the accused to trial for first degree murder. The existence of a temporal link was conceded, and the preliminary inquiry judge found that the Crown had adduced sufficient evidence to allow a jury to find the requisite causal connection. A preliminary inquiry judge's determination of sufficiency is entitled to the greatest deference; only if there is no evidence on an element of the offence, or on an essential condition of s. 231(5), can a reviewing court vacate the committal. While the jury would be entitled to find that the accused's intention in confronting the tenant was entirely independent of the forcible confinement of S, it would also be entitled to conclude that the accused murdered the tenant to facilitate his forcible confinement of S, or that he forcibly confined S to facilitate his murder of the tenant.

Cases Cited

Applied: R. v. Paré, [1987] 2 S.C.R. 618; R. v. Charemski, [1998] 1 S.C.R. 679; Skogman v. The Queen, [1984] 2 S.C.R. 93; Forsythe v. The Queen, [1980] 2 S.C.R. 268; Quebec (Attorney General) v. Girouard, [1988] 2 S.C.R. 254; referred to: R. v. Green (1987), 36 C.C.C. (3d) 137; Dubois v. The Queen, [1986] 1 S.C.R. 366; Hawkshaw v. The Queen, [1986] 1 S.C.R. 668; R. v. Luxton, [1990] 2 S.C.R. 711; R. v. Heywood, [1994] 3 S.C.R. 761; R. v. Hasselwander, [1993] 2 S.C.R. 398; R. v. Arkell, [1990] 2 S.C.R. 695; R. v. Kirkness, [1990] 3 S.C.R. 74.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 7.
Criminal Code, R.S.C. 1985, c. C-46, ss. 81, 81(1)(c), 231(2), (5) [am. c. 27 (1st Supp.), s. 40(2) (Sch. I, item 3)], (6) [ad. 1997, c. 16, s. 3], (6.1) [ad. 1997, c. 23, s. 8], 279, 548(1) [rep. & sub. c. 27 (1st Supp.), s. 101(1)], 577.

APPEAL from a judgment of the Ontario Court of Appeal (1999), 141 C.C.C. (3d) 556, [1999] O.J. No. 4862 (QL), setting aside an order of the Superior Court of Justice (1999), 138 C.C.C. (3d) 533, [1999] O.J. No. 3248 (QL), and restoring an order of the Ontario Court (Provincial Division) committing the accused to stand trial for first degree murder. Appeal dismissed.

P. Andras Schreck and Mara B. Greene, for the appellant. David Finley, for the respondent.

Solicitors for the appellant: Pinkofsky Lockyer, Toronto. Solicitor for the respondent: The Ministry of the Attorney General, Criminal, Toronto.

The judgment of the Court was delivered by

McLACHLIN C.J.

1 This case raises two important issues, one jurisdictional and the other substantive. The jurisdictional question, stated broadly, is whether a preliminary inquiry judge's committal of an accused to trial is reviewable on certiorari where it is alleged that the judge erred in setting out the elements of the offence. The substantive question is whether s. 231(5) of the Criminal Code, R.S.C. 1985, c. C-46, which states that murder is first degree if the accused caused the death of another person "while committing or attempting to commit" an offence enumerated under that provision, requires that the victim of the murder and the victim of the enumerated offence be the same person. For the following reasons, I conclude that the kind of error alleged by the appellant here is reviewable on certiorari, but that the preliminary inquiry judge did not err in finding that s. 231(5) may apply even where the victim of the murder and the victim of the enumerated offence are not the same.

I. Facts

2 The appellant was charged with the first degree murder of John Whittaker. He was also charged with the sexual assault, sexual assault with a weapon, forcible confinement, and robbery of the complainant, Janet Seccombe. The appellant did not contest his committal to trial for all charges listed in the information except for the charge of first degree murder. The only issue at the preliminary inquiry was whether he could be committed to trial for first degree murder rather than second.

3 Seccombe's testimony at the preliminary inquiry was to the following effect. Seccombe met the appellant in 1992, while he was serving a jail term, and began a romantic relationship with him that continued after his release from jail in March of 1997. When Seccombe first met the appellant, Whittaker had been a tenant in her home for approximately 18 years and was "like a

brother" to her. Whittaker and the appellant did not get along and were openly hostile toward one another. Whenever the appellant visited Seccombe, Whittaker avoided him by going downstairs to the basement to work on his computer. Whittaker indicated to Seccombe that he would move out if the appellant moved in. Accordingly, the appellant did not move in with Seccombe after his release from jail. Seccombe attributed the hostility between the appellant and Whittaker to the fact that the appellant is black and Whittaker was racist.

4 The relationship between Seccombe and the appellant deteriorated, apparently because the appellant refused to make payments on a car that Seccombe had purchased on his behalf. They had a disagreement on December 24, 1997. On December 28, the appellant called Seccombe and she agreed to go to dinner and exchange Christmas gifts.

5 The appellant arrived at Seccombe's home at around 4:30 p.m. on December 28. Whittaker was at home and in the basement. There is no evidence that the appellant knew Whittaker was in the house. After sharing a bottle of beer with Seccombe, drinking a shot of rum, and giving Seccombe two Christmas gifts, the appellant told Seccombe that he had also purchased a dress for her. He asked her to go upstairs and put it on to wear to dinner. Seccombe went upstairs, sat on her bed and started to undress.

6 The appellant followed her into the bedroom, put his arm around her neck, and threatened her with a knife. The appellant told her that he was in an "awful lot of trouble" and needed her car keys, credit card, and personal identification number (PIN). The appellant tied her up on the bed with an extension cord and shoelaces and gagged her. He then went downstairs, returned with a bottle of rum, undressed, untied Seccombe's feet, and allegedly sexually assaulted her. Afterward, he released Seccombe so that she could go to the bathroom. The appellant then tied her up again, this time using a telephone cord. He drank more rum, brought her a beer (removing the gag but threatening Seccombe with the knife), inserted a pornographic movie into the VCR, masturbated, and then again asked for Seccombe's PIN and her daily withdrawal limit. After Seccombe gave him the information, the appellant left the room.

7 For five to ten minutes the house seemed "really quiet" before Seccombe suddenly heard Whittaker screaming "Oh, my God, oh, no, oh no". After ten to fifteen minutes, the appellant returned to the bedroom, out of breath, with water or sweat pouring down his face. He wiped his knife on Seccombe's night dress, which was on the bed. The doorbell then began to ring continuously. The appellant asked Seccombe if the neighbours were home; she indicated that she did not know. The appellant left the bedroom. Three to four minutes later, a female police officer entered Seccombe's room and untied her.

8 Seccombe's neighbours testified that they heard a violent struggle taking place in the basement of Seccombe's home. After hearing Whittaker saying, "Stop, you're going to kill me" or "You're going to kill me", they called the police, and an officer was dispatched at 7:14 p.m. Officers arrived at 7:18 p.m.

9 The appellant met police at the door with a large bump on his forehead. Police found Whittaker in the basement beaten and stabbed to death. He had approximately forty stab wounds from the chest upward on the front and back and had been beaten with a blunt

instrument. A wooden mallet was found on the floor near Whittaker's body. The knife was found upstairs in the hall. Seccombe was found tied to the bed. Upon his arrest at the scene, the appellant told the officers, "You guys better call an ambulance ... because I stabbed him ... he hit me with a hammer, so I stabbed him."

II. Judgments

1. Ontario Court (Provincial Division)

10 The only issue at the preliminary inquiry was whether the accused could be committed to trial for first, rather than second, degree murder. The Crown advanced two arguments. First, it argued that the appellant could be committed on the basis of s. 231(5)(e) of the Criminal Code, which provides that murder is first degree if the accused murdered "while committing" an offence under s. 279 of the Criminal Code. Section 279 covers offences of kidnapping and forcible confinement. Second, the Crown argued that the appellant could be committed on the basis of s. 231(2), which states that murder is first degree "when it is planned and deliberate".

11 With regard to the s. 231(5)(e) argument, the central question was whether the application of that provision requires that the victim of the murder and the victim of the enumerated offence -- in this case, forcible confinement -- be the same person. Following the decision of the Alberta Court of Appeal in R. v. Green (1987), 36 C.C.C. (3d) 137, Wake Prov. J., answered the question in the negative. Wake Prov. J. conceded that certain language in this Court's decision in R. v. Paré, [1987] 2 S.C.R. 618, suggests that the victim of the murder and the victim of the enumerated offence must be the same. He reasoned, however, that Paré's language merely reflects that in Paré itself the victim of the murder and the victim of the enumerated crime were the same. In Wake Prov. J.'s view, "the essence of both Paré and Green is that [in order to warrant application of s. 231(5)] the underlying offence and the killing must be entwined sufficiently close[ly] in a temporal and causative way". He noted that in this case the accused had conceded that the forcible confinement and the killing had taken place contemporaneously, and he reasoned that a jury could reasonably infer a causal link between the murder and the forcible confinement.

12 Applying R. v. Charemski, [1998] 1 S.C.R. 679, Wake Prov. J. held that there was sufficient evidence to commit the appellant on first degree murder, and that "the question of whether or not there is a rational explanation for that evidence, other than the guilt of the accused, is a question for the jury". Having found that the accused could be committed to trial for first degree murder on the basis of s. 231(5)(e), he found it unnecessary to address the Crown's argument under s. 231(2).

2. Ontario Superior Court of Justice (1999), 138 C.C.C. (3d) 533

13 On certiorari to the Ontario Superior Court of Justice, Durno J. quashed the committal for first degree murder and substituted a committal for second degree murder, on the theory that s. 231(5) requires the victim of the murder and the victim of the enumerated offence to be the same person. Durno J. noted that in each of the cases in which this Court has examined s.

231(5) since the Alberta Court of Appeal's judgment in Green, supra, it has employed a "single transaction" concept to determine whether the "while committing" requirement has been satisfied. Durno J. understood Paré, supra, to stand for the proposition that a murder and another offence could be part of a single transaction only if the murder constitutes the "continuing illegal domination of the victim and the exploitation of the position of power created by the underlying offence" (p. 545 (emphasis added)). He reasoned that the "single transaction" concept "requires the continuing domination of the victim with the murder representing the ultimate exploitation of the position of power created by the underlying offence" (p. 546). He concluded that s. 231(5) requires that the victim of the murder and the enumerated offence be the same person.

14 Durno J. then considered whether the committal could be upheld if, on review, it was found that s. 231(5) did not require the victim of the murder and the victim of the enumerated offence to be the same person. He found that, if s. 231(5) could in fact be applied to two-victim scenarios, there was circumstantial evidence which could support an inference of a close causal connection between the murder and the forcible confinement. Citing Charemski, supra, he noted that "whether there is another rational explanation is a factual determination arising from an evaluation of the evidence which is properly left to the jury" (p. 549). He concluded that, if s. 231(5) could in fact be applied to two-victim scenarios, the preliminary inquiry judge had not erred in committing the accused to trial for first degree murder.

3. Court of Appeal for Ontario (1999), 141 C.C.C. (3d) 556

15 Before the Court of Appeal for Ontario, the Crown argued that, even if the preliminary inquiry judge had erred in finding that s. 231(5) could apply where the victim of the murder and the victim of the enumerated offence are not the same, the error constituted an error within jurisdiction and accordingly was not reviewable on certiorari. Finlayson J.A., writing for a unanimous panel, agreed. In his view, the question was answered by this Court's decision in Quebec (Attorney General) v. Girouard, [1988] 2 S.C.R. 254 (hereinafter "Tremblay"), which he took to stand for the proposition that a preliminary inquiry judge's error in interpreting the Criminal Code is an error within jurisdiction and therefore unreviewable on certiorari. Applying Tremblay, supra, Finlayson J.A. restored the order of Wake Prov. J. committing the accused to trial for first degree murder.

III. Legislation

16 Criminal Code, R.S.C. 1985, c. C-46

231. (1) ...

(2) Murder is first degree murder when it is planned and deliberate.

...

(5) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit an offence under one of the following sections:

(a) section 76 (hijacking an aircraft);

(b) section 271 (sexual assault);

(c) section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm);

(d) section 273 (aggravated sexual assault);

(e) section 279 (kidnapping and forcible confinement); or

(f) section 279.1 (hostage taking).

548. (1) When all the evidence has been taken by the justice, he shall

(a) if in his opinion there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction, order the accused to stand trial; or

(b) discharge the accused, if in his opinion on the whole of the evidence no sufficient case is made out to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction.

IV. Issues

17

1. If the preliminary inquiry judge erred in holding that s. 231(5) of the Criminal Code may apply even where the victim of the murder and the victim of the enumerated offence are not the same person, was the error subject to review on certiorari?
2. Does s. 231(5) require that the victim of the murder and the victim of the enumerated offence be the same person?

V. Analysis

1. Jurisdiction

18 The appellant contends that the preliminary inquiry judge erred in holding that s. 231(5) of the Criminal Code may apply even where the victim of the murder and the victim of the enumerated offence are not the same person. A threshold question on this appeal is whether such an error, if committed, is reviewable on certiorari.

19 The scope of review on certiorari is very limited. While at certain times in its history the writ of certiorari afforded more extensive review, today certiorari "runs largely to jurisdictional review or surveillance by a superior court of statutory tribunals, the term 'jurisdiction' being given its

narrow or technical sense": Skogman v. The Queen, [1984] 2 S.C.R. 93, at p. 99. Thus, review on certiorari does not permit a reviewing court to overturn a decision of the statutory tribunal merely because that tribunal committed an error of law or reached a conclusion different from that which the reviewing court would have reached. Rather certiorari permits review "only where it is alleged that the tribunal has acted in excess of its assigned statutory jurisdiction or has acted in breach of the principles of natural justice which, by the authorities, is taken to be an excess of jurisdiction": Skogman, supra, at p. 100 (citing Forsythe v. The Queen, [1980] 2 S.C.R. 268).

20 With respect to preliminary inquiries held under s. 548 of the Criminal Code, the reasons for limiting the scope of supervisory remedies is clear. While the preliminary inquiry also affords defence counsel the opportunity to assess the nature and strength of the case against his or her client, its primary purpose is to ascertain whether there is sufficient evidence to warrant committing the accused to trial: Skogman, supra, at p. 106 (citing G. Arthur Martin, Q.C.: "Preliminary Hearings", Special Lectures of the Law Society of Upper Canada (1955), p. 1); Dubois v. The Queen, [1986] 1 S.C.R. 366, at pp. 373-74. Critically, the preliminary inquiry is not meant to determine the accused's guilt or innocence. That determination is made at trial. The preliminary inquiry serves a screening purpose, and it is not meant to provide a forum for litigating the merits of the case against the accused. The limited scope of supervisory remedies reflects the limited purpose of the preliminary inquiry.

21 In my view, the appellant here alleges a jurisdictional error reviewable on certiorari. The result follows directly from our decision in Skogman, supra, which raised the question of whether it is jurisdictional error for a preliminary inquiry judge to commit an accused to trial where there is no evidence on an essential element of the offence. Estey J. answered that question in the affirmative. "'No evidence' on an essential element of the charge", he held, "cannot amount to 'sufficient evidence'", and s. 548 of the Criminal Code authorizes the committal of an accused to trial only if there is "sufficient evidence": Skogman, at p. 104. Thus, "[w]here the record ... does not include evidence relating to each essential element of the charge brought against the accused, a committal of the accused to stand trial can be brought forward by way of a writ of certiorari to a superior court and can be quashed": Skogman, at p. 106.

22 The appellant argues that, contrary to the holding of the preliminary inquiry judge, s. 231(5) requires that the victim of the murder and the victim of the enumerated offence be the same person. In this case the victim of the murder and the victim of the forcible confinement were not the same. If the appellant's interpretation of s. 231(5) is correct, he has been committed to trial for first degree murder even though there is "no evidence on an essential element" of s. 231(5). Accordingly, if the appellant is correct that the preliminary inquiry judge misinterpreted s. 231(5), the error was jurisdictional and is reviewable on certiorari.

23 This was essentially the reasoning of this Court in Hawkshaw v. The Queen, [1986] 1 S.C.R. 668. In that case the accused had been committed to trial for unlawfully making an obscene publication even though no evidence had been introduced suggesting that the accused had published or had intended to publish the photograph. McIntyre J. held that the committal must be quashed, writing: "[o]n the indictment as framed, evidence was required of publication or an

intent to publish. The committal without such evidence cannot be sustained on the basis of the majority decision of this Court in Skogman": Hawkshaw, supra, at p. 676.

24 One difference between this case and Hawkshaw is that, whereas Hawkshaw involved the absence of evidence on an essential element of the offence, the allegation here is of an absence of evidence as to an essential condition of s. 231(5), which is not an offence-creating provision but a sentence-classification provision: see Paré, supra, at p. 625; R. v. Luxton, [1990] 2 S.C.R. 711, at p. 720. However, the logic that applies to the absence of evidence on an element of the offence also applies to the absence of evidence as to an essential condition of a sentence-classification provision like s. 231. The "while committing" requirement is an essential condition to the application of s. 231(5). If the central purpose of the preliminary inquiry here was to ensure that there was sufficient evidence to warrant a trial for first degree murder, the absence of evidence that the accused murdered "while committing" an enumerated offence would be as determinative as would be an absence of evidence on an essential element of the offence.

25 In disputing that the alleged error was jurisdictional, the Crown relies principally on this Court's two-paragraph judgment in Tremblay, supra. In that case the accused was alleged to have disguised himself as a guard in order to deceive a bank employee into giving him money. The accused was charged with robbery, and he conceded that he had been armed. However, the preliminary inquiry justice reasoned that the mere fact that the accused had been armed, without evidence that he had threatened the victim or that the victim was intimidated, was not sufficient to warrant a committal for robbery. The magistrate therefore committed the accused to trial on charges of theft and conspiracy to commit theft, rather than robbery and conspiracy to commit robbery. The Crown's application for judicial review was allowed, and that decision was upheld by the Quebec Court of Appeal. This Court, however, restored the order of the magistrate, stating: "[a]ssuming, without deciding the point, that the magistrate erred in the manner suggested, the error was made within the scope of his jurisdiction and as such cannot be a basis for the remedy of certiorari": Tremblay, at p. 254.

26 In my view, the Crown's reliance on Tremblay is misplaced. In Tremblay, there was no danger that the accused had been committed to trial on the basis of no evidence. On the contrary, the allegation in Tremblay was that there was sufficient evidence to commit the accused to trial for a more serious offence than the one for which he had been committed. It is well-settled law that errors as to the sufficiency of the evidence are within the jurisdiction of the preliminary inquiry judge, as long as there is some evidence supporting the committal: Dubois, supra. Thus, Tremblay did not engage the jurisdictional concerns that were engaged in Skogman, supra. In this case, however, the challenge to the preliminary inquiry judge's determination raises the possibility that the committal may have been made though there was no evidence on an essential condition of s. 231(5), on the authority of which provision stands the charge of first degree murder. In these circumstances, it is Skogman, not Tremblay, that governs.

27 Contrary to the Crown's assertions, there is nothing in Dubois to suggest a different result. In Dubois all agreed that, on an accused's challenge of a committal order, certiorari is available only to correct jurisdictional errors. The question was whether the same rule applies to the

Crown's challenge of a discharge. Estey J. held that the restriction on supervisory remedies applies to the Crown as to the accused. "The questioning of errors of law", he wrote, "is ... as inappropriate in proceedings to quash a discharge as it is in proceedings to quash a committal": Dubois, at p. 374.

28 The Crown's argument here is that under the "parity" principle of Dubois, if a preliminary judge's error as to the elements of a crime is unreviewable when challenged by the Crown (as the Crown contends is the law under Tremblay), that kind of error must also be unreviewable when challenged by the accused. The Crown argues that "the availability of certiorari does not turn on the identity of the party seeking that relief, but rather on the nature of the alleged error". I find nothing objectionable in that assertion, but I cannot see how it warrants the conclusion that the alleged error in this case is unreviewable on certiorari. The fault lies in the Crown's characterization of the error as "an alleged misinterpretation of the elements of the offence". When characterized this way, it is indeed difficult to see how it can be that the accused can challenge such an error though the Crown cannot. The logic becomes clear, however, once the rule is framed, as it should be, in terms of the jurisdiction of the preliminary inquiry judge: whether the error is challenged by the Crown or by the accused, an error is reviewable on certiorari only if it is jurisdictional. If it is not jurisdictional, no recourse to certiorari may be had. It is not the fact that it is the accused seeking certiorari here that makes the error reviewable. It is the fact that the error is jurisdictional.

29 The discrepancy that troubles the Crown is not, in my view, disturbing. As I note above, the governing principle is the same whether an error is challenged by the Crown or by the accused. While it is true that the effect of this principle is that errors as to the essential elements of the crime will, as a general rule, be reviewable when challenged by the accused but not when challenged by the Crown, this disparity reflects the balance of harms: a wrongful discharge does not raise the possibility of a violation of s. 7 of the Canadian Charter of Rights and Freedoms; by contrast, I think it clear that committing an individual to stand trial on a charge for which there is no evidence on one of the essential elements would violate the principles of fundamental justice. I note, moreover, that in circumstances such as were at issue in Tremblay, the Crown is free, subject to the requirements of s. 577 of the Criminal Code, to lay a new information or prefer an indictment. There is no analogous remedy available to the accused.

30 I conclude that the appellant alleges a jurisdictional error that would be susceptible to review on certiorari.

2. Section 231(5)

31 I turn now to the question of whether the preliminary inquiry judge erred in holding that s. 231(5) may apply even if the victim of the murder and the victim of the enumerated offence are not the same.

32 The question is first and foremost one of statutory interpretation. As such, the governing principles are well settled: the words in question should be considered in the context in which they are used, and read in a manner consistent with the purpose of the provision and the

intention of the legislature: see R. v. Heywood, [1994] 3 S.C.R. 761, at p. 784 (citing E. A. Driedger, Construction of Statutes (2nd ed. 1983), at p. 87; R. v. Hasselwander, [1993] 2 S.C.R. 398). "If the ordinary meaning of the words is consistent with the context in which the words are used and with the object of the act, then that is the interpretation which should govern": Heywood, supra, at p. 784.

33 The language of s. 231(5) is clear. The provision does not state that the victim of the murder and the victim of the enumerated offence must be one and the same. It requires only that the accused have killed "while committing or attempting to commit" one of the enumerated offences. Nothing in that phrase suggests that the provision's application is limited to cases in which the victim of the murder and the victim of the enumerated offence are the same. An interpretation of the provision that recognized such a limitation would effectively read into the provision a restriction that is not stated.

34 Other provisions of the Criminal Code indicate that, where Parliament intends to limit the phrase "while committing or attempting to commit", it does so in express language. Section 231(6), for example, provides that:

> Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder when the death is caused by that person while committing or attempting to commit an offence under section 264 [Criminal Harassment] and the person committing that offence intended to cause the person murdered to fear for the safety of the person murdered or the safety of anyone known to the person murdered. [Emphasis added.]

Without the limitation, s. 231(6) would apply to a person who had murdered one person while criminally harassing another. The limitation restricts the application of the provision to those who murder the person they are criminally harassing. No analogous limitation is stated in s. 231(5).

35 Still other provisions of the Criminal Code suggest that Parliament's use of the phrase "while committing or attempting to commit" does not in itself reflect an intention to create a same-victim requirement. Section 231(6.1), for example, provides that:

> [M]urder is first degree when the death is caused while committing or attempting to commit an offence under section 81 [using explosives] for the benefit of ... a criminal organization. [Emphasis added.]

Section 81 proscribes conduct that includes using explosives against property: see s. 81(1)(c) ("Every one commits an offence who ... with intent to destroy or damage property without lawful excuse, places or throws an explosive substance anywhere ..."). Parliament must have contemplated, therefore, that s. 231(6.1) might be applied even where there is no "victim" at all to the underlying crime. It would be senseless to say that the victim of the murder and the explosives offence must be one and the same where the latter crime might have no victim at all. Section 231(6.1) suggests that the use of the phrase "while committing or attempting to commit" does not itself create a same-victim requirement.

36 If Parliament had intended to restrict the scope of s. 231(5), it could have done so explicitly, as it did in s. 231(6). That Parliament did not incorporate such a restriction suggests that it intended "while committing or attempting to commit" to apply even where the victim of the murder and the victim of the enumerated offence are not the same. Indeed, several of the offences enumerated in s. 231(5) quite clearly raise the possibility that the person murdered will not be the same as the victim of the enumerated crime, and it would be difficult to conclude that this possibility did not occur to the drafters of the provision. A hijacker might kill a person on the runway; a kidnapper might kill the parent of the child he means to kidnap; a hostage-taker might kill an innocent bystander or a would-be rescuer. It is difficult to conclude that Parliament did not envision such possibilities.

37 The fact that s. 231(5) reaches not only successfully executed offences but also attempts raises similar concerns. Many attempt charges stem from crimes that were thwarted or aborted, often because of the intervention of a third party. Parliament surely envisioned such scenarios when it drafted the provision. Had Parliament not wanted the provision to reach these circumstances, it could easily have attached an explicit restriction to the provision's language.

38 In arguing that s. 231(5) applies only where the victim of the murder and the victim of the enumerated offence are the same, the appellant relies principally on this Court's judgment in Paré, supra. In Paré, the accused had murdered a boy two minutes after indecently assaulting him. The question was whether the accused had committed the murder "while committing" the indecent assault. Wilson J. quoting Martin J.A. answered the question in the affirmative, holding that a death is caused "while committing" an offence enumerated under s. 231(5) "where the act causing death and the acts constituting the [enumerated offence] all form part of one continuous sequence of events forming a single transaction": Paré, at p. 632. Wilson J. reasoned that this understanding of the provision best reflects the underlying policy concerns, which she characterized as follows at p. 633:

> The offences listed in s. 214(5) [now s. 231(5)] are all offences involving the unlawful domination of people by other people. Thus an organizing principle for s. 214(5) can be found. This principle is that where a murder is committed by someone already abusing his power by illegally dominating another, the murder should be treated as an exceptionally serious crime.

39 While that passage does not in itself suggest that s. 231(5) applies only where the victim of the murder and the enumerated offence are the same, Wilson J. went on to write: "it is the continuing illegal domination of the victim which gives continuity to the sequence of events culminating in the murder. The murder represents an exploitation of the position of power created by the underlying crime and makes the entire course of conduct a 'single transaction'": Paré, supra, at p. 633 (emphasis added). The appellant's argument is that Parliament "never intended that the existence of unlawful domination, in and of itself, [would be] sufficient to warrant classifying a murder as first degree murder". Rather, as Wilson J. recognized, "it is the unlawful domination of the victim that justifies this classification" (appellant's factum, at p. 20 (emphasis in original)).

40 There is some support for the appellant's interpretation of s. 231(5) in this Court's other judgments dealing with s. 231(5). In R. v. Arkell, [1990] 2 S.C.R. 695, we considered whether s. 214(5) (now s. 231(5)) violates s. 7 of the Charter because it results in punishment that is not proportionate to the seriousness of the offences. In rejecting that contention, Lamer C.J. wrote: "Parliament's decision to treat more seriously murders that have been committed while the offender is exploiting a position of power through illegal domination of the victim accords with the principle that there must be proportionality between a sentence and the moral blameworthiness of the offender and other considerations such as deterrence and societal condemnation of the acts of the offender": Arkell, supra, at p. 704 (emphasis added).

41 In Luxton, supra, we addressed the related question of whether the combined effect of s. 214(5) and s. 669(a) infringes s. 7 of the Charter by foreclosing individualized sentences and thereby violating the principle that the severity of a sentence should reflect the degree of moral blameworthiness associated with the crime. Section 669(a) (now s. 745(a)) provides that an accused convicted of first degree murder must be sentenced to life in prison without the possibility of parole until he has served 25 years of his sentence. In finding that the impugned provisions did not infringe s. 7, Lamer C.J. wrote: "Murders that are done while committing offences which involve the illegal domination of the victim by the offender have been classified as first degree murder": Luxton, at p. 721 (emphasis added).

42 I am not persuaded, however, that this Court intended in Paré, supra, Arkell, supra, or Luxton, supra, to foreclose the application of s. 231(5) to multiple-victim scenarios. None of those cases involved multiple-victim scenarios, and the issue was simply not addressed by the Court. In my view, the references to the "victim" simply reflect the facts of those cases. The essential thrust of Wilson J.'s reasoning in Paré was that the offences enumerated in s. 231(5) are singled out because they are crimes involving the domination of one person by another. The essence of the reasoning was that s. 231(5) reflects Parliament's determination that murders committed in connection with crimes of domination are particularly blameworthy and deserving of more severe punishment. In many cases, such murders will be committed as the culmination of the accused's domination of the victim of the enumerated offence. This was the case in Paré, Arkell and Luxton. In other cases, however, the accused will have murdered one person in connection with the domination of another. I cannot conclude that Wilson J.'s judgment in Paré or Lamer C.J.'s judgments in Arkell or Luxton foreclose the application of s. 231(5) in such cases.

43 In my view the appellant states the organizing principle of s. 231(5) too narrowly. The provision reflects Parliament's determination that murders committed in connection with crimes of domination are particularly blameworthy and deserving of more severe punishment. "[W]hile committing or attempting to commit" requires the killing to be closely connected, temporally and causally, with an enumerated offence. As long as that connection exists, however, it is immaterial that the victim of the killing and the victim of the enumerated offence are not the same.

44 In oral argument, the appellant relied heavily on the fact that murder is not itself an offence enumerated under s. 231(5). On the appellant's theory, if Parliament had contemplated that the

provision might be applied to multiple-victim scenarios, it would surely have included murder on the list of offences, because murder committed to facilitate another, or other, murder is obviously as morally blameworthy as murder committed to facilitate any of the enumerated offences. In the appellant's view, the absence of murder from the list of offences can only be explained by the fact that Parliament did not contemplate that the provision might be applied to situations in which the victim of the murder and the victim of the enumerated offence are not the same.

45 I think the more likely explanation for the exclusion of murder from the list of enumerated offences under s. 231(5) is simply that, in most situations in which an accused has killed two or more people and there is a temporal and causal nexus between the killings, s. 231(2) will apply. That provision states that "[m]urder is first degree murder when it is planned and deliberate". While one can imagine situations in which an accused might have killed two or more people spontaneously, without planning or deliberation, such scenarios are surely the exception rather than the rule. In all likelihood, the reason that Parliament did not include murder as an enumerated offence under s. 231(5) is that it concluded that most multiple murders would engage s. 231(2).

46 The appellant rightly points out that s. 231(5) imposes a severe penalty -- indeed, the most severe penalty imposed under our Criminal Code -- and accordingly it is particularly important that the provision be strictly construed. While this principle is unimpeachable, it cannot in itself justify restricting the ordinary meaning of the provision's words. The cases of this Court dealing with s. 231(5) make clear that an accused commits a murder "while committing or attempting to commit" an enumerated offence only if there is a close temporal and causal connection between the murder and the enumerated offence: see, e.g., Paré, supra, at p. 632 (stating that a murder is committed "while committing" an enumerated offence only "where the act causing death and the acts constituting [the enumerated offence] all form part of one continuous sequence of events forming a single transaction"); R. v. Kirkness, [1990] 3 S.C.R. 74, at p. 86. In my view this requirement appropriately restricts the application of s. 231(5) to contexts within the intended scope of the provision.

47 This brings me to the question of whether there was sufficient evidence in this case to warrant committing the appellant to trial for first degree murder. The existence of a temporal link having been conceded, the only issue is whether a sufficient causal link existed between the murder and the forcible confinement. In finding that the Crown had presented sufficient evidence to allow a jury to find the requisite causal connection, Wake Prov. J. focused on the fact that the appellant went to the basement to confront Whittaker even though the two normally avoided one another, and on the fact that Seccombe was still bound and gagged when the appellant went downstairs to confront Whittaker. Wake Prov. J. found that "[t]he jury would be entitled to infer from the evidence that the accused on becoming aware of Mr. Whittaker's presence in the house would be concerned that Mr. Whittaker might readily discover his house-mate bound and gagged upstairs and raise an alarm which might thwart the accused's efforts to make use of her credit card and her car".

48 As we discussed in Skogman, supra, a preliminary inquiry judge's determination of sufficiency is entitled to the greatest deference; only if there is no evidence on an element of the offence, or on an essential condition of s. 231(5), can a reviewing court vacate the committal:

see Skogman, at pp. 100 and 106. With this in mind, I cannot conclude that the committal of the accused was unwarranted. While the jury would be entitled to find that the appellant's intention in confronting Whittaker was entirely independent of the forcible confinement of Seccombe -- indeed, the apparent animosity between the appellant and Whittaker might support such a conclusion -- the jury would equally be entitled to conclude that the appellant murdered Whittaker to facilitate his forcible confinement of Seccombe, or that the appellant forcibly confined Seccombe to facilitate his murder of Whittaker.

VI. Conclusion

49 For the foregoing reasons, I find that the error alleged by the appellant would have been reviewable on certiorari but that the preliminary inquiry judge did not err.

50 The appeal is dismissed.

R. v. Forsythe, [1980] 2 S.C.R. 268

Supreme Court Reports

Supreme Court of Canada

Present: Laskin C.J. and Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

1980: May 14 / 1980: June 27.

[1980] 2 S.C.R. 268 | [1980] 2 R.C.S. 268 | [1980] S.C.J. No. 66 | [1980] A.C.S. no 66

Gregory Forsythe, appellant; and Her Majesty The Queen, respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Criminal law — Charge of rape — Certiorari — Motion to quash — Preliminary hearing — Committal for trial — Whether complainant compellable witness at in camera hearing — Questions on sexual conduct — Adequacy of notice and particulars — Denial of natural justice — Right to cross-examine — Criminal Code, A.S.C. 1970, c. C-34 as amended, ss. 142, 455.3(1)(a), 468(1)1a).

The appellant and a co-accused were charged with rape. During the preliminary inquiry, the appellant was denied the right to question the complainant with respect to her sexual conduct with persons other than himself in an in camera hearing held pursuant to s. 142(1) of the Criminal Code. A request of appellant's counsel to cross-examine a police sergeant on the notes he made during an interview with the complainant was also refused. The appellant was eventually committed for trial and he applied for an order quashing the committal for trial. The application was dismissed by the Supreme Court of Ontario and the appeal from that judgment was dismissed by the Court of Appeal.

Held: The appeal should be dismissed.

That certiorari may be invoked to quash a committal for trial is accepted law in Canada, but only in cases of lack or loss of jurisdiction, which can only occur when a magistrate fails to observe a mandatory provision of the Criminal Code or when there is a denial of natural justice, which denial, in the case of a preliminary inquiry, has to be a complete denial to the accused of a right to call witnesses or to cross-examine prosecution witnesses. Mere disallowance of questions on cross-examination or a ruling on the admissibility of evidence, even if erroneous, do not go to jurisdiction and do not open the way to certiorari. The refusal of a request to crossexamine a police sergeant on some notes does not, therefore, even if wrong, support reviewability on certiorari.

With respect to the in camera hearing, it is the first time that the interpretation and application of s. 142(1) of the Criminal Code, introduced in 1976, are before this Court. It cannot be doubted, having regard to the reference in s. 142(1) to "the judge, magistrate or justice", that its provisions apply to a preliminary inquiry. Section 142 has affected the prior law which disentitled an accused to pursue and seek to contradict a denial by a complainant of sexual misconduct with persons other than the accused. Section 142 may be regarded as balancing the interests

of both the complainant (whereas she may now be, required to answer the question in public, she may not have to do so if the Court rules against it although she may have to submit to the question in private) and the accused (whereas he could formerly put the question in public without necessarily being entitled to an answer, he now has the right of answer and the right to contradict it if the Court rules in his favour in the in camera hearing).

The presiding judge or magistrate should go into an in camera hearing in respect of the adequacy or sufficiency of the "reasonable notice" and the "particulars of evidence" required by clause (a) of s. 142(1). It would defeat the purpose of s. 142 if the notice and particulars were revealed prior to the in camera hearing. The requirement of particulars does not oblige the accused to set out the very questions that he seeks to put. The findings of the judge or magistrate on the adequacy or sufficiency of the notice and particulars are not reviewable on certiorari or on a motion to quash brought to challenge a committal for trial or to challenge a decision made in the course of a preliminary inquiry.

The in camera hearing being for the purpose, inter alia, of enabling the judge or magistrate to satisfy himself as to the weight of the evidence, evidence may be taken at the hearing, although the judge or magistrate may decide, after hearing submissions or representations of counsel, that he does not need to hear any evidence. If evidence is taken, the witnesses proposed to be called must be regarded as compellable, and the complainant, whose credibility is an issue of fact specified in s. 142(1)(b), must be equally compellable, becoming, however, the accused's witness if called by him at the hearing. However, the judge or magistrate has discretion to decide not to hear a proposed witness, be the witness the complainant or some other person, though he would generally be better able to exercise his judgment about a witness after hearing his evidence rather than by not hearing it at all. Here, the presiding judge did not think that any assistance would be provided by compelling the complainant to testify at an in camera hearing, and his decision does not amount to a denial of natural justice.

Cases Cited

R. v. Botting, [1966] 2 O.R. 121; Chromium Mining and Smelting Corp. Ltd. v. Fortin, [1968] Que. Q.B. 536; Patterson v. The Queen, [1970] S.C.R. 409; Doyle v. The Queen, [1977] 1 S.C.R. 597; Alliance des Professeurs catholiques de Montr eal v. Labour Relations Board of Quebec, [1953] 2 S.C.R. 140; Attorney General for Quebec v,. Cohen, [1979] 2 S.C.R. 305; R. v. Moulton, [1980] 1 W.W.R. 711; R. v. Roussel (1979), 10 C.R. (3d) 184; R. v. Lawson (1978), 39 C.C.C. (2d) 85; R. v. Morris (1977), 1 C.R. (3d) 284; R. v. O'Brien (1976), 31 C.C.C. (2d) 396; R. v. MacIntyre (1978), 42 C.C.C. (2d) 217; R. v. McKenna, McKinnon and Nolan (1976), 32 C.C.C. (2d) 210; R. v. Finnessey (1906), 10 C.C.C. 347; R. v. Basken and Kohl (1974), 21 C.C.C. (2d) 321; R. v. Krausz (1973), 57 Cr. App. R. 466, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario [(1978), 27 Chitty's L.J. 36.], dismissing an appeal from a judgment of the Supreme Court of Ontario [(1978), 26 Chitty's L.J. 311.] dismissing an application for an order quashing the appellant's committal for trial on a charge of rape. Appeal dismissed.

Keith E. Wright, for the appellant. Bonnie J. Wein, for the respondent.

Solicitor for the appellant: Keith E. Wright, Toronto. Solicitor for the respondent: The Attorney General of Ontario, Toronto.

The judgment of the Court was delivered by

THE CHIEF JUSTICE

THE CHIEF JUSTICE:— The issue in this appeal, which is here by leave of this Court, is whether the appellant is entitled to quash on certiorari a committal for trial on a charge of rape. This issue engages Criminal Code, s. 142, as enacted by 1974-75-76 (Can.), c. 93, s. 8. The application to quash was dismissed by Hollingworth J., and his judgment was affirmed by the Ontario Court of Appeal without calling on counsel for the respondent Crown. Brooke J.A., in very short reasons, stated that the Court of Appeal was "in substantial agreement with the judgment of Mr. Justice Hollingworth, and in our view on the facts of this case he was correct in refusing to make the order [to quash]". I shall come shortly to Judge Hollingworth's reasons but I wish first to delineate the grounds upon which a committal for trial may be quashed.

That certiorari may be invoked to quash a committal for trial is accepted law in Canada: see R. v. Botting [[1966] 2 O.R. 121.]; Chromium Mining and Smelting Corp. Ltd. v. Fortin [[1968] Que. Q.B. 536.]. The fact that it is a discretionary remedy and may be refused where there is another recourse does not affect resort to it in respect of a committal for trial since there is no other recourse. Committals for trial are not appealable and can only be challenged by certiorari or motion to quash. What then are the grounds upon which a successful challenge may be made? In Patterson v. The Queen [[1970] S.C.R. 409.], this Court stated that lack of jurisdiction was the only ground for quashing a committal for trial. The decision was based upon a particular fact situation. Counsel for the accused sought, on the preliminary inquiry, to compel production of a statement given to the police by a prosecution witness. Although the request for production was denied, the defence was not prohibited from crossexamining on the contents of the statement. It discontinued cross-examination without seeking to delve into the statement. This Court held that even if the denial of production was wrong (and it held that it was not), this did not go to jurisdiction. Spence J., in dissent, felt that there was a denial of natural justice (and hence a jurisdictional error) by viewing the facts as depriving the accused of the right to cross-examine given by what is now Criminal Code, s. 468(1)(a).

In speaking of lack of jurisdiction, this Court was not referring to lack of initial jurisdiction of a judge or a magistrate to enter upon a preliminary inquiry. This is hardly a likelihood. The concern rather was with the loss of this initial jurisdiction and, in my opinion, the situations in which there can be a loss of jurisdiction in the course of a preliminary inquiry are few indeed. However, jurisdiction will be lost by a magistrate who fails to observe a mandatory provision of the Criminal Code: see Doyle v. The Queen [[1977] 1 S.C.R. 597.]. Canadian law recognizes that a denial of natural justice goes to jurisdiction: see Alliance des Professeurs catholiques de Montreal v. Labour Relations Board of Quebec [[1953] 2 S.C.R. 140.]. In the case of a preliminary inquiry, I cannot conceive that this could arise otherwise than by a complete denial to the accused of a right to call witnesses or of a right to cross-examine prosecution witnesses.

Mere disallowance of a question or questions on cross-examination or other rulings on proffered evidence would not, in my view, amount to a jurisdictional error. However, the judge or magistrate who presides at a preliminary inquiry has the obligation to obey the jurisdictional prescriptions of s. 475 of the Criminal Code.

In Attorney General for Quebec v. Cohen [[1979] 2 S.C.R. 305.], this Court was faced with an attempt by an accused to quash a decision of a magistrate during the course of a preliminary inquiry and before there was a committal for trial. Pigeon J., speaking for this Court, noted that this was an unprecedented proceeding. The decision which the accused sought to quash was a refusal by the magistrate to allow accused's counsel to put questions to a Crown witness on cross-examination in respect of depositions taken ex parte and in camera, under Criminal Code, s. 455.3(1)(a), by a magistrate before whom an information had been laid against the accused. An order to quash was denied on the ground that a ruling on the admissibility of evidence, even if erroneous, did not go to jurisdiction. There can be no gainsaying the correctness of this conclusion.

I come now to Criminal Code, s. 142 and to the course of proceedings before Provincial Court Judge McMahon and to the reasons of Hollingworth J. on the motion to quash the committal for trial. Criminal Code, s. 142 reads as follows:

> 142. (1) Where an accused is charged with an offence under section 144 or 145 or subsection 146(1) or 149(1), no question shall be asked by or on behalf of the accused as to the sexual conduct of the complainant with a person other than the accused unless
>
> (a) reasonable notice in writing has been given to the prosecutor by or on behalf of the accused of his intention to ask such question together with particulars of the evidence sought to be adduced by such question and a copy of such notice has been filed with the clerk of the court; and
>
> (b) the judge, magistrate or justice, after holding a hearing in camera in the absence of the jury, if any, is satisfied that the weight of the evidence is such that to exclude it would prevent the making of a just determination of an issue of fact in the proceedings, including the credibility of the complainant.
>
> (2) The notice given under paragraph (1)(a) and the evidence taken, the information given or the representations made at a hearing referred to in paragraph (1)(b) shall not be published in any newspaper or broadcast.
>
> (3) Every one who, without lawful excuse the proof of which lies upon him, contravenes subsection (2) is guilty of an offence punishable on summary conviction.
>
> (4) In this section, "newspaper" has the same meaning as it has in section 261.
>
> (5) In this section and in section 442, "complainant" means the person against whom it is alleged that the offence was committed.

I have reproduced the whole section although the issues in this case touch only subss. 1(a) and (b), as amplified by subs. (2).

The interpretation and application of s. 142(1) is before this Court for the first time, but it has been the subject of case law in the Courts of Appeal of Alberta and British Columbia (see R. v.

Moulton [[1980] 1 W.W.R. 711.], R. v. Roussel [(1979), 10 C.R. (3d) 184.] and R. v. Lawson [(1978), 39 C.C.C. (2d) 85.]; in the Supreme Court of British Columbia (see R. v. Morris 12); in District Courts in Newfoundland and in Ontario (see R. v. O'Brien [(1976), 31 C.C.C. (2d) 396.]); R. v. MacIntyre [(1978), 42 C.C.C. (2d) 217.] and in a Provincial Court of Ontario (see R. v. McKenna, McKinnon and Nolan [(1976), 32 C.C.C. (2d) 210.]). There has been advertence in this line of cases to what the various courts have considered to be the purpose of s. 142, namely, to alleviate the trauma and the humiliation and embarrassment of a complainant by an inquiry into her past sexual conduct with persons other than the accused. The provision also appears, however, to balance the interests of an accused because, under the prior law, a denial of sexual misconduct with others precluded any further inquiry into what was considered to be a collateral issue. However, inquiry into previous sexual encounters with the accused was not a collateral matter into which inquiry was foreclosed by a denial. It was relevant to consent which is so often the main issue in sexual offences. It was, also, open to an accused under the prior law to ask questions as to the complainant's general reputation for chastity, as a matter going to credibility and consent, but the accused was entitled to bring evidence to contradict a denial of unchastity, subject in some circumstances to the discretion of the trial judge to disallow such questions: see R. v. Finnessey [(1906), 10 C.C.C. 347.], at p. 351; R. v. Basken and Kohl [(1974), 21 C.C.C. (2d) 321.], at p. 337; and see also the wider scope of questions as to general reputation for prostitution approved in R. v. Krausz [(1973), 57 Cr. App. R. 466.], at p. 472. These last mentioned inquiries are not directly affected by s. 142.

In indicating as I have that, in my opinion s. 142 has affected the prior law which disentitled an accused to pursue and seek to contradict a denial by a complainant of sexual misconduct with others, I am endorsing a view that was expressed by Meredith J. in. R. v. Morris, supra. This, however, is not the view taken by McDermid J.A. in R. v. Moulton, supra, at p. 726. He said this:

> The rules as to the examination of a complainant as to her sexual conduct are judge-made rules. In my opinion if Parliament had intended to extend the rights of an accused by providing that evidence could be called to contradict a complainant's evidence in respect of specific acts of sexual intercourse with men other than the accused it would have so provided specifically and not by implication.

Since McDermid J.A. also held that a complainant could be a compellable witness at an in camera hearing under s. 142(1)(b) (a point which I address later in these reasons), I am puzzled by his statement quoted above. If the presiding judge or magistrate finds in an in camera hearing that the conditions upon which questions may be asked about sexual misconduct by the complainant with others have been met, it follows that her credibility becomes an issue of fact which can properly be pursued upon the resumption of the preliminary inquiry or of the trial, as the case may be. The accused, in making his defence, is not limited to cross-examining the complainant to expose the falsity of a denial of sexual encounters with others (if she does deny them), but may put forward other witnesses (those whose evidence was given in the in camera hearing) to impugn the credibility of the complainant. If this cannot be done, s. 142 becomes almost a dead letter, notwithstanding that the judge or magistrate, who has taken evidence in an in camera hearing, has concluded that to exclude the evidence, including that going to the credibility of the complainant, would prevent the making of a just determination of her credibility and of other issues of fact in the proceedings against the accused. I would note too that

Lieberman J.A. in the Moulton case takes a view contrary to that of McDermid J.A. and one in conformity with R. v. Morris.

It follows from the foregoing that the complainant must now answer the type of question envisaged by s. 142(1) and must do so in public, unless the Court, in the exercise of its discretion, refuses to allow such an inquiry after the in camera hearing. It may refuse because, for example, counsel for the accused is engaging in a fishing expedition and has no reasonable basis for putting such a question. Of course, the accused must not be prevented from making full answer and defence. Section 142 may, therefore, be regarded as balancing the interests of both the complainant and the accused through this change in the law of evidence. The gain of the complainant is that whereas she may now be required to answer the question in public she may not have to do so if the Court rules against it, although she may have to submit to the question in private. As for the accused, whereas he could formerly put the question in public without necessarily being entitled to an answer, he now has the right of answer and the right to contradict it if the Court rules in his favour in the in camera hearing.

As already noted, the issues touching the meaning and scope of s. 142 arose in this case upon a preliminary inquiry, and it cannot be doubted, having regard to the reference in the section to "the judge, magistrate or justice", that its provisions apply to such an inquiry. (In appearing to hold otherwise, R. v. Roussel, supra, was wrongly decided.) The section, applicable to charges of rape, attempted rape, sexual intercourse with a female under age fourteen and indecent assault of a female, is dominated by the words "no question shall be asked ... unless" clauses (a) and (b) of s. 142(1) are complied with and satisfied.

I turn first to a consideration of clause (a). The case law to which I have referred above indicates that what is reasonable notice is a question of fact in each case, and there can be no quarrel with this view. It follows, of course, that even if the question of reasonable notice might give rise to an appealable issue where s. 142 is invoked in the course of a trial, it does not give rise to an issue reviewable on certiorari brought to challenge a committal for trial or to challenge a decision made in the course of a preliminary inquiry. The second principal element of clause (a) is the requirement that the notice include "particulars of the evidence sought to be adduced by such question", that is, a question or questions sought to be put by the accused as to the sexual conduct of the complainant with a person or persons other than the accused. The term "particulars of the evidence" appears to me to be a self-defining dictionary term, but I think some latitude must be given to the judge or magistrate to assess the sufficiency of the particulars that are given. The requirement of particulars would, ordinarily, encompass time and place and the names of the other persons allegedly involved with the complainant but I do not think that the requirement obliges an accused to set out the very questions that he or his counsel seeks to put. The questions that are sought to be put are, in my view, sequential to the particulars and not themselves a part thereof, although it would be open to the accused to specify the questions in the particulars if he so wishes. I see no reason, moreover, why the presiding judge or magistrate should not permit an amendment to the particulars, so long as the requirement of reasonable notice remains satisfied and so long as there is no prejudice to the complainant.

In the present case, unfortunately, the notice in writing embodying the particulars was not made part of the record, although there is a reference to it in the transcript of the proceedings before Judge McMahon. Counsel for the respondent Crown urged that Judge McMahon had ruled against the sufficiency of the notice and particulars. I do not think that the record supports

this view. On the contrary, Hollingworth J. in his reasons had this to say on the matter:

> In this case, Mr. Wright [counsel for the accused] gave notice naming the complainant's boyfriend and Judge McMahon has accepted that notice as being adequate and I do not quarrel with him because that is his right.

The affirmation of Judge Hollingworth's reasons by the Ontario Court of Appeal means that there are concurrent findings on the adequacy or sufficiency of the notice and particulars. I would add this. Even if the question of sufficiency or insufficiency should be challenged, it would not be reviewable on certiorari or on a motion to quash at this stage, whatever be its appealability, if the matter arose in the course of a trial.

This brings me to clause (b), which is the nub of the present case under the competing and irreconcilable positions thereon by the accused and by the Crown. A preliminary issue is whether the presiding judge or magistrate should go into an in camera hearing in respect of the adequacy of the notice and particulars required under clause (a). I come back to what I said were the dominating words in s. 142, namely, "no question shall be asked ... unless". In my view, it would defeat the purpose of s. 142 if the notice and particulars were revealed prior to the in camera hearing because it may turn out that they are inadequate or do not properly indicate a relevant line of proposed questioning. If that be the case, then there should be no public revelation of "the particulars of the evidence sought to be adduced". Coming then directly to clause (b), there are two issues that were raised in the submissions of counsel for the accused and counsel for the Crown. They are (1) whether evidence may be or must be taken at the in camera hearing, and (2) whether, if so, the complainant, as well as any other person, is a compellable witness at the in camera hearing.

Counsel for the accused urged, of course, that s. 142(1)(b) envisaged the taking of evidence at the in camera hearing and, further, the credibility of the complainant being a matter expressly mentioned in s. 142(1)(b), she was necessarily a compellable witness to whom he was entitled, therefore, to put questions referable to the particulars set out in the notice. Counsel for the Crown submitted that s. 142(1)(b) did not envisage the proffering of evidence of witnesses at an in camera hearing, and certainly not the compellability of the complainant. According to Crown counsel, it was for the Court to determine merely on oral submissions whether the provisions of clauses (a) and (b) were met, and if the Court so concluded then the accused was free to put his questions at the resumption of the preliminary inquiry or of the trial, as the case might be. Alternatively, Crown counsel submitted that there is a broad discretion in the presiding judge to control the conduct of the in camera hearing and any error committed in the course of it would not be a ground to quash on certiorari.

I cannot subscribe to the main contention of Crown counsel that clause (b) envisages only oral submissions or representations by counsel. There are two main reasons for rejecting the contention. First, the in camera hearing is for the purpose, inter alia, of enabling the judge or magistrate to satisfy himself as to the weight of the evidence, and I am unable to appreciate how weight can be determined without an assessment of witnesses called to give evidence, an assessment which would take into account their demeanour, their knowledge of the events about which they are examined, the consistency of their testimony and so on. Second, s. 142(2) appears to me to be conclusive that evidence may (not must) be taken in the in camera hearing.

That provision, if I may repeat its relevant portion, speaks of "the evidence taken, the information given or the representations made at a hearing referred to in paragraph 1(b)". In my opinion, the judge or magistrate conducting the in camera hearing may decide, after hearing submissions or representations of counsel, that he does not need to hear any evidence. It is more likely that a decision not to hear any evidence would result in a holding adverse to the accused but this need not be invariably so. However, he may be persuaded by the representations made, or even without them, that evidence should be taken so that he can assess its weight to determine whether "[he] is satisfied ... that to exclude it would prevent the making of a just determination of an issue of fact in the proceedings, including the credibility of the complainant".

If evidence is taken at the in camera hearing, the witnesses proposed to be called must be regarded as compellable, and the complainant, whose credibility is an issue of fact specified in s. 142(1)(b), must be equally compellable, becoming, however, the accused's witness if called at the in camera proceedings. I agree, in respect of the compellability of the complainant, with the determination to this effect by the Alberta Appellate Division in R. v. Moulton, supra. There may be some reason or reasons why a proposed witness, be the witness the complainant or some other person, will not be heard by the presiding judge or magistrate who decides to take evidence. The presiding judge or magistrate may regard proposed evidence as too remote or he may conclude that its probative value is outweighed by its prejudicial effect. Again, he may be of the view that an intended witness should not be called if his evidence will involve the court in speculating on its relevance.

However, it seems to me that it will be a rare case where an accused will be denied the right to call a witness once evidence is to be taken. I say this because the presiding judge or magistrate will have already passed on the adequacy of the notice and the particulars and, hence, on the range of the questions to be asked. The presiding judge or magistrate, concerned with the weight of evidence, will be better able to exercise his judgment about a witness after hearing his evidence rather than by not hearing him at all. Of course, the presiding judge or magistrate may have to make rulings during the course of the evidence as to the propriety of questions and as to admissibility of testimony sought to be offered and, even if he be wrong in any such ruling, it would not give rise to a successful challenge on certiorari.

In the present case, Judge McMahon refused to allow counsel for the accused to examine the complainant at an in camera hearing pursuant to s. 142(1)(b). The ground of refusal appeared to be that a preliminary hearing was concerned only a with whether the Crown had made out a sufficient case to warrant committal for trial and Judge McMahon did not think that any assistance in that respect would be provided by compelling the complainant to testify at an in camera hearing. He indicated to counsel that the matter could be raised, apparently more properly, at the ensuing trial. Hollingworth J. held, following R. v. Morris, supra, that the complainant was a compellable witness at an in camera hearing, provided that a proper foundation was laid for the reception of her evidence. In his opinion, there was no such foundation and this was sufficient to dismiss the application to quash the committal for trial. Hollingworth J. noted that s. 142 gave the presiding judge or magistrate considerable power to control the course of proceedings, having regard, particularly, to the remedial purpose of the section.

Although there appears to be some contradiction in the reasons of Hollingworth J. between his assertion that the notice under s. 142(1)(a) was accepted by Judge McMahon as adequate

(a point to which I adverted earlier in these reasons) and his assertion made immediately following in his reasons that no proper basis had been laid for the examination of the complainant at an in camera hearing, the reconciliation of those views lies in an earlier passage of Judge Hollingworth's reasons. There he said that it would only be in exceptional cases that a complainant could be called first (as was requested here), so that, presumably, if there are other witnesses (there were no others who could be called in R. v. MacIntyre, supra, where the complainant was held to be compellable), one or more of them should be called first to establish a foundation for the examination of the complainant.

Although I do not think that this should be a rigid rule, I would not regard its application in this case as amounting to a denial of natural justice or as impeding an accused's right to make full answer and defence. There is a discretion in a judge or magistrate holding an in camera hearing during a preliminary inquiry as to the order in which witnesses may be called.

Another issue raised before Judge McMahon concerned a request of accused's counsel to crossexamine a police sergeant on the notes he made during an interview with the complainant. Counsel for the accused had seen the notes but his request to cross-examine on them was refused. I agree with Judge Hollingworth that this ruling, even if wrong, did not support reviewability on certiorari and, indeed, this Court did not call upon Crown counsel to deal with the matter. The main issue before Judge Hollingworth and before this Court concerned the effect of the refusal of Judge McMahon to allow the complainant to be examined in an in camera hearing.

It follows, in my opinion, that the Courts below were right in refusing to quash the committal for trial.

I would dismiss the appeal.

Appeal dismissed.

R. v. O'Connor, [1995] 4 S.C.R. 411

Supreme Court Reports

Supreme Court of Canada

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

1995: February 1 / 1995: December 14.

Errata : 2017: March 21.

File No.: 24114.

[1995] 4 S.C.R. 411 | [1995] 4 R.C.S. 411 | [1995] S.C.J. No. 98 | [1995] A.C.S. no 98 | 1995 CanLII 51

Hubert Patrick O'Connor, appellant; v. Her Majesty The Queen, respondent, and The Attorney General of Canada, the Attorney General for Ontario, the Aboriginal Women's Council, the Canadian Association of Sexual Assault Centres, the DisAbled Women's Network of Canada, the Women's Legal Education and Action Fund, the Canadian Mental Health Association and the Canadian Foundation for Children, Youth and the Law, interveners.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Criminal law — Evidence — Disclosure — Accused charged with sexual offences — Defence counsel obtaining pre-trial order requiring Crown to disclose complainants' entire medical, counselling and school records — Trial judge ordering stay of proceedings owing to non-disclosure and late disclosure by Crown — Court of Appeal allowing Crown's appeal and ordering new trial — Whether stay of proceedings appropriate remedy for non-disclosure by Crown of information in its possession.

Criminal law — Evidence — Medical and counselling records — Procedure to be followed where accused seeks production of records in hands of third parties.

The accused was charged with a number of sexual offences. Defence counsel obtained a pre-trial order requiring that the Crown disclose the complainants' entire medical, counselling and school records and that the complainants authorize production of such records. The Crown applied to a different judge for directions regarding the disclosure order and for the early appointment of a trial judge. After a trial judge had been appointed, the Crown again sought directions regarding the disclosure order. By this time many of the impugned records had come into its possession. The trial judge made it clear that he was to be provided promptly with therapy records relating to all four complainants. The accused later applied for a judicial stay of proceedings based on non-disclosure of several items. Crown counsel submitted that the two Crown prosecutors were handling the case from different cities, and that there were difficulties concerning communication and

organization. She asserted that the non-disclosure of some of the medical records was due to inadvertence on her part, and that she had "dreamt" the transcripts of certain interviews had been disclosed. She submitted that uninhibited disclosure of medical and therapeutic records would revictimize the victims, and suggested that the disclosure order exhibited gender bias. The trial judge dismissed the application for a stay, finding that the failure to disclose certain medical records had been an oversight. He noted, however, that the letters written by Crown counsel to the counsellors had unacceptably limited the scope of the disclosure to only those portions of the records which related directly to the incidents involving the accused. This resulted in the full therapy records not being disclosed to the defence until just before the trial. He concluded that while the conduct of the Crown was "disturbing", he did not believe that there was a "grand design" to conceal evidence, nor any "deliberate plan to subvert justice". In light of the difficulties encountered during discovery, Crown counsel then agreed to waive any privilege with respect to the contents of the Crown's file and to prepare a binder in relation to each of the complainants containing all information in the Crown's possession relating to each of them. On the second day of the trial, counsel for the accused made another application for a judicial stay of proceedings based largely on the fact that the Crown was still unable to guarantee to the accused that full disclosure had been made. The trial judge stayed proceedings on all four counts. He noted the constant intervention required by the court to ensure full compliance with the disclosure order and found that the Crown's earlier conduct had created "an aura" that had pervaded and ultimately destroyed the case. The Court of Appeal allowed the Crown's appeal and directed a new trial. This appeal raises the issues of (1) when non-disclosure by the Crown justifies an order that the proceedings be stayed and (2) the appropriate procedure to be followed when an accused seeks production of documents such as medical or therapeutic records that are in the hands of third parties.

Held (Lamer C.J. and Sopinka and Major JJ. dissenting): The appeal should be dismissed.

(1) Stay of Proceedings

Per La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: There is no need to maintain any type of distinction between the common law doctrine of abuse of process and Charter requirements regarding abusive conduct. Where an accused seeks to establish that non-disclosure by the Crown has violated s. 7, he or she must establish that the impugned non-disclosure has, on the balance of probabilities, prejudiced or had an adverse effect on his or her ability to make full answer and defence. Such a determination requires reasonable inquiry into the materiality of the non-disclosed information. Inferences or conclusions about the propriety of the Crown's conduct or intention are not necessarily relevant to whether or not the accused's right to a fair trial is infringed. The focus must be primarily on the effect of the impugned actions on the fairness of the trial. Once a violation is made out, the court must fashion a just and appropriate remedy, pursuant to s. 24(1). Where the adverse impact upon the accused's ability to make full answer and defence is curable by a disclosure order, then such a remedy, combined with an adjournment where necessary to enable defence counsel to review the disclosed information, will generally be appropriate. There may, however, be exceptional situations where, given the advanced state of the proceedings, it is simply not possible to remedy the prejudice. In those "clearest of cases", a stay of proceedings will be appropriate. When choosing a remedy for a non-disclosure that has violated s. 7, the court should also consider whether the Crown's breach of its disclosure obligations has violated fundamental principles underlying the community's sense of decency and fair play and thereby caused prejudice to the integrity of the judicial system. If so, it should be asked whether this prejudice is remediable, having regard to the seriousness of the violation and to the societal and individual interests in obtaining a determination of guilt or innocence.

While the Crown's conduct in this case was shoddy and inappropriate, the non-disclosure cannot be said to have violated the accused's right to full answer and defence. The whole issue of disclosure in this case arose out of the order requiring that the Crown "disclose" records in the hands of third parties and that the complainants authorize production of such records. This order was issued without any form of inquiry into their relevance, let alone a balancing of the privacy rights of the complainants and the accused's right to a fair trial, and was thus wrong. The Crown was ultimately right in trying to protect the interests of justice, and the fact that it did so in such a clumsy way should not result in a stay of proceedings, particularly when no prejudice was demonstrated to the fairness of the accused's trial or to his ability to make full answer and defence. Even had a violation of s. 7 been found, this cannot be said to be one of the "clearest of cases" which would mandate a stay of proceedings.

Per Cory and Iacobucci JJ.: While the actions of Crown counsel originally responsible for the prosecution of this case were extremely high-handed and thoroughly reprehensible, the Crown's misdeeds were not such that, upon a consideration of all the circumstances, the drastic remedy of a stay was merited.

Per Lamer C.J. and Sopinka and Major JJ. (dissenting on this issue): A stay of proceedings was appropriate here. The Crown's conduct impaired the accused's ability to make full answer and defence. The impropriety of the disclosure order if any does not excuse the Crown's failure to comply with it until immediately before the trial. The Crown never took proper action regarding the objections it had. If it could not appeal the order it should have returned to the issuing judge to request variation or rescission. The letters from the Crown prosecutor to the therapists narrowed the scope of the order. As soon as the order was clarified for the therapists, complete records were disclosed, suggesting that had the letters contained an accurate description of the order, compliance would have occurred at a much earlier time. The Crown also breached its general duty to disclose all relevant information. Each time disclosure was made in this case it was the result of the defence having to raise the matter in court. The conduct of the Crown was such that trust was lost, first by the defence, and finally by the trial judge. It is of little consequence that a considerable amount of the non-disclosed material was ultimately released piecemeal to the defence prior to the trial. The effect of continual discovery of more non-disclosed evidence, coupled with the Crown's admission that disclosure was possibly incomplete, created an atmosphere in which the defence's ability to prepare was impaired. The Crown's delay in making disclosure and its inability to assure the trial judge that full disclosure had been made even after commencement of the trial were fatal to the proceedings. The continual breaches by the Crown made a stay the appropriate remedy. Proceedings had become unworkable and unfair. Remedies under s. 24(1) of the Charter are properly in the discretion of the trial judge. This discretion should not be interfered with unless the decision was clearly unreasonable.

The same breaches of the disclosure order, the general duty of disclosure and the undertaking to disclose files to the defence which impaired the accused's right to make full answer and defence also violated fundamental principles of justice underlying the community's sense of fair play and decency. The trial judge showed admirable tolerance for the behaviour of the Crown but in the end had no choice but to order a stay. When a criminal trial gains notoriety because of the nature of the offence, the parties charged or any other reason, there is an added burden in the paramount interest of ensuring fairness in the process. In this case, the fact that the offences alleged were many years in the past and that the accused had a high profile in the community called for a careful prosecution to ensure fairness and the maintenance of integrity in the process. The conduct of the Crown during the time the trial judge was involved, as well as in the months before his appointment, was negligent, incompetent and unfair. The trial judge was in the best position to observe the conduct of the Crown and its effect on the proceedings. He found that the trial had become so tainted that it violated fundamental principles underlying the community's sense of fair play and decency and that the accused was impaired in his ability to make full answer and defence.

(2) Production of Records in the Possession of the Crown

Per Lamer C.J. and Sopinka J.: The Crown's disclosure obligations established in Stinchcombe are unaffected by the confidential nature of therapeutic records when the records are in the possession of the Crown. The complainant's privacy interests in therapeutic records need not be balanced against the right of the accused to make full answer and defence in the context of disclosure, since concerns relating to privacy or privilege disappear where the documents in question have fallen into the Crown's possession. The complainant's lack of a privacy interest in records that are possessed by the Crown counsels against a finding of privilege in such records. Fairness must require that if the complainant is willing to release this information in order to further the criminal prosecution, then the accused should be entitled to use the information in the preparation of his or her defence. Moreover, any form of privilege may be forced to yield where such a privilege would preclude the accused's right to make full answer and defence. Information in the possession of the Crown which is clearly relevant and important to the ability of the accused to raise a defence must be disclosed to the accused, regardless of any potential claim of privilege that might arise. While the mere existence of therapeutic records is insufficient to establish the relevance of those records to the defence, their relevance must be presumed where the records are in the Crown's possession.

Per Cory and Iacobucci JJ.: The principles set out in the Stinchcombe decision, affirmed in Egger, pertaining to the Crown's duty to disclose must apply to therapeutic records in the Crown's possession, as found by Lamer C.J. and Sopinka J.

Per Major J.: The Crown's disclosure obligations established in Stinchcombe are unaffected by the confidential nature of therapeutic records in its possession, as found by Lamer C.J. and Sopinka J.

Per La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: This appeal does not concern the extent of the Crown's obligation to disclose private records in its possession, or the question whether privacy and equality interests may militate against such disclosure by the Crown. These issues do not arise in this appeal and were not argued before the Court. Any comment on these questions would be strictly obiter.

(3) Production of Records in the Possession of Third Parties

Per Lamer C.J. and Sopinka J.: When the defence seeks information in the hands of a third party (as compared to the state), the onus should be on the accused to satisfy a judge that the information is likely to be relevant. In order to initiate the production procedure, the accused must bring a formal written application supported by an affidavit setting out the specific grounds for production. However, the court should be able, in the interests of justice, to waive the need for a formal application in some cases. In either event, notice must be given to third parties in possession of the documents as well as to those persons who have a privacy interest in the records. The accused must also ensure that the custodian and the records are subpoenaed to ensure their attendance in the court. The initial application for disclosure should be made to the judge seized of the trial, but may be brought before the trial judge prior to the empanelling of the jury, at the same time that other motions are heard. In the disclosure context, the meaning of "relevance" is expressed in terms of whether the information may be useful to the defence. In the context of production, the test of relevance should be higher: the presiding judge must be satisfied that there is a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify. While "likely relevance" is the appropriate threshold for the first stage of the two-step procedure, it should not be interpreted as an onerous burden upon the accused. A relevance threshold, at this stage, is simply a requirement to prevent the defence from engaging in speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming requests for production.

Upon their production to the court, the judge should examine the records to determine whether, and to what extent, they should be produced to the accused. In making that determination, the judge must examine and weigh the salutary and deleterious effects of a production order and determine whether a non-production order would constitute a reasonable limit on the ability of the accused to make full answer and defence. In balancing the competing rights in question, the following factors should be considered: (1) the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record; (3) the nature and extent of the reasonable expectation of privacy vested in the record; (4) whether production of the record would be premised upon any discriminatory belief or bias; and (5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record. The effect on the integrity of the trial process of producing, or failing to produce, the record, having in mind the need to maintain consideration in the outcome, is more appropriately dealt with at the admissibility stage and not in deciding whether the information should be produced. As for society's interest in the reporting of sexual crimes, there are other avenues available to the judge to ensure that production does not frustrate the societal interests that may be implicated by the production of the records to the defence. In applying these factors, it is also appropriate to bear in mind that production of third party records is always available to the Crown provided it can obtain a search warrant.

Per Cory and Iacobucci JJ.: The procedure suggested by Lamer C.J. and Sopinka J. for determining whether records in the possession of third parties are likely to be relevant was agreed with, as were their reasons pertaining to the nature of the onus resting upon the accused and the nature of the balancing process which must be undertaken by the trial judge.

Per Major J.: The substantive law and the procedure recommended by Lamer C.J. and Sopinka J. in obtaining therapeutic records from third persons were agreed with.

Per La Forest, L'Heureux-Dubé and Gonthier JJ. (dissenting on this issue): Private records, or records in which a reasonable expectation of privacy lies, may include medical or therapeutic records, school records, private diaries and social worker activity logs. An order for production of private records held by third parties does not arise as a remedy under s. 24(1) of the Charter since, at the moment of the request for production, the accused's rights under the Charter have not been violated. Nonetheless, when deciding whether to order production of private records, the court must exercise its discretion in a manner that is respectful of Charter values. The constitutional values involved here are the right to full answer and defence, the right to privacy, and the right to equality without discrimination.

Witnesses have a right to privacy in relation to private documents and records which are not part of the Crown's "case to meet" against the accused. They are entitled not to be deprived of their reasonable expectation of privacy except in accordance with the principles of fundamental justice. Since an applicant seeking production of private records from third parties is seeking to invoke the power of the State to violate the privacy rights of other individuals, the applicant must show that the use of the State power to compel production is justified in a free and democratic society. The use of State power to compel production of private records will be justified in a free and democratic society when the following criteria are met: (1) it is shown that the accused cannot obtain the information sought by any other reasonable means; (2) production that infringes privacy must be as limited as reasonably possible to fulfil the right to make full answer and defence; (3) the arguments urging production rest on permissible chains of reasoning, rather than upon discriminatory assumptions and stereotypes; and (4) there is proportionality between the salutary and deleterious effects of production. The measure of proportionality must reflect the extent to which a reasonable expectation of privacy vests in the particular records, on the one hand, and the importance of the issue to which the evidence relates, on the other. Moreover, courts must remain alive to the fact that, in certain cases, the deleterious effects of production may demonstrably include negative effects on the complainant's course of therapy, threatening psychological harm to the individual concerned and thereby resulting in a concomitant deprivation of the individual's security of the person.

The first step for an accused who seeks production of private records held by a third party is to obtain and serve on the third party a subpoena duces tecum. When the subpoena is served, the accused should notify the Crown, the subject of the records, and any other person with an interest in the confidentiality of the records that the accused will ask the trial judge for an order for their production. Then, at the trial, the accused must bring an application supported by appropriate affidavit evidence showing that the records are likely to be relevant either to an issue in the trial or to the competence to testify of the subject of the records. If the records are relevant, the court must balance the salutary and deleterious effects of ordering that the records be produced to determine whether, and to what extent, production should be ordered.

The records at issue here are not within the possession or control of the Crown, do not form part of the Crown's "case to meet", and were created by a third party for a purpose unrelated to the investigation or prosecution of the offence. It cannot be assumed that such records are likely to be relevant, and if the accused is unable to show that they are, then the application for production must be rejected as it amounts to nothing more than a fishing expedition. The burden on an accused to demonstrate likely relevance is a significant one. It would be insufficient for the accused to demand production simply on the basis of a bare, unsupported assertion that the records might impact on "recent complaint" or the "kind of person" the witness is. Similarly, the applicant cannot simply invoke credibility "at large", but must rather provide some basis to show that there is likely to be information in the impugned records which would relate to the complainant's credibility on a particular, material issue at trial. Equally inadequate is a bare, unsupported assertion that a prior inconsistent statement might be revealed, or that the defence wishes to explore the records for "allegations of sexual abuse by other people". Similarly, the mere fact that a witness has a medical or psychiatric record cannot be taken as indicative of the potential unreliability of the evidence. Any suggestion that a particular treatment, therapy, illness, or disability implies unreliability must be informed by cogent evidence, rather than stereotype, myth or prejudice. Finally, it must not be presumed that the mere fact that a witness received treatment or counselling after a sexual assault indicates that the records will contain information that is relevant to the defence. The focus of therapy is vastly different from that of an investigation or other process undertaken for the purposes of the trial. While investigations and witness testimony are oriented toward ascertaining historical truth, therapy generally focuses on exploring the complainant's emotional and psychological responses to certain events, after the alleged assault

has taken place.

If the trial judge decides that the records are likely to be relevant, then the analysis proceeds to the second stage, which has two parts. First, the trial judge must balance the salutary and deleterious effects of ordering the production of the records to the court for inspection, having regard to the accused's right to make full answer and defence, and the effect of such production on the privacy and equality rights of the subject of the records. If the judge concludes that production to the court is warranted, he or she should so order. Next, upon their production to the court, the judge should examine the records to determine whether, and to what extent, they should be produced to the accused. Production should only be ordered in respect of those records, or parts of records, that have significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice or by the harm to the privacy rights of the witness or to the privileged relation. The following factors should be considered in this determination: (1) the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record; (3) the nature and extent of the reasonable expectation of privacy vested in the record; (4) whether production of the record would be premised upon any discriminatory belief or bias; (5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record; (6) the extent to which production of records of this nature would frustrate society's interest in encouraging the reporting of sexual offences and the acquisition of treatment by victims; and (7) the effect on the integrity of the trial process of producing, or failing to produce, the record, having in mind the need to maintain consideration in the outcome. Where a court concludes that production is warranted, it should only be made in the manner and to the extent necessary to achieve that objective.

A preliminary inquiry judge is without jurisdiction to order the production of private records held by third parties. The disclosure order in the present case did not emanate from a preliminary inquiry judge, but was issued in response to a pre-trial application by the defence. Even a superior court judge, however, should not, in advance of the trial, entertain an application for production of private third party records. Such applications should be heard by the judge seized of the trial, rather than a pre-trial judge. In addition, it is desirable for the judge hearing an application for production to have had the benefit of hearing, and pronouncing upon, the defence's earlier applications, so as to minimize the possibility of inconsistency in the treatment of two similar applications. More generally, applications for production of third party records should not be entertained before the commencement of the trial, even by the judge who is seized of the trial. First, the concept of pre-trial applications for production of documents held by third parties is alien to criminal proceedings. Second, if pre-trial applications for production from third parties were permitted, it would invite fishing expeditions, create unnecessary delays, and inconvenience witnesses by requiring them to attend court on multiple occasions. Moreover, a judge is not in a position, before the beginning of the trial, to determine whether the records in question are relevant, much less whether they are admissible, and will be unable to balance effectively the constitutional rights affected by a production order.

Since the right of the accused to a fair trial has not been balanced with the competing rights of the complainant to privacy and to equality without discrimination in this case, a new trial should be ordered.

Per McLachlin J. (dissenting on this issue): L'Heureux-Dubé J.'s reasons were concurred in entirely. The test proposed strikes the appropriate balance between the desire of the accused for complete disclosure from everyone of everything that could conceivably be helpful to his defence, on the one hand, and the constraints imposed by the trial process and privacy interests of third parties who find themselves caught up in the justice system, on the other, all without compromising the constitutional guarantee of a trial which is fundamentally fair. The Charter guarantees not the fairest of all possible trials, but rather a trial which is fundamentally fair. What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. What the law demands is not perfect justice, but fundamentally fair justice.

Cases Cited

By L'Heureux-Dubé J.

Referred to: R. v. O'Connor (1994), 90 C.C.C. (3d) 257; A. (L.L.) v. B. (A.), [1995] 4 S.C.R. 536; R. v. Stinchcombe, [1991] 3 S.C.R. 326; R. v. Jewitt, [1985] 2 S.C.R. 128; R. v. Keyowski, [1988] 1 S.C.R. 657, aff'g (1986), 28 C.C.C. (3d) 553; R. v. Mack, [1988] 2 S.C.R. 903; R. v. Conway, [1989] 1 S.C.R. 1659; R. v. Scott, [1990] 3 S.C.R. 979; R. v. Power, [1994] 1 S.C.R. 601; Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486; R. v. Beare, [1988] 2 S.C.R. 387; Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835; R. v. Potvin, [1993] 2 S.C.R. 880; R. v. Collins, [1987] 1 S.C.R. 265; R. v. Elshaw, [1991] 3 S.C.R. 24; Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519; Mills v. The Queen, [1986] 1 S.C.R. 863; R. v. Morin, [1992] 1 S.C.R. 771; Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326; Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425; R. v. E. (A.W.), [1993] 3 S.C.R. 155; Cunningham v. Canada, [1993] 2 S.C.R. 143; R. v. Levogiannis, [1993] 4 S.C.R. 475; R. v. Xenos (1991), 70 C.C.C. (3d) 362; R. v. Burlingham, [1995] 2 S.C.R. 206; R. v. Seaboyer, [1991] 2 S.C.R. 577; R. v. Chaplin, [1995] 1 S.C.R. 727; R. v. Gingras (1992), 71 C.C.C. (3d) 53; R. v. Lyons, [1987] 2 S.C.R. 309; R. v. Osolin, [1993] 4 S.C.R. 595; B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315; Hunter v. Southam Inc., [1984] 2 S.C.R. 145; R. v. Pohoretsky, [1987] 1 S.C.R. 945; R. v. Dyment, [1988] 2 S.C.R. 417; McInerney v. MacDonald, [1992] 2 S.C.R. 138; Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130; R. v. Morgentaler, [1988] 1 S.C.R. 30; Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); Roe v. Wade, 410 U.S. 113 (1973); R. v. Plant, [1993] 3 S.C.R. 281; Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143; R. v. Gratton, [1987] O.J. No. 1984 (QL); R. v. Callaghan, [1993] O.J. No. 2013 (QL); R. v. Barbosa (1994), 92 C.C.C. (3d) 131; Carey v. Ontario, [1986] 2 S.C.R. 637; Dersch v. Canada (Attorney General), [1990] 2 S.C.R. 1505; R. v. Garofoli, [1990] 2 S.C.R. 1421; R. v. Durette, [1994] 1 S.C.R. 469; Baron v. Canada, [1993] 1 S.C.R. 416; R. v. Thompson, [1990] 2 S.C.R. 1111; R. v. Duarte, [1990] 1 S.C.R. 30; R. v. K. (V.) (1991), 4 C.R. (4th) 338; Descôteaux v. Mierzwinski, [1982] 1 S.C.R. 860; R. v. C. (B.) (1993), 80 C.C.C. (3d) 467; R. v. Davison, DeRosie and MacArthur (1974), 20 C.C.C. (2d) 424; Doyle v. The Queen, [1977] 1 S.C.R. 597; Caccamo v. The Queen, [1976] 1 S.C.R. 786; Skogman v. The Queen, [1984] 2 S.C.R. 93; Re Regina and Arviv (1985), 19 C.C.C. (3d) 395, leave to appeal refused, [1985] 1 S.C.R. v; R. v. Darby, [1994] B.C.J. No. 814 (QL); R. v. Egger, [1993] 2 S.C.R. 451; Patterson v. The Queen, [1970] S.C.R. 409; Re Hislop and The Queen (1983), 7 C.C.C. (3d) 240, leave to appeal refused, [1983] 2 S.C.R. viii; R. v. Litchfield, [1993] 4 S.C.R. 333; R. v. S. (R.J.), [1995] 1 S.C.R. 451; British Columbia Securities Commission v. Branch, [1995] 2 S.C.R. 3.

By McLachlin J.

Referred to: R. v. Harrer, [1995] 3 S.C.R. 562.

By Cory J.

Referred to: R. v. Stinchcombe, [1991] 3 S.C.R. 326; R. v. Egger, [1993] 2 S.C.R. 451.

By Lamer C.J. and Sopinka J. (dissenting)

A. (L.L.) v. B. (A.), [1995] 4 S.C.R. 536; R. v. Stinchcombe, [1991] 3 S.C.R. 326; R. v. Egger, [1993] 2 S.C.R. 451; R. v. Chaplin, [1995] 1 S.C.R. 727; R. v. Seaboyer, [1991] 2 S.C.R. 577; R. v. R. (L.) (1995), 39 C.R. (4th) 390; Morris v. The Queen, [1983] 2 S.C.R. 190; R. v. Preston, [1993] 4 All E.R. 638; Dersch v. Canada (Attorney General), [1990] 2 S.C.R. 1505; R. v. Garofoli, [1990] 2 S.C.R. 1421; Carey v. Ontario, [1986] 2 S.C.R. 637; R. v. Durette, [1994] 1 S.C.R. 469; R. v. Ross (1993), 79 C.C.C. (3d) 253; R. v. Ross (1993), 81 C.C.C. (3d) 234; R. v. Osolin, [1993] 4 S.C.R. 595; R. v. Morin, [1988] 2 S.C.R. 345; R. v. R.S. (1985), 19 C.C.C. (3d) 115; R. v. L. (D.O.), [1993] 4 S.C.R. 419; R. v. Norman (1993), 87 C.C.C. (3d) 153; R. v. Hedstrom (1991), 63 C.C.C. (3d) 261; Toohey v. Metropolitan Police Commissioner, [1965] 1 All E.R. 506; R. v. Ryan (1991), 69 C.C.C. (3d) 226.

By Major J. (dissenting)

R. v. Stinchcombe, [1991] 3 S.C.R. 326.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 8 to 14, 11(b), (d), 15, 24(1), (2). Charter of Human Rights and Freedoms, R.S.Q., c. C-12, s. 5. Civil Code of Quebec, S.Q. 1991, c. 64, arts. 35, 36. Criminal Code, R.S.C., 1985, c. C-46, ss. 276(3) [rep. & sub. 1992, c. 38, s. 2], 487(1)(b) [rep. & sub. c. 27 (1st Supp.), s. 68(1); repl. 1994, c. 44, s. 36], 545, 548(1), 581, 698, 700(1), Part XXII. European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, Art. 8. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, Art. 17. United States Constitution, Fourteenth Amendment. Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), Art. 12.

Authors Cited

Canada. Committee on Sexual Offences Against Children and Youths. Sexual Offences Against Children: Report of the Committee on Sexual Offences Against Children and Youths, vol. 1. Ottawa: Minister of Supply and Services Canada, 1984. Choo, Andrew L.-T. "Halting Criminal Prosecutions: The Abuse of Process Doctrine Revisited", [1995] Crim. L.R. 864. Cross, Sir Rupert. Cross on Evidence, 7th ed. By Sir Rupert Cross and Colin Tapper. London: Butterworths, 1990. Firsten, Temi. "An Exploration of the Role of Physical and Sexual Abuse for Psychiatrically Institutionalized Women" (1990), unpublished research paper, available from Ontario Women's Directorate. Halsbury's Laws of England, vol. 17, 4th ed. London: Butterworths, 1976. Paciocco, David M. "The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept" (1991), 15 Crim. L.J. 315. Stuesser, Lee. "Abuse of Process: The Need to Reconsider" (1994), 29 C.R. (4th) 92. Stuesser, Lee. "Reconciling Disclosure and Privilege" (1994), 30 C.R. (4th) 67. Wigmore, John Henry.

Evidence in Trials at Common Law, vol. 1, 3rd ed. Boston: Little, Brown & Co., 1940.

APPEAL from a judgment of the British Columbia Court of Appeal (1994), 89 C.C.C. (3d) 109, 42 B.C.A.C. 105, 67 W.A.C. 105, 20 C.R.R. (2d) 212, 29 C.R. (4th) 40, reversing a decision of the British Columbia Supreme Court (1992), 18 C.R. (4th) 98, ordering a stay of proceedings. Appeal dismissed, Lamer C.J. and Sopinka and Major JJ. dissenting.

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[Editor's note: An errata was published at [2016] 1 S.C.R., Part 4, page iv. The change indicated therein has been made to this document and the text of the errata as published in S.C.R. is appended to the judgment.]

The following are the reasons delivered by

LAMER C.J. and SOPINKA J. (dissenting)

I. Introduction

1 This case, along with the companion decision in A. (L.L.) v. B. (A.), [1995] 4 S.C.R. 536, raises the issue of whether and under what circumstances an accused is entitled to obtain production of sexual assault counselling records in the possession of third parties. It also raises the issue of when a stay of proceedings is the appropriate remedy for non-disclosure by the Crown of information in its possession which is neither clearly irrelevant nor privileged. On the latter issue, we agree with the reasons of Justice Major.

2 As for the issue of the production of therapeutic records, we have had the benefit of reading the reasons of our colleague Justice L'Heureux-Dubé, and we are in general agreement with her reasons on the issues of privacy and privilege. We wish, however, to make the following comments regarding the procedure to be followed for the disclosure and production of therapeutic records.

II. Analysis

1. Introduction

3 The issues raised in the present appeal relate primarily to the production of therapeutic records beyond the possession or the control of the Crown. Generally speaking, this issue concerns the manner in which the accused can obtain production of therapeutic records from the third party custodian of the documents in question. Although issues relating to the disclosure of private records in the possession of the Crown are not directly engaged in this appeal, we nevertheless feel that some preliminary comments on that issue would provide a useful background to a discussion of therapeutic records in the possession of third parties. As a result, we begin our analysis with a brief consideration of the disclosure obligations of the Crown where therapeutic counselling records are in the Crown's possession or control. From there, we will move on to consider the case where such records remain in the hands of third parties and the production of those records is sought by the accused.

2. Records in the Possession of the Crown

(a) The Application of Stinchcombe

4 The principles regarding the disclosure of information in the possession of the Crown were developed by this Court in R. v. Stinchcombe, [1991] 3 S.C.R. 326. In that case, it was determined that the Crown has an ethical and constitutional obligation to the defence to disclose all information in its possession or control, unless the information in question is clearly irrelevant or protected by a recognized form of privilege.

5 The Crown's duty to disclose information in its possession is triggered when a request for disclosure is made by the accused. When such a request is made, the Crown has a discretion to refuse to make disclosure on the grounds that the information sought is clearly irrelevant or privileged. Where the Crown chooses to exercise this discretion, the Crown bears the burden of

satisfying the trial judge that withholding the information is justified on the grounds of privilege or irrelevance.

6 The foregoing principles were settled by this Court's decision in Stinchcombe and affirmed in R. v. Egger, [1993] 2 S.C.R. 451, and R. v. Chaplin, [1995] 1 S.C.R. 727, and are not subject to challenge in this appeal. However, it is important to consider whether therapeutic records of the kind at issue in this appeal should be subject to a different disclosure regime than other kinds of information in the possession of the Crown. In answering this question, the Court must consider whether the Crown's disclosure obligations should be tempered by a balancing of the complainant's privacy interests in therapeutic records against the right of the accused to make full answer and defence. In our view, a balancing of these competing interests is unnecessary in the context of disclosure.

(b) Privacy and Privilege

7 As our colleague L'Heureux-Dubé J. points out, sexual assault counselling records relate to intimate aspects of the life of the complainant. As a result, therapeutic records attract a stronger privacy interest than many other forms of information that may be in the Crown's possession. One could accordingly argue that the intensely private nature of therapeutic records affects the Crown's obligation to disclose such material to the defence, or that disclosure by the Crown is not required owing to some form of privilege that may attach to the information contained in the records. In our view, however, concerns relating to privacy or privilege disappear where the documents in question have fallen into the possession of the Crown. We are accordingly of the opinion that the Crown's well-established duty to disclose all information in its possession is not affected by the confidential nature of therapeutic records.

8 In our view, it would be difficult to argue that the complainant enjoys an expectation of privacy in records that are held by the Crown. In discussing the nature of a complainant's privacy interest in therapeutic records, L'Heureux-Dubé J. points out that such records often relate to "intensely private aspects" of the complainant's personal life, and describe thoughts and feelings "which have never even been shared with the closest of friends or family" (para. 112). With respect, we agree that important privacy interests attach to counselling records in the situation described by our colleague. However, where the documents in question have been shared with an agent of the state (namely, the Crown), it is apparent that the complainant's privacy interest in those records has disappeared. Clearly, where the records are in the possession of the Crown, they have become "the property of the public to be used to ensure that justice is done" (Stinchcombe, supra, at p. 333). As a form of "public property", records in the possession of the Crown are simply incapable of supporting any expectation of privacy. As a result, there is no "privacy interest" to be balanced against the right of the accused to make full answer and defence.

9 The complainant's lack of a privacy interest in records that are possessed by the Crown counsels against a finding of privilege in such records. As stated above, it is somewhat inconsistent to claim that therapeutic records are sufficiently confidential to warrant a claim of privilege even after this confidentiality has been waived for the purpose of proceeding against

the accused. Obviously, fairness must require that if the complainant is willing to release this information in order to further the criminal prosecution, then the accused should be entitled to use the information in the preparation of his or her defence.

10 In deciding that the complainant waives any potential claim of privilege where therapeutic records are provided to the Crown, we recognize that any such waiver must be "fully informed" in order to defeat an attempted claim of privilege. Clearly, one could make the argument that the complainant would not have turned the documents over to the Crown had he or she been aware that the accused could be given access to the records. However, this problem is easily solved by placing an onus upon the Crown to inform the complainant of the potential for disclosure. Where the Crown seeks to obtain the records in question for the purpose of proceeding against the accused, the Crown must explain to the complainant that the records, if relevant, will have to be disclosed to the defence. As a result, the complainant will be given the opportunity to decide whether or not to waive any potential claim of privilege prior to releasing the records in question to the agents of the state.

11 Finally, it must be recognized that any form of privilege may be forced to yield where such a privilege would preclude the accused's right to make full answer and defence. As this Court held in Stinchcombe (at p. 340), a trial judge may require disclosure "in spite of the law of privilege" (emphasis added) where the recognition of the asserted privilege unduly limits the right of the accused to make full answer and defence. As a result, information in the possession of the Crown which is clearly relevant and important to the ability of the accused to raise a defence must be disclosed to the accused, regardless of any potential claim of privilege that might arise.

(c) Relevance

12 In commenting on the nature of therapeutic records, L'Heureux-Dubé J. has made it clear that the relevance of such records to the preparation of the defence cannot be presumed. As L'Heureux-Dubé J. states in her decision (at para. 144):

> ... it must not be presumed that the mere fact that a witness received treatment or counselling after a sexual assault indicates that the records will contain information that is relevant to the defence. The focus of therapy is vastly different from that of an investigation or other process undertaken for the purposes of the trial.

With respect, we agree with the proposition that the mere existence of therapeutic records is insufficient to establish the relevance of those records to the defence. However, we are of the opinion that the relevance of such records must be presumed where the records are in the possession of the Crown. Generally speaking, the Crown would not obtain possession or control of therapeutic records unless the information the records contained was somehow relevant to the case against the accused. While one could make the argument that the Crown simply wished to peruse the records in question in order to ensure that they contained no relevant information, this cannot affect the Crown's obligation to disclose. If indeed the Crown merely surveyed the records and found them to contain no relevant material, the Crown would retain the opportunity to prove the irrelevance of the records on a Stinchcombe application by the

defence. Clearly, the Crown is in a better position than the accused to discharge any onus regarding the relevance of the records, as the Crown retains possession and control of the information.

(d) Conclusion

13 For each of the foregoing reasons, we are of the view that the Crown's disclosure obligations established in the Stinchcombe decision are unaffected by the confidential nature of therapeutic records. Where the Crown has possession or control of therapeutic records, there is simply no compelling reason to depart from the reasoning in Stinchcombe: unless the Crown can prove that the records in question are clearly irrelevant or subject to some form of public interest privilege, the therapeutic records must be disclosed to the defence.

14 Having concluded that the principles of Stinchcombe are applicable in the context of therapeutic records within the Crown's possession, it remains to be determined what procedures for production will apply where the counselling records in question are possessed by third parties. Our views as to the appropriate procedure in that situation are discussed below.

3. Records in the Hands of Third Parties

(a) The Application of Stinchcombe

15 As stated earlier, this Court's decision in Stinchcombe set out the general principle that an accused's ability to access information necessary to make full answer and defence is now constitutionally protected under s. 7 of the Canadian Charter of Rights and Freedoms. The rationale for this constitutional protection stems from the basic proposition that the right to make full answer and defence is "one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted": Stinchcombe, at p. 336.

16 Stinchcombe and its progeny were decided in the context of disclosure, where the information in question was in the possession of the Crown or the police. In that context, we held that an accused was entitled to obtain all of the information in the possession of the Crown, unless the information in question was clearly irrelevant. However, Stinchcombe recognized that, even in the context of disclosure, there are limits on the right of an accused to access information. For example, when the Crown asserts that the information is privileged, the trial judge must then balance the competing claims at issue. In such cases, the information will only be disclosed where the trial judge concludes that the asserted privilege "does not constitute a reasonable limit on the constitutional right to make full answer and defence" (Stinchcombe, at p. 340).

17 In our opinion, the balancing approach we established in Stinchcombe can apply with equal force in the context of production, where the information sought is in the hands of a third party. Of course, the balancing process must be modified to fit the context in which it is applied. In cases involving production, for example, we are concerned with the competing claims of a constitutional right to privacy in the information on the one hand, and the right to full answer and

defence on the other. We agree with L'Heureux-Dubé J. that a constitutional right to privacy extends to information contained in many forms of third party records.

18 In recognizing that all individuals have a right to privacy which should be protected as much as is reasonably possible, we should not lose sight of the possibility of occasioning a miscarriage of justice by establishing a procedure which unduly restricts an accused's ability to access information which may be necessary for meaningful full answer and defence. In R. v. Seaboyer, [1991] 2 S.C.R. 577, at p. 611, we recognized that:

> Canadian courts ... have been extremely cautious in restricting the power of the accused to call evidence in his or her defence, a reluctance founded in the fundamental tenet of our judicial system that an innocent person must not be convicted.

Indeed, so important is the societal interest in preventing a miscarriage of justice that our law requires the state to disclose the identity of an informer in certain circumstances, despite the fact that the revelation may jeopardize the informer's safety.

(b) The First Stage: Establishing "Likely Relevance"

19 When the defence seeks information in the hands of a third party (as compared to the state), the following considerations operate so as to require a shifting of the onus and a higher threshold of relevance:

(1) the information is not part of the state's "case to meet" nor has the state been granted access to the information in preparing its case; and

(2) third parties have no obligation to assist the defence.

In light of these considerations, we agree with L'Heureux-Dubé J. that, at the first stage in the production procedure, the onus should be on the accused to satisfy a judge that the information is likely to be relevant. The onus we place on the accused should not be interpreted as an evidential burden requiring evidence and a voir dire in every case. It is simply an initial threshold to provide a basis for production which can be satisfied by oral submissions of counsel. It is important to recognize that the accused will be in a very poor position to call evidence given that he has never had access to the records. Viva voce evidence and a voir dire may, however, be required in situations in which the presiding judge cannot resolve the matter on the basis of the submissions of counsel. (See Chaplin, supra, at p. 744.)

20 In order to initiate the production procedure, the accused must bring a formal written application supported by an affidavit setting out the specific grounds for production. However, the court should be able, in the interests of justice, to waive the need for a formal application in some cases. In either event, however, notice must be given to third parties in possession of the documents as well as to those persons who have a privacy interest in the records. The accused must also ensure that the custodian and the records are subpoenaed to ensure their attendance in the court. The initial application for disclosure should be made to the judge seized of the trial, but may be brought before the trial judge prior to the empanelling of the jury, at the same time

that other motions are heard. In this way, disruption of the jury will be minimized and both the Crown and the defence will be provided with adequate time to prepare their cases based on any evidence that may be produced as a result of the application.

21 According to L'Heureux-Dubé J., once the accused meets the "likely relevance" threshold, he or she must then satisfy the judge that the salutary effects of ordering the documents produced to the court for inspection outweigh the deleterious effects of such production. We are of the view that this balancing should be undertaken at the second stage of the procedure. The "likely relevance" stage should be confined to a question of whether the right to make full answer and defence is implicated by information contained in the records. Moreover, a judge will only be in an informed position to engage in the required balancing analysis once he or she has had an opportunity to review the records in question.

(c) The Meaning of "Likely" Relevance

22 In the disclosure context, the meaning of "relevance" is expressed in terms of whether the information may be useful to the defence (see Egger, supra, at p. 467, and Chaplin, supra, at p. 740). In the context of production, the test of relevance should be higher: the presiding judge must be satisfied that there is a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify. When we speak of relevance to "an issue at trial", we are referring not only to evidence that may be probative to the material issues in the case (i.e. the unfolding of events) but also to evidence relating to the credibility of witnesses and to the reliability of other evidence in the case. See R. v. R. (L.) (1995), 39 C.R. (4th) 390 (Ont. C.A.), at p. 398.

23 This higher threshold of relevance is appropriate because it reflects the context in which the information is being sought. Generally speaking, records in the hands of third parties find their way into court proceedings by one of two procedures. First, under s. 698(1) of the Criminal Code, R.S.C., 1985, c. C-46, a party may apply for a subpoena requiring a person to attend where that person is likely to give material evidence in a proceedings. Pursuant to s. 700(1) of the Code, the subpoena is only available for those records in the custodian's possession "relating to the subject-matter of the proceedings". The second method of obtaining production of documents is to apply for a search warrant pursuant to s. 487(1) of the Code. Under s. 487(1)(b) a search warrant will be issued where a justice is satisfied that there is in a building, receptacle or place "anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence ...". Consequently, under either of these schemes the individual seeking access to third party records must satisfy a neutral arbiter that the records are relevant to the proceedings in question. We agree with L'Heureux-Dubé J. that the appropriate procedure to follow is via the subpoena duces tecum route.

24 While we agree that "likely relevance" is the appropriate threshold for the first stage of the two-step procedure, we wish to emphasize that, while this is a significant burden, it should not be interpreted as an onerous burden upon the accused. There are several reasons for holding that the onus upon the accused should be a low one. First, at this stage of the inquiry, the only issue is whether the information is "likely" relevant. We agree with L'Heureux-Dubé J. that

considerations of privacy should not enter into the analysis at this stage. We should also not be concerned with whether the evidence would be admissible, for example as a matter of policy, as that is a different query (Morris v. The Queen, [1983] 2 S.C.R. 190). As the House of Lords recognized in R. v. Preston, [1993] 4 All E.R. 638, at p. 664:

> ... the fact that an item of information cannot be put in evidence by a party does not mean that it is worthless. Often, the train of inquiry which leads to the discovery of evidence which is admissible at a trial may include an item which is not admissible....

A relevance threshold, at this stage, is simply a requirement to prevent the defence from engaging in "speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming" requests for production. See Chaplin, supra, at p. 744.

25 Second, by placing an onus on the accused to show "likely relevance", we put the accused in the difficult situation of having to make submissions to the judge without precisely knowing what is contained in the records. This Court has recognized on a number of occasions the danger of placing the accused in a "Catch-22" situation as a condition of making full answer and defence (see, for example, Dersch v. Canada (Attorney General), [1990] 2 S.C.R. 1505, at pp. 1513-14; R. v. Garofoli, [1990] 2 S.C.R. 1421, at pp. 1463-64; Carey v. Ontario, [1986] 2 S.C.R. 637; and R. v. Durette, [1994] 1 S.C.R. 469). In Durette, at p. 499, Sopinka J., for a majority of the Court, held:

> The appellants should not be required to demonstrate the specific use to which they might put information which they have not even seen.

Similarly, La Forest J. in Carey, at p. 678, held in commenting on the lower court's decision which denied the applicant access to cabinet documents because his submissions, according to that court, were no more than "a bare unsupported assertion ... that something to help him may be found":

> What troubles me about this approach is that it puts on a plaintiff [the] burden of proving how the documents, which are admittedly relevant, can be of assistance. How can he do that? He has never seen them; they are confidential and so unavailable. To some extent, then, what the documents contain must be a matter of speculation.

We are of the view that the concern expressed in these cases applies with equal force in the case at bar, where the ultimate goal is the search for truth rather than the suppression of potentially relevant evidence.

26 L'Heureux-Dubé J. questions the "Catch-22" analogy in the context of production. In her view, there is no presumption of materiality because the records are not created nor sought by the state as part of its investigation. However, it should be remembered that in most cases, an accused will not be privy to the existence of third party records which are maintained under strict rules of confidentiality. Generally speaking, an accused will only become aware of the existence of records because of something which arises in the course of the criminal case. For example, the complainant's psychiatrist, therapist or social worker may come forward and reveal his or her

concerns about the complainant (as occurred in R. v. Ross (1993), 79 C.C.C. (3d) 253 (N.S.C.A.), and R. v. Ross (1993), 81 C.C.C. (3d) 234 (N.S.C.A.)). In other cases, the complainant may reveal at the preliminary inquiry or in his or her statement to the police that he or she decided to lay a criminal charge against the accused following a visit with a particular therapist. There is a possibility of materiality where there is a "reasonably close temporal connection between" the creation of the records and the date of the alleged commission of the offence (R. v. Osolin, [1993] 4 S.C.R. 595, at p. 673) or in cases of historical events, as in this case, a close temporal connection between the creation of the records and the decision to bring charges against the accused.

27 In R. v. Morin, [1988] 2 S.C.R. 345, at p. 370, we recognized that "[i]t is difficult and arguably undesirable to lay down stringent rules for the determination of the relevance of a particular category of evidence". Consequently, while we will not attempt to set out categories of relevance, we feel compelled to respond to some of the statements expressed by our colleague. L'Heureux-Dubé J. suggests in her reasons that "the assumption that private therapeutic or counselling records are relevant to full answer and defence is often highly questionable" (para. 109) and that "the vast majority of information noted during therapy sessions bears no relevance whatsoever or, at its highest, only an attenuated sense of relevance to the issues at trial" (para. 144). With respect, we disagree. L'Heureux-Dubé J.'s observation as to the likelihood of relevance belies the reality that in many criminal cases, trial judges have ordered the production of third party records often applying the same principles we have enunciated in this case. The sheer number of decisions in which such evidence has been produced supports the potential relevance of therapeutic records.

28 Moreover, in Osolin, supra, this Court recognized the importance of ensuring access to the kind of information at issue in this appeal. In Osolin, we ordered a new trial where the accused had been denied an opportunity to cross-examine regarding the psychiatric records of the complainant. Those records contained the following entry (at p. 661):

> She is concerned that her attitude and behaviour may have influenced the man to some extent and is having second thoughts about the entire case.

Cory J., for the majority, held, at p. 674, that:

> ... what the complainant said to her counsellor ... could well reflect a victim's unfortunate and unwarranted feelings of guilt and shame for actions and events that were in no way her fault. Feelings of guilt, shame and lowered self-esteem are often the result of the trauma of a sexual assault. If this is indeed the basis for her statement to the counsellor, then they could not in any way lend an air of reality to the accused's proposed defence of mistaken belief in the complainant's consent. However, in the absence of cross-examination it is impossible to know what the result might have been.

29 By way of illustration only, we are of the view that there are a number of ways in which information contained in third party records may be relevant, for example, in sexual assault cases:

(1) they may contain information concerning the unfolding of events underlying the criminal complaint. See Osolin, supra, and R. v. R.S. (1985), 19 C.C.C. (3d) 115 (Ont. C.A.).

(2) they may reveal the use of a therapy which influenced the complainant's memory of the alleged events. For example, in R. v. L. (D.O.), [1993] 4 S.C.R. 419, at p. 447, L'Heureux-Dubé J. recognized the problem of contamination when she stated, in the context of the sexual abuse of children, that "the fear of contaminating required testimony has forced the delay of needed therapy and counselling". See too R. v. Norman (1993), 87 C.C.C. (3d) 153 (Ont. C.A.).

(3) they may contain information that bears on the complainant's "credibility, including testimonial factors such as the quality of their perception of events at the time of the offence, and their memory since". See R. v. R. (L.), supra, at p. 398; R. v. Hedstrom (1991), 63 C.C.C. (3d) 261 (B.C.C.A.); R. v. Ross (1993), 81 C.C.C. (3d) 234 (N.S.C.A.); Toohey v. Metropolitan Police Commissioner, [1965] 1 All. E.R. 506 (H.L.).

As a result, we disagree with L'Heureux-Dubé J.'s assertion that therapeutic records will only be relevant to the defence in rare cases.

(d) The Role of the Judge at the Second Stage: Balancing Full Answer and Defence and Privacy

30 We agree with L'Heureux-Dubé J. that "upon their production to the court, the judge should examine the records to determine whether, and to what extent, they should be produced to the accused" (para. 153). We also agree that in making that determination, the judge must examine and weigh the salutary and deleterious effects of a production order and determine whether a non-production order would constitute a reasonable limit on the ability of the accused to make full answer and defence. In some cases, it may be possible for the presiding judge to provide a judicial summary of the records to counsel to enable them to assist in determining whether the material should be produced. This, of course, would depend on the specific facts of each particular case.

31 We also agree that, in balancing the competing rights in question, the following factors should be considered: "(1) the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record in question; (3) the nature and extent of the reasonable expectation of privacy vested in that record; (4) whether production of the record would be premised upon any discriminatory belief or bias" and "(5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record in question" (para. 156).

32 However, L'Heureux-Dubé J. also refers to two other factors that she believes must be considered. She suggests that the judge should take account of "the extent to which production of records of this nature would frustrate society's interest in encouraging the reporting of sexual offences and the acquisition of treatment by victims" as well as "the effect on the integrity of the

trial process of producing, or failing to produce, the record, having in mind the need to maintain consideration in the outcome" (para. 156). This last factor is more appropriately dealt with at the admissibility stage and not in deciding whether the information should be produced. As for society's interest in the reporting of sexual crimes, we are of the opinion that there are other avenues available to the judge to ensure that production does not frustrate the societal interests that may be implicated by the production of the records to the defence. A number of these avenues are discussed by the Nova Scotia Court of Appeal in R. v. Ryan (1991), 69 C.C.C. (3d) 226, at p. 230:

> As the trials of these two charges proceed, there are a number of protective devices to allay the concerns of the caseworkers over the contents of their files. The trial judge has considerable discretion in these matters. It is for the trial judge to determine whether a ban shall be placed on publication. It is for the trial judge to decide whether spectators shall be barred when evidence is given on matters that the trial judge deems to be extremely sensitive and worth excluding from the information available to the public. High on the list is, of course, the matter of relevance. Unless the evidence sought from the witness meets the test of relevancy, it will be excluded. The trial judge is able to apply the well-established rules and tests to determine whether any given piece of evidence is relevant.

We are also of the view that these options are available to the judge to further protect the privacy interests of witnesses if the production of private records is ordered.

33 Consequently, the societal interest is not a paramount consideration in deciding whether the information should be provided. It is, however, a relevant factor which should be taken into account in weighing the competing interests.

34 In applying these factors, it is also appropriate to bear in mind that production of third party records is always available to the Crown provided it can obtain a search warrant. It can do so if it satisfies a justice that there is in a place, which includes a private dwelling, anything that there are reasonable grounds to believe will afford evidence of the commission of an offence. Fairness requires that the accused be treated on an equal footing.

III. Conclusion and Disposition

35 Although the parties have obviously failed to observe the above procedures for the production of third party records, it is unnecessary to determine whether or not a production order was warranted in this case. In our view, Major J. is correct in holding that the impropriety of the production order at issue in this appeal "does not excuse the conduct of the Crown after the order was made" (para. 222). As a result, whether or not production was warranted in this case, the conduct of the Crown in refusing to comply with the production order is inexcusable, and warrants a stay of the proceedings against the accused. We are therefore in complete agreement with the reasoning and conclusions of Major J., and would accordingly hold that this appeal should be allowed.

The reasons of La Forest, L'Heureux-Dubé and Gonthier JJ. were delivered by

L'HEUREUX-DUBÉ J.

36 Two issues are raised by this appeal. First, when does non-disclosure by the Crown justify an order that the proceedings which are the subject matter of the non-disclosure be stayed? Second, what is the appropriate procedure to be followed when an accused seeks production of documents such as medical and/or therapeutic records that are in the hands of third parties?

37 Strictly speaking, leave has only been sought to this Court from the decision of the British Columbia Court of Appeal in R. v. O'Connor (1994), 89 C.C.C. (3d) 109, which addressed the question of the appropriateness of a stay. However, much of the non-disclosure and late disclosure that formed the basis for the stay of proceedings that is the subject of this appeal related directly to disagreement over the appropriateness of the pre-trial disclosure order made by Campbell A.C.J. As a result, those reasons must be read together as a whole with R. v. O'Connor (1994), 90 C.C.C. (3d) 257 ("O'Connor (No. 2)"), in which the Court of Appeal provided guidelines for future applications for production of medical records held by third parties. Given the national importance of establishing guidelines for such production (in light of the absence of legislative intervention), and the fact that this matter was fully argued before us, it is appropriate for this Court to provide some assistance to lower courts in this respect. Besides, the question is squarely raised in another appeal which was heard by this Court and in which judgment is rendered concurrently with this one: A. (L.L.) v. B. (A.), [1995] 4 S.C.R. 536. As a preliminary matter, however, it is necessary to set out the facts and judgments relevant to each of the two issues raised in this case.

I. Abuse of Process

II. Facts and Judgments

38 The appellant, Hubert Patrick O'Connor, is a Bishop of the Roman Catholic Church. In the 1960s, he was the principal of a native residential school in Williams Lake. As a result of incidents alleged to have taken place between 1964 and 1967 in the Williams Lake area, the appellant was charged in February 1991 with two counts of rape and two counts of indecent assault. Each count arose in relation to a separate complainant. The four complainants, P.P, M.B., R.R., and A.S., were all former students employed by the school and under the direct supervision of the appellant.

39 A preliminary inquiry was held in Williams Lake on July 3 and 4, 1991, and, on June 4, 1992, defence counsel applied for, and obtained, an order from Campbell A.C.J. requiring disclosure of the complainants' entire medical, counselling and school records. Defence counsel justified its disclosure request on the need to test the complainants' credibility, as well as to determine issues such as recent complaint and corroboration. The order reads as follows:

> THIS COURT ORDERS that Crown Counsel produce names, addresses and telephone numbers of therapists, counsellors, psychologists or psychiatrists who have treated any of the complainants with respect to allegations of sexual assault or sexual abuse.
>
> THIS COURT FURTHER ORDERS that the complainants authorize all therapists, counsellors, psychologists and psychiatrists who have treated any of them with respect to allegations of sexual assault or sexual abuse, to produce to the Crown copies of their complete file contents and any other related material including all documents, notes, records, reports, tape recordings and videotapes, and the Crown to provide copies of all this material to counsel for the accused forthwith.
>
> THIS COURT FURTHER ORDERS that the complainants authorize the Crown to obtain all school and employment records while they were in attendance at St. Joseph's Mission School and that the Crown provide those records to counsel for the accused forthwith.
>
> THIS COURT FURTHER ORDERS that the complainants authorize the production of all medical records from the period of time when they were resident at St. Joseph's Mission School as either students or employees.

At the time this order was made, the Crown did not have in its possession any files of any persons who had treated any of the complainants in relation to allegations of sexual assault or sexual abuse. Nor, for that matter, were submissions heard from, or was notice given to, any of the complainants or guardians of the records sought by the defence.

40 On July 10, 1992, the Crown applied before Low J. of the British Columbia Supreme Court for directions regarding the disclosure order and for the early appointment of a trial judge. The court was informed that the complainants were not prepared to comply with the order of Campbell A.C.J., as the Crown wished to argue the point before the trial judge. On September 21, 1992, moreover, the Crown made an application before Oppal J. to change the venue of the trial back to Williams Lake. This application was dismissed. In the course of its submissions, the Crown noted that it intended to argue before the trial judge that the therapists' notes subject to the disclosure order of Campbell A.C.J. ought not to be disclosed on public policy grounds. The court expressed surprise at the fact that the order of Campbell A.C.J. was not being complied with.

41 Thackray J. was subsequently appointed the trial judge. On October 16, 1992, the appellant applied for a judicial stay of proceedings before Thackray J. on the basis that pre-charge delay made it impossible to make full answer and defence. At the same time, the Crown sought directions from the trial judge regarding the disclosure order of Campbell A.C.J. By this time, however, many of the impugned records had come into the Crown's possession. The trial judge made it clear that he was to be provided promptly with therapy records relating to all four complainants. Thackray J. was provided with the clinical notes of Dr. Ingimundson, the psychologist treating P.P. He reviewed these notes and they were provided to defence counsel. Crown counsel further informed the court that the therapist for M.B. had been instructed to forward all records to the Crown. On October 22, 1992, Thackray J. released written reasons dismissing the appellant's application for a stay of proceedings.

42 On October 30, 1992, the appellant applied by way of writ of certiorari to quash the committal of the appellant to stand trial on one count of the indictment. On November 5, 1992, the trial judge released written reasons dismissing the appellant's application. During the course of those proceedings, however, the Crown produced the notes of M.B.'s therapist, Dr. Cheaney, to the court for review. The Crown requested, however, that the court not release the records to the defence before hearing an application on that point from Crown counsel Wendy Harvey. The trial judge assented to this request.

43 On November 19, 1992, the appellant applied pursuant to s. 581 of the Criminal Code, R.S.C., 1985, c. C-46, for an order that the indictment be declared void ab initio for failure to provide sufficient detail. This application was dismissed by Thackray J. in reasons filed November 24, 1992. The appellant also once again raised the issue of the non-disclosure of the medical records of M.B. The Crown opposed the disclosure of the records on the ground that they were not relevant, but Thackray J. ordered that they be disclosed to the defence forthwith. Appellant's counsel also requested disclosure of the diary of the complainant R.R., for which it had already been provided with a synopsis. The trial judge took possession of the diary for review and expressed concern that the Crown was taking so long to comply with the order of Campbell A.C.J., given that the trial was scheduled to commence in 10 days.

44 On November 26, 1992, the appellant made another application for a judicial stay of proceedings based on non-disclosure of several items, including the following: the medical records of the complainants, the transcript of an interview between Crown counsel and the complainant M.B., the transcript of an interview between Crown counsel and witness M.O. containing statements contradictory to testimony given by the complainant M.B. and corroborative of the evidence of the appellant, and the diary of the complainant R.R.

45 In the course of submissions during this application, Crown counsel Wendy Harvey submitted that the two Crown counsel, herself and Mr. Greg Jones, were handling the prosecution from different cities, and that there were difficulties concerning communication and organization. She asserted that the non-disclosure of some of the medical records was due to inadvertence on her part, and that she had "dreamt" the transcripts of the interviews with M.B. and M.O. had been disclosed. Ms. Harvey submitted that uninhibited disclosure of medical and therapeutic records would revictimize the victims, and suggested that the order of Campbell A.C.J., and the request of defence counsel for disclosure of the therapy records of the complainants, exhibited gender bias.

46 In oral reasons delivered Friday, November 27, 1992, Thackray J. dismissed the application for a judicial stay, finding that the failure to disclose the records of Dr. Hume, R.R.'s physician, had been an oversight. He further found that M.O.'s evidence had been known to the defence for some time and that no prejudice to the accused had been demonstrated by its non-disclosure. He declined to disclose the complete diaries of the complainant R.R. on the basis that the summaries provided to the defence, as well as the excerpts already in their possession, were sufficient. He noted, however, that the letters written by Ms. Harvey to the counsellors had unacceptably limited the scope of the disclosure to only those portions of the records which related directly to the incidents involving the accused. This resulted in the full therapy records

not being disclosed to the defence until after November 26. He concluded that while the conduct of the Crown was "disturbing", he did not believe that there was a "grand design" to conceal evidence, nor any "deliberate plan to subvert justice". He was not convinced that the Crown's conduct would lead the public to hold the system of justice in disrepute. While dismissing the application for a judicial stay of proceedings, Thackray J. condemned in no uncertain terms Ms. Harvey's inability to distinguish "between her personal objectives and her professional responsibilities".

47 Over the weekend of November 28, in light of the difficulties encountered during discovery, Crown counsel agreed to waive any privilege with respect to the contents of the Crown's file and to prepare a binder in relation to each of the complainants containing all information in the Crown's possession relating to each of them. This agreement contemplated giving the defence copies of documents which would not ordinarily be disclosed, including Crown counsel's personal notes and work product, some of which were on computer. At the pre-trial conference held that Monday, Ms. Harvey informed the trial judge that appellant's counsel were now in possession of all the notes that she had prepared in connection with the case.

48 The trial began on Wednesday, December 2, 1992. The Crown's first witness was Dr. Van Dyke, a socio-cultural anthropologist. Its second witness was Margaret Gilbert, a former student at St. Joseph's Mission School. Her evidence dealt primarily with the layout of the school. On the second day of the trial, the Crown called the complainant P.P. In the course of direct examination, the Crown sought to have the witness give her evidence by drawing. Appellant's counsel objected. Discussions revealed that the witness had, during the course of witness preparation that weekend, made a drawing of this nature for Crown counsel that had not been disclosed to defence counsel. That drawing was obtained from the Crown office and the appellant took the position that it represented a materially different version of this complainant's allegations. The Crown disagreed with that assessment. The trial judge refused to allow the witness to testify through the use of drawings. At the end of the day, the Crown had not yet completely finished its examination-in-chief of this witness.

49 When the trial resumed the following day, appellant's counsel informed the court that, at the conclusion of the previous day's proceedings, the Crown had provided the appellant with another eight sets of drawings prepared by the various complainants in the presence of Crown counsel. Crown counsel Wendy Harvey was not present in court, and no explanation was given for her absence. Court was adjourned for one hour. When the trial resumed, Ms. Harvey was still not present. Appellant's counsel made another application for a judicial stay of proceedings based largely on the fact that the senior prosecutor, Mr. Jones, was still unable to guarantee to the appellant that full disclosure had been made. Over the objection of appellant's counsel, the trial judge granted Mr. Jones' request for a further adjournment until the afternoon session.

50 When court resumed that afternoon, Wendy Harvey was present. The Crown submission, however, was put forward by Mr. Jones. He acknowledged that the binders which had been provided to appellant's counsel as a result of the agreement reached over the weekend of November 28 were not complete, and that the staff had omitted to download Ms. Harvey's computer files. One of the undisclosed documents was the complete version of a Crown interview with P.P. which had been partially disclosed to the defence on November 25. After

reviewing some of the undisclosed notes, the Crown indicated that it did not believe that the notes revealed anything "new". Mr. Jones then indicated to the court that Ms. Harvey's complete computer files were in the process of being downloaded but that, in light of what had just happened, he could not guarantee that everything had been appropriately disclosed to the appellant at that time. He took the position, however, that the undisclosed notes contained nothing material, and encouraged the trial judge to engage in an inquiry of their materiality. These statements applied to all four counts on the indictment. Thackray J. indicated that he would give judgment on December 7 on defence counsel's motion for a stay. Although he indicated he would give counsel the opportunity to make further submissions if any other developments occurred, no further submissions were made by either side.

51 On December 7, 1992, Thackray J. handed down a judicial stay of proceedings on all four counts: (1992), 18 C.R. (4th) 98. He distinguished this application from previous applications for a stay of proceedings on the basis that the trial was now under way and witnesses had already been called by the Crown and cross-examined by the defence. Thackray J. found that had the diagrams of the complainant P.P. been disclosed prior to testimony, they might have affected the preparation of the case by the defence. While P.P. had not yet been cross-examined, Thackray J. found it unacceptable that defence counsel was put in the position of preparing the cross-examination without all the relevant documents. He therefore concluded that the accused had suffered prejudice, although he conceded that the extent of this prejudice could not be measured. He noted the constant intervention required by the court to ensure full compliance with the order of Campbell A.C.J. and found that the Crown's earlier conduct had created "an aura" that had pervaded and ultimately destroyed the case. In his view, this was now "one of the clearest of cases", and to allow the case to proceed would tarnish the integrity of the court.

52 The British Columbia Court of Appeal allowed the Crown's appeal and directed a new trial: (1994), 89 C.C.C. (3d) 109, 42 B.C.A.C. 105, 67 W.A.C. 105, 20 C.R.R. (2d) 212, 29 C.R. (4th) 40. It reviewed the case law on abuse of process and concluded that there was no settled view on whether the common law doctrine had or had not been subsumed within s. 7 of the Canadian Charter of Rights and Freedoms. It noted, however, that the focus of the common law doctrine of abuse of process had historically been on maintaining the integrity of the court's process whereas the focus of the Charter was on the rights of the individual. It also noted the seemingly different standards of proof and remedies under the two regimes. It therefore concluded that the common law doctrine of abuse of process continued to exist independently of s. 7 of the Charter, although there may be significant overlap between the two.

53 After noting that some ambiguity remained as to the required elements of abuse of process, the Court of Appeal concluded that in order to establish an abuse of process, as opposed to a "mere" violation of a Charter right, an accused must demonstrate conduct on the part of the Crown that is so oppressive, vexatious or unfair as to contravene our fundamental notions of justice and thus to undermine the integrity of our judicial process. It further noted that the discretion to order a stay may be exercised only in the "clearest of cases", meaning that the trial judge must be convinced that, if allowed to continue, the proceedings would tarnish the integrity of the judicial process.

54 The court then turned to the scope and extent of the Crown's obligation to disclose

information, as set out in R. v. Stinchcombe, [1991] 3 S.C.R. 326. It concluded that the right of an accused to full disclosure by the Crown is an adjunct of the right to make full answer and defence and that disclosure is not, itself, a constitutionally protected right. As such, a simple non-disclosure, in and of itself, would not necessarily constitute a Charter violation. A Charter violation would only be made out when the accused demonstrated that a document which should have been disclosed (i.e. there was a reasonable possibility that it could assist in making full answer and defence) had on a balance of probabilities prejudiced or had an adverse effect on the accused's ability to make full answer and defence. In some circumstances, the only appropriate remedy for such non-disclosure might be a stay of proceedings. The Court of Appeal further held that a material non-disclosure, without more, could never amount to a common law abuse of process. In its view, only when non-disclosure was motivated by an intention on the part of the Crown to deprive the accused of a fair trial could an abuse of process arise.

55 Applying these principles to the case at bar, the Court of Appeal concluded that the trial judge erred in failing to inquire into the materiality of the non-disclosed information before ordering the stay of proceedings. As such, it could not be said that a violation of the accused's s. 7 rights had occurred, nor that the conduct of the Crown amounted to an abuse of process.

56 The court noted that the trial judge had felt that a stay was necessary because of the "aura" which had been created by the earlier non-disclosures in respect of the order of Campbell A.C.J. It noted that the trial judge had found (in the judgment of November 27) that there was no "grand design" in this non-disclosure to subvert the fair trial rights of the accused. It also noted that the Crown had tried to rectify the earlier disclosure problems by waiving all privilege and giving the defence the entire contents of their file. The court thus concluded that there was no evidence that the Crown's inept handling of the case was motivated by an intention to deprive the accused of a fair trial. As such, the trial judge had erred in entering a stay of proceedings on the basis of the common law abuse of process.

57 The court then commented briefly on the question of whether an alternative remedy would have been available under the Charter. It concluded that since no determination as to the materiality of the records was made, a stay could not be sustained under s. 24(1). Since it did not appear that any permanent or irremediable damage had been done to the accused's ability to make full answer and defence as a result of any non-disclosures or late disclosures that were in fact material, the accused's rights could have been protected by an adjournment, by recalling witnesses who had already testified, or by declaring a mistrial if those would not suffice.

B. Analysis of Abuse of Process

58 I agree with the Court of Appeal that it would be pointless to order a new trial on the basis that there was no abuse of process if a stay ought nevertheless to have prevailed under ss. 7 and 24(1) of the Charter. It is therefore necessary to clarify the relationship between the common law and the Charter in this respect, both in order to dispose effectively of the question raised in this case and to provide guidance to courts facing similar situations involving non-

disclosure in the future.

(i) The Relationship Between Abuse of Process and the Charter

59 The modern resurgence of the common law doctrine of abuse of process began with the judgment of this Court in R. v. Jewitt, [1985] 2 S.C.R. 128. In Jewitt, the Court set down what has since become the standard formulation of the test, at pp. 136-37:

> Lord Devlin has expressed the rationale supporting the existence of a judicial discretion to enter a stay of proceedings to control prosecutorial behaviour prejudicial to accused persons in Connelly v. Director of Public Prosecutions, [1964] A.C. 1254 (H.L.) at p. 1354:
>
> > Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or who are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused.
>
> I would adopt the conclusion of the Ontario Court of Appeal in R. v. Young, supra, and affirm that "there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings". I would also adopt the caveat added by the Court in Young that this is a power which can be exercised only in the "clearest of cases". [Emphasis added.]

The general test for abuse of process adopted in that case has been repeatedly affirmed: R. v. Keyowski, [1988] 1 S.C.R. 657, at pp. 658-59, R. v. Mack, [1988] 2 S.C.R. 903, at p. 941, R. v. Conway, [1989] 1 S.C.R. 1659, at p. 1667, R. v. Scott, [1990] 3 S.C.R. 979, at pp. 992-93, and most recently in R. v. Power, [1994] 1 S.C.R. 601, at pp. 612-15.

60 After considering much of this case law, the Court of Appeal concluded that the preponderance of cases favoured maintaining a distinction between the Charter and the common law doctrine of abuse of process. The Court of Appeal may, in my view, have underestimated the extent to which both individual rights to trial fairness and the general reputation of the criminal justice system are fundamental concerns underlying both the common law doctrine of abuse of process and the Charter. This, for the following reasons.

61 First, while the Charter is certainly concerned with the rights of the individual, it is also concerned with preserving the integrity of the judicial system. Subsection 24(2) of the Charter gives express recognition to this dual role. More significantly, however, this Court has, on many occasions, noted that the principles of fundamental justice in s. 7 are, in large part, inspired by, and premised upon, values that are fundamental to our common law. In Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, at p. 503, Lamer J. (as he then was) observed:

> ...the principles of fundamental justice are to be found in the basis tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system. Such an approach to the interpretation of "principles of fundamental justice" is consistent with the wording and structure of s. 7, the context of the section, i.e., ss. 8 to 14, and the character and larger objects of the Charter itself. It provides meaningful content for the s. 7 guarantee all the while avoiding adjudication of policy matters. [Emphasis added.]

See also R. v. Beare, [1988] 2 S.C.R. 387, at p. 406; Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835, at p. 929 (per Gonthier J., dissenting on other grounds). The common law doctrine of abuse of process is part and parcel of those fundamental values. It is, therefore, not surprising that in R. v. Potvin, [1993] 2 S.C.R. 880, at p. 915 (per Sopinka J.), the majority of this Court recognized that the court's power to remedy abuses of its process now has constitutional status.

62 Conversely, it is equally clear that abuse of process also contemplates important individual interests. In "The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept" (1991), 15 Crim. L.J. 315, at p. 331, Professor Paciocco suggests that the doctrine of abuse of process, in addition to preserving the reputation of the administration of justice, also seeks to ensure that accused persons are given a fair trial. Arguably, the latter is essentially a subset of the former. Unfair trials will almost inevitably cause the administration of justice to fall into disrepute: R. v. Collins, [1987] 1 S.C.R. 265; R. v. Elshaw, [1991] 3 S.C.R. 24. See also A. L.-T. Choo, "Halting Criminal Prosecutions: The Abuse of Process Doctrine Revisited", [1995] Crim. L.R. 864, at p. 865. What is significant for our purposes, however, is the fact that one often cannot separate the public interests in the integrity of the system from the private interests of the individual accused.

63 In fact, it may be wholly unrealistic to treat the latter as wholly distinct from the former. This Court has repeatedly recognized that human dignity is at the heart of the Charter. While respect for human dignity and autonomy may not necessarily, itself, be a principle of fundamental justice (Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519, at p. 592, per Sopinka J. for the majority), it seems to me that conducting a prosecution in a manner that contravenes the community's basic sense of decency and fair play and thereby calls into question the integrity of the system is also an affront of constitutional magnitude to the rights of the individual accused. It would violate the principles of fundamental justice to be deprived of one's liberty under circumstances which amount to an abuse of process and, in my view, the individual who is the subject of such treatment is entitled to present arguments under the Charter and to request a just and appropriate remedy from a court of competent jurisdiction.

64 The overlap between prejudice to the individual and prejudice to the system was noted, for instance, in Mills v. The Queen, [1986] 1 S.C.R. 863, at p. 947, where Lamer J. stated that, in certain cases, a Charter stay might be appropriate to remedy a violation of s. 11(b) even where there was no demonstrated prejudice to the fairness of the trial. More recently, in R. v. Morin, [1992] 1 S.C.R. 771, at p. 786 (per Sopinka J.), and p. 812 (per McLachlin J.) this Court recognized that, although the primary purpose of s. 11(b) is the protection of the individual rights of the accused, there is also a secondary interest of society as a whole in the prompt, humane,

and fair trial of those accused of crimes. Equally apposite are the remarks of Wilson J. in Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326, at p. 1354, who noted that a contextually sensitive approach to Charter rights requires that the private interests reflected therein also be evaluated from the standpoint of the public interests that underlie those private rights. Given that many, if not most, of the individual rights protected in the Charter also have a broader, societal dimension, it is therefore consistent with both the purpose and the spirit of the Charter to look, in certain cases, beyond the possibility of prejudice to the particular accused, to clear cases of prejudice to the integrity of the judicial system.

65 For this reason, the principles of fundamental justice, including the "fairness of the trial", necessarily reflect a balancing of societal and individual interests: Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425, at p. 539 (per La Forest J.); R. v. E. (A.W.), [1993] 3 S.C.R. 155, at p. 198 (per Cory J.); Cunningham v. Canada, [1993] 2 S.C.R. 143; R. v. Levogiannis, [1993] 4 S.C.R. 475, at p. 486. As such, they reflect both individual and societal interests. In my view, it is undisputable that the preservation of the integrity of the judicial system is one of these interests.

66 Second, I would note the beginnings of a strong trend toward convergence between the Charter and traditional abuse of process doctrine. In R. v. Xenos (1991), 70 C.C.C. (3d) 362 (Que. C.A.), for instance, the accused had been charged with arson and attempting to defraud an insurance company. It emerged in cross-examination that the Crown's key witness had arranged with the insurers to be paid $50,000 by the insurers if the accused was convicted. The trial judge found an abuse of process, but declined to order a stay. Rather, in convicting the accused, he said that he had ignored this evidence. The Court of Appeal agreed in principle with the trial judge that a stay was not the only remedy for an abuse of process and went on to rule that the appropriate remedy was in fact to exclude the witness's testimony in a new trial before a different judge. This case is an excellent example, in my mind, of how courts are becoming increasingly bold and innovative in finding appropriate remedies in lieu of stays for abuses of process. Professor Stuesser points out in "Abuse of Process: The Need to Reconsider" (1994), 29 C.R. (4th) 92, at p. 99, moreover, that the common law in the United Kingdom and Australia urges judges to look at lesser remedies before entering stays of proceedings. He argues that these authorities support the view that even under the common law, the remedy for abuse of process is no longer only a stay of proceedings.

67 I recognize that this Court has consistently, albeit implicitly, considered abuse of process separately from the Charter. In Conway, supra, it considered abuse of process separately from the s. 11(b) considerations arising from the accused facing a third trial. In Scott, supra, in the context of an immediate stay by the Crown upon the posing by defence counsel of a question which would have revealed the identity of a police informer, the majority again considered abuse of process separately from an examination of whether the accused's s. 11(b) rights had been violated by the Crown's subsequent reinitiation of the proceedings. Finally, in Power, supra, it found no abuse of process in the Crown's failure to call further evidence after the trial judge had excluded a key breathalyzer sample and did not address the possibility of a Charter violation at all. In my view, however, the issues addressed in each of these three cases could have been addressed equally effectively under the Charter. In none of these decisions did the majority of this Court actively turn its mind to the interaction between the Charter and the common law

doctrine of abuse of process. On the only occasion that it did, moreover, it expressly declined to address the issue: Keyowski, supra, at pp. 660-61. On the other hand, in Mack, supra, this Court commented at pp. 939-40 and again at p. 976 upon the strong parallels that exist between the two regimes.

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 (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.

72 I therefore propose to set down some guidelines for evaluating, first, whether there has been a violation of the Charter that invokes concerns analogous to those traditionally raised under the doctrine of abuse of process and, second, the circumstances under which the remedy of a judicial stay of proceedings will be "appropriate and just", as required by s. 24(1) of the Charter.

(ii) Section 7, Abuse of Process and Non-disclosure

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.

74 Non-disclosure by the Crown normally falls within the second category described above. Consequently, a challenge based on non-disclosure will generally require a showing of actual prejudice to the accused's ability to make full answer and defence. In this connection, I am in full agreement with the Court of Appeal that there is no autonomous "right" to disclosure in the Charter (at pp. 148-49 C.C.C.):

> ...the right of an accused to full disclosure by the Crown is an adjunct of the right to make full answer and defence. It is not itself a constitutionally protected right. What this means is that while the Crown has an obligation to disclose, and the accused has a right to all that which the Crown is obligated to disclose, a simple breach of the accused's right to such disclosure does not, in and of itself, constitute a violation of the Charter such as to entitle a remedy under s. 24(1). This flows from the fact that the non-disclosure of information which ought to have been disclosed because it was relevant, in the sense there was a reasonable possibility it could assist the accused in making full answer and defence, will not amount to a violation of the accused's s. 7 right not to be deprived of liberty except in accordance with the principles of fundamental justice unless the accused establishes that the non-disclosure has probably prejudiced or had an adverse effect on his or her ability to make full answer and defence.
>
> It is the distinction between the "reasonable possibility" of impairment of the right to make full answer and defence and the "probable" impairment of that right which marks the difference between a mere breach of the right to relevant disclosure on the one hand and a constitutionally material non-disclosure on the other. [Italics in original; underlining added.]

Where the accused seeks to establish that the non-disclosure by the Crown violates s. 7 of the Charter, he or she must establish that the impugned non-disclosure has, on the balance of probabilities, prejudiced or had an adverse effect on his or her ability to make full answer and defence. It goes without saying that such a determination requires reasonable inquiry into the materiality of the non-disclosed information. Where the information is found to be immaterial to the accused's ability to make full answer and defence, there cannot possibly be a violation of the Charter in this respect. I would note, moreover, that inferences or conclusions about the propriety of the Crown's conduct or intention are not necessarily relevant to whether or not the accused's right to a fair trial is infringed. The focus must be primarily on the effect of the impugned actions on the fairness of the accused's trial. Once a violation is made out, a just and appropriate remedy must be found.

(iii) The Appropriate Remedy to a s. 7 Violation for Non-disclosure

75 Where there has been a violation of a right under the Charter, s. 24(1) confers upon a court of competent jurisdiction the power to confer "such remedy as the court considers appropriate and just in the circumstances". Professor Paciocco, supra, at p. 341, has recommended that a stay of proceedings will only be appropriate when two criteria are fulfilled:

> (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
>
> (2) no other remedy is reasonably capable of removing that prejudice.

I adopt these guidelines, and note that they apply equally with respect to prejudice to the accused or to the integrity of the judicial system.

76 As I have stated, non-disclosure will generally violate s. 7 only if it impairs the accused's right to full answer and defence. Although it is not a precondition to a disclosure order that there be a Charter violation, a disclosure order can be a remedy under s. 24(1) of the Charter. Thus, where the adverse impact upon the accused's ability to make full answer and defence is curable by a disclosure order, then such a remedy, combined with an adjournment where necessary to enable defence counsel to review the disclosed information, will generally be appropriate.

77 There may, however, be exceptional situations where, given the advanced state of the proceedings, it is simply not possible to remedy through reasonable means the prejudice to the accused's right to make full answer and defence. In such cases, the drastic remedy of a stay of proceedings may be necessary. Although I will return to this matter in my discussion on the disclosure of records held by third parties, we must recall that, under certain circumstances, the defence will be unable to lay the foundation for disclosure of a certain item until the trial has actually begun and witnesses have already been called. In those instances, it may be necessary to take measures such as permitting the defence to recall certain witnesses for examination or cross-examination, adjournments to permit the defence to subpoena additional witnesses or even, in extreme circumstances, declaring a mistrial. A stay of proceedings is a last resort, to be taken when all other acceptable avenues of protecting the accused's right to full answer and defence are exhausted.

78 When choosing a remedy for a non-disclosure that has violated s. 7, the court should also consider whether the Crown's breach of its disclosure obligations has also violated fundamental principles underlying the community's sense of decency and fair play and thereby caused prejudice to the integrity of the judicial system. If so, it should be asked whether this prejudice is remediable. Consideration must be given to the seriousness of the violation and to the societal and individual interests in obtaining a determination of guilt or innocence. Although some of the most salient considerations are discussed immediately below, that discussion is by no means exhaustive.

79 Among the most relevant considerations are the conduct and intention of the Crown. For instance, non-disclosure due to a refusal to comply with a court order will be regarded more seriously than non-disclosure attributable to inefficiency or oversight. It must be noted, however, that while a finding of flagrant and intentional Crown misconduct may make it significantly more likely that a stay of proceedings will be warranted, it does not follow that a demonstration of mala fides on the part of the Crown is a necessary precondition to such a finding. As Wilson J. observed for the Court in Keyowski, supra, at p. 659:

> To define "oppressive" as requiring misconduct or an improper motive would, in my view, unduly restrict the operation of the doctrine.... Prosecutorial misconduct and improper motivation are but two of many factors to be taken into account when a court is called upon to consider whether or not in a particular case the Crown's [conduct] amounts to an abuse of process.

80 Another pertinent consideration will be the number and nature of adjournments attributable to the Crown's conduct, including adjournments attributable to its failure to disclose in a timely

manner. Every adjournment and/or additional hearing caused by the Crown's breach of its obligation to disclose may have physical, psychological and economic consequences upon the accused, particularly if the accused is incarcerated pending trial. In all fairness, however, the Crown may also seek to establish by evidence that the accused is in the majority group of persons who benefit from a delay in the proceedings because they do not want an early trial: Morin, supra, at pp. 802-3.

81 Finally, in determining whether the prejudice to the integrity of the judicial system is remediable, consideration must be given to the societal and individual interests in obtaining a determination of guilt or innocence. It goes without saying that these interests will increase commensurately to the seriousness of the charges against the accused. Consideration should be given to less drastic remedies than a stay of proceedings (see for example R. v. Burlingham, [1995] 2 S.C.R. 206, where, although I agreed with the majority that the Crown's conduct in disregarding the plea bargain made with the accused did not amount to one of the "clearest of cases" requiring a stay of proceedings, I would have nonetheless found a violation of the accused's rights under s. 7 and substituted a conviction for the lesser included offence which was the object of the plea bargain).

82 It must always be remembered that a stay of proceedings is only appropriate "in the clearest of cases", where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued.

(iv) Summary

83 Where life, liberty or security of the person is engaged in a judicial proceeding, and it is proved on a balance of probabilities that the Crown's failure to make proper disclosure to the defence has impaired the accused's ability to make full answer and defence, a violation of s. 7 will have been made out. In such circumstances, the court must fashion a just and appropriate remedy, pursuant to s. 24(1). Although the remedy for such a violation will typically be a disclosure order and adjournment, there may be some extreme cases where the prejudice to the accused's ability to make full answer and defence or to the integrity of the justice system is irremediable. In those "clearest of cases", a stay of proceedings will be appropriate.

C. Application to the Facts

84 The motion which prompted Thackray J.'s pronouncement of a stay of proceedings was the fifth such motion since the trial judge was seized of the case. It was only the second, however, that related in any way to non-disclosure by the Crown. The first motion for a stay based upon non-disclosure, which Thackray J. rejected in reasons delivered on November 27, pertained to non-disclosures relating to the order of Campbell A.C.J., which in turn governed the production of materials which were almost exclusively in the hands of third parties. Much of the delayed disclosure by the Crown of the complainants' medical and therapeutic records, even after the order of Campbell A.C.J., seems to have been genuinely motivated by a desire to protect the privacy interests of the complainants, and not to compromise the rights of the accused. Some of

the non-disclosure was attributable to simple incompetence. Thackray J. concluded as much when he noted that there was no evidence to suggest any "grand design by the Crown to conceal evidence" (p. 105). Although, for reasons which appear below, I agree that the scope and nature of the disclosure order were unacceptably broad, I agree with the Court of Appeal that a more appropriate route for the Crown to have taken would have been to apply for a variation of the original disclosure order, in which the Crown would have sought greater accommodation for the privacy interests of the individual complainants involved.

85 Nonetheless, due in part to an undertaking by the Crown on November 28 to disclose to the defence its complete files on the case, there is no dispute that the order of Campbell A.C.J. had been fully complied with by the Crown at the time of the fifth application by the defence for a stay of proceedings. This fifth application was founded upon the non-disclosure of a full transcript of a witness interview which had previously only partly been disclosed to the defence, the non-disclosure of several diagrams produced by witnesses in the course of their preparations with the Crown, and the failure of Crown counsel to be able to assure the court on the third day of the trial that all relevant documents in Ms. Harvey's computer files had been fully disclosed to the defence. Defence counsel exhorted the trial judge to consider, as well, the previous disclosure difficulties encountered by the defence.

86 In granting the stay of proceedings on December 7, Thackray J. concluded that the Crown's previous uncooperativeness in response to Campbell A.C.J.'s disclosure order had created an "aura" which ultimately pervaded and destroyed the case. In the November 27 ruling refusing the fourth application for a stay, however, Thackray J. had ruled that although the Crown's excuses for non-disclosure were "limp" and indicative of incompetence, there was no evidence to suggest any "grand design by the Crown to conceal evidence" (p. 105). Given that the order of Campbell A.C.J. had been fully complied with by the time of the fifth application for a stay, it is unclear what changed the trial judge's mind about the Crown's conduct in relation to that non-disclosure. Rather, it would appear that Thackray J. attached greatest significance to the fact that, notwithstanding that the trial had now begun, Crown counsel could still not provide the court with an assurance that all relevant information had been disclosed. This may have been the straw that broke the proverbial camel's back.

87 The frustration of the trial judge, forced on several occasions to intervene in order to further the disclosure process, is certainly understandable. As I have already noted, the Crown's failure to comply fully with the disclosure order of Campbell A.C.J. must not be regarded lightly. At the same time, however, we must place the considerable disclosure difficulties within their proper context. The considerable disclosure difficulties related almost entirely to the following: (1) materials which were not in the Crown's possession at the time of the making of the original disclosure order and which consequently, for reasons that I shall discuss below, the Crown is not under any obligation to produce; and (2) work product which, provided that it contains no material inconsistencies or additional facts not already disclosed to the defence, the Crown would also not ordinarily be obliged to disclose, were it not for the undertaking which it gave to the defence the weekend before the beginning of the trial. This was not a case where the Crown failed, for whatever reason, to disclose the fruits of an investigation undertaken by agents of the state. Much confusion was attributable to the fact that the law regarding the disclosure of third parties' private records was highly uncertain, and nobody was quite sure what to do.

88 In agreeing on November 28 to hand over its complete files in the case, the Crown may unwittingly have promised more than it could realistically deliver in such a short time, given the lack of computer literacy of one of the Crown counsel, the complexities involved in the preparation of the case, and the fact that the prosecution was being run from two different cities. These are, as the trial judge noted, "limp" excuses. Nonetheless, although the Crown, as an officer of the court, must always strive to fulfil its undertakings, the fact that the imperfect compliance which ultimately triggered the granting of the stay was with respect to a voluntary undertaking by the Crown rather than with respect to an order of the trial judge or a clear legal obligation is a factor that should not be ignored.

89 Finally, although the non-disclosure of the diagrams prepared by the witnesses, as well as certain of Ms. Harvey's computer files, apparently contravened the Crown's good faith undertaking to the defence, it was unclear whether any of this information contained materially different versions of that which had already been disclosed to the defence. In fact, while Mr. Jones did concede that he could not assure the court that full disclosure had been made in conformity with the Crown's undertaking, he resolutely took the position, after having reviewed some of the impugned documents, that none of the undisclosed records were material. Nor, for that matter, was there any evidence of improper motive on the part of the Crown. I hasten to add that a finding that the non-disclosures were material might have supported an inference that the Crown was actively hiding information that was material to the defence. In the instant case, however, absent any inquiry into the materiality of the non-disclosures, the most that can be said is that the non-disclosures arose as a result of inadvertence or lack of communication on the part of the two Crown counsel, or because Crown counsel undertook to bite off more voluntary disclosure than it could chew. There is no proof, moreover, that any delays were attributable to Crown non-disclosure. If indeed there were such delays, then it is relevant to note that, since the accused was not incarcerated pending trial, these delays would not have prolonged the duration of the accused's imprisonment.

90 Bearing these factors in mind, I would make the following conclusions. First, although the Crown's conduct was shoddy and inappropriate, the non-disclosure cannot be said to have violated the accused's right to full answer and defence. Contrary to the impression held by the trial judge, a review of the transcripts reveals that the Crown did not at any time concede either materiality or prejudice to the defence. The most the Crown admitted was that defence counsel might be at a disadvantage because it had only had a short time during which to review the most recently disclosed documents. At its highest, moreover, the prejudice actually identified by the trial judge was that the non-disclosed diagrams were relevant in that they might have affected the preparation of the cross-examination of one of the witnesses. Cross-examination of that witness had not yet even begun. Although I am sympathetic to the difficulties of preparing an effective cross-examination, I cannot agree that an accused's right to full answer and defence has probably been infringed merely because of the possibility that a cross-examination of a witness, which has not yet begun, may have to be reformulated. Without any inquiry into the materiality of the non-disclosed information, it was, therefore, impossible for the trial judge to conclude that the non-disclosure had, on the balance of probabilities, prejudiced the accused's ability to make full answer and defence.

91 Second, it must be recalled that the whole issue of disclosure in this case arose out of Campbell A.C.J.'s order requiring that the Crown "disclose" records in the hands of third parties and that the complainants authorize production of such records. This order was issued without any form of inquiry into their relevance, let alone a balancing of the privacy rights of the complainants and the accused's right to a fair trial. We all agree that this order was wrong. Although the error was compounded by the Crown's inept and ineffective efforts to have this order reviewed and modified, it is clear, at the end of the day, that the Crown was right in trying to protect the interests of justice. The fact that it did so in such a clumsy way should not result in a stay of proceedings, particularly so when no prejudice was demonstrated to the fairness of the accused's trial or to his ability to make full answer and defence. Thus, even if I had found a violation of s. 7, this cannot be said to be one of the "clearest of cases" which would mandate a stay of proceedings.

92 To summarize, I am satisfied that the evidence in the present case did not support the finding of a violation under s. 7 of the Charter and, moreover, it did not reasonably support Thackray J.'s view that the only appropriate course of action under the circumstances was to stay the proceedings against the accused.

II. Production of Private Records

A. Judgment of the Court of Appeal

93 On May 16, 1994, the Court of Appeal released additional reasons in O'Connor (No. 2), supra. In those reasons, it set out guidelines governing applications for production of medical records of potential witnesses, which are not in the possession of the Crown. It recommended a two-stage procedure (at p. 261):

> At the first stage, the applicant must show that the information contained in the medical records is likely to be relevant either to an issue in the proceeding or to the competence of the witness to testify. If the applicant meets this test, then the documents meeting that description must be disclosed to the court.
>
> The second stage involves the court reviewing the documents to determine which of them are material to the defence, in the sense that, without them, the accused's ability to make full answer and defence would be adversely affected. If the court is satisfied that any of the documents fall into this category, then they should be disclosed to the parties, subject to such conditions as the court deems fit.

The court noted that it would often only be possible to make the ultimate determination as to relevance and materiality at the point in the trial when the issue to which the information is said to be relevant or material is addressed.

94 The court then held that while a liberal interpretation of the word "relevant" is to be encouraged, due regard must also be had for other legitimate legal and societal interests, notably the privacy interests of complainants in sexual assault cases and the danger that the

evidence will be unprobative and misleading. As such, consideration should be had for this Court's remarks in R. v. Seaboyer, [1991] 2 S.C.R. 577, as well as for the factors set out in s. 276(3) of the Criminal Code.

95 The Court of Appeal then reviewed grounds for disclosure which, in its view, would not meet the test for relevance. It would be insufficient, for instance, to invoke credibility "at large". A simple submission that the records may relate to "recent complaint" would be equally inadequate. So, too, would be a claim that the defence hopes to find lack of corroboration or the existence of a prior inconsistent statement, since this would amount to a fishing expedition into a person's private records. Equally insufficient would be an assertion of relevance based on the mere fact that a witness has received counselling or psychiatric assistance as a consequence of an alleged sexual assault. The fact of having received such counselling could not, moreover, justify a conclusion that the witness's evidence may be unreliable.

96 The Court of Appeal then turned to a consideration of appropriate procedures to guide the parties on an application for pre-trial production of medical records held by third parties. It made the following points (at pp. 267-68):

- the application for disclosure should ideally be supported by affidavits;
- notice should be given to Crown counsel, to the third party in possession, and to the complainant or other witness with a privacy interest in the records;
- the application should be heard by the trial judge whenever possible;
- at the hearing, persons with an interest in the records are entitled to present argument relating to issues of privacy and privilege, and to give evidence with respect to the relevance and materiality of the records in question;
- the judge will review the records to determine materiality, a procedure which may be done in camera or under a publication ban where the materials involved are of a sensitive nature;
- if the threshold test is not met, the records shall be sealed and retained in the file in the event they need to be reviewed later;
- any party to the original application may apply for a variation of the disclosure or non-disclosure order on proper grounds, and further application may be made if new evidence arises subsequently.

The court declined to discuss the issue of privilege, both because full disclosure was made in this case, and because no basis in relevance or materiality was established for the production of the records.

B. Analysis of Production Guidelines

97 Determining the nature and extent of production to the defence of a complainant's medical and therapeutic records, as well as any other documents in which the complainant holds a reasonable expectation of privacy, is a difficult and potentially value-laden exercise. I commend the initiative taken by the Court of Appeal in setting down its thoughtful approach to the issue. It can be seen that I approve of and adopt many of their observations and suggestions in the forthcoming pages.

98 As a preliminary matter, it should be noted that the issue before us relates to the production of private records held by third parties. We are not concerned here with the extent of the Crown's obligation to disclose private records in its possession, or with the question whether privacy and equality interests may militate against such disclosure by the Crown. Although my colleagues Lamer C.J. and Sopinka J. deal with these questions at great length in their reasons, I prefer not to pronounce on these issues as they do not arise in this appeal and were not argued before us. Any comment on these questions would be strictly obiter.

99 The question of production of private records not in the possession of the Crown arises in a wide variety of contexts. Although many of these contexts involve medical and therapeutic records of complainants to sexual assault, it will become apparent that the principles and guidelines outlined herein are equally applicable to any record, in the hands of a third party, in which a reasonable expectation of privacy lies. Although the determination of when a reasonable expectation of privacy actually exists in a particular record (and, if so, to what extent it exists) is inherently fact- and context-sensitive, this may include records that are medical or therapeutic in nature, school records, private diaries, and activity logs prepared by social workers, to name just a few. For the sake of convenience, information that is generically of this nature shall hereafter be referred to as "private records held by third parties".

(i) Basic Principles Governing Disclosure and Production

100 The basic principles governing disclosure were most recently summarized by this Court in R. v. Chaplin, [1995] 1 S.C.R. 727. It is now clearly established that the Crown is under a general duty to disclose all information, whether inculpatory or exculpatory, except evidence that is beyond the control of the prosecution, clearly irrelevant, privileged or subject to a right of privacy. However, where the Crown disputes the existence of the information sought by the defence, then the defence must first establish a basis which could enable the presiding judge to conclude that there is in existence further material which may be useful to the accused in making full answer and defence: Chaplin, supra, at pp. 743-45.

101 Though the obligation on the Crown to disclose has found renewed vigour since the advent of the Charter, in particular s. 7, this obligation is not contingent upon there first being established any violation of the Charter. Rather, full and fair disclosure is a fundamental aspect of the Crown's duty to serve the Court as a faithful public agent, entrusted not with winning or losing trials but rather with seeing that justice is served: Stinchcombe, supra, at p. 333. For this reason, as I have already mentioned, although a disclosure order can be a constitutional remedy, the obligation on the Crown to disclose all information in its possession that is not

clearly irrelevant, privileged or subject to a right of privacy undoubtedly has force independent of any violation of the accused's s. 7 rights. Because of the Crown's unique obligations, both to the court and to the public, it, alone, owes a duty to disclose to the defence. This duty does not extend to third parties. Similarly, the obligation upon the Crown to disclose all relevant material does not extend to records which are not within its possession or control. See, also, R. v. Gingras (1992), 71 C.C.C. (3d) 53 (Alta. C.A.).

102 Given that there is no duty on third parties to disclose, it has been suggested that s. 698 of the Code provides the basis upon which a court may order production of third parties' private records. In particular, ss. 698 and 700 authorize the issuance of a subpoena ad testificandum or a subpoena duces tecum to any person that is likely to give material evidence. With respect, however, I believe that this argument rests on a misunderstanding of the nature of the subpoena powers in s. 698.

103 Although a subpoena duces tecum requires that a witness who is the object of the subpoena bring the requested documents into court, the subpoena does not automatically call for an order requiring the documents to be produced to the court for inspection, let alone to the defence. Production will only be ordered if the documents are likely to be relevant and if production is appropriate, having regard to all of the relevant considerations. In exercising its discretion to order production, the court must, of course, have regard to the Charter rights of the accused and the other interests at stake, including any claims of privilege or a right to privacy which the subject or guardian of the records might successfully assert in respect of those documents.

104 One of the Charter values to be weighed is the "right" to disclosure, which is in reality an adjunct of the s. 7 right to make full answer and defence. Though the right to full answer and defence is generally asserted in the context of material non-disclosure by the Crown, we must recall that a purposive approach to the Charter requires that due consideration also be given to the effect of the exercise of discretion on an individual's rights. In particular, an effects-oriented approach to s. 7 dictates that when an accused is unable to make full answer and defence to the charges brought against him as a result of his inability to obtain information that is material to his defence, it is of little concern whether that information is in the hands of the state or in the hands of a third party. The effect is still potentially to deprive an individual of his liberty while denying him the ability to make full answer and defence.

105 An order for production of private records held by third parties does not arise as a remedy under s. 24(1) of the Charter since, at the moment of the request for production, the accused's rights under the Charter have not been violated. Nonetheless, when deciding whether to order production of private records, the court must exercise its discretion in a manner that is respectful of Charter values: Dagenais, supra, at p. 875. In particular, the nature, scope and breadth of the production order will ultimately depend upon a balancing of Charter rights which seeks to ensure that any adverse effects upon one right is proportionate to the salutary effects of the constitutional objective being furthered: Dagenais, at p. 890.

(ii) The Competing Constitutional Rights at Issue

106 In formulating an approach to govern production of private records held by third parties, it is important to appreciate fully the nature of the various interests at issue. I will describe briefly each of the three constitutional rights that I believe to be implicated in this analysis: (1) the right to full answer and defence; (2) the right to privacy; and (3) the right to equality without discrimination.

(a) The Right to a Fair Trial

107 Much has been written about the right to a fair trial. An individual who is deprived of the ability to make full answer and defence is deprived of fundamental justice. However, full answer and defence, like any right, cannot be considered in the abstract. The principles of fundamental justice vary according to the context in which they are invoked. For this reason, certain procedural protections might be constitutionally mandated in one context but not in another: R. v. Lyons, [1987] 2 S.C.R. 309, at p. 361. Moreover, though the Constitution guarantees the accused a fair hearing, it does not guarantee the most favourable procedures imaginable: Lyons, supra, at p. 362. Finally, although fairness of the trial and, as a corollary, fairness in defining the limits of full answer and defence, must primarily be viewed from the point of view of the accused, both notions must nevertheless also be considered from the point of view of the community and the complainant: E. (A.W.), supra, at p. 198. There is no question that the right to make full answer and defence cannot be so broad as to grant the defence a fishing licence into the personal and private lives of others. The question is therefore not whether the defence can be limited in its attempts to obtain production of private records held by third parties, but how it can be limited in a manner that accords appropriate constitutional protection to all of the constitutional rights at issue.

108 When the defence seeks production of third party records whose contents it is not aware of, the defence is obviously in a position of some difficulty. In assessing whether this difficulty poses a threat of constitutional proportions to the accused's ability to make fair answer and defence, however, one thing must be borne in mind. Given that these records are not in the possession of the Crown and have not constituted a basis for its investigations, they do not, by definition, constitute part of the state's "case to meet" against the accused. Unlike sealed wiretap packages, which represent the fruits of state investigation of the accused, private records in the hands of third parties are not subject to such a presumption of materiality.

109 I would note, finally, that an important element of trial fairness is the need to remove discriminatory beliefs and bias from the fact-finding process: Seaboyer, supra. As I pointed out in R. v. Osolin, [1993] 4 S.C.R. 595, at pp. 622-23, for instance, the assumption that private therapeutic or counselling records are relevant to full answer and defence is often highly questionable, in that these records may very well have a greater potential to derail than to advance the truth-seeking process:

> ...medical records concerning statements made in the course of therapy are both hearsay and inherently problematic as regards reliability. A witness's concerns expressed in the course of therapy after the fact, even assuming they are correctly understood and reliably

> noted, cannot be equated with evidence given in the course of a trial. Both the context in which the statements are made and the expectations of the parties are entirely different. In a trial, a witness is sworn to testify as to the particular events in issue. By contrast, in therapy an entire spectrum of factors such as personal history, thoughts, emotions as well as particular acts may inform the dialogue between therapist and patient. Thus, there is serious risk that such statements could be taken piecemeal out of the context in which they were made to provide a foundation for entirely unwarranted inferences by the trier of fact. [Emphasis added.]

(b) The Right to Privacy

110 This Court has on many occasions recognized the great value of privacy in our society. It has expressed sympathy for the proposition that s. 7 of the Charter includes a right to privacy: Beare, supra, at p. 412; B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315, at p. 369, per La Forest J. On numerous other occasions, it has spoken of privacy in terms of s. 8 of the Charter: see, e.g., Hunter v. Southam Inc., [1984] 2 S.C.R. 145; R. v. Pohoretsky, [1987] 1 S.C.R. 945; R. v. Dyment, [1988] 2 S.C.R. 417. On still other occasions, it has underlined the importance of privacy in the common law: McInerney v. MacDonald, [1992] 2 S.C.R. 138, at pp. 148-49; Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130.

111 On no occasion has the relationship between "liberty", "security of the person", and essential human dignity been more carefully canvassed by this Court than in the reasons of Wilson J. in R. v. Morgentaler, [1988] 1 S.C.R. 30. In her judgment, she notes that the Charter and the right to individual liberty guaranteed therein are tied inextricably to the concept of human dignity. She urges that both "liberty" and "security of the person" are capable of a broad range of meaning and that a purposive interpretation of the Charter requires that the right to liberty contained in s. 7 be read to "guarantee[] to every individual a degree of personal autonomy over important decisions intimately affecting their private lives" (p. 171). Concurring on this point with the majority, she notes, as well, that 'security of the person' is sufficiently broad to include protection for the psychological integrity of the individual.

112 Equally relevant, for our purposes, is Lamer J.'s recognition in Mills, supra, at p. 920, that the right to security of the person encompasses the right to be protected against psychological trauma. In the context of his discussion of the effects on an individual of unreasonable delay contrary to s. 11(b) of the Charter, he noted that such trauma could take the form of

> stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction.

If the word "complainant" were substituted for the word "accused" in the above extract, I think that we would have an excellent description of the psychological traumas potentially faced by sexual assault complainants. These people must contemplate the threat of disclosing to the very person accused of assaulting them in the first place, and quite possibly in open court, records containing intensely private aspects of their lives, possibly containing thoughts and statements which have never even been shared with the closest of friends or family.

113 In the same way that this Court recognized in Re B.C. Motor Vehicle Act, supra, that the "principles of fundamental justice" in s. 7 are informed by fundamental tenets of our common law system and by ss. 8 to 14 of the Charter, I think that the terms "liberty" and "security of the person" must, as essential aspects of a free and democratic society, be animated by the rights and values embodied in the common law, the civil law and the Charter. In my view, it is not without significance that one of those rights, s. 8, has been identified as having as its fundamental purpose "to protect individuals from unjustified state intrusions upon their privacy" (Hunter, supra, at p. 160). The right to be secure from unreasonable search and seizure plays a pivotal role in a document that purports to contain the blueprint of the Canadian vision of what constitutes a free and democratic society. Respect for individual privacy is an essential component of what it means to be "free". As a corollary, the infringement of this right undeniably impinges upon an individual's "liberty" in our free and democratic society.

114 A similarly broad approach to the notion of liberty has been taken in the United States. In Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), at pp. 571-72, the United States Supreme Court affirmed that "liberty" was a "broad and majestic term" and that "[i]n a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed". More significant for our purposes, the right to privacy was expressly found to reside in the term "liberty" in the Fourteenth Amendment in the landmark case of Roe v. Wade, 410 U.S. 113 (1973). In a similar vein, the right to personal privacy has also received recognition in international documents such as Article 17 of the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, Article 12 of the Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221.

115 Privacy has traditionally also been protected by the common law, through causes of action such as trespass and defamation. In Hill, supra, which dealt with a Charter challenge to the common law tort of defamation, Cory J. reiterates the constitutional significance of the right to privacy (at para. 121):

> ...reputation is intimately related to the right to privacy which has been accorded constitutional protection. As La Forest J. wrote in R. v. Dyment, [1988] 2 S.C.R. 417, at p. 427, privacy, including informational privacy, is "(g)rounded in man's physical and moral autonomy" and "is essential for the well-being of the individual". The publication of defamatory comments constitutes an invasion of the individual's personal privacy and is an affront to that person's dignity. The protection of a person's reputation is indeed worthy of protection in our democratic society and must be carefully balanced against the equally important right of freedom of expression. [Emphasis added.]

116 Quebec, for its part, has inserted into its new Civil Code, S.Q. 1991, c. 64, arts. 35 and 36, which read as follows:

> 35. Every person has a right to the respect of his reputation and privacy.

> No one may invade the privacy of a person without the consent of the person or his heirs unless authorized by law.
>
> 36. The following acts, in particular, may be considered as invasions of the privacy of a person:
>
> (1) entering or taking anything in his dwelling;
>
> (2) intentionally intercepting or using his private communications;
>
> (3) appropriating or using his image or voice while he is in private premises;
>
> (4) keeping his private life under observation by any means;
>
> (5) using his name, image, likeness or voice for a purpose other than the legitimate information of the public;
>
> (6) using his correspondence, manuscripts or other personal documents.

As well, s. 5 of the Quebec Charter of Human Rights and Freedoms, R.S.Q., c. C-12, reads:

> 5. Every person has a right to respect for his private life.

117 It is apparent, however, that privacy can never be absolute. It must be balanced against legitimate societal needs. This Court has recognized that the essence of such a balancing process lies in assessing reasonable expectation of privacy, and balancing that expectation against the necessity of interference from the state: Hunter, supra, at pp. 159-60. Evidently, the greater the reasonable expectation of privacy and the more significant the deleterious effects flowing from its breach, the more compelling must be the state objective, and the salutary effects of that objective, in order to justify interference with this right. See Dagenais, supra.

118 In R. v. Plant, [1993] 3 S.C.R. 281, albeit in the context of a discussion of s. 8 of the Charter, a majority of this Court identified one context in which the right to privacy would generally arise in respect of documents and records (at p. 293):

> In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the Charter should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual. [Emphasis added.]

Although I prefer not to decide today whether this definition is exhaustive of the right to privacy in respect of all manners of documents and records, I am satisfied that the nature of the private records which are the subject matter of this appeal properly brings them within that rubric. Such items may consequently be viewed as disclosing a reasonable expectation of privacy which is worthy of protection under s. 7 of the Charter.

119 The essence of privacy, however, is that once invaded, it can seldom be regained. For this reason, it is all the more important for reasonable expectations of privacy to be protected at the

point of disclosure. As La Forest J. observed in Dyment, supra, at p. 430:

> ...if the privacy of the individual is to be protected, we cannot afford to wait to vindicate it only after it has been violated. This is inherent in the notion of being secure against unreasonable searches and seizures. Invasions of privacy must be prevented, and where privacy is outweighed by other societal claims, there must be clear rules setting forth the conditions in which it can be violated. [Emphasis in last sentence added.]

In the same way that our constitution generally requires that a search be premised upon a pre-authorization which is of a nature and manner that is proportionate to the reasonable expectation of privacy at issue (Hunter, supra; Thomson Newspapers, supra), s. 7 of the Charter requires a reasonable system of "pre-authorization" to justify court-sanctioned intrusions into the private records of witnesses in legal proceedings. Although it may appear trite to say so, I underline that when a private document or record is revealed and the reasonable expectation of privacy therein is thereby displaced, the invasion is not with respect to the particular document or record in question. Rather, it is an invasion of the dignity and self-worth of the individual, who enjoys the right to privacy as an essential aspect of his or her liberty in a free and democratic society.

(c) The Right to Equality Without Discrimination

120 Unlike virtually every other offence in the Criminal Code, sexual assault is a crime which overwhelmingly affects women, children and the disabled. Ninety percent of all victims of sexual assault are female: Osolin, supra, at p. 669, per Cory J. Moreover, studies suggest that between 50 and 80 percent of women institutionalized for psychiatric disorders have prior histories of sexual abuse (T. Firsten, "An Exploration of the Role of Physical and Sexual Abuse for Psychiatrically Institutionalized Women" (1990), unpublished research paper, available from Ontario Women's Directorate). Children are most highly vulnerable (Sexual Offences Against Children (the Badgley Report), vol. 1 (1984)).

121 It is a common phenomenon in this day and age for one who has been sexually victimized to seek counselling or therapy in relation to this occurrence. It therefore stands to reason that disclosure rules or practices which make mental health or medical records routinely accessible in sexual offence proceedings will have disproportionately invasive consequences for women, particularly those with disabilities, and children. In particular, in determining questions of disclosure of records of persons allegedly assaulted in institutions where they get psychiatric assistance, the courts must take care not to create a class of vulnerable victims who have to choose between accusing their attackers and maintaining the confidentiality of their records.

122 This Court has recognized the pernicious role that past evidentiary rules in both the Criminal Code and the common law, now regarded as discriminatory, once played in our legal system: Seaboyer, supra. We must be careful not to permit such practices to reappear under the guise of extensive and unwarranted inquiries into the past histories and private lives of complainants of sexual assault. We must not allow the defence to do indirectly what it cannot do

directly under s. 276 of the Code. This would close one discriminatory door only to open another.

123 As I noted in Osolin, supra, at pp. 624-25, uninhibited disclosure of complainants' private lives indulges the discriminatory suspicion that women and children's reports of sexual victimization are uniquely likely to be fabricated. Put another way, if there were an explicit requirement in the Code requiring corroboration before women or children could bring sexual assault charges, such a provision would raise serious concerns under s. 15 of the Charter. In my view, a legal system which devalues the evidence of complainants to sexual assault by de facto presuming their uncreditworthiness would raise similar concerns. It would not reflect, far less promote, "a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration" (Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, at p. 171).

124 Routine insistence on the exposure of complainants' personal backgrounds has the potential to reflect a built-in bias in the criminal justice system against those most vulnerable to repeat victimization. Such requests, in essence, rest on the assumption that the personal and psychological backgrounds and profiles of complainants of sexual assault are relevant as to whether or not the complainant consented to the sexual contact, or whether the accused honestly believed that she consented. Although the defence must be free to demonstrate, without resort to stereotypical lines of reasoning, that such information is actually relevant to a live issue at trial, it would mark the triumph of stereotype over logic if courts and lawyers were simply to assume such relevance to exist, without requiring any evidence to this effect whatsoever.

125 It is revealing, for instance, to compare the approach often taken to private records in sexual assault trials with the approach taken in three decisions in which private files were sought by defence counsel in situations which did not involve sexual assaults. In Gingras, supra, the defence in a murder case sought disclosure of the prison file of an important Crown witness, who was serving time in a penitentiary in another province. The credibility of the witness was invoked as being at issue. In addition to finding important irregularities in the disclosure order, the Court concluded that the disclosure request amounted to no more than a fishing expedition and therefore quashed the order, notwithstanding the seriousness of the charge against the accused.

126 In both R. v. Gratton, [1987] O.J. No. 1984 (Prov. Ct.), and R. v. Callaghan, [1993] O.J. No. 2013 (Ont. Ct. (Prov. Div.)), an accused charged with assault of a police officer sought disclosure of the officer's personnel files and, in particular, any files relating to complaints or disciplinary actions taken against the officer. In both cases, the justification offered for this disclosure was to show that the officer had a propensity for violence. In both cases, in the absence of any evidence as to the likelihood that the records would contain evidence to the predisposition to violence or unreasonable use of force, the judge refused to give disclosure of those files. The contents of the files were characterized as hearsay, as potentially based on unfounded allegations, and as generally irrelevant. The only disclosure granted was of a file containing details of the formal investigation of the particular complaint filed by the accused in relation to activity which was the subject matter of the charges.

127 I see no reason to treat a sexual assault complainant any differently, or to accord any less respect to her credibility or privacy, than that which was accorded police officers and convicted criminals in the above-mentioned cases.

128 All of these factors, in my mind, justify concluding not only that a privacy analysis creates a presumption against ordering production of private records, but also that ample and meaningful consideration must be given to complainants' equality rights under the Charter when formulating an appropriate approach to the production of complainants' records. Consequently, I have great sympathy for the observation of Hill J. in R. v. Barbosa (1994), 92 C.C.C. (3d) 131 (Ont. Ct. (Gen. Div.)), to this effect (at p. 141):

> In addressing the disclosure of records, relating to past treatment, analysis, assessment or care of a complainant, it is necessary to remember that the pursuit of full answer and defence on behalf of an accused person should be achieved without indiscriminately or arbitrarily eradicating the privacy of the complainant. Systemic revictimization of a complainant fosters disrepute for the criminal justice system. [Emphasis added.]

(iii) Balancing Competing Values

129 As Lamer C.J. recently noted for the majority in Dagenais, supra, at p. 877, competing constitutional considerations must be balanced with particular care:

> A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law. When the protected rights of two individuals come into conflict... Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.

Notwithstanding my agreement with this proposition, I would emphasize that the imagery of conflicting rights which it conjures up may not always be appropriate. One such example is the interrelation between the equality rights of complainants in sexual assault trials and the rights of the accused to a fair trial. The eradication of discriminatory beliefs and practices in the conduct of such trials will enhance rather than detract from the fairness of such trials. Conversely, sexual assault trials that are fair will promote the equality of women and children, who are most often the victims.

130 From my earlier remarks, moreover, it should be clear that I am satisfied that witnesses have a right to privacy in relation to private documents and records (i.e. documents and records in which they hold a reasonable expectation of privacy) which are not a part of the Crown's "case to meet" against the accused. They are entitled not to be deprived of their reasonable expectation of privacy except in accordance with the principles of fundamental justice. In cases such as the present one, any interference with the individual's right to privacy comes about as a result of another person's assertion that this interference is necessary in order to make full answer and defence. As important as the right to full answer and defence may be, it must co-exist with other constitutional rights, rather than trample them: Dagenais, supra, at p. 877. Privacy and equality must not be sacrificed willy-nilly on the altar of trial fairness.

131 The proper approach to be taken in contexts involving competing constitutional rights may be analogized from Dagenais, at p. 891. In particular, since an applicant seeking production of private records from third parties is seeking to invoke the power of the state to violate the privacy rights of other individuals, the applicant must show that the use of the state power to compel production is justified in a free and democratic society. If it is not, then the other person's privacy rights will have been infringed in a manner that is contrary to the principles of fundamental justice.

132 The use of state power to compel production of private records will be justified in a free and democratic society when the following criteria are applied. First, production should only be granted when it is shown that the accused cannot obtain the information sought by any other reasonably available and effective alternative means. Second, production which infringes upon a right to privacy must be as limited as reasonably possible to fulfil the right to make full answer and defence. Third, arguments urging production must rest upon permissible chains of reasoning, rather than upon discriminatory assumptions and stereotypes. Finally, there must be a proportionality between the salutary effects of production on the accused's right to make full answer and defence as compared with the deleterious effects on the party whose private records are being produced. The measure of proportionality must reflect the extent to which a reasonable expectation of privacy vests in the particular records, on the one hand, and the importance of the issue to which the evidence relates, on the other. Moreover, courts must remain alive to the fact that, in certain cases, the deleterious effects of production may demonstrably include negative effects on the complainant's course of therapy, threatening psychological harm to the individual concerned and thereby resulting in a concomitant deprivation of the individual's security of the person.

133 All of the above considerations must be borne in mind when formulating an appropriate approach to the difficult issue raised in this appeal. Using these ground rules to structure our analysis, it is now possible to elaborate upon an approach to production of third parties' private records that, it is hoped, will maintain the greatest possible degree of proportionality in reconciling the equally important constitutional concerns of full answer and defence, privacy, and equality without discrimination.

(iv) Procedure for Obtaining Production

134 I would give substance to the general principles elaborated above by way of the following process. The first step for an accused who seeks production of private records held by a third party is to obtain and serve on the third party a subpoena duces tecum. When the subpoena is served, the accused should notify the Crown, the subject of the records, and any other person with an interest in the confidentiality of the records that the accused will ask the trial judge for an order for their production. Then, at the trial, the accused must bring an application supported by appropriate affidavit evidence showing that the records are likely to be relevant either to an issue in the trial or to the competence to testify of the subject of the records. If the records are relevant, the court must balance the salutary and deleterious effects of ordering that the records

be produced to determine whether, and to what extent, production should be ordered.

(a) Subpoena duces tecum and Notice to Interested Parties

135 The form of the subpoena duces tecum and the procedure for its issuance are described in Part XXII of the Criminal Code. In particular, a subpoena will not issue unless the applicant shows that the witness is likely to give material evidence in the proceeding: s. 698(1). The function of the subpoena is to summon the witness -- in this case, the guardian of the records -- to court and to require the witness to bring the documents described in the subpoena. It does not, in itself, require the witness to produce the records to the court or to the defence.

136 When the subpoena is served, the accused should give written notice to anyone with an interest in the confidentiality of the records that a motion will be brought for an order for production of the records. Interested persons include the Crown, the person who is the subject of the records, the guardian of the records, and any other person required by statute to be notified. Failure to give notice to all interested parties will be fatal to the application, although the accused may reapply and, as a matter of convenience, notice to the guardian of the records may accompany the subpoena duces tecum.

(b) Application for Production

137 At the trial, when the accused applies for an order for production of the records, the judge should follow a two-stage approach. First, the accused must demonstrate that the information contained in the records is likely to be relevant either to an issue in the proceedings or to the competence to testify of the person who is the subject of the records. If the information does not meet this threshold of relevance, then the analysis ends here and no order will issue. However, if the information is likely relevant to an issue at trial or to the competence of the subject to testify, the court must weigh the positive and negative consequences of production, with a view to determining whether, and to what extent, production should be ordered. At each stage counsel for all interested parties should be permitted to make submissions.

(1) Relevance

138 At the outset, the accused must establish a basis which could enable the presiding judge to conclude that there is actually in existence further material which may be useful to the accused in making full answer and defence, in the sense that it is logically probative (Chaplin, supra, at pp. 743-45). In other words, the accused must satisfy the court that the information contained in the records is likely to be relevant either to an issue in the proceeding or to the competence of the subject to testify (O'Connor No. 2, supra).

139 It may be useful at this stage for the third party guardian of the records to prepare a list of the records in its possession. In an appropriate case, the trial judge may require such a list to be provided to the accused and the other interested parties. This was done, for example, in Barbosa, supra, albeit in the somewhat different context of a request by the Crown to withhold

disclosure of records in its own possession. In that decision, Hill J. made the following comments about the utility of an inventory of records (at p. 136):

> The existence of an inventory not only promotes procedural efficiency during argument of an application of this type, but also has the advantage of potentially permitting defence counsel to focus the subject-matter of his application to a population of documents less than the whole of those in the custody of the relevant custodian. On occasion, such an inventory promotes further informal discussions between defence and Crown counsel leading to further disclosure without review by the court.

140 However, I wish to emphasize that, like any other motion, an application for an order for production of private records held by a third party must be accompanied by affidavit evidence which establishes to the judge's satisfaction that the information sought is likely to be relevant. The accused's demonstration that information is likely to be relevant must be based on evidence, not on speculative assertions or on discriminatory or stereotypical reasoning.

141 The Chief Justice and Sopinka J. argue that accused persons are placed in a difficult situation by the requirement that they prove the likely relevance of the documents without having access to them. My colleagues point to the decisions of this Court in Carey v. Ontario, [1986] 2 S.C.R. 637, Dersch v. Canada (Attorney General), [1990] 2 S.C.R. 1505 (especially at pp. 1513-14), R. v. Garofoli, [1990] 2 S.C.R. 1421, and R. v. Durette, [1994] 1 S.C.R. 469, and conclude that the standard of "likely relevance" should not be interpreted as an onerous burden. I would begin by noting that Carey arose in the context of a civil action in which neither the right to full answer and defence nor any constitutional right of privacy were engaged; it therefore has no application here. As for Dersch, Garofoli and Durette, a majority of this Court held in those cases that an accused is entitled to have access to information used by police to obtain a wiretap authorization because, without such access, the accused cannot realistically challenge the legality of the surveillance. However, in those cases, the accused sought access to records created by the state as part of its investigation; that situation can hardly be compared to the situation of an accused who demands access to therapeutic or other private records created and held by a third party. The records here in question are not within the possession or control of the Crown, do not form part of the Crown's "case to meet", and were created by a third party for a purpose unrelated to the investigation or prosecution of the offence. In my opinion, it cannot be assumed that such records are likely to be relevant, and if the accused is unable to show that they are, then the application for production must be rejected as it amounts to nothing more than a fishing expedition.

142 The burden on an accused to demonstrate likely relevance is a significant one. For instance, it would be insufficient for the accused to demand production simply on the basis of a bare, unsupported assertion that the records might impact on "recent complaint" or the "kind of person" the witness is. Similarly, the applicant cannot simply invoke credibility "at large", but must rather provide some basis to show that there is likely to be information in the impugned records which would relate to the complainant's credibility on a particular, material issue at trial. Equally inadequate is a bare, unsupported assertion that a prior inconsistent statement might be revealed, or that the defence wishes to explore the records for "allegations of sexual abuse by other people". Such requests, without more, are indicative of the very type of fishing expedition

that this Court has previously rejected in other contexts. See, in the context of cross-examination on sexual history, Osolin, supra, at p. 618, per L'Heureux-Dubé J. dissenting, and Seaboyer, supra, at p. 634, per McLachlin J. for the majority; in the context of search and seizure, Baron v. Canada, [1993] 1 S.C.R. 416, at p. 448, per Sopinka J. for the Court, and Hunter, supra, at p. 167, per Dickson J. (as he then was) for the Court; in the context of wiretaps and their supporting affidavits, Chaplin, supra, at p. 746, per Sopinka J. for the Court, Durette, supra, at p. 523, per L'Heureux-Dubé J. dissenting, R. v. Thompson, [1990] 2 S.C.R. 1111, at p. 1169, per La Forest J. dissenting, and R. v. Duarte, [1990] 1 S.C.R. 30, at p. 55, per La Forest J. for the majority. See also Cross on Evidence (7th ed. 1990), at pp. 51 et seq.; Halsbury's Laws of England (4th ed. 1976), vol. 17, para. 5, at p. 7.; Wigmore on Evidence (3rd ed. 1940), vol. 1, para. 9, at pp. 655 et seq.

143 Similarly, the mere fact that a witness has a medical or psychiatric record cannot be taken as indicative of the potential unreliability of his or her testimony. Any suggestion that a particular treatment, therapy, illness, or disability implies unreliability must be informed by cogent evidence, rather than stereotype, myth or prejudice. For these reasons, it would also be inappropriate for judicial notice to be taken of the fact that unreliability may be inferred from any particular course of treatment. See R. v. K. (V.) (1991), 4 C.R. (4th) 338 (B.C.C.A.), at pp. 350-51.

144 Finally, it must not be presumed that the mere fact that a witness received treatment or counselling after a sexual assault indicates that the records will contain information that is relevant to the defence. The focus of therapy is vastly different from that of an investigation or other process undertaken for the purposes of the trial. While investigations and witness testimony are oriented toward ascertaining historical truth -- namely, the facts surrounding the alleged assault -- therapy generally focuses on exploring the complainant's emotional and psychological responses to certain events, after the alleged assault has taken place. Victims often question their perceptions and judgment, especially if the assailant was an acquaintance. Therapy is an opportunity for the victim to explore her own feelings of doubt and insecurity. It is not a fact-finding exercise. Consequently, the vast majority of information noted during therapy sessions bears no relevance whatsoever or, at its highest, only an attenuated sense of relevance to the issues at trial. Moreover, as I have already noted elsewhere, much of this information is inherently unreliable and, therefore, may frustrate rather than further the truth-seeking process. Thus, although the fact that an individual has sought counselling after an alleged assault may certainly raise the applicant's hopes for a fruitful fishing expedition, it does not follow, absent other evidence, that information found in those records is likely to be relevant to the accused's defence.

145 Unlike my colleagues Lamer C.J. and Sopinka J., I would not take the "sheer number" of cases in which production has been ordered in the past as a demonstration of the potential relevance of therapeutic records. Whatever may have been their past practice in this regard, judges should be encouraged to carefully scrutinize claims of relevance in a manner that is sensitive to the therapeutic context and the nature of records created in that context. Without such sensitivity, the danger is great that records having no real relevance will be produced, the search for truth frustrated, and the rights of complainants needlessly violated.

146 In establishing the required evidentiary basis, the applicant may resort to the Crown's disclosure, to its own witnesses, and to cross-examination of the Crown witnesses at both the preliminary inquiry and the trial. On some occasions, it may also be necessary to introduce expert evidence to lay the foundation for a production application (for instance, expert evidence to the effect that a certain type of therapy may lead to "created memories"). The determination of relevance is a fluid, rather than fixed, process. In consequence, information which cannot be proved relevant at one point during the trial may later become relevant, in which case a further application for production may be warranted. However, regardless of when it is brought, an application for production will not succeed if it is not supported by evidence demonstrating the likely relevance of the records.

147 I would like to make two final observations on the subject of relevance. The first of these relates to the Court of Appeal's comment that relevance should be determined with due regard for "other legitimate legal and societal interests, including the privacy interests of complainants" (O'Connor (No. 2), at pp. 261-62). In my view, the privacy rights of complainants should be considered separately, rather than factored into the analysis of relevance. It is important to remember that the rationale underlying resort to privilege or privacy rights is diametrically opposed to that underlying most ordinary evidentiary rules of exclusion. Privilege and privacy interests would exclude evidence despite the fact that such evidence might further the truth-seeking process. On the other hand, ordinary rules of exclusion are generally motivated by the desire to further the truth-seeking process, in that they tend to exclude evidence which might be unreliable, which might mislead or prejudice the trier of fact, or which might otherwise prejudice the fairness of the trial. Consequently, it is both easier and more intellectually honest to consider privacy and societal interests in a separate, balancing step.

148 However, as I have already noted, consideration for equality is not alien to the objectives of finding the truth and conducting a fair trial. On the contrary, all of these objectives dictate that a court be precluded from drawing inferences on the basis of discriminatory or stereotypical lines of reasoning. For instance, it is impermissible to seek production of records containing reference to other sexual activity to support the inference that because the complainant has engaged in unrelated sexual activity she is more likely to have consented to the activity in question, or less worthy of belief: Seaboyer, supra.

149 My second observation relates to the competence to testify of the subject of the records. A witness is presumed competent to testify until otherwise shown. Incompetence to testify can be shown in many ways, such as calling a doctor who has treated the witness, which do not require disclosure of private medical records. If competence is the basis for defence counsel's application for production of private medical records, then the court should first consider if there are any other reasonable alternatives of testing the witness's competence which would constitute a lesser invasion into the witness's privacy.

(2) Balancing

150 If the trial judge concludes that the records are not likely to be relevant to an issue in the

trial or to the competence to testify of the subject of the records, the application should be rejected. If, on the other hand, the judge decides that they are likely to be relevant, then the analysis proceeds to the second stage, which has two parts. First, the trial judge must balance the salutary and deleterious effects of ordering the production of the records to the court for inspection, having regard to the accused's right to make full answer and defence, and the effect of such production on the privacy and equality rights of the subject of the records. If the judge concludes that production to the court is warranted, he or she should so order.

151 The Chief Justice and Sopinka J. appear to share my view that the balancing of the effects of production should be undertaken only at this second stage of the procedure, after the records have been found to be likely relevant. However, they contend that the trial judge need not consider competing interests, such as the privacy rights of the subject of the records, before ordering them produced to the court for inspection. This is not my position. What my colleagues fail to recognize is that even an order for production to the court is an invasion of privacy. The records here in question are profoundly intimate, and any violation of the intimacy of the records can have serious consequences for the dignity of the subject of the records and, in some cases, for the course of his or her therapy. Neither the subject nor the guardian of the records should be compelled to violate the intimacy of the records unless the judge has determined, after careful consideration, that the salutary effects of doing so outweigh the damage done thereby.

152 In borderline cases, the judge should err on the side of production to the court. The trial judge, in examining the materials, will guard the privacy of the witness to the best of his or her ability. Nevertheless, reading and vetting large quantities of material that have been ordered produced to the court out of an abundance of caution can impose an excessive burden on judicial resources, especially if only a small proportion of the records produced to the court are ultimately produced to the defence. Consequently, while borderline cases at this stage should be decided in favour of production to the court, the determination of relevance and balancing should be meaningful, fair and considered. This carefully considered balancing will prevent documents from being needlessly produced.

153 Next, upon their production to the court, the judge should examine the records to determine whether, and to what extent, they should be produced to the accused. This step requires the court anew, but with the benefit of the inspection of the documents, to consider the likely relevance and salutary and deleterious effects as previously but with production to the accused in mind.

154 I have some difficulties with the Court of Appeal's position to the effect that the judge may simply disclose to the defence any evidence which is "material". The problem with such an approach is that it effectively does away with any consideration for privacy, or for larger societal interests. A fair legal system requires respect at all times for the complainant's personal dignity, and in particular his or her right to privacy, equality and security of the person. As the Chief Justice said in Dagenais, supra, in the context of a publication ban, the common law should not accord pre-eminence to the right to a fair trial, over other constitutionally entrenched rights (at p. 877):

> The pre-Charter common law rule governing publication bans emphasized the right to a fair trial over the free expression interests of those affected by the ban. In my view, the balance this rule strikes is inconsistent with the principles of the Charter, and in particular, the equal status given by the Charter to ss. 2(b) and 11(d). It would be inappropriate for the courts to continue to apply a common law rule that automatically favoured the rights protected by s. 11(d) over those protected by s. 2(b). A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.

Similarly, as regards the production of private records held by third parties, a balance must be struck that places the Charter rights of complainants on an equal footing with those of accused persons.

155 In Dagenais, the Court assessed proportionality by examining and weighing the salutary and deleterious effects of the rights infringements in question. I believe that such a process was already implicit in Seaboyer, in which this Court sought to achieve a measure of proportionality between the right to privacy and the right to a fair trial. In my view, an analogous approach is appropriate in the disclosure context. Once a court has reviewed the records, production should only be ordered in respect of those records, or parts of records, that have significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice or by the harm to the privacy rights of the witness or to the privileged relation. See also Stuesser, "Reconciling Disclosure and Privilege" (1994), 30 C.R. (4th) 67, at pp. 71-72.

156 Although this list is not exhaustive, the following factors should be considered in this determination: (1) the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record in question; (3) the nature and extent of the reasonable expectation of privacy vested in that record; (4) whether production of the record would be premised upon any discriminatory belief or bias; (5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record in question; (6) the extent to which production of records of this nature would frustrate society's interest in encouraging the reporting of sexual offences and the acquisition of treatment by victims; and (7) the effect on the integrity of the trial process of producing, or failing to produce, the record, having in mind the need to maintain consideration in the outcome.

157 According to the Chief Justice and Sopinka J., society's interest in encouraging victims of sexual assault to report the offences and to obtain treatment "is not a paramount consideration" (para. 33), and the effect of production on the integrity of the trial process should not be considered at all, in assessing whether the guardians of therapeutic records should be compelled to produce them to the defence. I can see no reason to reduce the relative importance of these factors, let alone exclude them, when balancing the salutary and deleterious effects of a production order.

158 This Court has already recognized that society has a legitimate interest in encouraging the

reporting of sexual assault and that this social interest is furthered by protecting the privacy of complainants: Seaboyer, supra, at pp. 605-6. Parliament, too, has recognized this important interest in s. 276(3)(b) of the Criminal Code. While Seaboyer and s. 276(3)(b) relate to the admissibility of evidence regarding the past sexual conduct of the complainant, the same reasoning applies here. The compelled production of therapeutic records is a serious invasion of complainants' privacy which has the potential to deter sexual assault victims from reporting offences or, if they do report them, from seeking treatment.

159 As Lamer C.J. and Sopinka J. observe, measures exist for limiting the extent of the invasion of privacy associated with a production order. However, despite such measures, the compelled production of therapeutic records to the defence remains a serious violation of the complainant's privacy and a deterrent to the reporting of offences and the acquisition of treatment. At the same time, production may affect the integrity of the trial process. Judges must carefully weigh these consequences when deciding whether to make an order for production.

160 As a further argument in favour of a less onerous burden upon the accused, the Chief Justice and Sopinka J. compare the accused to a state agent applying for a search warrant under s. 487(1)(b) of the Criminal Code. They state that, by virtue of s. 487(1)(b), "production of third party records is always available to the Crown" (para. 34) where there are reasonable grounds to believe that evidence will be found. Because the interpretation of s. 487(1)(b) is not an issue in this appeal, I will keep my comments to a minimum. However, I must disagree with my colleagues' suggestion that the Crown can always obtain a warrant for production of the therapeutic records of innocent third parties simply by establishing "reasonable grounds". On the contrary, in a decision penned by the Chief Justice (then Lamer J.), this Court has held that a judge may refuse a search warrant, even if the statutory requirement of "reasonable grounds" is met, in order to protect the fundamental rights of innocent third parties: Descôteaux v. Mierzwinski, [1982] 1 S.C.R. 860, at pp. 889-91. Therefore, it should not be assumed that the state could obtain a warrant in respect of intimate records held by innocent third parties as easily as the Chief Justice and Sopinka J. now suggest. Nor, in my view, should the accused be entitled to compel production of such records without a rigorous inquiry into the relevance of the records and the salutary and deleterious effects of compelling their production.

161 I would add that where the defence seeks to justify disclosure on the basis of anticipated relevance to particular issues, some inquiry is warranted into whether or not these issues are collateral to the real issues at trial. Since the defence cannot pursue inconsistencies on collateral issues, the defence is really no better off having production on that issue. It follows that failure to produce information relating only to collateral issues will not impair the accused's right to full answer and defence. See, e.g., R. v. C. (B.) (1993), 80 C.C.C. (3d) 467 (Ont. C.A.); R. v. Davison, DeRosie and MacArthur (1974), 20 C.C.C. (2d) 424 (Ont. C.A.).

162 At the opposite end of the spectrum, where material is found that is essential to the accused's ability to make full answer and defence, then justice dictates that this material be produced, even if this information was not argued as a basis for production by the defence. However, in some such cases, sensitivity to the complainant's privacy rights and security of the person might dictate that the complainant be given the option of withdrawing from the prosecution rather than facing production of the records in question.

163 In that vein, where a court concludes that production is warranted, it should only be made in the manner and to the extent necessary to achieve that objective: Dagenais, supra. The court should not release classes of records, but rather should inspect each individual record for materiality. Records that are to be produced should be vetted with a view to protecting the witness's privacy, while nonetheless maintaining sufficient detail to make the contents meaningful to the reader. The judge may, in certain cases, wish to hear submissions on whether the vetting of the records should be assisted by counsel for the complainant, for the guardian of the records, or for the Crown. It will generally be appropriate, moreover, to review the records in camera, and to keep the records sealed and in the custody of the registrar. Depending upon the sensitivity of the records, the court should consider prohibiting the making of any reproductions of those records and imposing a publication ban on such terms as are deemed appropriate. In exceptional cases, the court may consider making an order prohibiting defence counsel from discussing the contents of these records with the accused. Finally, I agree with the Court of Appeal that it is appropriate that all records produced to the court but not ultimately to the defence be sealed and retained in the file in the event that they should need to be reviewed later. These procedures are part and parcel of the process of ensuring that privacy rights are minimally impaired while nonetheless furthering the objective of guaranteeing the accused full answer and defence and a fair trial.

(v) Admissibility

164 I cannot emphasize enough that the guidelines outlined above are clearly not synonymous with the test for admissibility of evidence at trial, outlined in Seaboyer and in s. 276 of the Code. Disclosure and production are broader concepts than admissibility and, as such, evidence which is produced to the defence will not necessarily be admissible at trial.

165 Indeed, in most cases, private records relating to the counselling or treatment of the complainant will be irrelevant and inadmissible hearsay evidence. Notes of statements made by a complainant in a therapeutic context are inherently unreliable because they are frequently not prepared contemporaneously with the statements, are not intended to be an accurate record of the statements, and are not ratified by the complainant. Moreover, they touch on a variety of topics not relevant to the issues at trial or the complainant's competence to testify. As I have observed earlier in these reasons, there is a real risk that statements having little or no real relevance may be taken out of context as a basis for unwarranted inferences.

166 In any event, the admissibility of the records as evidence must be determined if and when the accused seeks to introduce them. The fact that records have been ordered produced to the defence does not mean that the records are necessarily admissible.

167 I now turn to the last issue argued before this Court, which is the question of the proper forum for an application for production, and the timing of such an application.

(vi) Forum and Timing

(a) Preliminary Inquiry

168 In Doyle v. The Queen, [1977] 1 S.C.R. 597, this Court stated that the powers of a preliminary inquiry judge are only those conferred either expressly by statute or by necessary implication. Since there is no explicit statutory authority for an order requiring third parties to produce private records to the defence at a preliminary inquiry, the power to make such an order, if it exists, must be necessarily incidental to some other statutory power.

169 The primary function of the preliminary inquiry, which is clearly set out in s. 548(1) of the Code, is undoubtedly to ascertain that the Crown has sufficient evidence to commit the accused to trial. See also Caccamo v. The Queen, [1976] 1 S.C.R. 786. Over time, however, the preliminary inquiry appears to have taken upon itself an ancillary purpose, which is to afford the accused an opportunity to discover and appreciate the case to be made against him at trial: Skogman v. The Queen, [1984] 2 S.C.R. 93. This judicially inspired expansion of the nature and ambit of the preliminary inquiry has been attributed by learned commentators to the historical lack of any formal, institutionalized procedures by which an accused could obtain full and effective disclosure of the Crown's case. (See Re Regina and Arviv (1985), 19 C.C.C. (3d) 395 (Ont. C.A.), at p. 403, per Martin J.A., leave to appeal refused, [1985] 1 S.C.R. v.)

170 Although preliminary inquiry judges are not permitted to determine the credibility of witnesses, one might hazard to say that the ancillary purpose of "discovery" has lately begun to eclipse the primary purpose of sparing the accused the gross indignity of being placed on trial in circumstances where there is simply insufficient evidence to justify holding the trial at all. One provincial court judge, in the course of a thoughtful discussion on the evolving role of the preliminary inquiry, recently expressed great frustration with this apparent turn of events:

> ...the preliminary hearing or preliminary inquiry has been turned into a nightmarish experience for any provincial court judge. Rules with respect to relevancy have been widened beyond recognition. Cross-examination at a preliminary inquiry now seems to have no limits. Attempts by provincial court judges to limit cross-examination have been perceived by some superior courts as a breach of the accused's right to fundamental justice, a breach of his or her ability to be able to make full answer and defence.
>
> The present state of the preliminary inquiry is akin to a rudderless ship on choppy waters. The preliminary hearing has been turned into a free-for-all, a living hell for victims of crime and witnesses who are called to take part in this archaic ritual.
>
> (R. v. Darby, [1994] B.C.J. No. 814 (Prov. Ct.), at paras. 9 and 10.)

171 Nevertheless, the "discovery" aspect of the preliminary inquiry remains, at most, an incidental aspect of what is in essence an inquiry into whether the Crown's evidence is sufficient to warrant the committal of the accused to trial. We must also recognize that the law of disclosure in Canada changed significantly as a result of this Court's decision in Stinchcombe, supra. Stinchcombe recognized that a rigorous duty exists on the Crown to disclose to the defence all information in its possession, both inculpatory and exculpatory, which is not clearly irrelevant or privileged. While the Crown retains a discretion as to what is "clearly irrelevant", this discretion is reviewable by the trial judge at the instance of the defence. In short, Stinchcombe

marked the dawn of a new era in disclosure to the defence, by transforming a professional courtesy into a formal obligation. Failure by the Crown to comply with this obligation may, particularly when motivated by an intention to withhold relevant information, result in the drastic remedy of a stay of proceedings. Consequently, in light of Stinchcombe and other decisions of this Court that have elaborated on those disclosure guidelines (R. v. Egger, [1993] 2 S.C.R. 451; Chaplin, supra), it may be necessary to reassess the extent to which the "discovery" rationale remains appropriate as a consideration in the conduct of the modern-day preliminary inquiry.

172 The more limited question for the purposes of this appeal, however, is whether the judge at a preliminary inquiry may consider applications for production of private records held by third parties.

173 It is beyond doubt that the statutory powers of a preliminary inquiry judge include the power to order witnesses to give evidence. Section 545 of the Code, for example, contemplates that a preliminary inquiry judge may require a witness to produce documents. However, the jurisdiction of a judge at a preliminary inquiry must be interpreted in light of the essential purpose of the inquiry, which is to assess whether the Crown has sufficient evidence to warrant committing the accused to trial. The preliminary inquiry judge does not have the power to inquire into other matters, or to order the production of documents which are not related to this assessment.

174 In Patterson v. The Queen, [1970] S.C.R. 409, for instance, this Court held that a preliminary inquiry judge had no power to compel production of a statement made to police by a prosecution witness. It is apparent that the Court was of the view that production of such a statement was not related to the purpose of the preliminary inquiry. On behalf of the majority, Judson J. stated (at p. 412):

> The purpose of a preliminary inquiry is clearly defined by the Criminal Code -- to determine whether there is sufficient evidence to put the accused on trial. It is not a trial and should not be allowed to become a trial. We are not concerned here with the power of a trial judge to compel production during the trial nor with the extent to which the prosecution, in fairness to an accused person, ought to make production after the preliminary hearing and before trial.

(See also Re Hislop and The Queen (1983), 7 C.C.C. (3d) 240 (Ont. C.A.), leave to appeal refused, [1983] 2 S.C.R. viii.) Similarly, I do not see how private records in the hands of third parties could ever be relevant to the issues at a preliminary inquiry.

175 In addition, it is crucial not to lose sight of the fundamental rationale for allowing an accused to obtain production of private records. The records are not part of the Crown's case against the accused; consequently, the purpose of ordering their production is not to give the accused advance notice of the case to meet. Nor would the records be produced for the purpose of providing possible leads for the defence's own "investigation" -- third parties have no obligation to assist the defence in this manner. Rather, the sole basis on which third parties may be compelled to produce the records to the defence is that it would be unfair for an accused to be convicted if, as a result of evidence having significant probative value being unjustifiably withheld from the defence, the accused were unable to put this evidence before the trier of fact.

176 Since a preliminary inquiry is not a final determination of guilt, this fundamental rationale for ordering production is inapplicable. It follows that, while production of the records at the preliminary inquiry would no doubt be useful to the defence, there is no constitutional imperative at that stage that would justify an infringement of the privacy rights of the subject of the records.

177 For these reasons, I am of the view that a preliminary inquiry judge is without jurisdiction to order the production of private records held by third parties.

(b) Pre-trial Applications

178 The disclosure order in the present case, however, did not emanate from a preliminary inquiry judge. Rather, it was issued in response to a pre-trial application by the defence before Campbell A.C.J., who was not seized of the trial. There is no question that Campbell A.C.J. had jurisdiction to make the order requested. However, for the following reasons, it is my view that even a superior court judge should not, in advance of the trial, entertain an application for production of private third party records.

179 In the first place, such applications should be heard by the judge seized of the trial, rather than a pre-trial judge. In R. v. Litchfield, [1993] 4 S.C.R. 333, this Court had occasion to examine the reviewability of a pre-trial severance order issued by a judge who was not seized of the trial. Although it noted that the collateral attack rule ordinarily precluded a trial judge from reviewing orders made by judges of concurrent jurisdiction, it concluded that the rationales of the collateral attack rule did not apply in the case of a pre-trial division and severance order. More significantly, for our purposes, it went on to discuss practical and policy reasons why it was most desirable for only the judge seized of the trial to make orders of this nature (at p. 353):

> Not only are trial judges better situated to assess the impact of the requested severance on the conduct of the trial, but limiting severance orders to trial judges avoids the duplication of efforts to become familiar enough with the case to determine whether or not a severance order is in the interests of justice.

Orders for production of private records held by third parties are, in my view, governed by similar logic.

180 In addition, it is desirable for the judge hearing an application for production to have had the benefit of hearing, and pronouncing upon, the defence's earlier applications, so as to minimize the possibility of inconsistency in the treatment of two similar applications. Otherwise, the possibility of such inconsistency raises the spectre of situations in which production is ordered by a pre-trial judge under circumstances later discovered to be unfounded at trial. The privacy rights of the complainant will have been infringed for naught.

181 More generally, for the following reasons, it is my view that applications for production of third party records should not be entertained before the commencement of the trial, even by the judge who is seized of the trial. First, the concept of pre-trial applications for production of

documents held by third parties is alien to criminal proceedings. In criminal matters, witnesses can only be compelled to give evidence at trial. A prospective witness is not obliged to cooperate with either the Crown or the defence before the trial, and a court should not compel the witness to provide the defence with a preview of his or her evidence. I am not persuaded that prospective defence witnesses in sexual assault cases should be treated any differently.

182 Second, if pre-trial applications for production from third parties were permitted, it would invite fishing expeditions, create unnecessary delays, and inconvenience witnesses by requiring them to attend court on multiple occasions. Moreover, a judge is not in a position, before the beginning of the trial, to determine whether the records in question are relevant, much less whether they are admissible, and will be unable to balance effectively the constitutional rights affected by a production order (see R. v. S. (R.J.), [1995] 1 S.C.R. 451, and British Columbia Securities Commission v. Branch, [1995] 2 S.C.R. 3).

183 Proponents of a pre-trial procedure argue that without such a procedure, an accused might not obtain access to important records until it is too late. However, the situation would be no different in any other trial in which a witness has refused to cooperate with the defence. I cannot emphasize enough that the records here in question do not form part of the Crown's case against the accused, and that the accused consequently has no right to advance notice of their contents. Nor does the accused have any right to search the records for potential leads. The sole ground on which third parties may be compelled to produce the records to the defence is if they have probative value in respect of the issues in the trial, or the competence to testify of the subject of the records, that is not significantly outweighed by prejudice to the administration of justice or to the subject's privacy and equality rights. I am not persuaded that this purpose requires that the accused have access to the documents in advance of the trial.

184 For these reasons, I am firmly of the view that applications for production of private records held by third parties should only be entertained at the trial.

III. Summary

185 In summary, on the issue of abuse of process for non-disclosure by the Crown, I conclude that there is no need to maintain any type of distinction between the common law doctrine of abuse of process and Charter requirements regarding abusive conduct. On the facts of this case, no such abusive conduct by the Crown has been demonstrated and a stay of proceedings was not appropriate.

186 On the issue of production of private records held by third parties, courts must balance the right of an accused to a fair trial with the competing rights of a complainant to privacy and to equality without discrimination. Since this exercise has not been done in this case, I agree with the Court of Appeal that a new trial should be ordered.

IV. Conclusion and Disposition

187 Since I am of the opinion that the Court of Appeal was correct in concluding that the trial

judge erred in staying the proceedings against the appellant, I would dismiss the appeal and dispose of this matter in the manner suggested by the Court of Appeal.

The reasons of Cory and Iacobucci JJ. were delivered by

CORY J.

188 The actions of Crown counsel originally responsible for the prosecution of this case were extremely high-handed and thoroughly reprehensible. Nonetheless, I cannot agree with Justice Major that the misdeeds of the Crown were such that, upon a consideration of all the circumstances of this case, the drastic remedy of a stay was merited. Like Justice L'Heureux-Dubé and the Court of Appeal for British Columbia, I do not think that this is one of those clearest of cases which merits the imposition of the ultimate remedy of a stay.

189 I agree with the result reached by L'Heureux-Dubé J. and many of her conclusions pertaining to privacy and privilege. However, I concur with the reasons of the Chief Justice and Justice Sopinka with respect to their holding that the principles set forth in R. v. Stinchcombe, [1991] 3 S.C.R. 326, affirmed in R. v. Egger, [1993] 2 S.C.R. 451, pertaining to the Crown's duty to disclose must apply to therapeutic records in the Crown's possession.

190 I further agree with the Chief Justice and Sopinka J. as to the procedure they suggest for determining whether records in the possession of third parties are likely to be relevant. As well, I am in agreement with their reasons pertaining to the nature of the onus resting upon the accused and the nature of the balancing process which must be undertaken by the trial judge.

The following are the reasons delivered by

McLACHLIN J.

191 I have read the reasons of my colleagues. I concur entirely in those of Justice L'Heureux-Dubé and wish only to add this comment in support of the position she adopts.

192 Discovery on criminal cases must always be a compromise. On the one hand stands the accused's right to a fair trial. On the other stands a variety of contrary considerations. One of these contrary considerations is the protection of privacy of third parties who find themselves, through no fault of their own, caught up in the criminal process. Another is the increase in the length and complexity of trials which exhaustive discovery proceedings may introduce. Both impact adversely and heavily on the public.

193 The task before us on this appeal is to devise a test for the production of records held by third parties which preserves the right of an accused to a fair trial while respecting individual and public interest in privacy and the efficient administration of justice. The key to achieving this lies in recognition that the Canadian Charter of Rights and Freedoms guarantees not the fairest of

all possible trials, but rather a trial which is fundamentally fair: R. v. Harrer, [1995] 3 S.C.R. 562. What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. Perfection in justice is as chimeric as perfection in any other social agency. What the law demands is not perfect justice, but fundamentally fair justice.

194 Perfect justice in the eyes of the accused might suggest that an accused person should be shown every scintilla of information which might possibly be useful to his defence. From the accused's perspective, the catalogue would include not only information touching on the events at issue, but anything that might conceivably be used in cross-examination to discredit or shake a Crown witness. When other perspectives are considered, however, the picture changes. The need for a system of justice which is workable, affordable and expeditious; the danger of diverting the jury from the true issues; and the privacy interests of those who find themselves caught up in the justice system -- all these point to a more realistic standard of disclosure consistent with fundamental fairness. That, and nothing more, is what the law requires.

195 I believe the test proposed by L'Heureux-Dubé J. strikes the appropriate balance between the desire of the accused for complete disclosure from everyone of everything that could conceivably be helpful to his defence, on the one hand, and the constraints imposed by the trial process and privacy interests of third parties who find themselves caught up in the justice system, on the other, all without compromising the constitutional guarantee of a trial which is fundamentally fair.

196 I would dispose of the appeal as proposed by L'Heureux-Dubé J.

The following are the reasons delivered by

MAJOR J. (dissenting)

197 I have read the reasons of Justice L'Heureux-Dubé, and agree that common law abuse of process has been subsumed in the Canadian Charter of Rights and Freedoms and should not be considered separately unless circumstances arise to which the Charter does not apply, which is not the case in this appeal. The party alleging abuse of process must prove on a balance of probabilities that a violation of the Charter has occurred. Upon proving this, a variety of remedies are available under s. 24(1).

198 With respect, I am unable to agree that a stay of proceedings was not appropriate. The conduct of the Crown in this case both impaired the ability of the accused to make full answer and defence and contravened fundamental principles underlying the community's sense of fair play and decency. This is so having regard to the failure of the Crown to disclose information within its control to alleged offences that were many years old. The remedy of a stay was within the trial judge's discretion and was appropriate under the circumstances.

I. History of Crown Conduct

199 The circumstances giving rise to the complaints in this case occurred between January 1, 1964 and November 1, 1967. The appellant was charged by indictment dated November 6, 1991, 24 years after the last incident alleged. The long delay in charges being laid made the gathering of evidence difficult for both the Crown and defence. Some witnesses were dead or incompetent and some records were lost. The defence was entitled to assistance and consideration as it sought to uncover evidence from so long ago.

200 The case was also unusual in that the accused was, at the time of the alleged offences, a teacher and member of the clergy. Almost 30 years later when the charges had been laid he had become a Bishop of the Roman Catholic Church. It was important that because of the high degree of public interest in the case created by the position of the accused and the nature of the allegations that the accused receive the same treatment by the Crown as any accused person has the right to expect.

201 It is important in this case not to isolate instances of Crown conduct which, by themselves, are mere irritations or embarrassments. It is when the incidents are seen as a pattern of conduct that the "aura" mentioned by the trial judge becomes evident and the suggestion of it all being a comedy of errors disappears. It is relevant to summarize the actions and lack thereof by the Crown.

202 In the early stages of investigation Constable Grinstead of the RCMP taped interviews with the complainants. At this point the accused had not yet been charged. Three of these tapes were disclosed to defence counsel in 1991. There were more tapes in the possession and control of the Crown which were not disclosed at that time.

203 On December 16, 1991, the complainant M.B. and a witness, M.O., made statements to Crown prosecutor Wendy Harvey. The interview with M.O. contained information which tended to conflict with the statement of M.B. and corroborate the story of the accused. This information was not disclosed to the accused until November 25, 1992, 11 months after the initial trial date and five days before the trial date at the time of disclosure.

204 On May 25, 1992, the Crown gave a list of 14 witnesses to the defence with one-line summaries of what the witnesses would say. The accused should have received entire witness statements. The defence raised this matter before Campbell A.C.J. on June 4, 1992.

205 On June 4, 1992, Campbell A.C.J. made the order for disclosure reproduced in the reasons of L'Heureux-Dubé J. The Crown opposed the application for the order but did not make the policy arguments mentioned later by Ms. Harvey and by the interveners in this case other than mentioning that the complainants would have to disclose details of a personal nature. The Crown argued relevance and the fact that the records were not in their possession. The order granted by Campbell A.C.J. was not appealed. As a result of the order and the insufficient disclosure of the witness statements the trial was adjourned to November 30, 1992.

206 On June 16, 1992, Ms. Harvey wrote to two of the complainants' therapists. She included a

copy of the order and described it. Her description narrowed the order to include only information related to alleged sexual assaults by the accused.

207 On July 8, 1992, Ms. Harvey wrote to the complainant P.P. stating that the Crown had resisted the application for the disclosure order, that the Crown intended to go before the Justice and ask for direction and that the Crown was not seeking the records of P.P.'s therapist at that time.

208 On September 21, 1992, Oppal J. expressed surprise that the order had not yet been complied with and said that the Crown should disclose the records. On October 16, 1992, Thackray J., who had been appointed trial judge, expressed similar surprise and ordered disclosure again. At that time the trial judge was given the notes of P.P.'s therapists, which he gave to the accused. On October 30, 1992, the Crown informed Thackray J. that further disclosure would be forthcoming.

209 On October 30, 1992, the Crown gave the court the records of M.B.'s therapist, Dr. Cheaney. The Crown asked that these notes not be turned over to the defence until submissions could be made by Ms. Harvey, who was not present on that day. No such submission had been made by November 19, 1992, when the defence raised the matter of the records again. Mr. Jones, for the Crown, made submissions regarding the relevance of the documents in question and mentioned that Ms. Harvey had submissions concerning victimizing the complainants again by disclosing the documents.

210 Thackray J., observing that the trial was to commence in ten days, ordered production of the documents in question. Thackray J. also ruled that a diary which the complainant R.R. had used to refresh her memory at the preliminary hearing was to be given to the court so that he could rule on its relevance.

211 On November 25, 1992, the defence received, in response to a renewed request for disclosure, the transcripts of the M.B. and M.O. interviews as well as two tapes of interviews done by the RCMP early in the investigation. It was also discovered that M.B. had therapists whose names and records had not been disclosed. The files of Dr. Cheaney were found to be incomplete. The defence also received an affidavit sworn by Constable Grinstead which alleged that the defence counsel had not attempted to look at the files held by the RCMP and that all interview tapes had been disclosed the previous year. This information was not correct.

212 On November 26, 1992, the accused applied for a stay of proceedings, based on non-disclosure by the Crown. Ms. Harvey explained the Crown's actions by pointing out that the law had recently changed to overcome myths and biases surrounding victims of sexual assault. She submitted that the order was difficult to enforce given the problems surrounding traditional stereotypes regarding sexual assault. She submitted that the order and the requests of the defence counsel for disclosure exhibited gender bias.

213 Ms. Harvey also submitted that the letters to the therapists included the order and that therefore her faulty summary should not have affected the eventual disclosure of the records. The trial judge pointed out that after the therapists were advised of the true meaning of the

order, the full files were disclosed. The trial judge further pointed out that the complainants had authorized production of the records in question. He said that there was not, in reality, a problem.

214 Thackray J. asked why the Crown had not gone back before Campbell A.C.J. to obtain direction, as Ms. Harvey had indicated was her intention in her letter to P.P. The Crown replied that it had instead sought direction from the trial judge. Thackray J. noted that he had ordered production and that the complainants had been forthcoming after that.

215 Ms. Harvey then explained the delays as partially attributable to the difficulties encountered by having two prosecutors in two places handling the case. She submitted that R. v. Stinchcombe, [1991] 3 S.C.R. 326, was a recent decision and that the Crown was still struggling with how to cope with the new disclosure rules. Ms. Harvey said that she knew at the time that M.B. and M.O.'s interview transcripts were information that the defence should have had and incredibly suggested that she must have "dreamt" she gave this information to the defence. Other failures to disclose were attributed to inadvertence.

216 The application for a stay was denied on November 27, 1992. Thackray J. felt the delay could be remedied before trial and ordered the Crown to complete disclosure. He ordered that only a portion of the diary was to be disclosed. Thackray J. said that the Crown submissions were disturbing and commented on the general incompetence and "dilly-dallying" of the Crown. He adjourned the trial to December 1, 1992.

217 On November 28, 1992, the Crown agreed to waive privilege regarding its files and undertook to prepare four binders for the accused containing all information in the Crown's possession. At a pre-trial conference on November 30, 1992, Ms. Harvey indicated that the defence now had all of the notes she had prepared in connection with the case. The trial was adjourned an additional day to allow the accused's counsel time to review the newly disclosed material.

218 On the second day of trial, December 3, 1992, the Crown attempted to have P.P. give evidence through drawings. It was revealed that the Crown possessed several drawings from pre-trial interviews by the complainants. These had not been disclosed to the accused. The Crown turned over eight sets of drawings by the next day but was unable to guarantee that full disclosure had been made.

219 The accused renewed his stay application and the Crown requested an adjournment so that Ms. Harvey could make submissions. On December 4, 1992, Ms. Harvey was present but made no submissions. Mr. Jones said that the binders given to the defence were incomplete and that the Crown could still not guarantee full disclosure had been made. The trial judge gave counsel the weekend to formulate submissions regarding the stay. When the trial resumed on December 7, 1992, no submissions were made and the stay was entered: (1992), 18 C.R. (4th) 98.

II. Effects of the Crown's Conduct

220 The actions by the Crown both impaired the accused's ability to make full answer and defence and contravened fundamental principles of justice underlying the community's sense of fair play and decency. I shall deal with each category.

A. Full Answer and Defence

221 The actions of the Crown over time included a failure, until immediately before the trial, to comply with the order of Campbell A.C.J. The respondent submits that this breach is not significant in that the order was improper and was complied with before the trial and the final stay application.

222 The impropriety of the court order if any does not excuse the conduct of the Crown after the order was made. By July 10, 1992, the order had not been complied with, and Low J. was informed that there were problems in getting the complainants to comply. The court continually expressed surprise that the order had not been complied with, and reminded the Crown of its obligation to obey court orders. By October 16, 1992, the records in question were mainly in the possession of the Crown. It was not a complainant objection which barred disclosure but the fact that the Crown disagreed with the order. The order still had not been complied with after six months.

223 The Crown never took proper action regarding the objections it had to the order. If the Crown could not appeal the order it could have, and should have, returned to Campbell A.C.J. to request variation or rescission of the order if as was suggested by them they had reason to do so. The letter from the Crown prosecutor Ms. Harvey to the complainant P.P. suggests that this is what the Crown intended. This failure gives the Crown's submissions about the propriety of the order and policy problems surrounding the order to justify non-compliance little weight.

224 The letters from Ms. Harvey to the therapists narrowed the scope of the order. It is unclear whether this was deliberate, given Ms. Harvey's opinion regarding the order, or whether it was an error. As soon as the order was clarified for the therapists, complete records were disclosed, suggesting that had the letters contained an accurate description of the order, compliance would have occurred at a much earlier time. The letter to the complainant P.P. dated July 8, 1992 displayed an intention to disregard the order.

225 The excuses proffered by the Crown were as the trial judge described them, limp. The recent Stinchcombe decision had nothing to do with obeying a court order for disclosure. The problems encountered by the two Crown prosecutors operating in different locations are not unusual and cannot explain the delay in either complying with or applying to vary the order.

226 The fact that by the time of trial the order seems to have been complied with is not much of a mitigating factor. The conduct of the Crown regarding the court order, in combination with their faulty disclosure after the trial began, would make it uncertain that the order had in fact been fully obeyed at the time of trial, notwithstanding what the Crown claimed. On previous occasions the Crown had said that the terms of the order had been fulfilled when this was not true.

227 The Crown also breached the general duty of disclosure as outlined in Stinchcombe. At the time Stinchcombe was a relatively new decision and prosecutors were still ascertaining the scope of the duty contained therein. However, the concepts outlined were clear enough: that the Crown had a general duty to disclose all relevant information. Sopinka J. set out the following principles in Stinchcombe:

> -- the Crown has a legal duty to disclose all relevant information to the defence;
>
> -- the obligation is subject to a Crown discretion regarding information which is "clearly irrelevant" or subject to privilege, and to the time and manner of disclosure;
>
> -- the Crown's use of the discretion is reviewable by the trial judge, guided by the general principle that information is not to be withheld if there is a reasonable possibility that this will impair the right to make full answer and defence;
>
> -- the absolute withholding of relevant information can only be justified on the basis of a legal privilege.

228 The Crown's breach of this obligation includes the minimal disclosure of witness statements given to the accused on May 25, 1992. This was not proper disclosure as directed in Stinchcombe. Defence counsel prepare for cross-examination of Crown witnesses in three ways. They use information obtained at preliminary hearings, information supplied by their own witnesses and by the accused, and by the disclosure in the production of the Crown. The defence was, in this case, impaired to prepare for cross-examination and in gathering rebuttal evidence by the incomplete disclosure.

229 The interviews with M.B. and with M.O. were statements which should have been disclosed. The interview with M.O. was particularly important as she was not called at the preliminary hearing, and her information tended to be exculpatory. The fact that the accused had, through his own sources, discovered the existence of this information has nothing to do with the breach of the duty of disclosure. This information was disclosed only when the defence raised the issue before the trial judge, suggesting that perhaps other information was not disclosed. This is part of the "aura" which the trial judge suggested had been created by December 7, 1992.

230 Each time disclosure was made in this case it was the result of the defence having to raise the matter in court. The defence had to find out about the missing information through alternate means. The defence was left to wonder if information existed about which it knew nothing. In order for the public to have faith in the justice system it must be able to trust Crown counsel to be forthcoming with such information. The conduct of the Crown in this case was such that trust was lost, first by the defence, and finally by the trial judge on December 7, 1992.

231 The drawings at the centre of the final application for a stay of proceedings were not the working papers of Ms. Harvey. Since the intention of the Crown was to have these complainants give evidence in the form of drawings these drawings were witness statements. Even if the drawings were not significantly different from the ones which would have been produced at trial,

the defence was entitled to disclosure. The test is not whether the information reveals contradictions, but merely is the information relevant. This was relevant material.

232 It is of little consequence on the facts of this case that a considerable amount of the non-disclosed material was ultimately released piecemeal to the defence prior to the trial. The effect of continual discovery of more non-disclosed evidence, coupled with the Crown admission that disclosure was possibly incomplete, created an atmosphere in which the defence's ability to prepare was impaired. The defence had to repeatedly renew requests for disclosure on the chance that more information was extant.

233 The breach of the undertaking to the defence by the Crown impaired the ability to prepare a full answer and defence. It does not matter whether this undertaking was unprecedented or whether it went beyond what is expected of the Crown. The defence was entitled to rely on the undertaking, and did rely on it, as the trial commenced without comment. Since the previous breaches of the court order and the general duty had created concern on the part of the accused regarding disclosure, the undertaking by the Crown was an attempt to remedy the situation. The breach of the undertaking had the opposite effect and created a suspicious atmosphere in which the defence could not know what evidence the Crown was going to present.

234 The Crown offered many reasons for delay in disclosure, including a philosophical dispute regarding the court order, differences of opinion regarding relevance, miscommunication between the two Crown prosecutors involved, and simple forgetfulness. The Crown behaved in a manner consistent with the view that it was not aware of or interested in its obligations to the court or the accused.

235 Many of the explanations offered at different times during the proceedings before Thackray J. appear to be rationalizations for unacceptable conduct after the fact. Each time deficiencies in disclosure were revealed the Crown assured the court that best efforts would be made to complete disclosure. On some occasions the court was told that disclosure was complete when in fact it was not. As the trial judge mentioned, it became embarrassing to observe the Crown counsel attempt to duck its responsibility with excuses such as dreaming that interview transcripts had been disclosed.

236 The respondent submitted that where an accused alleges that non-disclosure has impaired his ability to make full answer and defence, an inquiry into the materiality of the information in question is necessary. This is arguable in a situation involving a single piece of information. Here we have a history of non-disclosure over a year, and, where the disclosure problems are continual, the effects of the non-disclosure must be looked at over the whole period of time in question. This is what the trial judge did. It was not simply the final non-disclosure of drawings or the incomplete binders supplied to the defence which the trial judge considered. He considered the history of Crown conduct outlined above.

237 It has frequently been stated that trial judges usually are in the best position to observe the conduct of both witnesses and counsel for the Crown and the defence. It is particularly true in this case as Thackray J. was seized of the matter by October 16, 1992, had heard several motions, and had observed the repeated attempts by the defence to obtain disclosure and the

repeated attempts by Crown counsel to explain its delay in failing to comply with its obligations. The court had become, in the words of Thackray J., "an integral part of the trial preparation process" (p. 110). The familiarity of the trial judge with the conduct of the Crown and the material in question make further inquiry into materiality of the final non-disclosed material less necessary.

238 The respondent submitted that, at its highest, the prejudice suffered by the defence was merely an effect on the cross-examination of one of the witnesses. This understates the matter; it is not only cross-examination, but rebuttal evidence which is affected by the non-disclosure of information from or about a witness. The Crown's submission fails to consider the cumulative effect of the previous non-disclosures which affected the conduct of the entire defence.

239 The accused faced proceedings in which it had grown unlikely that he would be dealt with fairly by the Crown. The Crown had breached the common law duty of disclosure, the terms of a court order, and undertakings to the defence. The Crown's behaviour had created an atmosphere of mistrust. Defence counsel had repeatedly been taken by surprise, given assurances which were unreliable, and generally left in the dark. This dramatically impaired the accused to present a full answer and defence. The delay of the Crown in making disclosure and its inability to assure the trial judge that full disclosure had been made even after commencement of the trial were fatal to the proceedings.

240 It is the continual breaches by the Crown that made a stay the appropriate remedy. This is not a case where a further order for disclosure and an adjournment was appropriate. All this had been ordered earlier in the proceedings without success. Proceedings had become unworkable and unfair. Remedies under s. 24(1) of the Charter are properly in the discretion of the trial judge. This discretion should not be interfered with unless the decision was clearly unreasonable. The repeated failure of the Crown to comply with its duty to disclose and, laterally, its failure to comply with its own undertakings suggest that if a stay was not granted in this case, it is difficult to imagine a case where a stay would be granted.

B. Fair Play and Decency

241 The same breaches of the disclosure order, the duty under Stinchcombe, and the undertaking to disclose files to the defence which impaired the accused's right to make full answer and defence also violated fundamental principles of justice underlying the community's sense of fair play and decency. The community would see proceedings as being unfair where the Crown continually failed in its obligations and finally was unable to assure the court that it could ever meet them.

242 The number and nature of adjournments due to the Crown's conduct is a factor to consider because of the consequences to the accused. Not only were adjournments necessary because of non-disclosure, but also because Ms. Harvey, who had requested the opportunity to make submissions regarding disclosure, was either unavailable or unprepared at the appointed time. In two instances Ms. Harvey failed to make the promised submission, thus wasting the

adjournment granted for that purpose and the timing of the adjournments was obviously a factor to the trial judge, as several came immediately before and during the trial.

243 I accept the trial judge's view that there was no "grand design" on the part of the Crown; however, the motives of the Crown are still questionable. Ms. Harvey obviously disagreed with the court order. Her actions based on her disagreement were improper. The Crown at times took responsibility for the delays only grudgingly, offering a litany of "limp" excuses.

244 Non-disclosure is not the only conduct of the Crown which violated fundamental principles of fair play and decency. The Crown also displayed an intention to disregard complying with a court order. The Crown breached an undertaking to defence counsel. The Crown gave the court assurances which turned out to be false. While these actions were tied to the issue of disclosure they also stand on their own violating fundamental principles underlying the community's sense of fair play and decency and failed the reasonable expectation of citizens of the expected conduct of the Crown.

245 The affidavit of Constable Grinstead should be considered as well. The affidavit was not explained by the Crown. The affidavit contained information which was false, namely that the defence counsel had not bothered to visit the RCMP in Williams Lake to look at file contents. This conduct by another agent of the Crown added to the "aura" of unfairness expressed by the trial judge.

246 The complete record of non-disclosure, delay, excuses and breaches of obligation by the Crown violated the fundamental principles which underlie the community's sense of fair play and decency. The trial judge showed admirable tolerance for the behaviour of the Crown but in the end had no choice but to order a stay. The case was "now 'one of the clearest of cases'. To allow the case to proceed would tarnish the integrity of the court" (p. 110).

III. Conclusion

247 When a criminal trial gains notoriety because of the nature of the offence, the parties charged or any other reason, there is an added burden in the paramount interest of ensuring fairness in the process. Fairness is a concern in every trial, but in high profile proceedings special attention must be paid because of the danger of extraneous factors interfering with the trial. The judicial system is on display and counsel for the Crown and the accused must take care to ensure the expected standards of conduct in all cases are maintained in the exceptional ones.

248 In this case, the facts of the offences alleged were many years in the past. As well, the accused had a high profile in the community. These ingredients called for a careful prosecution to ensure fairness and the maintenance of integrity in the process.

249 The Crown should have been scrupulous to its obligations to the court and to the accused. Ms. Harvey admitted that this was "a case that require[d] a great deal of diligence and professionalism". On December 7, 1992, it was clear to the trial judge, who had personally

witnessed the conduct of the Crown over a three-month period and was aware of earlier failures to disclose, that the trial was no longer fair and could not be redeemed.

250 In summary and in chronological order the Crown impaired the ability of the appellant to prepare a defence in the following way:

1. In 1991 the Crown failed to disclose to the RCMP interviews with the complainants.
2. On December 16, 1991, the Crown failed to disclose statements made by M.B. and M.O. to Wendy Harvey.
3. On May 25, 1992, the Crown failed to disclose the complete witness statements in their possession but substituted one-line summaries.
4. On June 16, 1992, the Crown failed to disclose the letter from Wendy Harvey to therapists narrowing Campbell A.C.J.'s disclosure order of June 4, 1992.
5. On July 8, 1992, the Crown failed to disclose the letter from Crown Counsel Harvey to P.P. stating an intention to disregard the June 4, 1992 order.
6. On September 21, 1992, the Crown failed to comply with the order of Oppal J. who expressed concern and urged compliance.
7. On October 16, 1992, the Crown turned the records of P.P. over to the court. Thackray J. was concerned about the rest of the records and ordered disclosure.
8. On October 30, 1992, the Crown failed to disclose that Dr. Cheaney's records concerning M.B. had been turned over to the court, but not to the defence.
9. On November 19, 1992, the Crown failed to disclose its remaining records.
10. On November 30, 1992, the Crown waived privileges and produced four binders of material based on an undertaking to the defence to disclose its whole file. The Crown indicated disclosure was now complete.
11. On December 3, 1992, the Crown discovered that it possessed drawings by the complainants which had not been disclosed. The Crown agreed it was now unable to say that full disclosure had been made.
12. On December 4, 1992, the Crown admitted that the binders it turned over to the defence were incomplete.

251 The conduct of the Crown during the time Thackray J. was involved, as well as in the months before his appointment, was negligent, incompetent and unfair. While I am content to accept Thackray J.'s interpretation of the Crown's behaviour as being without deliberate intent some concerns remain, particularly in regard to the continual avoidance of compliance with the court order of June 4, 1992.

252 The trial judge was as stated in the best position to observe the conduct of the Crown and its effect on the proceedings. He found that the trial had become so tainted that it violated fundamental principles underlying the community's sense of fair play and decency and that the accused was impaired in his ability to make full answer and defence.

253 The trial judge carefully balanced the competing public interest in prosecuting offences with the need for a fair trial. He recognized that an order for a stay could be seen as a technicality, but concluded that in these unusual circumstances it was the appropriate, and only, remedy. He held that "[e]very citizen is entitled to the protection of the law, and to have the law meticulously observed" (pp. 110-11). I agree and would allow the appeal and restore the stay of proceedings.

254 I concur with the Chief Justice and Justice Sopinka that the Crown's disclosure obligations established in Stinchcombe are unaffected by the confidential nature of therapeutic records in its possession. I agree with the substantive law and the procedure recommended in obtaining such records from third persons.

* * * * *

Errata, published at [2016] 1 S.C.R., Part 4, page iv

[1995] 4 S.C.R., p. 455, para. 59, line 27 of the English version. Read "oppressive or vexatious proceedings" instead of "oppressive and vexatious proceedings".

R. v. Regan, [2002] 1 S.C.R. 297

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

2001: March 15 / 2002: February 14.

File No.: 27541

[2002] 1 S.C.R. 297 | [2002] 1 R.C.S. 297 | [2002] S.C.J. No. 14 | [2002] A.C.S. no 14 | 2002 SCC 12

Gerald Augustine Regan, appellant; v. Her Majesty the Queen, respondent, and The Attorney General of Canada, the Attorney General of Quebec and the Attorney General for New Brunswick, interveners.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA (232 paras.)

Case Summary

Criminal law — Remedies — Abuse of process — Stay of proceedings — Accused charged with sex-related offences — Police identifying accused as suspect before charges laid — Crown engaging in "judge shopping" and conducting pre-charge interviews of complainants — Trial judge staying some of charges — Court of Appeal overturning stay — Whether conduct of Crown and police amounted to abuse of process — Whether partial stay of proceedings warranted — Whether Court of Appeal entitled to interfere with trial judge's decision to grant partial stay.

During the police investigation into allegations that the accused, a former Premier of Nova Scotia, had committed numerous sexual offences against a variety of young women who had worked for or with him, a police officer confirmed to a reporter that the accused was under investigation, in violation of police policy to remain silent about individual suspects until charges are laid. At the conclusion of the investigation, a report was submitted to the Director of Public Prosecutions ("DPP") requesting his opinion about the laying of charges. The DPP recommended that charges should be laid involving four of the eight Nova Scotia-based complainants who [page298] were willing to testify. He chose the incidents which involved the most serious physical violations. He also recommended that the police re-contact the six women who had been victims of apparent criminal conduct, but were unwilling to testify. The police did not agree with the DPP's charging recommendation, being of the view that a more complete picture of the allegations against the accused should be put before the court. After the Crown joined police in re-interviewing most of the original complainants, 19 counts for sex-related offences were laid against the accused. One year after the preliminary inquiry, the Crown decided to prefer a direct indictment setting out 18 counts of sex-related offences, including one new charge (count 16).

After the DPP's written recommendation, one of the Crown Attorneys met with police. At that recorded meeting, she suggested that it would not be "advisable" for charges to be brought before a particular judge, because she thought he might be a political appointment of the same party as the accused. Instead, she said she would "keep

monitoring the court docket to see who is sitting when and what would be in our best interest". Police and Crown also agreed to re-interview a number of the complainants.

Citing the cumulative effect of this Crown behaviour combined with the police premature identification of him as a suspect, the accused sought a stay of all of the charges. At trial, a partial stay -- 9 of the 18 counts -- was granted. One of the charges stayed was count 16, which was similar in fact to an incident alleged to have occurred in Alberta, and the trial judge was suspicious that the Crown's eagerness to put the Alberta facts before a Nova Scotia court motivated the Crown to lay this new, similar, Nova Scotia-based charge. The Court of Appeal, in a majority decision, allowed the Crown's appeal and set aside the stays of the nine counts.

Held (Iacobucci, Major, Binnie and Arbour JJ. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and L'Heureux-Dubé, Gonthier, Bastarache and LeBel JJ.: A stay of proceedings will only be granted as a remedy for an abuse of process [page299] in the "clearest of cases". Regardless of whether the abuse causes prejudice to the accused, because of an unfair trial, or to the integrity of the justice system, a stay of proceedings will only be appropriate when two criteria are met: (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and (2) no other remedy is reasonably capable of removing that prejudice. The first criterion is critically important, and reflects the fact that a stay of proceedings is a prospective rather than a retroactive remedy. While most cases of abuse of process will cause prejudice by rendering the trial unfair, under s. 7 of the Canadian Charter of Rights and Freedoms a small residual category of abusive action exists which does not affect trial fairness, but still undermines the fundamental justice of the system. When dealing with an abuse which falls into the residual category, a stay of proceedings is generally speaking only appropriate when the abuse is likely to continue or be carried forward. Only in exceptional, relatively very rare cases will the past misconduct be so egregious that the mere fact of going forward in the light of it will be offensive. Where uncertainty persists about whether the abuse is sufficient to warrant the drastic remedy of a stay, a third criterion is considered: the interests that would be served by the granting of a stay of proceedings are balanced against the interest that society has in having a final decision on the merits.

The judge shopping in this case was offensive. Judge shopping is unacceptable both because of its unfairness to the accused, and because it tarnishes the reputation of the justice system. Furthermore, it should not infect the investigative process by involving police in a conspiracy to manipulate the process. The trial judge quite properly was seriously troubled by this evidence. He nevertheless was mindful that this single comment was not acted upon, and did not find it determinative in his ultimate conclusion that the process against the accused had been abusive to the point of necessitating a stay of proceedings.

Wide-ranging pre-charge Crown interviews are not, per se, an abuse of process. While the separation of police and Crown roles is a well-established principle of our criminal justice system, different provinces have implemented this principle in various ways. In some Canadian jurisdictions, pre-charge interviews by the Crown are a regular, even common practice. In these jurisdictions at least, it appears that public policy is served by the practice, and potentially harmful and [page300] arbitrary results are avoided by the refusal to draw a hard line at the decision to lay charges, before which Crown counsel may not interview complainants. The pre-charge interviews in this case were done in accordance with the common practice of some other provinces, a practice more wide-ranging than the narrow, exceptional to rare practice the trial judge described. Furthermore, the Crown conducted an understandable review of the potential witnesses, in the wake of an early recommendation by the DPP that was not determinative. Given the uncertainty of the charges at that point, it could not be known whether the re-interviews led to more charges than would otherwise have been laid.

The trial judge was correct in his finding that the police error in releasing the accused's name as a suspect well in advance of any charges does not rise to the level of egregious abuse. While the police policy that the identity of suspects may be released only after charges have been laid is laudable, and a breach of it should not be condoned, other evidence on the record indicates that after this one misstep, the police exercised greater caution in preventing further information leaks until the process was truly public. Moreover, the prejudice experienced by the accused as a result of this early leak -- humiliation and stress -- cannot be attributed to this police error alone. The serious remedy of a stay of proceedings is not an appropriate method to denounce or punish past police conduct of this nature.

The trial judge erred in finding an abusive or improper purpose behind the laying of count 16. The trial judge's erroneous finding of a loss of Crown objectivity influenced this holding. If the trial judge had not started from the premise that the Crown had lost its objectivity, there would have been no justification for the trial judge to find the similarity between count 16 and the Alberta incident as the primary motivation for count 16, virtually ignoring the reasonable and probable grounds for laying count 16 in its own right.

There was no abuse of process in this case. The cumulative effect of the judge shopping, pre-charge [page301] Crown interviews, the improper police announcement, and the addition of count 16 in the direct indictment, while troubling in some respects, does not rise to the level of abuse of process which is egregious, vexatious, oppressive or which would offend the community's sense of decency and fair play. Moreover, this conduct, even if it did amount to an abuse, did not have an ongoing effect on the accused which would jeopardize the fairness of his trial.

The trial judge fell into error when he ordered the ultimate remedy of a partial stay of a number of charges. The trial judge misconceived the governing test for a stay of proceedings. Instead of inquiring into whether the abuse would be manifested, perpetuated or aggravated by ongoing proceedings, and then inquiring into whether any remedy other than a stay could cure this ongoing taint, the trial judge focussed his attention only on the final balancing exercise. The abuse found by the trial judge should be and was addressed by remedies other than a stay. Moreover, even if the trial judge had found an ongoing abuse which could only be remedied by a stay, the cumulative effect of the abuse still left some question about whether this was one of those clearest of cases warranting a stay. In his balancing analysis, the trial judge omitted some significant issues relevant to the public interest. Victims of sexual assault must be encouraged to trust the system and bring allegations to light. As the police saw it, there is evidence of a pattern of an assailant sexually attacking young girls and women who were in a subordinate power relationship with the accused, in some cases bordering on a relationship of trust. When viewed in this light, the charges are very serious and society has a strong interest in having the matter adjudicated, in order to convey the message that if such assaults are committed they will not be tolerated, and that young women must be protected from such abuse. In omitting to consider any of these issues which favour proceeding with charges, the trial judge's discretion was not fully exercised and therefore cannot stand.

The decision to grant a stay is a discretionary one, which should not be lightly interfered with. However, where the trial judge made some palpable and overriding error which affected his assessment of the facts, the decision based on these facts may be reversed. Here, the trial judge made palpable and overriding factual errors which set his assessment of the facts askew. He was in error when he ruled that "pre-charge Crown interviewing in this country is ... non-existent to rare". As well, [page302] the trial judge implied that the loss of Crown objectivity was abusive because it meant that the accused ultimately faced more charges, but no evidence can be found to support this deduction. The trial judge also misdirected himself regarding the law for granting a stay by overlooking key elements of the analysis, thereby committing an error which was properly reversed by the Court of Appeal.

Per Iacobucci, Major, Binnie and Arbour JJ. (dissenting): The trial judge found as a fact that there was no independent and objective review by the Crown prosecutors in this case. The absence of the usual and proper checks and balances would, he thought, shock the conscience of the community. He cited a number of concerns that reflected this institutional failure, but his listing of the symptoms should not be mistaken for his important and central finding of fact that the accused had been denied his constitutional right to a fair pre-trial procedure. No reason has been shown to set aside this critical finding of fact. The conclusion that well-informed people may reasonably take from the continued prosecution of what the former Director of Public Prosecutions described as "minor" allegations 24 to 34 years after the events are said to have taken place is that the accused is being pursued not so much for what he has done as for who he is. Such a perception undermines public confidence in the impartiality and integrity of the criminal justice system.

The courts are very slow to second-guess the exercise of prosecutorial discretion and do so only in narrow circumstances, but these extensive discretionary powers must be exercised with objectivity and dispassion. Here, the failure of the proper and usual institutional checks and balances prevented the objective review of charges laid by the police that, because of their staleness, relatively minor nature (compared with those that did go to trial) and the potentially light sentences even if convicted, would likely have been stopped if an objective

review had taken place.

The preferral of a direct indictment by the Attorney General did not "cleanse" the prior errors of judgment of the Crown attorneys. It was motivated by an understandable desire to bring to an end a preliminary inquiry that had lasted almost a year, and cannot be taken as having belatedly supplied the objective and dispassionate review [page303] of the original charging decision that, in the trial judge's view, had never taken place. A stay of proceedings was appropriate in this case. The absence of the proper checks and balances between police and prosecutor led to an increase in the number of charges laid against the accused. The trial judge concluded that the Crown's loss of objectivity and improper motive will be "manifested, perpetuated or aggravated" through the continued prosecution of the charges to which these abuses of process gave rise. If the trial itself would not have occurred but for the abusive conduct, then the trial itself necessarily perpetuates the abuse. The only way to halt this continued prejudice to the accused is a stay of proceedings.

Cases Cited

By LeBel J.

Referred to: Canada (Minister of Citizenship and Immigration) v. Tobiass, [1997] 3 S.C.R. 391; R. v. O'Connor, [1995] 4 S.C.R. 411; R. v. Power, [1994] 1 S.C.R. 601; R. v. Conway, [1989] 1 S.C.R. 1659; R. v. Scott, [1990] 3 S.C.R. 979; Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307, 2000 SCC 44; United States of America v. Cobb, [2001] 1 S.C.R. 587, 2001 SCC 19; Boucher v. The Queen, [1955] S.C.R. 16; R. v. S. (S.), [1990] 2 S.C.R. 254; R. v. Seaboyer, [1991] 2 S.C.R. 577; R. v. Ewanchuk, [1999] 1 S.C.R. 330; R. v. Mills, [1999] 3 S.C.R. 668; R. v. Darrach, [2000] 2 S.C.R. 443, 2000 SCC 46; Elsom v. Elsom, [1989] 1 S.C.R. 1367; Stein v. The Ship "Kathy K", [1976] 2 S.C.R. 802; R. v. Oickle, [2000] 2 S.C.R. 3, 2000 SCC 38; R. v. Van der Peet, [1996] 2 S.C.R. 507.

By Binnie J. (dissenting)

R. v. Curragh Inc., [1997] 1 S.C.R. 537; Boucher v. The Queen, [1955] S.C.R. 16; Lemay v. The King, [1952] 1 S.C.R. 232; R. v. Stinchcombe, [1991] 3 S.C.R. 326; Elsom v. Elsom, [1989] 1 S.C.R. 1367; R. v. Carosella, [1997] 1 S.C.R. 80; Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3; R. v. Van der Peet, [1996] 2 S.C.R. 507; R. v. Bain, [1992] 1 S.C.R. 91; Nelles v. Ontario, [1989] 2 S.C.R. 170; R. v. Chamandy (1934), 61 C.C.C. 224; R. v. G.D.B., [2000] 1 S.C.R. 520, 2000 SCC 22; Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486; R. v. O'Connor, [1995] 4 S.C.R. 411; In re Sproule (1886), 12 S.C.R. 140; R. v. Jewitt, [1985] 2 S.C.R. 128; R. v. Beare, [1988] 2 S.C.R. 387; R. v. Power, [1994] 1 S.C.R. 601; Smythe v. The Queen, [1971] S.C.R. 680; R. v. T. (V.), [1992] 1 S.C.R. 749; R. v. Lyons, [1987] 2 S.C.R. 309; R. v. Keyowski, [1988] 1 S.C.R. 657; Canada (Minister of Citizenship and [page304] Immigration) v. Tobiass, [1997] 3 S.C.R. 391; R. v. Sweitzer, [1982] 1 S.C.R. 949; R. v. B. (C.R.), [1990] 1 S.C.R. 717; R. v. Osborn, [1971] S.C.R. 184; Rourke v. The Queen, [1978] 1 S.C.R. 1021; R. v. Conway, [1989] 1 S.C.R. 1659; R. v. Scott, [1990] 3 S.C.R. 979.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 24(1). Criminal Code, R.S.C. 1985, c. C-46, s. 577 [rep. & sub. c. 27 (1st Supp.), s. 115]. Criminal Code, S.C. 1953-54, c. 51, s. 138(2).

Authors Cited

Canada. Law Reform Commission. Working Paper 62. Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor. Ottawa: The Commission, 1990. Canadian Bar Association. Code of Professional Conduct. Ottawa: Canadian Bar Association, 1988. Nova Scotia. Department of the Attorney General. Independence, Accountability and Management in the Nova Scotia Public Prosecution Service: A Review and Evaluation. By Joseph A. Ghiz and Bruce P. Archibald. Halifax: The Department, 1994. Nova Scotia. Royal Commission on the Donald Marshall, Jr., Prosecution, vol. 1, Findings and Recommendations. Halifax: The Commission, 1989. Ontario. Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions. Toronto: The Committee, 1993. Ontario. The Commission on Proceedings Involving Guy Paul Morin: Report, vol. 2. Toronto: Ministry of the Attorney General, 1998. Paciocco, David M. "The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept" (1991), 15 Crim. L.J. 315. Québec. Ministère de la Justice. Crimes à caractère sexuel: Guide du poursuivant. Québec: Direction générale des poursuites publiques, 2000. Québec. Ministère de la Justice. Manuel de directives aux substituts du procureur général. Québec: Direction générale des affaires criminelles et pénales, 1988 (rév. 21 janvier 1997).

APPEAL from a judgment of the Nova Scotia Court of Appeal (1999), 179 N.S.R. (2d) 45, 137 C.C.C. (3d) 449, 28 C.R. (5th) 1, [1999] N.S.J. No. 293 (QL), allowing the Crown's appeal from a decision of the Nova Scotia Supreme Court (1998), 21 C.R. (5th) 366, 58 C.R.R. (2d) 283, [1998] N.S.J. No. 128 [page305] (QL). Appeal dismissed, Iacobucci, Major, Binnie and Arbour JJ. dissenting.

Edward L. Greenspan, Q.C., and Marie Henein, for the appellant. Robert Morrison, Q.C., and Heather Leonoff, Q.C., for the respondent. Robert J. Frater and Silvie Kovacevich, for the intervener the Attorney General of Canada. Mario Tremblay, for the intervener the Attorney General of Quebec. John J. Walsh, for the intervener the Attorney General for New Brunswick.

[Quicklaw note: Please see complete list of solicitors appended at the end of the judgment.]

The judgment of McLachlin C.J. and L'Heureux-Dubé, Gonthier, Bastarache and LeBel JJ. was delivered by

LeBEL J.

I. Introduction

1 This case brought before the Court allegations of prosecutorial misdeeds, allegations of sexual interference and the harsh light of publicity surrounding the man at the centre, Nova Scotia's former Premier, Gerald Regan. The appellant Regan was ultimately charged with 18 counts of rape, attempted rape, indecent assault and unlawful confinement involving 13 women. He has already faced trial on eight of these counts, involving three women, for which he was acquitted. At the time of this hearing, one charge involving a fourth woman was still awaiting trial. The remaining charges were stayed by the trial judge because of Regan's claim that the Crown prosecutor was out to get him. The Court of Appeal overturned the stay. The Crown, itself, has since stayed two of the charges, and seven counts of sexual assault against Regan are currently pending.

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2 The issue before this Court is whether the Crown and the police did indeed overstep their authority in the proceedings of this case, and if so, whether that abuse of the criminal justice process was so egregious as to warrant a stay of the proceedings. The ultimate question, as far as the appellant Regan is concerned, is whether or not he must return to trial to face the remaining charges of sex-related offences. Thus, the decision to uphold a stay of proceedings is a very serious one, which prevents, forever, the possibility of bringing charges of criminal behaviour before a judge and jury. In this case, the evidence does not disclose any serious abuse of process, or taint of the justice system, that would warrant such a drastic measure. I would dismiss Regan's appeal.

II. Facts

A. Overview

3 On March 15, 1995, Gerald Regan, by that time a former Premier of Nova Scotia, was charged with a long list of sexual offences, against a variety of women who had worked for or with him, dating back to the 1950s. The stories of alleged abuse had taken a long and winding path before finally surfacing. First, a CBC journalist spoke to a number of women who told of abusive acts they had allegedly suffered at the hands of the appellant. But that journalist did not broadcast the story. Several years later, while doing some research of his own, an avowed political foe of the appellant uncovered the information from the aborted news report. This informant took the stories to the police in July of 1993, and in September, an RCMP task force launched an investigation. During the investigation, a police officer responded to a reporter's request to confirm or deny that the appellant was under investigation. The police confirmed -- a public admission which was in violation of police policy to remain silent about individual suspects until charges are laid. More than 300 interviews later, and 18 months after the story first

[page307] broke about the Regan investigation, charges were laid.

B. The Charges

4 The decision to lay charges also has a convoluted history. At the conclusion of the police investigation, a report dated March 30, 1994 was submitted to the province's then Director of Public Prosecutions ("DPP"), John Pearson, with a request for his opinion about the laying of charges. The report identified 22 women complainants. Among them were six women who had been Regan's babysitters, one who had been his housekeeper, a political intern, a legislative page, a secretary, and a political reporter. The women were all young at the time of the alleged assaults, ranging in age from 14 to 24 years. One woman alleged she was raped when she was 14, two others alleged attempted rape. The other incidents involved sexual touching, exposure and kissing. The police report categorized the charges this way:

- three complainants who "may have been victims of sexual impropriety", but in the opinion of the police were not victims of criminal acts (although the acts showed a "modus operandi");
- six complainants who the police believed were victims of criminal offences, but who were "not willing to testify in a court of law";
- four complainants who were considered victims of criminal offences, but who did not want to testify as complainants, and were only willing to "co-operate by providing similar fact evidence at trial";
- and nine complainants of criminal acts who were willing to testify as complainants. Of these nine, [page308] one of them alleged the attack had occurred in Calgary, Alberta.

5 DPP Pearson responded to police by letter dated June 28, 1994, that he and two other prosecutors had reviewed the file. One of those was Susan Potts, then Senior Crown Attorney in charge of sexual assault prosecutions. Pearson recommended that charges should be laid involving four of the eight Nova Scotia-based complainants who were willing to testify. He chose the incidents which involved the most serious physical violations, including rape, attempted rape, and the one case where it was alleged the appellant had exposed his penis.

6 In the other four local cases of willing complainants, DPP Pearson recommended that the police not proceed with charges. These cases involved many similar accounts of the appellant trying to grope and "French kiss" the victim. DPP Pearson explained that although these acts would have been against the law at the time, "the allegations are minor in nature, especially when placed in the context of societal values at the time", and the "staleness" of the offences outweighed their "gravity". He thought that the minor charges could be sanctioned by proceeding against the more major ones, and he feared that otherwise the prosecution might appear to be a "persecution".

7 In addition, DPP Pearson advised that "the case against Regan would be significantly enhanced if some of the more recent incidents were proceeded with". He recommended that the

police re-contact the six women who had been victims of apparent criminal conduct, but were unwilling to testify. He made no recommendation about the complainants who had apparently been victims of criminal behaviour, but were only willing to give similar fact evidence. Finally, DPP Pearson recommended that the police contact Alberta authorities with regard to the Calgary-based incident. He advised the police that "you are not obliged to accept our opinion and [page309] that the final charging decision rests with you. We are also cognizant of the duties and responsibilities of Crown Counsel to consider whether or not it is appropriate to proceed with charges once they have been laid." He suggested that police investigators "meet with [Crown counsel] Susan Potts to finalize the wording of any charge [the police] decide to proceed with".

8 The police did not agree with DPP Pearson's charging recommendation. They were of the view that a more complete picture of the allegations against the appellant should be put before the court. Chief Superintendent Falkingham testified:

> ... over the several years I saw a pattern and an MO that Mr. Regan sexually assaulted, in my view, a number of young teenagers. ... The MO was with babysitters, the MO was with -- when he had an opportunity to be alone with a young girl, and I felt that that was all building into a large picture which indicated to me that there was a continuing criminal offence in my mind, together -- as a global investigation.
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> ...
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> My view is the matter of charges had to involve the large number of complainants and as a result of them -- the continued offences over the years... .

9 After the Crown joined police in re-interviewing most of the original complainants, 16 counts for sex-related offences, involving 11 women, were laid against the appellant on March 15, 1995. On May 30, 1995, a revised information was sworn, which added two new complainants and three new counts, for a total of 19 counts related to 13 women.

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10 The matter proceeded to a preliminary hearing in April 1996. One year later, the Crown decided to prefer a direct indictment. In that final charging decision, one complainant was dropped, a new one was added (count 16), and the charges concerning a third were amended to drop one count, bringing the final tally to 18 counts of sex-related offences, involving 13 women, laid against the appellant.

C. Crown Conduct

11 After DPP Pearson's written recommendations, Crown Potts met with police on July 15, 1994. At that recorded meeting, Crown Potts suggested that it would not be "advisable" that charges be brought before a particular judge, because she thought he would have political ties to the appellant. Instead, she said she would "keep monitoring the court docket to see who is

sitting when and what would be in our best interest" -- an exercise commonly known as "judge shopping".

12 At the same meeting, Potts requested to read all the investigation reports, because "this would give her a clear picture of what was actually going on". Notes of a meeting on January 17, 1995, attended by the RCMP Chief Superintendent on the case, confirmed that Potts had by then re-read "the evidence and the victims' statements". Police and Crown then agreed that six complainants reluctant to testify "have to be re-interviewed". In the end, police and Crown counsel together re-interviewed many of the original 22 complainants, as well as five new women who came forward after the Pearson letter.

13 The purpose of the re-interviews was "[f]irstly and primarily, to provide information about the Court process to potential complainants so that they could make an informed decision as to their involvement in these proceedings; and secondly, [page311] to make assessments of credibility about these witnesses, including their capacity for recall and general demeanor issues, and to prepare for a preliminary inquiry". (Trial submissions of the Crown, Appellant's Record, p. 1089)

14 The re-interviews included 16 of the original 22 complainants: four of the six reluctant witnesses whom DPP Pearson had recommended should be re-approached; three of the four women only willing, at first, to give similar fact evidence; three of the four complainants for whom Pearson had recommended laying charges (the fourth refused to proceed further); all four willing complainants whom the police wanted to charge but for whom DPP Pearson had recommended that no charge be laid; the complainant in the Alberta-based incident; and one of the three complainants for whom, at first, it was thought there was no criminal offence.

15 Crown Potts was removed from the prosecution of this case by the time the preliminary inquiry began in April 1996. Crown Adrian Reid stepped in as lead counsel at the preliminary inquiry and trial. Crown Reid became involved with the case in December 1995 after charges were laid.

16 Citing the cumulative effect of this Crown behaviour combined with the police premature identification of him as a suspect, the appellant sought a global stay of all of the charges. At trial, a partial stay -- 9 of the 18 counts -- was granted.

III. Judicial History

A. Nova Scotia Supreme Court (1998), 21 C.R. (5th) 366

17 Michael MacDonald A.C.J. identified that the appellant was not claiming an abuse of process which had tainted the fairness of the trial, and was [page312] therefore seeking relief under the so-called residual category of procedural abuse, which will warrant a stay of proceedings. MacDonald A.C.J. noted, however, that the remedy of a stay remains reserved for only the clearest of cases, where it is the only remedy available to counter the effects of the abuse (Canada (Minister of Citizenship and Immigration) v. Tobiass, [1997] 3 S.C.R. 391).

18 MacDonald A.C.J. adopted the test for a stay articulated in Tobiass, at para. 90, where the

Court held that in order to grant a stay, two criteria must be satisfied: (1) that the prejudice will be manifested, perpetuated or aggravated through the conduct of the trial or by its outcome, and (2) that no other remedy is reasonably capable of removing the prejudice flowing from the abuse. The Court added a third factor which should be considered in cases where it remains unclear whether the abuse is sufficient to warrant the stay. It requires courts to engage in a weighing of the societal interests involved. Courts must then "balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits. This is not to say, of course, that something akin to an egregious act of misconduct could ever be overtaken by some passing public concern" (Tobiass, at para. 92). MacDonald A.C.J. acknowledged that this third criterion would play a significant part in his analysis. In approaching the issue, MacDonald A.C.J. noted that he had to weigh the cumulative effect of any alleged wrongdoing. He was also mindful that abuse of process need not be driven by evidence of mala fides to warrant a stay, although such evidence was certainly relevant.

19 MacDonald A.C.J. reviewed the respective roles of the police and of the Crown and noted that while performing independent tasks, they must work well together. A strict separation of their functions, however, creates a safeguard against misconduct by either one. This system of checks and balances is achieved by drawing a clear line between the investigation of charges, and their prosecution. He [page313] held that police in Nova Scotia are "exclusively responsible for the investigation of crime and deciding what if any charges are to be laid... . Here, the Crown's role is limited to simply providing legal advice; advice which is not binding on the police" (paras. 63 and 65). In contrast, the Crown must function as "a quasi judicial minister of justice who must also serve as advocate" (para. 67).

20 The appellant submitted a list of allegations of police and Crown misconduct, including the premature formation of a police task force to investigate allegations against Regan, and questionable investigative techniques and arrest procedures. MacDonald A.C.J. concluded that these actions had little impact on the appellant. He did consider that the premature confirmation of Regan as a suspect in the police investigation was clearly wrong, as it contravened express police policy. He was troubled by this serious error in judgment.

21 MacDonald A.C.J. then reviewed the allegations of Crown misconduct. He found clear evidence of Crown Potts' blatant attempt at judge shopping, and found this offensive and most troubling. For MacDonald A.C.J., this gave the appearance of a Crown Attorney who was attempting to secure a conviction at all costs. He concluded that Potts' behaviour had the effect of tainting her entire involvement in the process.

22 The pre-charge Crown interviews of complainants were, however, the most contentious issue before MacDonald A.C.J. Crown counsel, particularly Ms. Potts, became heavily involved with pre-charge interviewing. He found that the practice of [page314] pre-charge Crown interviewing in this country is not entirely rejected, but where used, its scope is narrow. MacDonald A.C.J. observed that in the provinces like New Brunswick, where pre-charge Crown interviews are done, they serve only as a screen to protect a suspect from the humiliation of being charged, if charges are later dropped or stayed. In this case, he found that the purpose for at least some of the pre-charge Crown interviews was to have reluctant complainants change

their minds and come forward to lay charges. MacDonald A.C.J. held that protection of the appellant was never a factor motivating the Crown's pre-charge interviews.

23 As a result, MacDonald A.C.J. found that this process had an impact on the number of charges that were ultimately laid. He held that the Crown was integrally immersed in the decision-making about charges. Cooperation led to consensus and this collaboration homogenized the process which then became a joint charging decision. The Crown had lost its objectivity: the effect was to deny the appellant a hard, objective second look at the charging decision, which is fundamental to the role of the Crown. In MacDonald A.C.J.'s view (at para. 124),

> [i]t is impossible to retain the requisite level of objectivity by conducting lengthy (and no doubt emotional) pre-charge interviews with the complainants. Human nature just will not allow it. By doing so you hear first hand only one side of the story. How can you then objectively review the process which includes a consideration of the rights of the applicant?

Nevertheless, MacDonald A.C.J. found that the Crown did not get involved in the investigation, and apart from Crown Potts' inexcusable comment about judge shopping, all other Crown counsel involved in the case were well-intentioned throughout the [page315] process, yet they simply lost perspective during the charging procedure.

24 MacDonald A.C.J. found that the Crown had not acted in bad faith when preferring the direct indictment. The preliminary inquiry was very lengthy. If the Crown had been ill-motivated, it could have preferred the direct indictment at the outset or at least sooner than it did.

25 When viewing his concerns cumulatively, about judge shopping, the Crown's pre-charge interviews and to a lesser extent, the RCMP's premature confirmation that Regan was under investigation, in total this was not one of those clearest of cases of procedural abuse that demanded a global stay of all the charges. Instead, on a case-by-case review, he decided that for the nine charges concerning the most serious allegations there was a strong societal interest in proceeding with the prosecution.

26 However, for the less serious charges, MacDonald A.C.J. pointed out that the Pearson Report was detailed and comprehensive and spoke volumes about what the Crown originally thought was fair to the appellant. The Crown should not be seen to significantly change its position without valid reason. He held that the Crown did change its position: the direct indictment proceeded with charges involving at least four and arguably six complainants who were initially on Mr. Pearson's recommended list to exclude. He concluded that the Pearson recommendations should be given significant deference. He followed the Pearson charging recommendation and also applied its criteria to charges which post-dated the Pearson report. In the end, MacDonald A.C.J. concluded by staying the remaining 9 of the 18 counts before him.

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27 MacDonald A.C.J. added a final comment about count 16, which was among those he

stayed. He held that the Crown had been motivated by an improper purpose in proceeding with this charge, which was first laid as part of the direct indictment. Count 16 was similar in fact to the incident alleged to have occurred in Alberta. The Alberta allegation could not be pursued in Nova Scotia. MacDonald A.C.J. was suspicious that the Crown's eagerness to put the Alberta facts before a Nova Scotia court motivated the Crown to lay this new, similar, Nova Scotia-based charge. MacDonald A.C.J. considered this an improper purpose which irretrievably tainted this count.

B. Nova Scotia Court of Appeal (1999), 179 N.S.R. (2d) 45

1. Cromwell J.A. (Roscoe J.A. concurring)

28 Cromwell J.A., for a majority of the Court of Appeal, found two significant errors in the trial judge's reasoning. First, the trial judge erred in law by not asking himself whether the continuation of the prosecution of the charges would manifest, perpetuate or aggravate the prejudice caused by the Crown's failure to properly exercise its discretion at the charging stage. Second, the trial judge also erred by treating a judicial stay of proceedings as a remedy for past misconduct.

29 The narrow, residual category of abuse of process applied in this case, because the trial judge had rejected all the appellant's arguments that he could not receive a fair trial. Cromwell J.A. observed that there must be exceptional circumstances here to warrant the granting of a stay, as "[o]nly in rare and unusual circumstances could holding a fair trial, of itself, be damaging to the integrity of the judicial process" (para. 108).

[page317]

30 Cromwell J.A. recounted the three-step analysis for this residual category (Tobiass, supra). At the first step, the accused must show that there has been misconduct, or circumstances which have arisen apart from misconduct, which render the continuation of the prosecution damaging to the integrity of the judicial process. At the second step, the court must balance the integrity of the judicial process against the societal interest in the prosecution of alleged crimes. This is done by considering whether the prejudice caused by the abuse will be manifested, perpetuated or aggravated by the continuation of the prosecution. If so, then the court considers whether another remedy, short of a stay, is reasonably capable of removing the prejudice. Only if the abuse is ongoing, and no other remedy is tenable, does the balance favour a judicial stay.

31 Further analysing the elements of the second stage, Cromwell J.A. emphasized that the remedy of a stay is prospective rather than retroactive: "a stay of proceedings is not approached as a remedy to redress a wrong that has already been done, but rather as a remedy to prevent further damage to the integrity of the judicial process in the future caused by the continuation of the prosecution" (para. 116). The ongoing harm might be repeated in the future, or might plague the process in the sense that the misconduct is so egregious that the mere going forward with the proceedings is offensive. To these examples in the case law, Cromwell J.A. added a third possibility of ongoing prejudice. This would occur in cases where "the conduct has the effect of

setting the prosecution on a fundamentally different path than it would otherwise have followed" (para. 118).

32 The third step in the analysis is only undertaken if, after completing the analysis at the first two stages, it is still unclear whether a stay is required. The third stage reconsiders the balance between society's interest in proceeding, and the interests served by granting the stay. At this stage, however, the emphasis is on whether the misconduct, on its own, is so egregious that a stay is warranted. Cromwell J.A. pointed out that in theory, such cases might exist, but in practice, it is unlikely that such [page318] egregious behaviour would not meet the criterion of ongoing harm at step two. Thus Cromwell J.A. concluded that to grant the remedy of a stay, evidence of ongoing harm from the abuse will almost always be key.

33 Cromwell J.A. noted that abuse of process cases are dependent on their facts. The trial judge made specific findings of misconduct on four matters: the premature announcement of Regan as a suspect, the judge-shopping comment, the Crown's loss of objectivity at the charging stage, and a fourth specific finding relating to count 16, the so-called similar fact count. Cromwell J.A. went on to outline what the trial judge had specifically not found, including: the Crown was not improperly involved in the investigation; the police did not act wrongly in laying the charges; the Crown had not acted with mala fides or with an improper purpose when preferring the direct indictment; the Crown's loss of objectivity did not extend beyond the charging stage; and the Crown did not encourage the police to lay more charges nor did the Crown disregard police freedom and independence to make a decision on charges.

34 Generally, the trial judge appeared to leave out any direct consideration of the second step in the stay inquiry. There was no finding by the trial judge of a likelihood of future or ongoing misconduct, nor did he find that the cumulative abuse was so egregious, in itself, that a stay was required. Cromwell J.A. added: "However, he appears to have thought that the loss of objectivity had ongoing impact because it may have resulted in more charges proceeding than would have been prosecuted had objectivity been retained" (para. 131). Nevertheless, the trial judge expressly stated that the abuse was not serious enough to warrant a global stay. Furthermore, the trial judge gave no explicit consideration to whether [page319] another remedy was capable of removing the prejudice.

35 Cromwell J.A. proceeded to analyze each of the trial judge's findings of abuse. First was the misconduct found in the laying of count 16, the similar fact count. The trial judge concluded that count 16 was added to the direct indictment because of an improper motive. Cromwell J.A. found that this finding was contradicted by the judge's other findings that, aside from Ms. Potts, no Crown had acted improperly or with bad faith, and their perspective was lost only at the charging stage, "the time around which the first charges were laid in March of 1995" (para. 129) (not at the direct indictment, when count 16 was added). There was nothing inherently objectionable in the Crown considering questions of the admissibility of evidence and its impact on the prospects of conviction when deciding to proceed with charges. Cromwell J.A. concluded the evidence surrounding count 16 disclosed no abuse, and thus failed step one of the stay analysis. The trial judge had erred in ordering a stay of count 16.

36 Next Cromwell J.A. dealt with the finding of the loss of Crown objectivity. The trial judge had

reached two independent conclusions: at the charging stage, the Crown had lost its objectivity, and at the direct indictment stage, the Crown decision was proper. Cromwell J.A. found these two holdings could not stand together. If the Crown's discretion to prefer the direct indictment was properly exercised, it must be taken to have been exercised with proper regard to the public interest. This was consistent with the trial judge's finding that the Crown's loss of objectivity was confined to the charging stage. [page320] Cromwell J.A. also noted that virtually all of the specific findings of misconduct related exclusively or primarily to Ms. Potts. Her involvement in the matter ended at the time of the preliminary inquiry and before the direct indictment was preferred. Cromwell J.A. found that the trial judge erred in generalizing about misconduct by the Crown, given the narrowness of the specific conclusions that the loss of objectivity was at the charging stage, and misconduct was attributed only to Crown Potts.

37 Cromwell J.A. disagreed with the trial judge's finding that collaboration between the Crown and the police in the charging decision is wrong. He found no basis in law for such a conclusion. Provided that the independence and distinct roles of the police and the Crown are respected and that no improper purpose is being pursued, it is desirable for the Crown and police to avoid unnecessary disagreements about whether charges should proceed.

38 The trial judge had reasoned that human nature makes it impossible for the Crown to maintain objectivity if they interview witnesses pre-charge. Cromwell J.A. rejected this. If it were so, the Crown could never conduct witness interviews, pre- or post-charge, and still remain objective. Cromwell J.A. concluded instead that "[t]he obligation to be fair-minded is ongoing" (para. 158). There was nothing "inherently insidious" about the Crown's pre-charge interviews in this case, and Cromwell J.A. proceeded on the narrower ground identified by the trial judge that the Crown's pre-charge interviews were conducted without objectivity because they were not done "for the purpose of reviewing whether the charges should proceed in the public interest" (para. 163). In other words, the Crown did something more than charge screening in this case. [page321] However, Cromwell J.A. added that neither the trial judge nor he found anything wrong with the Crown encouraging, by ethical means, reluctant complainants to come forward, especially in cases of sexual assault, because those victims' confidence in the justice system is especially low.

39 Cromwell J.A. noted that the loss of Crown objectivity constituted the central concern regarding abuse of process in this case. The improper police announcement, and the judge-shopping comment appeared to be incidental to the decision to stay the nine charges. As a result, Cromwell J.A. did not deal with these issues at any great length.

40 Turning to the test for a stay of proceedings, Cromwell J.A. was of the view that the trial judge erred fundamentally at step two of this analysis because he focussed on the abuse rather than on the future harm to the integrity of the justice system. The trial judge did not find that the prejudice flowing from the abuse would be manifested, perpetuated or aggravated by the trial, nor did he turn his mind to any acceptable remedy short of a stay. However, the trial judge's reasons were consistent with a conclusion that Regan was facing more charges than he might have been, if the Crown had not lost its objectivity. In this sense the abuse may have had ongoing effects. But granting a stay on this basis overlooked the proper preferring of the direct indictment.

41 Cromwell J.A. concluded that the trial judge erred in law by relying so heavily on the Pearson recommendation as a guide to his decision to stay some of [page322] the charges. The trial judge's approach intended to restore Regan to the position he would have enjoyed but for the Crown's subsequent loss of objectivity. This was wrong, as it was a retroactive cure for past misdeeds, instead of a prospective consideration of whether the abuse was ongoing, and what remedy would be best to address it. The Pearson letter had not crystallized the Crown's position on the charging decision -- it was merely advice in response to police questions, and it did not even deal with three new charges, from five new complainants who surfaced after the Pearson letter.

42 Furthermore, the trial judge had not expressly considered the issue of whether another remedy was capable of removing the prejudice. Cromwell J.A. was of the view that this criterion could be satisfied without the need for a stay in this case. Crown Potts' removal from the case and the proper preferring of the direct indictment accrued to provide sufficient remedies to any past misconduct, and to prevent any future harm to the integrity of the judicial process.

43 From the errors committed in the stay inquiry, Cromwell J.A. concluded that the trial judge must have been unsure about the necessity of a stay at the completion of step two, and proceeded on to the balancing exercise at step three, on a case-by-case basis. In contrast, Cromwell J.A. ruled that the inevitable conclusion was that neither of the two criteria at the second stage of the test for a stay of proceedings was satisfied. However, if he was in error and it was necessary to go on to the third stage, Cromwell J.A. thought the trial judge erred in failing to properly consider all of the interests affected by the cases he stayed. It is impossible to do the required balancing of interests if only one side of the scale is considered. The trial judge had considered Regan's interest in granting the stay, but did not consider the societal interests in proceeding. Cromwell J.A. was especially sensitive to the fact that three of the stayed counts involved teenagers, employed as babysitters or a housekeeper by the appellant, and [page323] he opined that, in such situations, the integrity of the justice system might be harmed by not proceeding to trial. In the result, he allowed the appeal and set aside the stays of all nine counts.

2. Freeman J.A. (dissenting)

44 Freeman J.A. found that this case turned on the need for police and the Crown to observe the demarcation line between their functions, particularly at the pre-charge stage. The trial judge had found that the police decision to charge and the Crown decision to prosecute the charge had been scrambled together, or homogenized. As a result, neither police nor Crown was able to discharge their constitutional role of protecting the accused and the public perception of the administration of justice. Freeman J.A. reviewed the trial judge's decision and found no fault with the careful manner in which the trial judge instructed himself respecting the role of the police and of the Crown.

45 A trial judge has superior familiarity with the context of a case. This is an important reason for an appeal court to show the trial decision deference. Freeman J.A. observed that the trial judge was shocked by the judge-shopping incident and even more so by the Crown's

assumption of the police role in conducting pre-charge interviews to encourage witnesses to pursue charges. The trial judge had also noted the context in which this had all occurred. Following the tragedy of the wrongful imprisonment of Donald Marshall, Jr., the criminal justice system in Nova Scotia was criticized for treating prominent people more favourably. The appellant argued that Regan was the victim of a backlash, specifically that the authorities in this case overreacted by singling him out for special, unfavourable [page324] treatment. Freeman J.A. agreed that any citizen knowledgeable of the principles and facts involved would be equally shocked.

46 Freeman J.A. was of the view that the trial judge had correctly applied the legal principles to determine that the appellant had been denied a dispassionate review of the charging decision, by an objective Crown. The result was that the accused faced a multiplicity of charges which had been determined without taking societal interests, including those of decency and fair play, into account. The trial judge had properly found this one of the clearest of cases to warrant a stay of some of the charges. A reduction in the number of charges by pruning out the less serious ones, and by accommodating society's interest by proceeding with the more serious criminal charges of rape and attempted rape, was not only the obvious remedy, but the only effective one. In conclusion, Freeman J.A. found that the trial judge had not misdirected himself and his decision was not so clearly wrong as to amount to an injustice.

IV. Legislation

47 Canadian Charter of Rights and Freedoms

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Criminal Code, R.S.C. 1985, c. C-46

> 577. In any prosecution,
>
> [page325]
>
> (a) where a preliminary inquiry has not been held, an indictment shall not be preferred, or
>
> (b) where a preliminary inquiry has been held and the accused has been discharged, an indictment shall not be preferred or a new information shall not be laid
>
> before any court without,

(c) where the prosecution is conducted by the Attorney General or the Attorney General intervenes in the prosecution, the personal consent in writing of the Attorney General or Deputy Attorney General, or

(d) where the prosecution is conducted by a prosecutor other than the Attorney General and the Attorney General does not intervene in the prosecution, the written order of a judge of that court.

V. Issues

48 1. Did the conduct of the Crown and police amount to an abuse of process under s. 7 of the Canadian Charter of Rights and Freedoms?

2. Was a partial stay of proceedings warranted?

3. Was the Court of Appeal entitled to interfere with the trial court's decision to grant a partial stay?

VI. Analysis

A. Abuse of Process

49 In the Charter era, the seminal discussion of abuse of process is found in R. v. O'Connor, [1995] 4 S.C.R. 411. The doctrine of abuse of process had been traditionally concerned with protecting society's interest in a fair process. However, in O'Connor, L'Heureux-Dubé J., writing for a unanimous Court on this issue (Lamer C.J. and Sopinka and Major JJ. dissenting on the application of law to the facts), subsumed the common law doctrine abuse of process into the principles of the Charter in the following terms, at para. 63:

> [I]t seems to me that conducting a prosecution in a manner that contravenes the community's basic sense of [page326] decency and fair play and thereby calls into question the integrity of the system is also an affront of constitutional magnitude to the rights of the individual accused.

50 L'Heureux-Dubé J. also acknowledged the existence of a residual category of abuse of process in which the individual's right to a fair trial is not implicated. She described this category, which is invoked in the present appeal, as follows in O'Connor, at para. 73:

> 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.

L'Heureux-Dubé J. thus held that now, when the courts are asked to consider whether the judicial process has been abused, the analysis under the common law and the Charter will dovetail (see O'Connor, at para. 71). In this manner, while it acknowledged that the focus of the

Charter had traditionally been the protection of individual right, the O'Connor decision reflected and accommodated the earlier concepts of abuse of process, described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (R. v. Power, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (R. v. Conway, [1989] 1 S.C.R. 1659, at p. 1667). In an earlier judgment, McLachlin J. (as she then was) expressed it this way:

> ... abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice. I add that I would read these criteria cumulatively.
>
> (R. v. Scott, [1990] 3 S.C.R. 979, at p. 1007)

[page327]

51 Under the Charter, the violation of specific fair trial rights may also constitute an abuse of process, as will a breach of the more general right to fundamental justice (see O'Connor, at para. 73).

52 Finally, this Court's most recent consideration of the concept of abuse of process arose in the administrative context. In Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307, 2000 SCC 44, it was held that a 30-month delay in processing a sexual harassment complaint through the British Columbia human rights system was not an abuse of process causing unfairness to the alleged harasser. For the majority, Bastarache J. came to this decision on the basis that abuse of process has a necessary causal element: the abuse "must have caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected" (para. 133). In Blencoe's case, it was held that the humiliation, job loss and clinical depression which he suffered did not flow primarily from the delay, but from the complaint itself, and the publicity surrounding it (Blencoe, at para. 133; see also United States of America v. Cobb, [2001] 1 S.C.R. 587, 2001 SCC 19).

B. Stay of Proceedings

53 A stay of proceedings is only one remedy to an abuse of process, but the most drastic one: "that ultimate remedy", as this Court in Tobiass, supra, at para. 86, called it. It is ultimate in the sense that it is final. Charges that are stayed may never be prosecuted; an alleged victim will never get his or her day in court; society will never have the matter resolved by a trier of fact. For these reasons, a stay is reserved for only those cases of abuse where a very high threshold is met: "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'" (O'Connor, supra, at para. 68).

[page328]

54 Regardless of whether the abuse causes prejudice to the accused, because of an unfair trial, or to the integrity of the justice system, a stay of proceedings will only be appropriate when two criteria are met:

(1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and

(2) no other remedy is reasonably capable of removing that prejudice. [O'Connor, at para. 75]

The Court's judgment in Tobiass, at para. 91, emphasized that the first criterion is critically important. It reflects the fact that a stay of proceedings is a prospective rather than a retroactive remedy. A stay of proceedings does not merely redress a past wrong. It aims to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole, in the future.

55 As discussed above, most cases of abuse of process will cause prejudice by rendering the trial unfair. Under s. 7 of the Charter, however, a small residual category of abusive action exists which does not affect trial fairness, but still undermines the fundamental justice of the system (O'Connor, at para. 73). Yet even in these cases, the important prospective nature of the stay as a remedy must still be satisfied: "[t]he mere fact that the state has treated an individual shabbily in the past is not enough to warrant a stay of proceedings" (Tobiass, at para. 91). When dealing with an abuse which falls into the residual category, generally speaking, a stay of proceedings is only appropriate when the abuse is likely to continue or be carried forward. Only in "exceptional", "relatively very rare" cases will the past misconduct be "so egregious that the mere fact of going forward in the light of it will be offensive" (Tobiass, at para. 91).

56 Any likelihood of abuse which will continue to manifest itself if the proceedings continue then must be considered in relation to possible remedies less [page329] drastic than a stay. Once it is determined that the abuse will continue to plague the judicial process, and that no remedy other than a stay can rectify the problem, a judge may exercise her or his discretion to grant a stay.

57 Finally, however, this Court in Tobiass instructed that there may still be cases where uncertainty persists about whether the abuse is sufficient to warrant the drastic remedy of a stay. In such cases, a third criterion is considered. This is the stage where a traditional balancing of interests is done: "it will be appropriate to balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits". In these cases, "an egregious act of misconduct could [never] be overtaken by some passing public concern [although] ... a compelling societal interest in having a full hearing could tip the scales in favour of proceeding" (Tobiass, at para. 92).

C. Application to the Case at Bar

1. Abuse of Process

58 In the case at bar, the trial judge was concerned with the cumulative effect of three elements of the proceedings brought against the appellant: "These include judge shopping; the Crown's pre-charge interviews, and to a lesser extent, the R.C.M.P.'s premature press release confirming the investigation" (para. 132). In addition to these events early in the proceedings, the trial judge found that the one count added to the direct indictment (count 16) was laid for an improper purpose.

(a) Judge Shopping

59 It is important to understand exactly what the Crown said and did in relation to judge shopping. There is direct evidence that the Senior Crown Attorney assigned to this case during the police investigation said in a meeting with police that [page330] the laying of charges should be delayed to avoid bringing them before a particular judge, whom she feared might be sympathetic to the accused. This impropriety was exacerbated by her comment that she would monitor the court docket, looking for a different judge who would be more sympathetic to the laying of charges against the accused. There is no evidence that the comment was made more than once, and no evidence that it was acted upon. Nevertheless, it was said to police involved in the case, and set a tone of overzealous and unfair pursuit of a prosecution against the accused.

60 This Court has adverted to the impropriety of trying to influence the outcome of a proceeding by trying to "select" the judge. Where it appeared that the Crown had abandoned a case before one judge to avoid an unfavourable ruling, and then reinstated charges at a new trial before a new judge, McLachlin J. was quick to point out the affront to the integrity of the system (Scott, supra, at pp. 1008-9):

> The concern with "judge-shopping" arises from the use of the stay to avoid the consequences of an unfavourable ruling. Normally, Crown counsel faced with an unfavourable ruling is expected to accept it. The remedy is by way of appeal... .
>
> Such conduct also raises concern for the impartiality of the administration of justice, real and perceived. The use of the power to stay, combined with reinstitution of proceedings as a means of avoiding an unfavourable ruling, gives the Crown an advantage not available to the accused.

61 The judge shopping in this case was equally offensive. It illustrated another inequality between the Crown and defence, in that only the Crown has the power to influence which judge will hear its case by manipulating the timing of the laying of the charge. Even if this advantage was not ultimately exploited, it must be reasserted that judge shopping is unacceptable both because of its unfairness to the accused, and because it tarnishes the reputation [page331] of the justice system. Furthermore, it should not infect the investigative process by involving police in a conspiracy to manipulate the process. The trial judge quite properly was seriously troubled by this evidence. He nevertheless was mindful that this single comment was not acted upon, and did not find it determinative in his ultimate conclusion that the process against the accused

had been abusive to the point of necessitating a stay of proceedings.

(b) The Police/Crown Relationship

62 The appellant contends that a bright line must be drawn at the stage where charges are laid, in order to keep the functions of the police separate from those of the prosecutors. This separation, he argues, is the only way to maintain the Crown's crucial objectivity when reviewing the appropriateness of charges. The trial judge adopted this approach in assessing the administration of justice now practised in Nova Scotia. Citing various studies on the police/Crown relationship, MacDonald A.C.J. identified the police role as limited to pure investigation pre-charge, and the subsequent decision of whether to lay a charge. This reserves for the Crown the role of "Minister of Justice", in the sense that the Crown must be both ardent prosecutor once charges have been laid, and objective defender of the general public interest in determining whether to prosecute the charges recommended by police. Recognizing that in practice the police and Crown must still work together, MacDonald A.C.J. nevertheless emphasized that "the need for co-operation should never interfere [with] their individual autonomy" (para. 72).

63 The trial judge determined that the practice of Crown pre-charge interviewing in this country is [page332] "non-existent to rare", and is only done for the benefit of the accused, that is for the purpose of screening out frivolous or unsupportable charges: "[o]n the occasions when it is performed, it serves as a screen designed to protect an accused from going through the embarrassment (humiliation) of being charged only to later have the charges dropped or stayed" (para. 117). Any other pre-charge contact with witnesses would unavoidably undermine the Crown's objectivity -- MacDonald A.C.J. reasoned that human nature would prevent the Crown from considering any interest other than that of the witness. The trial judge concluded that in this case, every charge laid subsequent to a Crown interview was suspect, and only DPP Pearson's paper-based assessment of the charges was objective.

64 The question before this Court is whether the Crown's objectivity is necessarily compromised if Crown counsel conduct pre-charge interviews of witnesses without the single, express intention of screening out charges before they are laid. In essence, this Court has been asked to consider whether, at law, Crown prosecutors must be prevented from engaging in wide-ranging pre-charge interviews in order to maintain their essential function as "Ministers of Justice". First, it is my view that different provinces have answered this question differently, and that the trial judge erred in his evaluation of the standard practice across the country on this issue. Furthermore, while the police tasks of investigation and charge-laying must remain distinct and independent from the Crown role of prosecution, I do not think it is the role of this Court to make a pronouncement on the details of the practice of how that separation must be maintained.

65 The seminal concept of the Crown as "Minister of Justice" is expressed by this Court's judgment in Boucher v. The Queen, [1955] S.C.R.16, in which Rand J. explained, at pp. 23-24:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is [page333] to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility.

The issue before the Court in Boucher, inter alia, was whether the Crown counsel's personal opinion about the guilt of the accused was improper. It was so found. The exposition of the facts in Boucher helps to draw the distinction between Crown involvement with the case, pre-charge, and whether that inevitably leads to a loss of the Crown's necessary objectivity (at p. 27, per Locke J.):

> The [Crown's] statements were calculated to impress upon the jury the asserted fact that, before the accused had been arrested, the Crown, with its experts, had made a thorough investigation and was satisfied that he was guilty beyond a reasonable doubt. Introduced into the record in this manner, there could be no cross-examination to test their accuracy.
>
> ...
>
> The Crown prosecutor, having improperly informed the jury that there had been an investigation by the Crown which satisfied the authorities that the accused was guilty, thus assured them on his own belief in his guilt and employed language calculated to inflame their feelings against him. [Emphasis added.]

Based on the underlined sections, it appears that the Crown was involved in the investigation, before the arrest, thus presumably pre-charge. Yet this alone was not troublesome to the Court. Instead, it was the subsequent Crown's personal conclusion drawn from this investigation, namely that the accused was guilty, which was then put before the jury in the manner of evidence, which the Court found inappropriate. This action revealed that the Crown had lost his objective stance as a Minister of Justice in [page334] the process. The example, I believe, helps to differentiate between the fact of pre-charge involvement by the Crown, and the loss of objectivity which may result.

66 The need for a separation between police and Crown functions has been reiterated in reports inquiring into miscarriages of justice which have sent innocent men to jail in Canada. The Royal Commission on the Donald Marshall, Jr., Prosecution, vol. 1, Findings and Recommendations (1989) ("Marshall Report") speaks of the Crown's duty this way: "In addition to being accountable to the Attorney General for the performance of their duties, Crown prosecutors are accountable to the courts and the public. In that sense, the Crown prosecutor occupies what has sometimes been characterized as a quasi-judicial office, a unique position in our Anglo-Canadian legal tradition" (pp. 227-28). The Marshall Report emphasizes that this role must remain distinct from (while still cooperative with) that of the police (at p. 232):

> We recognize that cooperative and effective consultation between the police and the Crown is also essential to the proper administration of justice. But under our system, the policing function -- that of investigation and law enforcement -- is distinct from the prosecuting function. We believe the maintenance of a distinct line between these two functions is essential to the proper administration of justice.

67 I note that investigation is not synonymous with interviewing for the purposes at issue in this appeal. The trial judge made a clear ruling that the Crown did not engage in "investigation" in this case. The distinct line appears to be that police, not the Crown, have the ultimate responsibility for deciding which charges should be laid. This can still be true after the Crown has made its own pre-charge assessment, and when the two arms of the criminal justice system disagree on whether to lay charges. (See testimony of Philip Stenning, Appellant's Record, [page335] at p. 975.) The Nova Scotia Solicitor General's Directive on Laying of Charges (1990), which responded to the Marshall inquiry, states:

> All Police Departments must implement the following protocol for the resolution of disputes between police and Crown over the laying of criminal charges:
>
> (i) no charge shall be laid, contrary to the advice of a Crown Prosecutor, until discussion concerning the matter has taken place between the Police Department and the Crown Prosecutor;
>
> (ii) if there is no resolution of the disagreement at that level, the matter must be referred to a senior police official of the department, who will discuss the matter with the Regional Crown Prosecutor;
>
> (iii) if, following such discussion, the police remain of the view that a charge is warranted, the charge shall be laid.

68 The protocol encourages a police and Crown joint assessment pre-charge: there is nothing in these recommendations that indicates that the separation between police and Crown functions must be implemented by preventing Crown contact with potential witnesses pre-charge. Therefore, while the Marshall Report speaks of a distinct line between police and Crown functions, it is one that may be drawn conceptually and figuratively, through conscious practice, rather than literally by the act of laying charges.

69 The appellant also drew the Court's attention to the 1998 Report of the Commission on Proceedings Involving Guy Paul Morin, which inquired into another recent instance of wrongful conviction, after which Morin spent several years in jail, before his innocence was recognized. This inquiry focussed on the Crown's failure of objectivity throughout the process as a result of too close contact between the [page336] Crown counsel and police. Justice Kaufman, who wrote the report, concluded that, at the root of the problems in the Morin case there had been a failure by the Crown prosecutor to assess objectively the reliability of evidence, before charges were laid (vol. 2, at pp. 909, 911 and 1069-70):

> The bottom line is this: [the Crown] failed to objectively assess the reliability of evidence which favoured the prosecution. It is difficult to determine the precise extent to which

> each of the prosecutors appreciated just how unreliable some of the evidence tendered was... .
>
> The prosecutors showed little or no introspection about these contaminating influences upon witnesses for two reasons: one, the evidence favoured the prosecution; this coloured their objectivity; two, their relationship with the police which, at times, blinded them, and prevented them from objectively and accurately assessing the reliability of the police officers who testified for the prosecution... .
>
> It is also understandable that this belief [of Morin's guilt] would affect the prosecutors' assessment of their own evidence and the evidence tendered by the defence. Their failing was that this belief so pervaded their thinking that they were unable, at times, to objectively view the evidence, and incapable at times to be at all introspective about the very serious reliability problems with a number of their own witnesses. As I have said earlier, their relationship with the police, at times, blinded them to the very serious reliability problems with their own officers. [Emphasis in original.]

70 The parties agree in the present case that Crown objectivity and the separation of Crown from police functions are elements of the judicial process which must be safeguarded. What the Morin inquiry shows is that objectivity can be lost without the Crown's involvement in pre-charge interviews, and that this loss of objectivity in fact did occur, in part, as a result of post-charge Crown interviews. It does not mean that the absence of pre-charge interviews would be, of itself, a guarantee of fair process or that the restrained use of such interviews may not be consistent with a separation of Crown and police functions.

[page337]

(c) Other Jurisdictions

71 While the separation of police and Crown roles is a well-established principle of our criminal justice system, different provinces have implemented this principle in various ways. This Court has already recognized that some variation in provincial practices in the administration of the criminal law is to be expected and allowed in certain circumstances. In R. v. S. (S.), [1990] 2 S.C.R. 254, Dickson C.J. observed, at pp. 289-90:

> It is necessary to bear in mind that differential application of federal law can be a legitimate means of forwarding the values of a federal system. In fact, in the context of the administration of the criminal law, differential application is constitutionally fostered by ss. 91(27) and 92(14) of the Constitution Act, 1867. The area of criminal law and its application is one in which the balancing of national interests and local concerns has been accomplished by a constitutional structure that both permits and encourages federal-provincial cooperation. A brief review of Canadian constitutional history clearly demonstrates that diversity in the criminal law, in terms of provincial application, has been recognized consistently as a means of furthering the values of federalism. Differential application arises from a recognition that different approaches to the administration of the criminal law are appropriate in different territorially based communities.

An examination of the practices in several Canadian provinces illustrates that different jurisdictions have approached the issue of Crown pre-charge interviews in different ways.

(i) New Brunswick

72 At trial, several witnesses gave evidence about the system of criminal prosecutions in the province of New Brunswick. Glendon Abbott, Director of Public Prosecutions for the province, was one. He described that part of the Crown's function as to

> provide advice to policing authorities. We in the Province of New Brunswick, at least, exercise a pre-charge screening function. The Attorney General has set [page338] out a threshold for charging and we review police files that are brought to us for that purpose, to make a decision on charging. And we exercise the prosecutorial duties to advance the case through the legal system... . The short form of the test [to determine whether a prosecution should proceed] is to be satisfied that there is a reasonable prospect of conviction.

73 Mr. Abbott also gave evidence about his understanding of New Brunswick's written policy on initiating prosecutions: "In my view, yes, implicitly it does speak to [Crown pre-charge interviews] and contemplates pre-charge contact with potential witnesses." The policy states:

> In making a decision as to sufficiency of evidence, the Crown prosecutor considers such factors as the availability and admissibility of evidence, the credibility of witnesses, and their likely impression on a judge or jury, the admissibility of any confessions, the reliability and admissibility of any identification, and generally will draw on experience to evaluate how strong the case is likely to be when presented in court. In addition, there are public interest factors that may be taken into account.
>
> (New Brunswick Criteria for Prosecutions, Appellant's Record, at pp. 519-520)

Mr. Abbott testified that based on this policy,

> in some cases ... the prosecutor and myself from my own experience would want to interview some of the witnesses [pre-charge]. Not in every case, but in some cases... .
>
> Over approximately 23 or so years I've been with public prosecutions, this is not an uncommon practice... .
>
> I think as a category of offenses or alleged offenses, where there are allegations of sexual assault, this is more common.

Such Crown pre-charge interviews are conducted to assess credibility and weight of the complainant's [page339] evidence, for both youthful witnesses, and adults, and to inform potential witnesses of the legal process, while also testing their resolve to pursue the matter. Mr. Abbott acknowledged that as a result of his pre-charge interviews, "there were cases where it aided [him] in drawing a conclusion that there was a reasonable prospect of conviction and --

well, not equally, but in many cases where there wasn't a reasonable prospect of conviction". He concluded, "I don't feel that interviewing the witness prior to the approval or not or approval [sic] of charges affects my ability to discharge my duty impartially."

74 Regional Crown Prosecutor for the rural Miramichi district of New Brunswick, Fred Ferguson, testified that he too does pre-charge interviewing, about once a year. In his experience, such interviewing is done for young witnesses, historic sex assault allegations, and "where there's been a question of motive" to prosecute. He said that time and manpower have made it difficult to do more pre-charge interviews.

(ii) Quebec

75 The intervener Attorney General of Quebec made submissions before this Court that it is not unusual in that province for Crown counsel to interview witnesses pre-charge: [TRANSLATION] "[T]he intervener maintains that there is nothing heretical in a representative of the Attorney General meeting with or even questioning witnesses, including victims, before charges are laid" (Intervener's factum, at para. 3). In fact, pre-charge screening has been a "systematic" practice in Quebec for more than 30 years (Intervener's factum, at para. 4).

76 The system of Crown pre-charge screening in Quebec is much like that in New Brunswick, and was instituted to improve the administration of [page340] justice. In particular, the practice is done for a number of reasons:

> [TRANSLATION] The prosecutor's decision to authorize the laying of criminal charges presupposes that the conduct complained of constitutes an offence in law, that there are reasonable grounds to believe that the person under investigation is the perpetrator, that it is legally possible to prove it, and that it is appropriate to prosecute. In exercising prosecutorial discretion, the prosecutor must take into account various policy and social considerations. [Intervener's factum, at para. 14]

As almost all of the expert witnesses at trial testified, Crown pre-charge interviewing is especially useful in cases of sexual assault allegations. The Quebec experience further supports this:

> [TRANSLATION] Generally, the goals are to understand better the victim's reluctance to lodge a complaint or to testify, to reassure him or her and to create an atmosphere of trust, in order better to assess the witness's credibility if necessary or to get the witness to relate accurately the circumstances of the offence to the court or, in some cases, simply to explain the proceedings to the victim, including the examination and cross-examination, so that he or she is better prepared to face an experience that is very painful for a number of people. [Intervener's factum, at para. 36]

In fact, Quebec's Justice Minister has instructed that contact between sexual assault complainants and Crown counsel should occur at the beginning of the process of laying charges, and in cases of minors (under the age of 18) who make such complaints, pre-charge

meetings with the Crown are mandatory. According to the Manuel de directives aux substituts du procureur général (rev. 1997), Directive No. INF-1, at para. 5, with certain exceptions, [TRANSLATION] "[t]he prosecutor must meet with the child before authorizing the laying of an information". (See also ministère de la Justice du Québec, Crimes à caractère sexuel: Guide du poursuivant (2000), at pp. 13 and 27.)

(iii) British Columbia

77 Several of the witnesses and interveners remarked that British Columbia also uses a system [page341] of pre-charge screening, similar to New Brunswick and Quebec. In British Columbia, Crown counsel must approve charges before the police can lay them, and this Crown approval may require witness interviews, pre-charge. The Crown charge screening function is intended to accomplish the same variety of systemic benefits as in New Brunswick, Quebec, and even Ontario (see below). A 1990 study by the Law Reform Commission of Canada, which looked at the role of Crown counsel in the criminal justice system, remarked that the pre-charge screening/interviewing procedures used in New Brunswick, Quebec and British Columbia work well (Law Reform Commission of Canada, Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor (1990), Working Paper 62, at pp. 74-75).

(iv) Ontario

78 Michael Code, a witness for the appellant, described the most restrictive role for Crown pre-charge involvement, which he said is the practice in Ontario. According to Mr. Code, a former Assistant Deputy Attorney General -- Criminal Law of the province, two dangers arise from pre-charge interviewing by the Crown. First, it can undermine the independence of police in deciding which charges to lay, and second, it can strip the Crown of its necessary objectivity in assessing whether to proceed with the charges laid by police. (I note here that the trial judge in this case made no finding that the police decision to lay charges was improper. Therefore, only the second concern will be further developed.)

79 To avoid these perversions of our system of police/Crown independence, Mr. Code was of the opinion that Crown counsel should not interview witnesses until after police have laid the charge, and after the Crown has decided to prosecute it. He [page342] testified that among the 10 very senior prosecutors he knows, they personally never conduct pre-charge interviews, have never heard of anyone else doing it, and think it is wrong, and inconsistent with their role as Crown counsel.

80 Despite Mr. Code's position, another witness from Ontario, Chief Crown Attorney for Ottawa-Carleton, Andrejs Berzins, testified that some pre-charge Crown interviewing is done in Ontario. Mr. Berzins has done one or two such pre-charge interviews every year.

81 Brian Gover, another expert witness from Ontario, confirmed this practice: "I regard it as an unusual event for a Crown counsel to interview a potential witness at a pre-charge stage. But, nonetheless, it's my view that Crown practice in Ontario is sufficiently flexible to accommodate

that occurring." (Appellant's Record, p. 696) He added (at p. 717):

> ... it's important that Crown counsel have paramount in his or her mind the role of the Crown as distinguished from the role of the police. It's essential that the Crown not engage in pre-charge evidence-gathering. But, as I said, there will be circumstances in which it is appropriate for the Crown to engage in a process of confirming in his or her own mind that the evidence attributed to a witness would, in fact, be given by that witness as part of the determination of whether reasonable grounds exist and whether there's a reasonable likelihood of conviction.

82 Therefore, even in Ontario, it cannot be said that Crown pre-charge interviews are non-existent, and in Quebec, New Brunswick and British Columbia they are common, and regularly conducted in sexual assault cases, especially when historic incidents or young complainants are involved.

(d) Policy Considerations

83 A lesson underscored by the report on the Morin case and the events which led to its tragic outcome [page343] is that the appellant's proposed "quick fix" to maintain Crown objectivity, by preventing Crown interviews pre-charge, is both misguided, and potentially harmful -- because pre-charge Crown interviews may advance the interests of justice (see below), and because the pre- versus post-charge distinction may distract attention away from the necessary vigilance to maintain objectivity throughout the proceedings.

84 It is quite clear that there are many public policy reasons for which Crown counsel in some jurisdictions conduct witness interviews, pre-charge. Mr. Abbott and Mr. Gover both testified about efficiencies which are gained by pre-charge screening which protect the repute of the justice system, not only the personal interests of the accused. Complainants also benefit from a single decision to proceed with or avoid laying charges, rather than having to deal with the stress and publicity of a charge and then face the appearance that they have made a spurious accusation if the charge is later withdrawn. In addition, all of the expert witnesses with knowledge of the Crown practice of pre-charge interviewing told of the interests it serves in assessing witness credibility, demeanour and resolve, especially in sexual assault cases. Such pre-charge interviews are even more important when charges are "historic" or when complainants are young.

85 The evidence in this case also exposes the systemic concerns that sexual assault complainants often have. The RCMP report about the Regan investigation is very telling in this regard:

> In some cases, those strongly suspected of being a victim, would not discuss the incident with the investigators, leaving the member with the feeling that the incident had [page344] taken place however they preferred not to disclose... . [some] who were willing to confirm that an offence was committed... . are not in a position to become involved in any court process because of ... the fear of repercussions... .

> The fact that the suspect, in some cases being the Premier of the Province or in other cases, a high-profile person within the community, coupled with the victim's fear and what the public reaction would be, especially in the 1950 's, '60 's and '70 's, is certainly reason to understand why victims failed to disclose.
>
> (Investigation Report, March 30, 1994, Appellant's Record, at pp. 1068-69)

Complainants may worry of retribution from the alleged assailant, and from their own families and community. They may also fear being "re-victimized" by the court system. They may not feel comfortable making complaints to police, or feel reassured by police regarding confidentiality, or the process in general. The extensive record of discussion between witnesses, police and Crown (see for example: continuation report, Respondent's Record, at pp. 716-18) here shows that, in some cases where police failed to assuage the concerns of some complainants, Crown counsel were successful. The interests of justice are not only served by screening out fruitless complaints but also served by encouraging proper charges to go forward, and by signalling to the larger society that complainants can bring sexual assault charges to the courts without further undue trauma, and that where charges are properly laid, they will be prosecuted.

86 Finally, quite apart from the specific aspects of sexual assault allegations, other examples abound of situations where the interests of justice may be served by the Crown conducting pre-charge interviews. For example: the protection of Charter rights during an investigation, cases [page345] involving jailhouse informants, and cases which have a statutory requirement for Crown consent to the laying of charges.

(e) The Impact of the Trial Judge's Approach to Policy Issues

87 It is also important that the justice system not be and not appear arbitrary. The trial judge explained the "crucial issue" before him as a narrow one: "It involves firstly, the Crown's determination to interview complainants pre-charge and secondly, the impact of that process on the number and types of charges that were ultimately laid" (para. 121). But the determination of the appropriateness of Crown influence on the charging decision based on when Crown interviews are conducted reveals a certain arbitrariness. In the case at bar, the trial judge found abuse because the Crown interviewed complainants before charges were laid. The trial judge found that this extinguished the Crown's objectivity, and he implied that, as a result, more charges were laid than if objectivity had been retained. Yet, if the Crown had waited until after charges were laid to re-interview those complainants who initially had refused to come forward, it would still have been open to the Crown to recommend to police that these additional charges should be laid. It would have remained within police discretion to add charges based on that Crown advice. In fact, the May 30 amendment to the information did add new charges in relation to a new complainant. Yet, again, in the direct indictment, a new complainant was added and other charges were amended or dropped. The conclusion to be drawn from what could have happened and did happen is that the process is a fluid one. The expectation is that both the police and the Crown will act according to their distinct roles in the process, investigating allegations of criminal behaviour, and assessing the public interest in prosecuting, respectively. The exercise of these roles does not seem to be clearly or predictably [page346] altered by whether the formal act of the laying of charges has occurred.

88 The trial judge's more formalistic view might have negative policy consequences. MacDonald A.C.J. said: "The Crown emphasizes the fact that they always interview complainants post-charge in any event... . That, with respect, misses the point. The charging decision is crucial. It determines who the complainants will be" (para. 125). This approach, however, does not account for the fact, recognized by the expert witnesses, that in some cases, especially involving sexual assault, complainants may need information from the Crown to properly understand the process in order to decide whether to press charges. In the trial judge's scenario, this could never happen, because Crown counsel would only ever interview complainants who were already pressing charges.

89 There is another negative implication of arbitrarily drawing a hard line at the decision to lay charges. As Rand J. made clear in Boucher, supra, commitment to the case, belief in the allegations, and the desire to see justice done are not incompatible with objectivity and fairness. Objectivity requires that a rational assessment of facts be brought to bear in making decisions relating to the case. Awareness of one's strong feelings about a case can and should be kept in mind, as a check against tunnel vision. The danger with the trial judge's approach, that of drawing a bright line between pre- and post-charge interviews, is that it risks giving the false impression that remaining personally detached from complainants before charges are laid is the best (or the only necessary) effort to protect objectivity. So how does the [page347] Crown protect objectivity after the charge is laid? As all parties accept, objectivity and fairness is an ongoing responsibility of the Crown, at every stage of the process. The Court of Appeal, respondent and interveners point out that if subjectivity is the inevitable consequence of contact between the Crown and complainant, then even post-charge interviews are problematic because they would undermine Crown objectivity for every decision after these interviews have taken place.

90 Finally, the trial judge's concern about human nature must be addressed. The trial judge held that personal interaction in the form of interviews between the Crown and potential complainants inherently threatens the Crown's ability to be objective, because it is an inevitable fact of human nature that the Crown will become subjectively involved with the facts of the case. In the result, the trial judge found that a bright line should be drawn between pre- and post-charge interviews by the Crown. Yet he also ruled that pre-charge Crown interviews are quite proper for the limited purpose of charge screening, to spare the potential accused from the unnecessary embarrassment and harm to reputation that comes with a criminal charge. This begs the question, however, of how a Crown in such proper pre-charge interviews would be able to overcome the natural impulse to favour the complainants, in order to reach the objective conclusion to recommend against laying charges.

91 Summing up, the evidence shows that in some Canadian jurisdictions, pre-charge interviews by the [page348] Crown are a regular, even common practice. In these jurisdictions at least, it appears that public policy is served by the practice, and potentially harmful and arbitrary results are avoided by the refusal to draw a hard line at the decision to lay charges, before which Crown counsel may not interview complainants. Viewed in this context, I cannot conclude that wide-ranging pre-charge Crown interviews, per se, are an abuse of process.

(f) Police Conduct

92 The trial judge found that the police were "clearly wrong" (para. 86) when they released Regan's name as a suspect, well in advance of any charges. This was in contravention of the express policy of law enforcement agencies that the identity of suspects may be released only after charges have been laid. However, MacDonald A.C.J. added that this lapse was not done in bad faith, and the judge himself further indicated that this police error influenced his finding of abuse of process "to a lesser extent" (para. 132).

93 This policy was adopted, no doubt, to protect the privacy and other interests of individuals who are merely questioned about a crime, with nothing more. There is no question that such a policy is laudable, and a breach of it should not be condoned. However, other evidence on the record indicates that after this one misstep, the police exercised greater caution in preventing further information leaks until the process was truly public. For example, when the police delivered their investigation report to DPP Pearson, the letter included

> a control sheet asking that all persons who have control or access to please sign and date, to establish continuity. [page349] Throughout this investigation, the media has been diligent and persistent in obtaining information and for this reason security must remain a priority. I have implemented controls within the R.C.M.Police to limit access. I have not allowed any R.C.M.Police documents, pertaining to this investigation, to be disseminated outside this Headquarters, Halifax Sub Division and the Task Force investigators. Therefore, I am now asking that the same restriction occur within your office and this information be carefully protected.
>
> (Letter from Chief Superintendent Falkingham to DPP Pearson, May 19, 1994)

In addition, the police acceded to Regan's request to hold the arraignment outside Halifax, to try to avoid a media frenzy. In my view, this supports the finding of no bad faith.

94 I would add that following the dictum in Blencoe, the prejudice experienced by the appellant as a result of this early leak -- humiliation and stress -- cannot be attributed to this police error alone. This impact on Regan was a certainty no matter when his name was finally released in connection with these charges, and there is no question that there was sufficient evidence and subjective belief for the police to ultimately lay at least some of the charges. Furthermore, there is no evidence to suggest that the premature announcement had any effect on the separate question of whether the Crown properly proceeded with the charges. While the media may have been clamouring for information, it does not follow that this put pressure on the authorities to lay any particular number of charges, or any charges at all, for that matter.

95 For these reasons, I think the trial judge was correct in his finding that this police error either alone or in combination with the Crown conduct discussed above does not rise to the level of egregious abuse. The serious remedy of a stay of proceedings is not an appropriate method to [page350] denounce or punish past police conduct of this nature.

(g) Count 16

96 This count involved a woman who alleged that when she was a 24-year-old political reporter, she was pushed onto a hotel room bed and groped during an interview with then-Premier Regan. At the time of DPP Pearson's assessment of the allegations, this complainant was only willing to be a similar fact witness. Pearson suggested that she be re-interviewed. After a re-interview with police and Crown, this witness decided to press charges.

97 The trial judge was "unsettled" by the laying of this charge because it was factually similar to the Alberta-based incident. From this, MacDonald A.C.J. concluded: "The Crown therefore felt it needed [to lay count 16] so that [the Alberta complainant's] 'story could be told'... . Yet the Crown's goal as I see it was to have the jury hear and (presumably act upon) the [complaint of the Alberta woman], a similar fact witness" (paras. 157-58).

98 The trial judge did, however, recognize the validity of count 16 in its own right: "I realize that the Crown nonetheless considers [count 16] to be worthy of prosecuting. Yet I do not find this to be their primary motive" (para. 159). The reason the Crown's motive was improper, in MacDonald A.C.J.'s view, was because of his finding of the Crown's loss of objectivity: "When the Crown interviews pre-charge a certain amount of objectivity is lost. The Crown's critical review of the charge list is gone. Perhaps if the Crown had not been so involved with interviewing witnesses pre-charge, they may have seen all this in a different light" (para. 160).

[page351]

99 As I have already discussed, I find that the trial judge's finding of a loss of Crown objectivity cannot be supported by the evidence. This erroneous reading of the facts influenced the holding on count 16. If the trial judge had not started from the premise that the Crown had lost its objectivity, there would have been no justification for the trial judge to find the similarity between count 16 and the Alberta incident as the primary motivation for count 16, virtually ignoring the reasonable and probable grounds for laying count 16 in its own right. Furthermore, as Cromwell J.A. observed, in other respects the trial judge held that there was no improper purpose or mala fides underlying the preferral of the direct indictment. The trial judge found a loss of Crown objectivity only at the first charging decision, nearly a year before the direct indictment. Moreover, Cromwell J.A. pointed out, "[t]here is nothing inherently objectionable in the Crown considering questions of the admissibility of evidence and their impact on the prospects of conviction when deciding to proceed with charges" (para. 140). For these reasons I find the trial judge erred in finding an abusive or improper purpose behind the laying of count 16.

(h) Cumulative Effect of Police and Crown Conduct

100 In assessing the cumulative effect of this evidence of Crown and police misconduct, the trial judge concluded that Crown Potts' objectivity was hopelessly lost, and her influence on the case set other well-meaning Crown counsel astray. The trial judge seemed reinforced in this decision because in addition to Potts' judge-shopping comment, he was troubled by "Ms. Potts' perplexing desire to interview all potential complainants" (para. 100).

[page352]

101 On close review of the evidence, however, the Crown's intention to re-interview complainants does not seem perplexing at all. Police were of the opinion that a pattern of criminal behaviour emerged from a view of the full picture of the allegations. They disagreed with DPP Pearson's recommendation to lay charges in respect of only four complainants. Police were urging further review and Crown Potts undertook to read the voluminous, detailed investigation reports (which ultimately took her some six months).

102 In the course of that review, Crown Potts indicated that re-interviews would be appropriate, according to notes taken by Staff Sergeant Fraser: "Reports being reviewed by Potts. Interested in meeting with victims" (Fraser notes, August 17 and 18, 1994, Respondent's Record, at p. 501; see also Investigation Report, August 22, 1994, Respondent's Record, at p. 498). These re-interviews were done after DPP Pearson had already advised that the case which proceeded would be strengthened if the unwilling complainants with the more recent allegations would change their mind and come forward. Furthermore, DPP Pearson specifically recommended that six of the unwilling complainants should be interviewed, albeit by police. The police attended with the Crown at these re-interviews and appeared to agree that the joint interviews should be done: "It is now the investigators and the Crown's belief that if these persons could be re-interviewed with both the Crown Prosecutor and police investigator present there would be a greater chance of them changing their minds" (Police Transit Slip, January 17, 1995, Appellant's Record, at p. 1084). Finally, the expert testimony of Glendon Abbott, Fred Ferguson, Andrejs Berzins and Philip Stenning indicated that in a case such as this, it would be very likely that in other provinces, some Crown counsel would interview complainants pre-charge: the allegations of sexual assault were historic, the alleged victims were young at the time of the incidents, the alleged perpetrator was high profile and the case was made further controversial by the involvement of the suspect's political enemy. In this context, I fail to see why a thorough re-interview of [page353] complainants by the Crown was perplexing, where the Crown would have wanted to assess first-hand the possible charges versus similar fact evidence, and to ensure that complainants fully understood the judicial process before deciding whether to press charges.

103 From this process, the trial judge seemed to infer that the appellant ended up facing more charges than he otherwise would have. Yet I do not see how re-interviewing the complainants for whom DPP Pearson had already recommended charges could have led to more charges in those cases. In the case of the unwilling and similar fact complainants, Pearson had made no charging recommendation. He did, however, generally recommend that some witnesses be re-approached, and that more recent allegations would strengthen the overall case. As some of these complainants decided to press charges, I do not understand why it was inappropriate to reassess the other cases, even where Pearson had initially recommended against laying charges. And of course, during this process, five new complainants surfaced. It is not known to what extent their allegations cast a new light or raised new questions in relation to the earlier list of complainants. In the end, it appears to me that the police had virtually made their charging decision -- they wanted to lay charges in respect of the complete picture. The Crown's interviews appear to have provided a basis on which to make their own charging decision -- which was also

based on an assessment of the full, revised picture. The re-interviews were done to promote many of the policy reasons discussed above: to fully inform potential complainants of the process, to assess their evidence and credibility, for efficiency in the administration of justice, and for the sake of the appearance of decisive action, taken in an already highly public and controversial case. Finally, as the Pearson charging recommendation was clearly preliminary, it is impossible to know whether, as a result of the [page354] Crown interviews, the appellant ended up facing more charges.

104 In summary, it is my view that there was no abuse of process in this case. The pre-charge interviews were done in accordance with the common practice of some other provinces, a practice more wide-ranging than the narrow, exceptional to rare practice the trial judge described. Furthermore, the Crown conducted an understandable review of the potential witnesses, in the wake of an early recommendation by DPP Pearson that was not determinative. Given the uncertainty of the charges at that point, it could not be known whether the re-interviews led to more charges than would otherwise have been laid. I conclude that, based on the evidence of judge shopping, pre-charge Crown interviews, the improper police announcement, and the addition of count 16 in the direct indictment, the cumulative effect of these actions, while troubling in some respects, does not rise to the level of abuse of process which is egregious, vexatious, oppressive or which would offend the community's sense of decency and fair play. Moreover, this conduct, even if it did amount to an abuse, did not have an ongoing effect on the accused, which would jeopardize the fairness of his trial. On that basis, I must now turn to the central issue decided by the Court of Appeal, namely the decision to lift the stay of proceedings ordered by the trial judge.

2. Stay of Proceedings

105 Having found an abuse of process under s. 7 of the Charter but ruled that it would not affect trial [page355] fairness, the trial judge recognized this put the case in the narrow residual category of abuse where a stay may be granted only in exceptional cases. However, the trial judge misconceived the governing test for a stay of proceedings as outlined in Tobiass. At this stage of the analysis, instead of inquiring into whether the abuse would be manifested, perpetuated or aggravated by ongoing proceedings, and then inquiring into whether any remedy other than a stay could cure this ongoing taint, the trial judge focussed his attention only on the final balancing exercise (at paras. 58-59):

> This balancing act, so common to almost everything we do as judges, will play a significant role in my analysis in the case at bar.
>
> In summary, to justify a stay I must ask myself: Are the alleged wrongdoings so unfair to the applicant or so offensive to society so as to render a stay the only reasonable remedy? Is this one of those "clearest of cases" or, on the other hand, are there societal interests compelling enough to tip the scales in favour of proceeding? [Emphasis in original.]

106 This error was further emphasized when the judge turned his mind to the facts of the abuse

of process, as he saw them (at para. 133):

> ... the cumulative effect of these actions would not shock the community's sense of fair play and decency so as to warrant a stay of all charges outright. It is not one of those "clearest of cases" that demands a global stay. Some of these charges involve very serious allegations that by their very nature present a strong societal interest to have prosecuted through a full and fair hearing. As was explained in Tobiass, supra, I find that this "compelling societal interest ... tips the scales in favour of proceeding" with at least some of these charges. [Emphasis in original.]

107 There was no discussion in the trial judge's reasons of any ongoing impact of the abuse he found. As discussed earlier, the embarrassment to the [page356] appellant of the premature police announcement was overtaken by the charges which would have been laid in any event. Therefore there was no continuing prejudice from this misconduct. One must also remember that the humiliation flowing from properly laid charges, while unpleasant, is not an abuse of process. As for the trial judge's concern for loss of Crown objectivity, there was no evidence that this was in any way affected by the police misbehaviour. It was also discussed above that the evidence cannot support the inference that Crown pre-interviews or any loss of Crown objectivity inevitably led to the appellant facing more charges. It should be noted that DPP Pearson and the police had expressed a desire to re-interview all but three of the complainants, and that, since then, these three never pressed any charges. Therefore this conduct, even if abusive, cannot be said to be manifested or perpetuated if the process continues. The judge-shopping comment was restricted to one Crown counsel, on one occasion, without further action. In addition, that Crown counsel has long since left the prosecution of this case. Finally, there was simply nothing improper about the inclusion of count 16 in the direct indictment. To speak of ongoing abuse where none was ever apparent makes no sense. All told, even if this conduct did amount to abuse, it falls at the low end of the spectrum of seriousness, and is not significant enough that proceeding in its wake would, in and of itself, shock the community's sense of fairness and decency.

108 Thus, the trial judge fell into error when he ordered the ultimate remedy of a partial stay of a number of charges. The abuse that was found by the trial judge could be and was addressed by remedies other than a stay. Crown Potts was removed [page357] from the prosecution. A Crown not involved with the earlier stages of the case became lead counsel for the prosecution. The police instituted strict measures to maintain confidentiality of the investigation. And ultimately, there was a detailed review of the charges, signed by a new Director of Public Prosecutions when the direct indictment was preferred.

(a) The Direct Indictment

109 For the purposes of assessing any ongoing or lingering effects of the abuse of process found by the trial judge, the majority of the Court of Appeal relied heavily on the direct indictment as evidence of a fresh, objective review of the charges. Cromwell J.A. noted that the trial judge's finding of abuse was at "the charging stage", that is, when the information was sworn on May 30, 1995. The trial judge also found no impropriety in the Crown's decision to prefer the direct

indictment. Cromwell J.A. therefore reasoned that even if Crown Potts' involvement in the process, and more generally the Crown's participation in pre-charge interviews, had tainted the process, by the time of the direct indictment, Crown Potts was no longer on the case, and the direct indictment itself amounted to a remedy which cleansed any earlier abuse.

110 Section 577 of the Criminal Code, R.S.C. 1985, c. C-46, requires that the Attorney General or his or her Deputy give personal consent in writing to prefer a direct indictment. It is predictable that there will be variation from office to office and province to province on the actual procedure involved to meet this requirement. I think it is fair to assume, however, that the case at bar would not have been treated as any garden variety, pro forma approval of a direct indictment. As Freeman J.A. (dissenting) pointed out, from the outset, this prosecution had been "extraordinary and controversial" (para. 4) as a result of "[t]he prominence of the [page358] accused and the high level of media interest in the case" (para. 5).

111 Not only would this sensitive context likely have drawn the close attention of the Attorney General of Nova Scotia (or his or her delegate), but there is direct evidence that the Crown paid close attention to the actual charges contained in the direct indictment. First, one complainant listed on the May 30, 1995 information was completely dropped from the direct indictment. Second, one count under s. 138(2) of the Criminal Code, S.C. 1953-54, c. 51, was dropped from the charges in relation to a second complainant. Third, a count in relation to an entirely new complainant was added to the direct indictment. Furthermore, these changes were ultimately approved by Jerry Pitzul, a new Director of Public Prosecutions, who was not involved in the Pearson review, and was not the acting DPP immediately after Pearson left the post.

112 Finally, there is evidence of objectivity at the stage when the Crown was preparing the direct indictment. Two witnesses were interviewed by the Crown a second time in April 1997. In one case, the woman was included as an unwilling witness on the original list that went to DPP Pearson. At this final meeting, she expressed an interest in pressing charges against Regan, but the Crown decided not to include her in the direct indictment. In the other case, the woman had come forward after the Pearson recommendation with another, similar allegation against the accused. At that time, and at the time of the direct indictment, she was unwilling to get involved in the proceedings, and no charge was laid.

(b) Balancing a Stay Against Proceeding to Trial

113 Even if one assumes that by applying the proper test the trial judge had found an ongoing abuse [page359] which could only be remedied by a stay, the cumulative effect of the abuse still left some question about whether this was one of those clearest of cases warranting a stay. Indeed, that prompted the trial judge's charge-by-charge balancing analysis. Yet in his balancing analysis, the trial judge omitted some significant issues relevant to the public interest.

114 The trial judge "afforded significant deference" (para. 141) to the Pearson charging recommendation when reaching his conclusion about staying half of the total charges. In fact, the decision to proceed with charges relating to only four complainants directly reflected DPP Pearson's advice. The trial judge explained that he was so highly influenced by Pearson's

position because "the Crown should not be seen to significantly change its position without valid reason" (para. 135). The trial judge, however, did not seem to consider the inconclusive nature of the Pearson recommendation. First, the Pearson letter advised that the case would be strengthened if more complainants with more recent allegations were willing to come forward. Second, the Pearson letter specifically recommended that four complainants be re-interviewed. Police did re-interview those women, and others, accompanied by a Crown counsel. As a result, more women came forward, willing to lay charges. This constituted a valid reason to alter the original opinion regarding charges. Finally, the letter indicated that it was entirely within police discretion to accept or ignore the Pearson recommendation, and it was also open to the Crown to reconsider which charges to proceed with, following the police charging decision. These qualifications all signify a Crown recommendation which anticipated the possibility of change -- not one which was etched in stone. As a result of new complainants surfacing, of further interviews, and ongoing consideration of the charges by both police and the Crown, a charging decision was made which included the Pearson recommendation as well as additional charges. There was no reason to assume that the Pearson view of the [page360] matter was the Crown's final or most appropriate view.

115 The trial judge's differentiation between the charges he stayed and those he did not also reflected DPP Pearson's view of the "seriousness" of the alleged offences. As discussed above, the Pearson view emphasized physical invasiveness and overlooked the complainants' age, and their socially subordinate and relatively powerless positions in relation to the accused. The Pearson view also reflected the notion of social acceptance (as opposed to illegality) of the alleged crimes some 30 to 40 years ago. Charges brought before a modern court should not be trapped in a social time warp. Once it is determined that past behaviour was an apparent violation of the contemporary law, then the benefit of current social mores should be brought to bear in assessing the advisability of pursuing charges. This approach is especially significant when sexual assault charges are at issue. This Court has recognized the disadvantage that women victims have suffered as a result of stereotypes in society and the justice system. (See, for example, R. v. Seaboyer, [1991] 2 S.C.R. 577; O'Connor, supra; R. v. Ewanchuk, [1999] 1 S.C.R. 330; R. v. Mills, [1999] 3 S.C.R. 668; R. v. Darrach, [2000] 2 S.C.R. 443, 2000 SCC 46.) Without revisiting the thoughtful consideration of those judgments in the current case, it suffices to say that those gains would amount to nothing if modern charges of sexual assault for historic acts are viewed with blinkers and through a looking glass that sees an old stereotypic view rather than an enlightened one. It is not for this Court to judge the Crown's assessment of social interests in proceeding with historic sexual assault charges. It is, however, appropriate for this Court to review lower court decisions according to the standards of modern jurisprudence. Furthermore, [page361] when exercising their discretion to grant a stay, courts are bound to consider all significant factors, a requirement by which the Crown is not bound when making its charging decisions. It was not sufficient for the trial judge to merely follow the course set by DPP Pearson.

116 There are many societal interests engaged by this case, which the trial judge failed to factor into the balance. Victims of sexual assault must be encouraged to trust the system and bring allegations to light. As the police saw it, there is evidence of a pattern of an assailant sexually attacking young girls and women who were in a subordinate power relationship with the accused, in some cases bordering on a relationship of trust. When viewed in this light, the

charges are very serious and society has a strong interest in having the matter adjudicated, in order to convey the message that if such assaults are committed they will not be tolerated, and that young women must be protected from such abuse. In omitting to consider any of these issues which favour proceeding with charges, the trial judge's discretion was not fully exercised and therefore cannot stand.

D. Standard of Review

117 The decision to grant a stay is a discretionary one, which should not be lightly interfered with: "an appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice" (Tobiass, supra, at para. 87; Elsom v. Elsom, [1989] 1 S.C.R. 1367, at p. 1375). Furthermore, where a trial judge exercises her or his discretion, that decision [page362] cannot be replaced simply because the appellate court has a different assessment of the facts (Stein v. The Ship "Kathy K", [1976] 2 S.C.R. 802; see also R. v. Oickle, [2000] 2 S.C.R. 3, 2000 SCC 38; R. v. Van der Peet, [1996] 2 S.C.R. 507).

118 This does not mean, however, that the trial judge is completely insulated from review. It is settled law that where the "trial judge made some palpable and overriding error which affected his assessment of the facts", the decision based on these facts may be reversed (Kathy K, at p. 808). In the present case, I find that the trial judge made palpable and overriding factual errors which set his assessment of the facts askew. I also find that he misdirected himself regarding the law for granting a stay by overlooking key elements of the analysis, thereby committing an error which was properly reversed by the Court of Appeal.

1. Error of Fact

119 I find that the trial judge's characterization of the scope of pre-charge interviewing done across the country was narrower than the expert evidence indicates. The trial judge concluded (at para. 117):

> Based upon my review of all of the above expert evidence, it seems to me that the scope of pre-charge Crown interviewing in this country is a very narrow one. It ranges from non-existent to rare. On the occasions when it is performed, it serves as a screen designed to protect an accused from going through the embarrassment (humiliation) of being charged only to later have the charges dropped or stayed.

He characterized the practice of pre-charge interviewing conducted by Crowns in New Brunswick, Quebec and British Columbia as "Crown pre-charge screening" (para. 120). By this, MacDonald A.C.J. meant that the only acceptable form of Crown pre-charge meetings with complainants occurs when the Crown is motivated solely by a desire to benefit the [page363] accused by screening out frivolous or unsustainable charges. The evidence of Glendon Abbott, Fred Ferguson, Andrejs Berzins and Philip Stenning clearly contradicts this. Pre-charge interviews in New Brunswick are done for a variety of policy reasons, only one of which is the protection of the potential accused. Furthermore, even in Ontario where the practice of Crown

pre-charge interviewing is the most circumscribed, it does occur on a regular basis. The trial judge, with respect, was therefore in error when he ruled that "pre-charge Crown interviewing in this country is ... non-existent to rare" (para. 117). The evidence before him disclosed that Crown pre-charge interviews range from a regularly although infrequently exercised practice in Ontario, to a commonly practised procedure in New Brunswick. While the practice is not used in every case, it appears that it is typically used in cases of sexual assault, especially when allegations are historic, the complainant is young, or there is some other reason for specific concern about the strength of the evidence. This palpable error of fact had significant ramifications on the trial judge's reasoning. Based on his erroneous view, he found the Crown's conduct in this case at variance with standard practice across the country and therefore improper. From this impropriety he deduced a loss of objectivity in the Crown's decision to proceed with charges, and from that finding, he concluded that there was an abuse of process, where the other examples of police and Crown misconduct alone would not have risen to the level of procedural abuse where a stay might be warranted.

120 In addition, I find a second factual error in the trial judge's reasoning. Without ever explicitly stating it, the trial judge implies that the loss of objectivity was abusive because it meant that the appellant ultimately faced more charges. No evidence can be [page364] found to support this deduction. The recommendations of DPP Pearson were clearly given as part of a charging decision still in flux. Pearson stated that the police were not bound to follow his advice, nor was the Crown bound to proceed with any charges which the police decided to lay. Pearson expressly recommended that some complainants be reinterviewed and he suggested that more charges would strengthen the case. Finally, he could not have anticipated that five new complainants would come forward, subsequent to his charging recommendation (three of whom ultimately accepted that the Crown proceed with charges). All of these facts point to the conclusion that the Pearson recommendation to proceed with charges related to four complainants was an interim one, and that it would be impossible to know whether the process which followed the Pearson recommendation resulted in the appellant facing more charges -- more charges in relation to what? However, this erroneous factual finding was a palpable error which served as a springboard for the trial judge to find an abuse of process, and to launch into the case-by-case assessment of which charges should be stayed. At any rate, it could not have been inappropriate to lay additional charges if they had an adequate factual foundation and probable cause could be ascertained.

2. Error of Law

121 In addition, the trial judge misdirected himself on the test for granting a stay. By incorrectly emphasizing the balancing stage, weighing the interests flowing from a stay against the public interest in proceeding, he skipped over the key assessment of whether the abuse (as he so found it) would be manifested, perpetuated or aggravated in the proceedings if they continued. He also ignored the step of the analysis which requires that other remedies be considered.

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122 I agree with the Court of Appeal that if the trial judge had properly applied the law, he would

have concluded that the abuse that he had identified was not ongoing, and that indeed, the remedies of removing Crown Potts from the prosecution and of recognizing, in the circumstances of this case, the direct indictment as a fresh, objective review of the charges put an end to any lingering doubt that the appellant was continuing to face a prosecution that was abusive, vexatious, oppressive or in any way an affront to decency and fair play.

123 Finally, if after having properly undertaken this analysis, the trial judge had still been in doubt as to whether a stay of proceedings was the proper remedy for the abuse of process he found, the balancing exercise which he ultimately undertook was also erroneous. The Tobiass test instructs that in such circumstances, the benefits of a stay must be considered in relation to the benefits of continuing the process. An egregious act of misconduct can overtake some passing public concern, but, in other circumstances, a compelling societal interest in proceeding can tip the scales against granting a stay. By the trial judge's own assessment, the case of abuse before him was not egregious enough to warrant a global stay of all the charges. Yet this less serious example of abuse was not fully weighed against the compelling societal interests in signalling that allegations of sexual abuse of young, vulnerable girls and women will be heard, in encouraging all sexual assault complainants to trust the system and come forward, and in protecting the repute of a system of justice that is sensitive to these allegations of crime and the difficulties faced by the complainants who make them. If the societal factors had been fully weighed, the balancing exercise would have led to the conclusion that not one of these allegations was among the clearest of cases where a stay of proceedings was appropriate.

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VII. Conclusion

124 As Freeman J.A., dissenting, put it: "On the hearing of the application for the stays, it was incumbent on the appellant to establish not only that he was entitled to a duty of objectivity on the part of the Crown in making its prosecuting decision, but that the duty was infringed so seriously that only a stay of proceedings could remedy the harm." There is no question, and the Crown readily concedes, that the principles of fairness and fundamental justice entitle an accused to a duty of objectivity exercised by the Crown in deciding to prosecute. However, even if the trial judge was correct in finding an abuse of process, when the facts at bar are correctly understood, and when the proper test for granting a stay of proceedings is applied, the appellant fails to establish that the Crown's duty of objectivity was infringed so seriously, either by the police, Crown Potts, or the Crown's involvement in pre-charge interviews, that only a stay can remedy the harm.

125 For these reasons I would dismiss the appeal.

The reasons of Iacobucci, Major, Binnie and Arbour JJ. were delivered by

BINNIE J. (dissenting)

126 This is an appeal from the discretionary order of Michael MacDonald A.C.J., who stayed the prosecution of nine charges of indecent assault against the appellant while permitting nine more serious charges to proceed. It was his view, after an 18-day hearing, that Crown prosecutors had manifested such a lack of objectivity in seeking the conviction of a prominent politician "at all costs" as to taint the integrity of the administration of justice in Nova Scotia. We ought to defer to his factual conclusions, in my opinion.

127 In the two most serious situations, which were allowed to proceed, the appellant was charged with [page367] rape (and attempted rape) and unlawful confinement. In a third situation, which also went to trial, he was charged with exposing his penis to a babysitter while grabbing her hand when driving her home. These charges involved teenage girls, one barely 14 years of age, about half the appellant's age at the time.

128 A Nova Scotia jury subsequently acquitted the appellant of all eight charges that have thus far gone to trial. One charge of indecent assault is outstanding.

129 The trial judge was favourably impressed by the opinion of the then Director of Public Prosecutions in Nova Scotia, Mr. John Pearson, when advising the RCMP in 1994 prior to the commencement of any proceedings. Mr. Pearson concluded that while the more serious charges should proceed against the appellant, the prosecution of the less serious charges (that are now 24 to 34 years old) "may be seen as 'persecution' in light of the facts, the staleness of the offences and the relatively insignificant sentence, which could be anticipated if convictions were entered". While Mr. Pearson did not say so, it appears he viewed the "lesser" incidents as matters that might have proceeded at the earlier time on summary conviction, in which case the applicable limitation period would have been six months.

130 The appellant claims that because of strong criticism of the Nova Scotia prosecutors' service in the case of Donald Marshall who served 11 years in jail for a crime he did not commit, and the controversies related to prosecutions arising out of the Westray mining disaster (discussed in part in R. v. Curragh Inc., [1997] 1 S.C.R. 537), the prosecutors failed in this case to perform their constitutional role as a check and balance on police power. In their determination not to be seen to be favouring the appellant, a former Premier of Nova Scotia, they leaned over backwards and denied him the "hard objective second look (at the charging decision)" ((1998), 21 C.R. (5th) 366, at para. 122) to which every citizen, [page368] of whatever rank or station, is entitled. In the trial judge's view the prosecutors, far from acting as a counterbalance to the police team, effectively became part of it.

131 Since obtaining a favourable decision from the Nova Scotia Court of Appeal the Crown has, on its own motion, stayed two of the nine charges on which it obtained a green light to proceed.

132 The remaining seven charges that were the subject of the stay involve allegations of sexual assault consisting of unwanted kissing, "French kissing", groping, fondling or similar acts between 1968 and 1978 with different complainants who, at the time, came into contact with the appellant as babysitters, a legislative page, a housekeeper, a hotel dishwasher and a news reporter. The complainants' ages varied from 14 to 24 years old. The trial judge acknowledged

that all charges of sexual assault are serious. Nevertheless, he concluded that the Crown's failure to act objectively in this case amounted to an abuse of process. The policy concerns raised by the then Director of Public Prosecutions were never subsequently properly addressed, as they ought to have been, in the trial judge's view.

133 As the charges themselves were the direct product of the abuse, the logical remedy was to stay their further prosecution. No lesser remedy would eliminate the root of the abuse. The trial judge found the prosecution of the additional nine charges to arise out of a fundamentally unfair procedure and to be among the "clearest of cases" calling for a stay of proceedings.

134 In my view, the trial judge instructed himself properly on the law and there is no reversible error in his application of the law to the facts. His decision [page369] ought not to have been reversed by the majority judgment of the Nova Scotia Court of Appeal (Freeman J.A. dissenting). That court, in my view, simply substituted their own divided opinion on issues that were given to the trial judge to decide. I would allow the appeal.

I. Abuse of Process

135 Everyone in this country, however prominent or obscure, is entitled to the equal protection of the law. As a politician of some prominence, the appellant was not entitled to be treated any better than other individuals, but nor should he have been treated worse. An important element of the protection of the law is that where the Crown Attorneys are involved they stand independent both of the police and of persons suspected of crimes to determine in a fair and even-handed way whether and how charges laid by the police should proceed.

136 The appellant says that the Crown cannot point to any other instances where it was sought to prosecute a comparable series of 24- to 34-year-old allegations of sexual touching, serious as those allegations are, and his counsel draws the conclusion that if the appellant had remained in obscurity as a sometime lawyer and sports announcer, Nova Scotia would not now be expending its considerable resources to obtain his conviction. The Crown Attorney's office, in his view, is not standing up as they should to the powerful pressures of the media and an aroused public opinion.

137 I agree with the trial judge as a matter of law that the Crown prosecutors must retain objectivity in their review of charges laid by the police, or their pre-charge involvement, and retain both the substance and appearance of even-handed independence from the police investigative role. This is the Crown Attorney's "Minister of Justice" function and its high standards are amply supported in the cases: Boucher v. The Queen, [1955] S.C.R. 16; Lemay v. The King, [1952] 1 S.C.R. 232, at p. 257, and [page370] R. v. Stinchcombe, [1991] 3 S.C.R. 326, at p. 341. In Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor (1990), Working Paper 62, the Law Reform Commission of Canada rightly observed that "prominent people, such as politicians ... should be treated neither preferentially nor more harshly than others. If proceedings would not have been commenced against an ordinary individual, they ought also not to be commenced against the prominent individual" (p. 80).

138 The trial judge found as a fact that there was no independent and objective review by the Crown prosecutors in this case. The absence of the usual and proper checks and balances would, he thought, shock the conscience of the community. He cited a number of concerns that reflected this institutional failure (including premature disclosure of the investigation, improper Crown involvement in the charging decisions, laying a charge to bootstrap otherwise inadmissible similar fact evidence, and judge shopping), but his listing of the symptoms should not be mistaken for his important and central finding of fact that the appellant had been denied his constitutional right to a fair pre-trial procedure.

A. Standard of Review

139 I agree with my colleague LeBel J. that the standard of review of the trial judge's decision to grant a remedy under s. 24(1) of the Canadian Charter of Rights and Freedoms was authoritatively stated by Gonthier J. in Elsom v. Elsom, [1989] 1 S.C.R. 1367, at p. 1375, as follows: "[A]n appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice"; see also R. v. Carosella, [1997] 1 S.C.R. 80, at para. 48.

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140 We should also keep in mind the well-established rule mentioned by La Forest J. in Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3, at p. 76:

> The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way.

B. Review of Findings of Fact

141 An appellate court should give appropriate deference to the findings of fact of a trial judge, who in this case heard nine days of evidence and nine days of legal argument. The relevant cases are gathered together in R. v. Van der Peet, [1996] 2 S.C.R. 507, where Lamer C.J. concluded, at para. 81:

> It is a well-settled principle of law that when an appellate court reviews the decision of a trial judge that court must give considerable deference to the trial judge's findings of fact, particularly where those findings of fact are based on the trial judge's assessment of the testimony and credibility of witnesses.
>
> ...
>
> I would also note that the principle of appellate court deference has been held to apply equally to findings of fact made on the basis of the trial judge's assessment of the credibility of the testimony of expert witnesses ... .

142 For the reasons that follow, it is my view that the critical findings of fact of the trial judge in this case compel the issuance of a stay of proceedings.

C. Approach of the Court of Appeal

143 I agree with Cromwell J.A. in the Nova Scotia Court of Appeal ((1999), 179 N.S.R. (2d) 45) that the crux of the trial judge's reasoning was that as a result of the abuse of process which the trial judge [page372] found to exist, the appellant is facing charges that otherwise would never have been laid, or if laid would not have been prosecuted. (The excessive charges, to be specific, are the nine charges which are the subject of the stay.)

144 Cromwell J.A. put it this way at para. 128:

> Although the judge does not explicitly say so, it appears that he found that the respondent, as a result of the loss of objectivity, may have been facing many more charges than he would have had appropriate objectivity been retained. With respect to Count 16, the judge found that it was prosecuted for an improper motive.

145 On the other hand, with respect, I do not agree with the overall approach of the majority judgment of Cromwell J.A. when it takes the symptoms of institutional failure identified by the trial judge and (as I interpret his opinion) addresses each symptom in isolation from the others with a view to demonstrating that what was done was not necessarily and in all cases wrong. I think, with respect, this approach is incorrect. Quite apart from the trial judge's emphasis on the cumulative effect of the various elements of the conduct complained of, the majority opinion mistakes the symptoms for the diagnosis. The trial judge's concern was not so much at the level of the individual symptoms as it was with the failure in this case of the institutional checks and balances. The failure prevented the objective review of charges laid by the police that, because of their staleness, relatively minor nature (compared with those that did go to trial) and the potentially light sentences even if convicted, would likely have been stopped if an objective review had taken place.

146 As stated, these broader concerns found expression in the report of the then Director of Public Prosecutions for Nova Scotia, Mr. John Pearson, dated June 28, 1994. The trial judge accepted, of course, that Mr. Pearson's opinion was not binding upon the police or on subsequent prosecutors (and [page373] certainly not on the court). Still, it represented a bench mark of objectivity and even-handedness that he thought ought to have continued to guide consideration of both the charges Mr. Pearson considered and the others that followed. Mr. Pearson made the following observations about the potential charges that he recommended against proceeding with:

> The Other Complainants
>
> Concerning the other four complainants ... it is our opinion that these allegations should not be proceeded with by way of criminal charges. We have concluded that acts contemplated by the indecent assault section of the Criminal Code of the day were

present in these cases. However, consideration of the following public interest factors tips the scale in favour of not proceeding with these matters as criminal charges:

i) the allegations are minor in nature, especially when placed in the context of societal values at the time (this fact is best illustrated in [the] incident [involving one complainant] where her father, upon learning of the facts, demanded an apology from the accused);

ii) the "staleness" of the offences when compared with their gravity;

iii) the prosecution of these charges may be seen as "persecution" in light of the facts, the staleness of the offences and the relatively insignificant sentence, which could be anticipated if convictions were entered;

iv) other alternatives are available to sanction this behaviour, i.e. the prosecution of the more serious charges; and

v) the maintenance of public confidence in the administration of justice can be sustained without these four charges proceeding.

147 The charges that were stayed by the trial judge were described by Freeman J.A., dissenting, as historic counts (at para. 20):

> Each count alleges a single impulsive act, an isolated incident without repetition, follow-up, or persistency on the part of the respondent. The most recent of the stayed [page374] counts was almost 20 years old at the time of the trial, and some were more than 30. None of the complainants had come forward to initiate contact with police. The director of public prosecutions who evaluated the police case before the charging decision was made, and before the Crown's objectivity had been compromised, had recommended against proceeding with historic counts of this nature.

148 The conclusion that well-informed people may reasonably take from the continued prosecution of what Mr. Pearson described as "minor" allegations 24 to 34 years after the events are said to have taken place is that the appellant is being pursued not so much for what he has done as for who he is. Such a perception undermines public confidence in the impartiality and integrity of the criminal justice system, in my opinion.

D. Law Governing Abuse of Process

149 There is no doubt that the prosecutorial misconduct found by the trial judge would not prevent the accused from receiving a fair trial on all charges. The appellant's complaints in that regard were all properly rejected.

150 The issues relevant to the "abuse of process" claim in this case are:

(i) the extent to which an objective and even-handed Crown Attorney is essential to the checks and balances at the stages of the criminal justice system in which he or she is involved, and

(ii) whether preferring a direct indictment and the holding of a subsequent fair trial cures the omission of an essential check and balance in the laying of the charges.

1. The Importance of Checks and Balances

151 It is clear that Crown Attorneys perform an essential "Minister of Justice" role at all stages of [page375] their work. Their role in considering or carrying forward a prosecution is of the highest importance for the integrity of our criminal justice system, and was perhaps most famously described by Rand J. in Boucher, supra, at pp. 23-24:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

Many other statements of the highest authority can be found to the same effect. In Stinchcombe, supra, Sopinka J. for the Court stated as follows, at p. 341:

> The tradition of Crown counsel in this country in carrying out their role as "ministers of justice" and not as adversaries has generally been very high.

152 In R. v. Bain, [1992] 1 S.C.R. 91, Gonthier J. for himself, McLachlin and Iacobucci JJ., dissenting on other grounds, stated at p. 118:

> The single-minded pursuit of convictions cannot be compatible with the responsibilities of Crown prosecutors.

153 In Nelles v. Ontario, [1989] 2 S.C.R. 170, Lamer J. (as he then was) for himself, Dickson C.J. and Wilson J., stated at p. 191:

> Traditionally the Crown Attorney has been described as a "minister of justice" and "ought to regard himself as part of the Court rather than as an advocate".

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154 See also Lemay, supra, per Cartwright J., dissenting on other grounds, at p. 257: "[T]he sole object of the proceedings is to make certain that justice should be done".

155 The "Minister of Justice" responsibility is not confined to the courtroom and attaches to the Crown Attorney in all dealings in relation to an accused person whether before or after charges are laid. It is a responsibility "that should be conducted without feeling or animus on the part of the prosecution" (R. v. Chamandy (1934), 61 C.C.C. 224 (Ont. C.A.), per Riddell J.A., at p. 227).

156 These statements suggest at least three related but somewhat distinct components to the "Minister of Justice" concept. The first is objectivity, that is to say, the duty to deal dispassionately with the facts as they are, uncoloured by subjective emotions or prejudices. The second is independence from other interests that may have a bearing on the prosecution, including the police and the defence. The third, related to the first, is lack of animus -- either negative or positive -- towards the suspect or accused. The Crown Attorney is expected to act in an even-handed way.

157 In R. v. G.D.B., [2000] 1 S.C.R. 520, 2000 SCC 22, at para. 24, we held that "the right to effective assistance of counsel" in the criminal justice system reflects a principle of fundamental justice within the meaning of s. 7 of the Charter. The duty of a Crown Attorney to respect his or her "Minister of Justice" obligations of objectivity and independence is no less fundamental. It is an essential protection of the citizen against the sometimes overzealous or misdirected exercise of state power. It is one of the more important checks and balances of our criminal justice system and easily satisfies the criteria first established in Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, at p. 513:

[page377]

> Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system, as it evolves.

158 These requirements set a high standard. The courts rightly presume, such are the high traditions of the prosecutorial service in this country, that they are met in the thousands of decisions taken every day that so vitally impact the lives of those who find themselves in trouble -- rightly or wrongly -- with the law. Unfounded or trivial allegations will be given short shrift. In this case, however, the trial judge found that the departure from the expected standard was neither unfounded nor trivial. The extent of the departure was deeply troubling. The trial judge has much experience in the practicalities of criminal prosecutions. We are thus confronted in this case with a very exceptional set of facts.

159 The police investigate. Their task is to assemble evidence and, assessing it as dispassionately as they can, determine whether in their view it provides reasonable and probable grounds to lay charges. The prosecutors provide the initial checks and balances to the power of the police. As the late Mr. Justice Arthur Martin observed in his Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions (1993) ("Martin Report"), at p. 117, "[a]s ministers of justice, their ultimate task is to see that the public interest is served, in so far as it can be, through the use, or non-use, of the criminal courts" (emphasis added). Further (at pp. 117-18):

> Discharging these responsibilities, therefore, inevitably requires Crown counsel to take into account many factors, discussed above, that may not necessarily have to be

> considered by even the most conscientious and responsible police officer preparing to swear an information charging someone with a criminal offence.

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160 The Crown prosecutor thus stands as a buffer between the police and the citizen. As the Martin Report emphasized, at p. 39:

> ... separating the investigative and prosecutorial powers of the state is an important safeguard against the misuse of both. Such separation of power, by inserting a level of independent review between the investigation and any prosecution that may ensue, also helps to ensure that both investigations and prosecutions are conducted more thoroughly, and thus more fairly. [Emphasis added.]

161 The appellant was as much entitled to this "level of independent review" as any other suspect. The trial judge concluded that the distinct roles of the Crown Attorney and the police became blurred and "homogenized". In the result, the appellant was deprived of the institutional protection to which he was, and is, entitled. This is how the trial judge put this crucial finding of fact (at para. 122):

> The Crown states that it was not involved in the investigation and I accept this. However it is clear to me that the Crown was integrally immersed in the decision-making process as it applied to the laying of charges. In so doing it became heavily involved with interviewing potential complainants. Unlike Mr. Pearson, they did not critically review a police report. Instead they collaborated fully with the police to create what in essence became a joint charging decision. Cooperation led to consensus, but only at the expense of the process which became homogenized. Thus the applicant was denied that hard objective second look (at the charging decision) which is so fundamental to the role of the Crown. [Emphasis added.]

162 These are findings of fact for which there was ample evidence.

163 No reason has been shown, in my view, for any interference in these findings of fact either by the Nova Scotia Court of Appeal or by this Court.

2. The "Residual Category" of the Law on Abuse of Process

164 The jurisprudence is clear that a fair trial cannot always cure an earlier default that taints the integrity [page379] of the justice system. In R. v. O'Connor, [1995] 4 S.C.R. 411, it was said at para. 73 that 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.

165 The common law had developed a doctrine of abuse of process long before the Charter. In Canada it is sometimes traced to In re Sproule (1886), 12 S.C.R. 140. A rationale of the common law doctrine was adopted in R. v. Jewitt, [1985] 2 S.C.R. 128, in terms that are pertinent here, at p. 136:

> Lord Devlin has expressed the rationale supporting the existence of a judicial discretion to enter a stay of proceedings to control prosecutorial behaviour prejudicial to accused persons in Connelly v. Director of Public Prosecutions, [1964] A.C. 1254 (H.L.) at p. 1354:
>
> > Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or who are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused.

E. Prosecutorial Discretion

166 The trial judge in this case was careful not to understate or diminish the broad scope traditionally and properly afforded to prosecutorial discretion. Courts are very slow to second-guess the exercise of that discretion and do so only in narrow circumstances. In R. v. Beare, [1988] 2 S.C.R. 387, for [page380] example, the Court noted that a system which did not confer a broad discretion on law enforcement and prosecutorial authorities would be unworkable, per La Forest J., at p. 410:

> Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay charges, to arrest and to conduct incidental searches, as prosecutors do in deciding whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch an appeal and so on.

See also: R. v. Power, [1994] 1 S.C.R. 601; Smythe v. The Queen, [1971] S.C.R. 680, at p. 686; R. v. T. (V.), [1992] 1 S.C.R. 749; and R. v. Lyons, [1987] 2 S.C.R. 309, at p. 348.

167 Still, the corollary to these extensive discretionary powers is that they must be exercised with objectivity and dispassion. This principle has found its way into the Canadian Bar Association's Code of Professional Conduct (1988); see chapter IX, "The Lawyer as Advocate", s. 9 (Duties of Prosecutor):

> The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately.

168 Because the exercise of prosecutorial discretion is, within broad limits, effectively non-reviewable by the courts, it is all the more imperative that the discretion be exercised in a fair

and objective way. Where objectivity is shown to be lacking, corrective action may be necessary (as here) to protect what O'Connor referred to as "the integrity" of the criminal justice system.

169 Wilson J., in R. v. Keyowski, [1988] 1 S.C.R. 657, developed the notion that abuse of process in this regard does not require a demonstration of [page381] prosecutorial bad faith. She wrote that courts should look at all relevant factors. "To define 'oppressive' as requiring misconduct or an improper motive would, in my view, unduly restrict the operation of the doctrine... . Prosecutorial misconduct and improper motivation are but two of many factors to be taken into account ..." (p. 659).

170 In the present case, the overriding concern was the failure of the proper and usual institutional checks and balances.

171 The fact that O'Connor brought together the two streams of jurisprudence relating to abuse of power -- the common law with its emphasis on the integrity of the criminal justice system and the Charter with its emphasis on individual rights -- did not diminish judicial preoccupation with the integrity of the process. It was fairly observed in Canada (Minister of Citizenship and Immigration) v. Tobiass, [1997] 3 S.C.R. 391, that cases of abuse of process that do not involve fair trial rights or other individual rights and freedoms can be expected to be few in number. This is because despite the fact that errors are made, the institutional integrity of our system of justice is rarely called into question successfully.

172 In my view, the Crown did not demonstrate that in finding an abuse of process in this case the trial judge either misdirected himself or that "his decision is so clearly wrong as to amount to an injustice" (Elsom, supra, at p. 1375).

173 I agree with Freeman J.A. in dissent when he said, at para. 5, that:

> The prominence of the accused and the high level of media interest in the case called for a disciplined and dispassionate approach by the Crown to ensure a perception that Mr. Regan was treated as even-handedly as any citizen has a right to expect. Instead the trial judge identified a number of lapses of judgment indicative of over-zealousness by the police and the Crown, three of which figured in his decision to stay what were considered to be [page382] lesser charges to preserve the reputation of the administration of justice.

174 As Freeman J.A. points out, the specific lapses were considered "indicative" (not exhaustive) of over-zealousness.

F. Addressing the Symptoms

175 Much of the reasons for judgment of the majority in the Nova Scotia Court of Appeal is devoted to pointing out what the trial judge did not find, or alleged inconsistencies in what he did find. In my view, with respect, the reasons of the trial judge read as a whole by a mind willing to understand are consistent and coherent. As stated, I disagree with the effort to divide his reasons into airtight compartments and then isolate and attack the compartments one by one.

Nevertheless, I proceed with a consideration of the symptoms listed by the trial judge and addressed by the Court of Appeal in the order in which they arose in the earlier judgments.

1. Police Misconduct

176 The trial judge rejected almost all of the appellant's allegations of misconduct against the police, including the allegedly "premature" formation of a task force to investigate rumours and journalistic speculation about the appellant's behaviour, allegedly questionable investigative techniques, missing evidence and arrest procedures. He was nevertheless "troubled" by the "serious error in judgment" (para. 87) by the police in confirming that the appellant was under investigation before any of the complainants had been interviewed let alone charges laid. This was contrary to the express direction of the provincial Solicitor General's Department dated February 6, 1990:

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3. No police official shall disclose the fact of a police investigation, other than on a need-to-know basis within the Police Department, so as to maintain confidentiality and secrecy respecting the identity of a person who is the subject of an investigation.

The disclosure was not a slip. The trial judge found that the police officer checked with his superior officer before making the disclosure and issued the disclosure in the form of a press release. The effect, as pointed out by Freeman J.A., was that "[t]he story made national headlines some 17 months before charges were laid" (para. 24).

177 The majority judgment of the Nova Scotia Court of Appeal considered this event to be largely irrelevant to the issues under appeal because it relates to the police, not the prosecutors. I disagree. What this incident should have indicated to the Crown Attorney's office was that the police perceived themselves to be under a great deal of public pressure and that a "hard objective second look" at any charges ultimately laid would be of the highest importance to the fair and even-handed administration of justice. It is in such situations that the system of checks and balances is most severely tested.

2. Conduct of the Crown Prosecutors

178 There were three aspects, in particular, of the conduct of the prosecutors that indicated to the trial judge that the system of checks and balances did not operate in this case.

(a) Judge Shopping

179 The first aspect was the apparent willingness of the Senior Crown Attorney on the case, Ms. Susan Potts, to manipulate the court system to advantage the prosecution. This emerged in the RCMP minute of a meeting on July 15, 1994 between the Crown Attorney and RCMP investigators where she advocated judge shopping, i.e., using the Crown's scheduling privilege

to get the case before a judge of its [page384] own choosing, a practice which undermines both the reality and the appearance of the impartial administration of justice. The RCMP minute reads:

> There was some discussion in regards to where charges are laid and an appearance by Regan in court. [Crown counsel] Potts said that Judge Randall is sitting in Sept and it is not advisable to bring the matter before him -- political appointment (Liberals). Oct may be the appropriate month. Potts is to keep monitoring the court docket to see who is sitting when and what would be in our best interest. [Emphasis added.]

180 The trial judge considered the note important because of what it revealed, namely that the Senior Crown Attorney with day-to-day responsibilities for the case had identified herself with the police point of view, and was "attempting to secure a conviction at all costs". The trial judge wrote (at para. 101):

> This entry represents a blatant attempt at judge shopping, pure and simple. It is offensive and most troubling. The reference to avoiding a particular judge is one distressing thing, the flagrant attempt at "monitoring the court docket to see who is sitting when and what would be in our best interest" [emphasis added by MacDonald A.C.J.] is even more disturbing. This gives the appearance of a Crown Attorney who is attempting to secure a conviction at all costs. [Emphasis added.]

181 The Nova Scotia Court of Appeal pointed out that eventually Ms. Potts left the case in 1996. This is true, but the trial judge was concerned about the absence of an objective view at the time the charges were laid, at which point (for example, the critical meeting with the RCMP on January 17, 1995) Ms. Potts was very much the heart and sinews of the prosecution team. The Crown says that the "judge shopping" comment was neither repeated nor acted on. We do not know this. The appellant attempted to subpoena Ms. Potts to testify at the abuse of process hearing but it seems that [page385] her appearance was successfully blocked by Crown objections.

(b) Joining Forces with the Police

182 A few years before the investigation in this case, the prosecutorial branch in Nova Scotia was severely shaken by the findings of the Royal Commission on the Donald Marshall, Jr., Prosecution, vol. 1, Findings and Recommendations (1989) (the "Marshall Report"). In the course of inquiring into the wrongful conviction of Mr. Marshall, the Royal Commission found instances of political interference in charging decisions and differential treatment as between prominent citizens and the disadvantaged. The Marshall Report therefore recommended that the problems historically experienced in Nova Scotia be addressed by maintaining a "distinct line" between the police and the Crown law office (at p. 232):

> We recognize that cooperative and effective consultation between the police and the Crown is also essential to the proper administration of justice. But under our system, the policing function -- that of investigation and law enforcement -- is distinct from the

> prosecuting function. We believe the maintenance of a distinct line between these two functions is essential to the proper administration of justice. [Emphasis added.]

183 The accepted practice in Nova Scotia in the 1994-95 time period (i.e., the "local custom") was set out in a report submitted to the Minister of Justice for Nova Scotia concerning the status of the Public Prosecution Service in 1994, in which Professors Ghiz and Archibald of Dalhousie Law School stated as follows:

> In some Canadian jurisdictions, and in Nova Scotia prior to the Marshall Inquiry, prosecutors claimed the authority to direct the police in their general investigative duties (as well prior to as after the laying of charges), and sometimes purported to have the authority to order the police not to lay charges in specific cases. Pursuant to recommendations 36 and 37 of the Marshall Inquiry, as adopted by the Attorney General and the then Solicitor [page386] General, there is now a clearer understanding of the importance of separating the policing and prosecution functions. Fundamentally, one might say the police have the right to investigate and lay charges unimpeded by Crown Prosecutors, while Prosecutors have the right to stop charges once laid. However, there is often a need for both pre-charge and post-charge consultation since the normal scenario is a cooperative rather than antagonistic relationship between Crowns and police, both of whom share common goals in the administration of criminal justice. The nature of this advice sought by police and given by Crowns is usually limited as to the appropriateness of a specific charge under the Criminal Code or the interpretation of a Criminal Code section, but the advice may also extend to whether or not certain evidence that has been gathered would be sufficient to sustain a case in court. [Emphasis in original.]
>
> (J. A. Ghiz and B. P. Archibald, Independence, Accountability and Management in the Nova Scotia Public Prosecution Service: A Review and Evaluation (1994), at pp. 41-42)

184 In my view, the Nova Scotia Court of Appeal did not meet the trial judge's point when it attempted to show that pre-charge involvement of Crown Attorneys with the police varies somewhat from province to province and cannot be regarded as in all circumstances and for all purposes objectionable. I agree that the test is a principled test (i.e., have objectivity and independence been maintained?) rather than mechanical (e.g., did the interview take place pre-charge or post-charge?), and that in principle the charging decision does not represent a "bright line" prior to which the involvement of a Crown Attorney is presumptively suspect.

185 Moreover, I agree with my colleague LeBel J., at para. 83, that:

> ... pre-charge Crown interviews may advance the interests of justice (see below), and because the pre- versus [page387] post-charge distinction may distract attention away from the necessary vigilance to maintain objectivity throughout the proceedings. [Emphasis in original.]

186 The trial judge's concern was a principled concern. He deplored what he found to be the absence of independence and objectivity on the part of Ms. Potts and her colleagues in the

Crown office working on this case. Those who engaged in the pre-charge interviews had acquired, for whatever reason, tunnel vision under the pressures of a high profile investigation of a politically prominent individual.

187 The trial judge was not opposed to the pre-charge involvement of the Crown. He had no trouble, for example, with the pre-charge involvement of Mr. Pearson, the Director of Public Prosecutions. He stated his concern more narrowly (at para. 121):

> The crucial issue before me is a more narrow one. It involves firstly, the Crown's determination to interview complainants pre-charge and secondly, the impact of that process on the number and types of charges that were ultimately laid. [Emphasis added.]

188 Some of the trial judge's observations on the dangers of interviewing complainants pre-charge may have gone beyond the "narrow" issue he had identified for himself. I do not, for example, think he should be taken to say that pre-charge interviews necessarily give rise to a loss of objectivity. Not only did he endorse pre-charge interviews for certain limited purposes but he was dealing with a loss of objectivity that pre-dated even the initial Crown interviews. Ms. Potts made the judge-shopping comment on July 15, 1994, but she did not begin her interviews of the complainants until over four months later, on November 17, 1994.

189 Taking his reasons as a whole, the trial judge appeared to accept (as I do) the correctness of the evidence of Dr. Philip Stenning, which the [page388] trial judge summarized as follows (at paras. 115-16):

> Dr. Philip Stenning was arguably the Crown's most qualified expert. He has dedicated his entire academic career to studying the role of the Crown and has published extensively on this topic. Like Mr. Gover, he feels it would be an over-simplification to decree that a prosecutor should never interview pre-charge. Everything must be placed in context he feels, and local customs must be acknowledged and respected. Despite what might be stated in the Martin and Marshall Reports, he feels there is still room for the Crown to interview pre-charge in appropriate circumstances.
>
> ... [He] does concede that such occasions would be rare.

190 The specific problems here, therefore, were breach of what Dr. Stenning termed a "local custom" of maintaining a distinct division of responsibilities that was perhaps more emphasized in Nova Scotia than elsewhere due to well-publicized problems with the Crown Attorney's office over the preceding ten years or so, and the problematic motive for the breach. As to the former, the trial judge's concern was not with cross-Canada variations but whether or not the Crown Attorneys in Nova Scotia observed the local rules that had been put in place following the Marshall Report. Their willingness to ignore the "distinct line" between their role and that of the police, accepted by Nova Scotia following the Marshall Report, showed a zeal for the laying of more charges that "homogenized" what were supposed to be distinct and separate functions. Instead of the police laying charges and the Crown providing a "hard objective second look", the Crown had subordinated itself and become a supporting actor in the initial charging decision, which the trial judge described as a "joint ... decision". As to motive, the trial judge recognized

several legitimate reasons to interview a complainant pre-charge, for example, to prevent an accused "from going through the embarrassment (humiliation) of being charged only to later have the charges dropped or stayed" (para. 117), rapport building to encourage informed willingness to participate, [page389] or assessing victim credibility. He said (at para. 118):

> The Crown in the case at bar has given its reasons for interviewing precharge. They include "rapport building" and assessing victim credibility. Yet, despite these stated intentions, it is clear according to one R.C.M.P. file reviewer that the purpose for at least some of these pre-charge Crown interviews was to have reluctant complainants change their minds and come forward. [Emphasis added.]

191 The purpose here, apparently, was not to "build rapport" with complainants who were worried about the court process, which would be a perfectly acceptable reason for a pre-charge interview. The trial judge saw the Crown involvement in "changing their minds" as simply another aspect of the Crown's joining the police team rather than exercising a "level of independent review". In this respect, he quoted (at para. 118) a contemporaneous RCMP internal note dated January 17, 1995, which recorded:

> It is now the investigators and the Crown's belief that if these persons could be re-interviewed with both the Crown Prosecutor and police investigator present there would be a greater chance of them changing their minds. [Emphasis added.]

This was to further the police strategy of a "broadly based prosecution", as it was described by counsel for the Crown in this Court. In my view, the trial judge was correct in his criticism. If the charges were examined and approved one by one, the Crown might wind up with a "broadly based prosecution", but the Crown ought not to start out with the objective of a broadly based prosecution and then afterwards look to approve individual charges to make [page390] it happen. This is what the trial judge criticized (at para. 123):

> The Crown's role in response is to objectively assess the case globally. As ministers of justice they are to dispassionately protect the process which includes protecting the rights of the applicant. In this case the Crown did not review the investigators' charging decision. They became part of it. They interviewed all potential complainants. Their involvement became subjective by nature. Like the police, it is understandable that they would have strong feelings. Not surprisingly and as Mr. Reid confirmed, they eventually came to see the case the same way the police saw it. That would be fine if their review was totally objective; as was Mr. Pearson's. It becomes problematic when what was to be a review becomes a joint endeavour and a joint decision. That I believe is what happened in the case at bar.

192 On this point, Freeman J.A., dissenting, made the following comment, with which I agree (at para. 67):

> While expert opinions varied as to the rare circumstances in which pre-charge interviews may be engaged in by the Crown without imperiling Crown objectivity, there was agreement that Crown objectivity itself was an essential component of Canadian justice.

> If such a value exists then it must have a home within the system, and there must be remedies for lapses.

In my opinion, such a value exists and its home is in s. 7 of the Charter.

193 The Crown's effort to lay the responsibility for all this on the head of Ms. Susan Potts is unconvincing. As mentioned, when the defence attempted to subpoena Ms. Potts to testify about the extent and depth of alleged loss of objectivity among the prosecutors, the Crown resisted and she never had the opportunity to explain her conduct to the court. I do not say the Crown's objections to her testimony were either unfounded or unreasonable. I say only that the Crown cannot draw a self-serving conclusion from this unfortunate situation when the [page391] critical evidence went unheard because of the Crown's objection.

(c) Count 16

194 This count related to a 24-year-old news reporter who says that in 1976 she was forcibly fondled by the appellant in a hotel room while being pushed onto a bed. She was unwilling to become involved as a complainant. The police wanted count 16 before the court because it would enable them to lead "similar fact" evidence of a more significant incident in Alberta in 1990. The police apparently thought this 1990 incident would add credibility to their "broadly based prosecution" strategy by making the series of charges appear less stale and more up to date. This strategy was reflected in Staff Sergeant Fraser's internal RCMP report of December 9, 1994:

> The investigation surfaced many victims and charges to be laid should reflect the whole picture. The report, dated 94-06-28, from the Public Prosecution Service [the Pearson opinion] recommended that charges be laid in respect to four victims. This in effect shows that the subject was active in his early years however the investigation surfaced evidence to support the fact that the offenses continued throughout the period 1960-1990. For this reason, it was requested by C/Supt. FALKINGHAM that Crown review the evidence and consider laying charges in all instances so that the gravity of the subject's actions be properly presented to give the full picture.

195 The obstacle to this "full picture" strategy is that the only complainant more recent than 1978 was the Alberta allegation that could not be prosecuted in Nova Scotia. The Crown therefore decided to prosecute count 16 as a gateway to introduce the Alberta evidence, thereby extending by 12 years "the full picture".

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196 The majority judgment of the Nova Scotia Court of Appeal considered count 16 to be valid in its own right, and the trial judge's condemnation of the police strategy to be misconceived. Cromwell J.A. writes, at para. 140:

> There is nothing inherently objectionable in the Crown considering questions of the admissibility of evidence and their impact on the prospects of conviction when deciding to proceed with charges.

I agree, but that is not the point taken by the trial judge. His concern with count 16, as was his concern with the judge-shopping comment and the pre-charge interviews, was the Crown's apparent inability or unwillingness to assert its independence from the police strategies. On count 16 the trial judge said (at para. 158):

> Yet the Crown's goal as I see it was to have the jury hear and (presumably act upon) the complaint of A.R.S., a similar fact witness. Similar fact evidence is only admissible if relevant to proving the listed charge. You cannot lay a charge in order to get similar fact evidence in. Such a concept would be totally contrary to the very essence of this exclusionary rule.

197 In my view, the trial judge's concern was quite appropriate. Similar fact evidence is generally inadmissible but will be permitted where its probative value exceeds its prejudicial effect: R. v. Sweitzer, [1982] 1 S.C.R. 949, at p. 952, and R. v. B. (C.R.), [1990] 1 S.C.R. 717, at p. 735. The trial judge concluded that count 16 was to be used as a vehicle to get otherwise inadmissible evidence before the jury to extend and perhaps distort "the full picture". Whether or not a conviction was entered on count 16 was, according to the trial judge's finding of fact, of secondary importance to the police and the Crown. This was a reversal of the natural and proper order of considerations, and showed to his satisfaction that over-zealousness by the Crown was still operating more than a year after Ms. Potts left the case.

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(d) Preferring the Direct Indictment

198 The majority decision of the Nova Scotia Court of Appeal concluded that even if proper procedures were not followed in the laying of the charges in 1995 (and the subsequently added charges), the omission was cured by the preferral of the direct indictment on April 10, 1997. In this respect, Cromwell J.A. in a number of passages interprets the trial judge's decision as saying the "discretion to prefer a direct indictment, some two years after the initial charges were laid, was properly exercised" (para. 105 (emphasis added); see also paras. 143 and 173). The "cleansing effect" of the direct indictment is endorsed by my colleague LeBel J. at para. 109.

199 I think the so-called "cleansing effect" of a direct indictment is overstated. While s. 577(c) of the Criminal Code, R.S.C. 1985, c. C-46, requires "the personal consent in writing of the Attorney General or Deputy Attorney General", the purpose of this provision is to engage the responsibility of senior officials, not necessarily to compel their sustained and undivided attention to the nuts and bolts of a prosecution. Under our notions of ministerial responsibility, much is done on the basis of the signature of a Minister or Deputy Minister that he or she could not possibly have reviewed in any detail. They rely (and it is expected that they rely) on advice

from their officials. In this case, the officials were the very people whose conduct the appellant complains about.

200 The extracts of the record before us, which are restricted to factual matters relevant to the legal issues, exceed 1200 pages in length. I do not say that the Attorney General or his Deputy did not master the file, but I would require more evidence than we have been given before accepting as realistic the conclusion that they did so to the point of "cleansing" the failures in the system of checks and balances that had occurred earlier. This is particularly so when the real explanation for the direct indictment is perfectly clear. The direct indictment [page394] was recommended to the Attorney General because the preliminary hearing had run the better part of a year and showed no signs of an early conclusion.

201 In any event, I view the trial judge's finding on this point somewhat differently than did the Nova Scotia Court of Appeal majority. What the trial judge said, in fact (at para. 131), is that he was

> not convinced that the Crown acted mala fides in its decision. The preliminary inquiry was very lengthy. If the Crown was so ill-motivated, it could have preferred the direct indictment at the outset or at least sooner than it did.

202 A finding of mala fides or bad faith is not, of course, a condition precedent to finding an abuse of process: Keyowski, supra, at p. 659. The trial judge found that the Crown had not acted in bad faith to shut down a preliminary inquiry that had already run from April 9, 1996 to February 25, 1997. His comment about mala fides did not address and was not intended to address the appellant's much broader complaint of a failure by the Crown, for whatever reason, to review in an objective and even-handed way the appropriateness of the "minor" charges that Mr. Pearson had earlier rejected, and charges in the same category laid subsequently, in light of all the factors touching on the public interest. As to the direct indictment issue, I agree with Freeman J.A. in dissent (at para. 15):

> Whether the decision was fixable at that stage [i.e., of the direct indictment] is not the issue. Justice MacDonald did not find it had been fixed.

203 In light of the trial judge's conclusion that the charging process was fundamentally flawed, and the fact that he eventually entered a stay against nine of the lesser charges, it is apparent that while he did not regard the direct indictment that cut short the [page395] preliminary inquiry as tainted with mala fides on that account, he nevertheless concluded that in limited respects it was inappropriate. He specifically so found in relation to count 16, which was not laid until the direct indictment, i.e., long after Ms. Potts had left the prosecution team.

204 The direct indictment in this case was not a cleanser. At best it was a missed opportunity.

205 I would not want to leave this branch of the case without repeating the apposite observations of McLachlin J. (as she then was) and Major J. in Curragh, supra. Although written in dissent, they are sentiments with which no member of the Court would disagree (at para.

120):

> [I]t is especially where pursuit of truth is righteous that we must guard against overreaching on the part of those charged with the authority to investigate and prosecute crimes. We cannot be tolerant of abusive conduct and dispose of due process, however serious the crimes charged. High profile trials, by their nature, attract strong public emotions. In our society the Crown is charged with the duty to ensure that every accused person is treated with fairness... . When the Crown allows its actions to be influenced by public pressure the essential fairness and legitimacy of our system is lost. We sink to the level of a mob looking for a tree.

206 I would uphold in this case the trial judge's conclusion that the nine charges that he stayed represented, in all the circumstances, an abuse of process.

II. Stay of Proceedings

207 Demonstration of an abuse of process does not, of course, lead to an automatic stay of proceedings.

208 This is particularly true where, as here, the trial judge concluded that notwithstanding the passage of [page396] time and the difficulty of getting to the bottom of momentary events that happened 24 to 34 years ago, the appellant's fair trial interests have not been prejudiced by the conduct found to amount to an abuse of process.

209 The inherent power of a superior court to stay proceedings that are an abuse of power was recognized in Canada in the nineteenth century, called into question in R. v. Osborn, [1971] S.C.R. 184, and Rourke v. The Queen, [1978] 1 S.C.R. 1021, but affirmed again with Jewitt, supra. In Rourke, Pigeon J., for the majority, concluded, consistent with earlier statements in Osborn, that "I cannot admit of any general discretionary power in courts of criminal jurisdiction to stay proceedings regularly instituted because the prosecution is considered oppressive" (p. 1043), while also stating that "[i]f there is the power", it "should only be exercised in the most exceptional circumstances" (p. 1044).

210 The controversy over whether the discretion to stay for abuse of process was an option that had been completely foreclosed in Canada remained in doubt until Jewitt, supra, where Dickson C.J., for a unanimous Court, affirmed the availability of a stay of proceedings to remedy an abuse of process and Osborn and Rourke were read narrowly. This Court affirmed the existence of the residual discretion of a trial judge to stay proceedings where "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings" (pp. 136-37). Further, he added, the power can be exercised only in the "clearest of cases".

211 In Jewitt, Dickson C.J. alluded briefly to the concern about the defendant receiving a procedural windfall of sorts. "The stay of proceedings [page397] for abuse of process is given as

a substitute for an acquittal because, while on the merits the accused may not deserve an acquittal, the Crown by its abuse of process is disentitled to a conviction" (p. 148). That concern was more fully developed, along with an elaboration of the abuse of process doctrine, in R. v. Conway, [1989] 1 S.C.R. 1659, at p. 1667, by L'Heureux-Dubé J. for the majority:

> Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge. The prosecution is set aside, not on the merits ..., but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. The doctrine is one of the safeguards designed to ensure "that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society"... . It 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.]

See also R. v. Scott, [1990] 3 S.C.R. 979, per McLachlin J., at pp. 1007-8.

212 The residual category of cases where a stay of proceedings is available notwithstanding the fact the abuse of process found to exist does not affect the fairness of the trial (or impair the more specific procedural rights in the Charter) was further elaborated in O'Connor, supra, per L'Heureux-Dubé J., at para. 73:

> 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.

[page398]

213 In Tobiass, supra, at para. 89, the Court characterizes the residual category as a "small one" and observes that fairness of the trial will occupy the "vast majority" of the cases. I do not treat that observation as deprecating the importance of the residual category. As previously suggested, it merely reflects the fact that on the whole our system of criminal justice functions justly. The cases where a stay of proceedings is required on this account are rare, not because of judicial fiat to limit their numbers but because the system works. The institutional checks and balances are observed.

214 Tobiass notes that a stay of proceedings is not intended to redress a past wrong but to prevent the perpetuation of a wrong that will continue to trouble the parties and community in the future. The mere fact of "shabby treatment" of an individual in the past does not satisfy the criterion (at para. 96):

> A stay is not a form of punishment. It is not a kind of retribution against the state and it is not a general deterrent. If it is appropriate to use punitive language at all, then probably the best way to describe a stay is as a specific deterrent -- a remedy aimed at preventing the perpetuation or aggravation of a particular abuse.

215 Accordingly, in a unanimous pronouncement on the subject, this Court in Tobiass laid down a two-part analysis for considering the grant of a stay of proceedings (at para. 90):

> If it appears that the state has conducted a prosecution in a way that renders the proceedings unfair or is otherwise damaging to the integrity of the judicial system, two criteria must be satisfied before a stay will be appropriate. They are that:
>
> (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
>
> (2) no other remedy is reasonably capable of removing that prejudice.

To which a potential third step was added at para. 92:

[page399]

> After considering these two requirements, the court may still find it necessary to consider a third factor. As L'Heureux-Dubé J. has written, "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"... . We take this statement to mean that there may be instances in which it will be appropriate to balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits.

216 In my view, with respect, the criteria laid down in these cases, and recited by the trial judge in his reasons for judgment, are amply fulfilled by the findings of fact in this case.

217 The absence of the proper checks and balances between police and prosecutor in this case led to an increase in the number of charges laid against the appellant. The trial judge's reasons can be read in no other way. Cromwell J.A. noted, at paras. 168-69, that the trial judge's

> reasons are consistent with a conclusion that the respondent may have been facing more charges than he would have been had Crown objectivity been retained at "the charging stage". In other words, had objectivity been retained, some of the charges laid by the police might have been stayed by the Crown. If this is correct, the loss of objectivity found by the judge could be taken to have ongoing effects in the sense that it may have put the prosecution on a fundamentally different path than it would otherwise have followed. The judge sought to remedy the loss of objectivity by staying counts which he thought Mr. Pearson would not have proceeded with had he remained in office.

> In my respectful view, this analysis overlooks the proper preferring of the direct indictment.

218 I have already discussed my disagreement with Cromwell J.A.'s interpretation of the trial judge's treatment of the direct indictment.

219 It is clear to me, applying the first stage of the Tobiass test, that the trial judge concluded that the Crown's loss of objectivity and improper motive [page400] will be "manifested, perpetuated or aggravated" through the continued prosecution of the charges to which these abuses of process gave rise (Tobiass, at para. 90). If the trial itself would not have occurred but for the abusive conduct, then the trial itself necessarily perpetuates the abuse.

220 Secondly, the only way to halt this continued prejudice to the appellant is by bringing a halt to the charges going forward to trial, i.e., a stay of proceedings.

221 The trial judge's analysis of these first two elements in the Tobiass analysis draws support, I think, from the scholarly article that initially formulated these elements of the test (see O'Connor, supra, at para. 75):

> Where the abuse has caused no prejudice to the fairness of the trial itself, a stay will be appropriate where:
>
> > the abuse is in the very fact that a charge was laid, and the abuse in question or the prejudice it has caused is so significant relative to the seriousness of the offence that it is more important to the interests of justice that the court redress the abuse, than try the offence on its merits ... . [Emphasis added.]
>
> (D. M. Paciocco, "The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept" (1991), 15 Crim. L.J. 315, at p. 350)

222 In this case, "the seriousness" of the offences was characterized as relatively "minor" and the importance which may be attached to their prosecution therefore does not outweigh the prejudice in this case to the integrity of the administration of justice.

223 The majority opinion in the Nova Scotia Court of Appeal largely rested on the view that the trial judge had failed to consider whether the continuation of the prosecution would "manifest, perpetuate or aggravate the prejudice" (para. 101). The trial judge cited that specific aspect of the test at para. 56 of his reasons and in my opinion he applied it and, given his findings of fact, he came to the right conclusion.

[page401]

224 The Tobiass case, I note parenthetically, was decided on very different facts. Neither the original charges nor the conduct of the prosecutors assigned to the case were criticized. A meeting took place between the Chief Justice of the Federal Court and a senior member of the Justice Department (neither of whom had any direct role in Tobiass or its companion cases). At the meeting, Tobiass and its companion cases, amongst other cases of alleged war crimes,

were referred to in terms of alleged scheduling delays. Defence counsel were not made aware of the meeting until after it had occurred. This Court found a serious breach of fairness had occurred, but the prejudice could be eliminated by ensuring that the participants in the meeting at issue had no further participation whatsoever in the case. No such limited remedy is possible in this case. So long as the charges stand, the prejudice will persist.

225 Finally, at the third stage of the Tobiass test, the court is to consider (if it still has any uncertainty) the balance between any harm to the justice system that would result from taking the charges to trial as against the public interest in having these charges disposed of on their merits. As mentioned, the balancing process was described by L'Heureux-Dubé J. in Conway, supra, at p. 1667:

> ... 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.

226 This was expressly noted by the trial judge in this case, who said: "This balancing act, so common to almost everything we do as judges, will play a significant role in my analysis in the case at bar" (para. 58).

227 The key to the trial judge's "balance" was his view that despite the existence of allegations which, [page402] if believed, would constitute the offences charged, the group of charges stayed were less serious than those he allowed to proceed, and had never been objectively reviewed in light of what the Martin Report described as factors "that may not necessarily have to be considered by even the most conscientious and responsible police officer" (p. 118).

228 Society, like the Crown Attorney, has no specific interest in "winning or losing" but it does have an interest in placing the relevant facts before a court for determination on their merits. This factor militates against a stay, but in this case it is a factor that is overwhelmed by competing considerations.

229 The trial judge was clearly of the same view as the former Director of Public Prosecutions, Mr. John Pearson, who said that while on the one hand "acts contemplated by the indecent assault section of the Criminal Code of the day were present in these cases", nevertheless, on the other side of the ledger, "consideration of the following public interest factors tips the scale in favour of not proceeding" (emphasis added) with the "minor" charges. For ease of reference, I repeat Mr. Pearson's public interest factors which the trial judge adopted:

i) the allegations are minor in nature, especially when placed in the context of societal values at the time (this fact is best illustrated in the [C.E.R.] incident where her father, upon learning of the facts, demanded an apology from the accused);

ii) the "staleness" of the offences when compared with their gravity;

iii) the prosecution of these charges may be seen as "persecution" in light of the facts, the staleness of the offences and the relatively insignificant sentence, which could be anticipated if convictions were entered;

[page403]

iv) other alternatives are available to sanction this behaviour, i.e. the prosecution of the more serious charges; and

v) the maintenance of public confidence in the administration of justice can be sustained without these four charges proceeding. [Emphasis added.]

230 The Pearson report was clearly not binding on the Crown or upon Mr. Pearson's successors, and the trial judge never suggested that it was. What he did suggest is that the factors put in the balance by Mr. Pearson were logical and pertinent. It was open to the trial judge to adopt the Pearson criteria as his own, and he did so. As I read his judgment, he concluded, that in light of his decision to send the appellant to trial on the nine more serious charges (eight of which, as stated, have now resulted in the appellant's acquittal), the prosecution of additional charges of a relatively minor nature that allegedly took place 24 to 34 years ago, and which if successful would carry a "relatively insignificant sentence", did not outweigh the public interest in vindicating the importance of the role played by objective and independent Crown prosecutors.

231 The trial judge thought that in this way an appropriate balance had been struck between the public interest in having all charges dealt with on their merits against the public interest in having all charges stayed to show the court's determination to ensure the continued vigour of checks and balances in the criminal justice system. Whether or not this Court would draw the line precisely where the trial judge drew it is beside the point. After hearing evidence and argument for 18 days, he properly instructed himself on the law, carefully reviewed the facts, and made no palpable or overriding error in the inferences and conclusions that he reached.

III. Conclusion

232 I would therefore allow the appeal.

[page404]

Solicitors for the appellant: Greenspan, Henein & White, Toronto. Solicitor for the respondent: The Department of Justice, Winnipeg. Solicitor for the intervener the Attorney General of Canada: The Attorney General of Canada, Ottawa. Solicitor for the intervener the Attorney General of Quebec: The Attorney General of Quebec, Quebec. Solicitor for the intervener the Attorney General for New Brunswick: The Attorney General for New Brunswick, Miramichi.

R. v. Jordan, [2016] 1 S.C.R. 631

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

Heard: October 7, 2015;

Judgment: July 8, 2016.

File No.: 36068.

[2016] 1 S.C.R. 631 | [2016] 1 R.C.S. 631 | [2016] S.C.J. No. 27 | [2016] A.C.S. no 27 | 2016 SCC 27

Barrett Richard Jordan, Appellant; v. Her Majesty The Queen, Respondent, and Attorney General of Alberta, British Columbia Civil Liberties Association and Criminal Lawyers' Association (Ontario), Interveners.

(303 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Catchwords:

Constitutional law — Charter of Rights — Right to be tried within reasonable time — Delay of more than four years between charges and end of trial — Whether accused's right to be tried within reasonable time under s. 11(b) of Canadian Charter of Rights and Freedoms infringed — New framework for applying s. 11(b).

Summary:

J was charged in December 2008 for his role in a dial-a-dope operation. His trial ended in February 2013. J brought an application under s. 11(*b*) of the *Canadian Charter of Rights and Freedoms*, seeking a stay of proceedings due to the delay. In dismissing the application, the trial judge applied the framework set out in *R. v. Morin*, [1992] 1 S.C.R. 771. Ultimately, J was convicted. The Court of Appeal dismissed the appeal.

Held: The appeal should be allowed, the convictions set aside and a stay of proceedings entered.

Per Abella, Moldaver, Karakatsanis, Côté and Brown JJ.: The delay was unreasonable and J's s. 11(*b*) *Charter* right was infringed. The *Morin* framework for [page632] applying s. 11(*b*) has given rise to both doctrinal and practical problems, contributing to a culture of delay and complacency towards it. Doctrinally, the *Morin* framework is too unpredictable, too confusing, and too complex. It has itself become a burden on already over-burdened trial courts. From a practical perspective, the *Morin* framework's after-the-fact rationalization of delay

does not encourage participants in the justice system to take preventative measures to address inefficient practices and resourcing problems.

A new framework is therefore required for applying s. 11(*b*). This framework is intended to focus the s. 11(*b*) analysis on the issues that matter and encourage all participants in the criminal justice system to cooperate in achieving reasonably prompt justice, with a view to fulfilling s. 11(*b*)'s important objectives.

At the heart of this new framework is a presumptive ceiling beyond which delay -- from the charge to the actual or anticipated end of trial -- is presumed to be unreasonable, unless exceptional circumstances justify it. The presumptive ceiling is 18 months for cases tried in the provincial court, and 30 months for cases in the superior court (or cases tried in the provincial court after a preliminary inquiry). Delay attributable to or waived by the defence does not count towards the presumptive ceiling.

Once the presumptive ceiling is exceeded, the burden is on the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. If the Crown cannot do so, a stay will follow. Exceptional circumstances lie outside the Crown's control in that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) they cannot reasonably be remedied.

It is obviously impossible to identify in advance all circumstances that may qualify as exceptional for the purposes of adjudicating a s. 11(*b*) application. Ultimately, the determination of whether circumstances are exceptional will depend on the trial judge's good sense and experience. The list is not closed. However, in general, exceptional circumstances fall under two categories: discrete events and particularly complex cases.

[page633]

If the exceptional circumstance relates to a discrete event (such as an illness or unexpected event at trial), the delay reasonably attributable to that event is subtracted from the total delay. If the exceptional circumstance arises from the case's complexity, the delay is reasonable and no further analysis is required.

An exceptional circumstance is the only basis upon which the Crown can discharge its burden to justify a delay that exceeds the ceiling. The seriousness or gravity of the offence cannot be relied on, nor can chronic institutional delay. Most significantly, the absence of prejudice can in no circumstances be used to justify delays after the presumptive ceiling is breached. Once so much time has elapsed, only circumstances that are genuinely outside the Crown's control and ability to remedy may furnish a sufficient excuse for the prolonged delay.

Below the presumptive ceiling, however, the burden is on the defence to show that the delay is unreasonable. To do so, the defence must establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, and (2) the case took markedly longer than it reasonably should have. Absent these two factors, the s. 11(*b*) application must fail. Stays beneath the presumptive ceiling should only be granted in clear cases.

As to the first factor, while the defence might not be able to resolve the Crown's or the trial court's challenges, it falls to the defence to show that it attempted to set the earliest possible hearing dates, was cooperative with and responsive to the Crown and the court, put the Crown on timely notice when delay was becoming a problem, and conducted all applications (including the s. 11(*b*) application) reasonably and expeditiously. At the same time, trial judges should not take this opportunity, with the benefit of hindsight, to question every decision made by the defence. The defence is required to act reasonably, not perfectly.

Turning to the second factor, the defence must show that the time the case has taken markedly exceeds the reasonable time requirements of the case. These requirements derive from a variety of factors, including the complexity of the case and local considerations. Determining the time the case reasonably should have taken is [page634] not a matter of precise calculation, as has been the practice under the *Morin* framework.

For cases currently in the system, a contextual application of the new framework is required to avoid repeating the post-*Askov* situation, where tens of thousands of charges were stayed as a result of the abrupt change in the law. Therefore, for those cases, the new framework applies, subject to two qualifications. First, for cases in which the delay exceeds the ceiling, a transitional exceptional circumstance may arise where the charges were brought prior to the release of this decision. This transitional exceptional circumstance will apply when the Crown

satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed. This requires a contextual assessment, sensitive to the manner in which the previous framework was applied, and the fact that the parties' behaviour cannot be judged strictly, against a standard of which they had no notice.

The second qualification applies to cases currently in the system in which the total delay (minus defence delay) falls below the ceiling. For these cases, the two criteria -- defence initiative and whether the time the case has taken markedly exceeds what was reasonably required -- must also be applied contextually, sensitive to the parties' reliance on the previous state of the law. Specifically, the defence need not demonstrate having taken initiative to expedite matters for the period of delay preceding this decision. Since defence initiative was not expressly required by the *Morin* framework, it would be unfair to require it for the period of time before the release of this decision. Further, if the delay was occasioned by an institutional delay that was, before this decision was released, reasonably acceptable in the relevant jurisdiction under the *Morin* framework, that institutional delay will be a component of the reasonable time requirements of the case for cases currently in the system.

In this case, the total delay between the charges and the end of trial was 49.5 months. As the trial judge found, four months of this delay were waived by J when he [page635] changed counsel shortly before the trial was set to begin, necessitating an adjournment. In addition, one and a half months of the delay were caused solely by J for the adjournment of the preliminary inquiry because his counsel was unavailable for closing submissions on the last day. This leaves a remaining delay of 44 months, an amount that vastly exceeds the presumptive ceiling of 30 months in the superior court. The Crown has failed to discharge its burden of demonstrating that the delay of 44 months (excluding defence delay) was reasonable. While the case against J may have been moderately complex given the amount of evidence and the number of co-accused, it was not so exceptionally complex that it would justify such a delay.

Nor does the transitional exceptional circumstance justify the delay in this case. Since J's charges were brought prior to the release of this decision, the Crown was operating without notice of the new framework within a jurisdiction with some systemic delay issues. But a total delay of 44 months (excluding defence delay), of which the vast majority was either Crown or institutional delay, in an ordinary dial-a-dope trafficking prosecution is simply unreasonable regardless of the framework under which the Crown was operating. Therefore, it cannot be said that the Crown's reliance on the previous state of the law was reasonable. While the Crown did make some efforts to bring the matter to trial more quickly, these efforts were too little and too late. And the systemic delay problems that existed at the time cannot justify the delay either. Much of the institutional delay could have been avoided had the Crown proceeded on the basis of a more reasonable plan by more accurately estimating the amount of time needed to present its case. To the extent that the trial judge held that this delay was reasonable, he erred.

All the parties were operating within the culture of complacency towards delay that has pervaded the criminal justice system in recent years. Broader structural and procedural changes, in addition to day-to-day efforts, are required to maintain the public's confidence by delivering justice in a timely manner. Ultimately, all participants in the justice system must work in concert to achieve speedier trials. After all, everyone stands to benefit from these [page636] efforts. Timely trials are possible. More than that, they are constitutionally required.

Per McLachlin C.J. and Cromwell, Wagner and Gascon JJ.: This Court's jurisprudence for dealing with alleged breaches of s. 11(*b*) of the *Canadian Charter of Rights and Freedoms* over the last 30 years supplies a clear answer to this appeal. Striking out in the completely new direction adopted by the majority is unnecessary. A reasonable time for trial under s. 11(*b*) cannot and should not be defined by numerical ceilings, as the majority concludes.

The right to be tried in a reasonable time is multi-factored, fact-sensitive, and case-specific; its application to specific cases is unavoidably complex. The relevant factors and general approach set out in *R. v. Morin*, [1992] 1 S.C.R. 771, respond to these complexities. With modest adjustments to make the analysis more straightforward and with some additional clarification, a revised *Morin* framework will continue to ensure that the constitutional right of accused persons to be tried in a reasonable time is defined and applied in a way that appropriately balances the many relevant considerations. In order to do so, the *Morin* considerations should be regrouped

under four main analytical steps.

First, the accused must establish that there is a basis for the s. 11(*b*) inquiry. The court should look to the overall period between the charge and the completion of the trial to determine whether its length merits further inquiry.

Second, the court must determine on an objective basis what would be a reasonable time for the disposition of a case like the one under review -- that is, how long a case of this nature should reasonably take. The objective standard of reasonableness has two components: institutional delay and inherent time requirements of the case. Both of these periods of time are to be determined objectively. The acceptable period of institutional delay is the period that is reasonably required for the court to be ready to hear the case once the parties are ready to proceed, and is determined in accordance with the administrative guidelines for institutional delay set out by this Court in *Morin*: eight to ten months before the provincial [page637] courts and six to eight months before the superior courts. These guidelines set some rough limits on the point at which inadequacy of state resources will be accepted as an excuse. The guidelines should not be understood as precluding allowance for any sudden and temporary strain on resources that causes a temporary congestion in the courts. The inherent time requirements of a case, on the other hand, represent the period of time that is reasonably required for the parties to be ready to proceed and to conclude the trial for a case similar in nature to the one before the court, and are to be determined on the basis of judicial experience, supplemented by submissions of counsel and evidence. In estimating a reasonable time period, the court should also take into account the liberty interests of the accused.

Third, the court must consider how much of the actual delay in the case counts against the state. This is done by subtracting the periods attributable to the defence, including any waived time periods, from the overall period of delay. When the accused consents to a date for trial offered by the court or to an adjournment sought by the Crown, that consent, without more, does not amount to waiver. The onus is on the Crown to demonstrate that this period is waived, that is, that the accused's conduct reveals something more than mere acquiescence in the inevitable, and that it meets the high bar of being clear, unequivocal, and informed acceptance. Delay resulting from unreasonable actions solely attributable to the accused must also be subtracted from the period for which the state is responsible, such as last-minute changes in counsel or adjournments flowing from a lack of diligence. It is also necessary to subtract from the actual delay any periods that, although not fairly attributable to the defence, are nonetheless not fairly counted against the state, including unavoidable delays due to inclement weather or illness of a trial participant.

Fourth, the court must determine whether the actual period of time that fairly counts against the state exceeds the reasonable time by more than can be justified on any acceptable basis. Where the actual time exceeds what would have been reasonable for a case of that nature, the result will be a finding of unreasonable delay unless [page638] the Crown can show that the delay was justified. Even substantial excess delay may be justified and therefore reasonable where, for example, there is a particularly strong societal interest in the prosecution proceeding on its merits, or where the delay results from temporary and extraordinary pressures on counsel or the court system. However, it does not follow that in these conditions the excess period is invariably justified. The accused still may be able to demonstrate actual prejudice. Although actual prejudice need not be proved to find an infringement of s. 11(*b*), its presence would make unreasonable (in the particular circumstances of the case) a delay that might otherwise be objectively viewed as reasonable. As a result, justification may be found to be lacking.

Under this revised *Morin* framework, any delay in excess of the reasonable time requirements and any actual prejudice arising from the overall delay must be evaluated in light of societal interests: on one hand, fair treatment and prompt trial of accused persons and, on the other, determination of cases on their merits. If there are exceptionally strong societal interests in the prosecution of a case against an accused which substantially outweigh the societal interest and the interest of the accused person in prompt trials, these can serve as an acceptable basis upon which exceeding the inherent and institutional requirements of a case can be justified.

This approach is a slight reorientation of the *Morin* framework because the focus is more explicitly on the period of delay which exceeds what would have been reasonable. But there is no change in principle.

Applying these four steps of the revised *Morin* framework in this case, J's constitutional right to be tried within a reasonable time was violated. The 49.5-month delay from the charges to the end of the scheduled trial date is

sufficient to trigger an inquiry into whether the delay is unreasonable. There were 10.5 months of inherent delay and 18 months of institutional delay. These findings make it appropriate to conclude that the reasonable time requirements for a case of this nature were 28.5 months. The case in fact took 49.5 months. The difference is 21 months. Of that, 4 months are attributable to the defence. The rest -- a period of 17 months *[page639]* -- counts against the state. In other words, this case took almost a year and a half longer than what would be a reasonable period to prosecute a case of this nature. This is not a close case. The time to the end of trial greatly exceeds what would be a reasonable time to prosecute a similar case. While there are societal interests in the trial on the merits of the serious drug crimes alleged against J, these cannot make reasonable the grossly excessive time that it took society to bring him to trial.

In contrast, the majority's new framework is not an appropriate approach to interpreting and applying the s. 11(*b*) right, for several reasons. First, the new approach reduces reasonableness to numerical ceilings. Reasonableness cannot be judicially defined with precision or captured by a number. As well, the majority's judicially created ceilings largely uncouple the right to be tried within a reasonable time from the bedrock constitutional requirement of reasonableness, which is the core of the right.

Moreover, this approach unjustifiably diminishes the right to be tried within a reasonable time. When the elapsed time is below the ceiling, an accused would have to show not only that the case took markedly longer than it reasonably should have but also that he or she took meaningful steps that demonstrate a sustained effort to expedite the proceedings. This requirement has no bearing on whether the delay was unreasonable.

The majority's approach also exceeds the proper role of the Court. Creating fixed or presumptive ceilings is a task better left to legislatures. The ceilings place new limits on the exercise of the s. 11(*b*) right to a trial within a reasonable time for reasons of administrative efficiency that have nothing to do with whether the delay in a given case was or was not excessive. This is inconsistent with the judicial role.

As well, the ceilings have no support in the record in this case. What evidence there is in the record suggests that it would be unwise to establish these sorts of ceilings. For the vast majority of cases, the ceilings are so high that they risk being meaningless. They are unlikely [page640] to address the culture of delay that is said to exist and are more likely to feed such a culture.

The majority's approach also risks negative consequences for the administration of justice. The presumptive ceilings are unlikely to improve the pace at which the vast majority of cases move through the system. As well, if this new framework were applied immediately, the majority's transitional provisions would not avoid the risk of thousands of judicial stays.

Moreover, the increased simplicity which is said to flow from the majority's new framework is likely illusory. Even if creating ceilings were an appropriate task for the courts and even if there were an appropriate evidentiary basis for them, there is little reason to think these ceilings would avoid the complexities inherent in deciding whether a particular delay is unreasonable. The majority's framework simply moves the complexities of the analysis to a new location: deciding whether to rebut the presumption that a delay is unreasonable if it exceeds the ceiling in particular cases.

Ultimately, the majority's new framework casts aside three decades of the Court's jurisprudence when no participant in the appeal called for such a wholesale change, has not been the subject of adversarial scrutiny or debate, and risks thousands of judicial stays. In short, the new framework is wrong in principle and unwise in practice.

Cases Cited

By Moldaver, Karakatsanis and Brown JJ.

Overruled: *R. v. Morin*, [1992] 1 S.C.R. 771; **referred to:** *R. v. Askov*, [1990] 2 S.C.R. 1199; *R. v. Pidskalny*, 2013 SKCA 74, 299 C.C.C. (3d) 396; *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3; *R. v. Williamson*, 2016 SCC 28, [2016] 1 S.C.R. 741; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *R. v. MacDougall*, [1998] 3 S.C.R. 45; *R. v. Conway*, [1989] 1 S.C.R. 1659; *R. v. Elliott* (2003), 114 C.R.R. (2d) 1; *R. v. Vassell*, 2016 SCC 26, [2016] 1 S.C.R. 625; *R. v. Auclair*, 2014 SCC 6, [2014] 1 S.C.R. 83; *R. v. Rodgerson*, 2015 SCC 38, [page641] [2015] 2 S.C.R. 760; *R. v. Tremblay*, [1987] 2 S.C.R. 435; *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429; *R. v. Brydges*, [1990] 1 S.C.R. 190; *R. v. Feeney*, [1997] 2 S.C.R. 117; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401; *R. v. Omar*, 2007 ONCA 117, 84 O.R. (3d) 493; *R. v. Ghavami*, 2010 BCCA 126, 253 C.C.C. (3d) 74.

By Cromwell J.

Applied: *R. v. Morin*, [1992] 1 S.C.R. 771, aff'g (1990), 55 C.C.C. (3d) 209; **referred to:** *Mills v. The Queen*, [1986] 1 S.C.R. 863; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. Conway*, [1989] 1 S.C.R. 1659; *R. v. Smith*, [1989] 2 S.C.R. 1120; *R. v. Askov*, [1990] 2 S.C.R. 1199; *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3; *R. v. Beason* (1983), 36 C.R. (3d) 73; *R. v. Sharma*, [1992] 1 S.C.R. 814; *R. v. Brassard*, [1993] 4 S.C.R. 287; *R. v. Nuosci*, [1993] 4 S.C.R. 283; *R. v. Ghavami*, 2010 BCCA 126, 253 C.C.C. (3d) 74; *Beavers v. Haubert*, 198 U.S. 77 (1905).

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 10(*b*), 11(*b*).

Criminal Code, R.S.C. 1985, c. C-46, s. 561.

International Covenant on Civil and Political Rights, Can. T.S. 1976 No. 47, art. 14(3)(c).

Magna Carta (1215), clause 40.

Speedy Trial Act of 1974, 18 U.S.C. s. 3161 (2012).

Authors Cited

Alberta Justice and Solicitor General. Criminal Justice Division. "Injecting a Sense of Urgency: A new approach to delivering justice in serious and violent criminal cases", report by Greg Lepp, April 2013 (online: https: //justice.alberta.ca/programs_services/criminal_pros/Documents /InjectingSenseUrgency.pdf).

Amsterdam, Anthony G. "Speedy Criminal Trial: Rights and Remedies" (1975), 27 Stan. L. Rev. 525.

B.C. Justice Reform Initiative. *A Criminal Justice System for the 21st Century: Final Report to the Minister of Justice and Attorney General Honourable Shirley Bond*, report by D. Geoffrey Cowper, Q.C., Chair. Victoria: The Initiative, 2012.

[page642]

British Columbia. Provincial Court. "Justice Delayed: A Report of the Provincial Court of British Columbia Concerning Judicial Resources", September 14, 2010 (online: www.provincialcourt.bc.ca/downloads/pdf/Justice_Delayed_-_A_Report_of_the_Provincial_Court_of_British_Columbia_Concerning_Judicial_Resource.pdf).

British Columbia. Provincial Court. "The Semi-Annual Time to Trial Report of the Provincial Court of British Columbia to March 31, 2015" (online: www.provincialcourt.bc.ca/downloads/pdf/Time%20to%20Trial%20-%20Update%20(as%20at%20March%2031,%202015).pdf).

Canada. Department of Justice. "The Final Report on Early Case Consideration of the Steering Committee on Justice Efficiencies and Access to the Justice System", 2006 (online: www.justice.gc.ca/eng/rp-pr/csj-sjc/esc-cde/).

Canada. Law Reform Commission. Working Paper 67. *Trial Within a Reasonable Time: A Working Paper Prepared for the Law Reform Commission of Canada*. Ottawa: Canada Communication Group, 1994.

Code, Michael A. *Trial Within a Reasonable Time: A Short History of Recent Controversies Surrounding Speedy Trial Rights in Canada and the United States*. Scarborough, Ont.: Carswell, 1992.

Hill, Casey, and Jeremy Tatum. "Re-Chartering an Old Course Rather than Staying Anew in Remedying Unreasonable Delay under the Charter", paper presented at the Crown Defence Conference, Winnipeg, September 2012 (online: www.crowndefence.ca/wp-content/uploads/2011/05/Justice-Casey-Hill_Remedying-Unreasonable-Delay1.pdf).

Hogg, Peter W. *Constitutional Law of Canada*, 5th ed. Supp. Toronto: Carswell, 2007 (updated 2015, release 1).

Hopwood, Shon. "The Not So Speedy Trial Act" (2014), 89 Wash. L. Rev. 709.

LaFave, Wayne R., et al. *Criminal Procedure*, 5th ed. St. Paul, Minn.: West, 2009.

Lamer, Antonio. "The Role of Judges", address to the Empire Club of Canada, 1995 (online: http: //speeches.empireclub.org/61076/data?n=1).

LeSage, Patrick J., and Michael Code. *Report of the Review of Large and Complex Criminal Case Procedures*. Toronto: Ontario Ministry of the Attorney General, 2008.

McLachlin, Beverley. "The Challenges We Face" (2007), 40 U.B.C. L. Rev. 819.

Ruby, Clayton C. "Trial Within a Reasonable Time under Section 11(b): the Ontario Court of Appeal [page643] Disconnects from the Supreme Court" (2013), 2 C.R. (7th) 91.

Venice Commission (European Commission for Democracy through Law). *Can excessive length of proceedings be remedied?* Strasbourg: Council of Europe Publishing, 2007.

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, MacKenzie and Stromberg-Stein JJ.A.), 2014 BCCA 241, 357 B.C.A.C. 137, 611 W.A.C. 137, 313 C.R.R. (2d) 1, [2014] B.C.J. No. 1263 (QL), 2014 CarswellBC 1760 (WL Can.), affirming a decision of Verhoeven J., 2012 BCSC 1735, [2012] B.C.J. No. 2448 (QL), 2012 CarswellBC 3655 (WL Can.). Appeal allowed.

Counsel

Eric V. Gottardi and *Tony C. Paisana*, for the appellant.

Croft Michaelson, *Q.C.*, and *Peter R. LaPrairie*, for the respondent.

Jolaine Antonio, for the intervener the Attorney General of Alberta.

Tim A. Dickson and *Martin Twigg*, for the intervener the British Columbia Civil Liberties Association.

Frank Addario and *Erin Dann*, for the intervener the Criminal Lawyers' Association (Ontario).

The judgment of Abella, Moldaver, Karakatsanis, Côté and Brown JJ. was delivered by

MOLDAVER, KARAKATSANIS and BROWN JJ.

I. Introduction

1 Timely justice is one of the hallmarks of a free and democratic society. In the criminal law context, it takes on special significance. Section 11(*b*) of the *Canadian Charter of Rights and Freedoms* attests to this, in that it guarantees the right of accused persons "to be tried within a reasonable time".

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2 Moreover, the Canadian public expects their criminal justice system to bring accused persons to trial expeditiously. As the months following a criminal charge become years, everyone suffers. Accused persons remain in a state of uncertainty, often in pre-trial detention. Victims and their families who, in many cases, have suffered tragic losses cannot move forward with their lives. And the public, whose interest is served by promptly bringing those charged with criminal offences to trial, is justifiably frustrated by watching years pass before a trial occurs.

3 An efficient criminal justice system is therefore of utmost importance. The ability to provide fair trials within a reasonable time is an indicator of the health and proper functioning of the system itself. The stakes are indisputably high.

4 Our system, however, has come to tolerate excessive delays. The circumstances in this appeal are illustrative. Notwithstanding a delay of over four years in bringing a drug case of modest complexity to trial, both the trial judge and the Court of Appeal were of the view that the appellant was tried within a reasonable time. Their analyses are reflective of doctrinal and practical difficulties plaguing the current analytical framework governing s. 11(*b*). These difficulties have fostered a culture of complacency within the system towards delay.

5 A change of direction is therefore required. Below, we set out a new framework for applying s. 11(*b*). At the centre of this new framework is a presumptive ceiling on the time it should take to bring an accused person to trial: 18 months for cases going to trial in the provincial court, and 30 months for cases going to trial in the superior court. Of course, given the contextual nature of reasonableness, the framework accounts for case-specific factors both above and below the presumptive ceiling. This framework is intended to focus the s. 11(*b*) analysis on the issues that matter and encourage all participants in the criminal justice system to cooperate in achieving reasonably prompt justice, [page645] with a view to fulfilling s. 11(*b*)'s important objectives.

6 Applying this new framework, including its transitional features, we conclude that the appellant was not brought to trial within a reasonable time. We would allow the appeal, set aside his convictions and direct a stay of proceedings.

II. Facts

7 The appellant, Mr. Jordan, was arrested in December 2008 following an RCMP investigation into a "dial-a-dope" operation in Langley and Surrey, British Columbia. He was eventually charged with nine other co-accused on a 14-count information alleging various offences relating

to possession and trafficking. Mr. Jordan remained in custody until February 2009, when he was released under strict house arrest and other restrictive bail conditions.

8 The 10 co-accused made numerous appearances through the early months of 2009 as they obtained counsel, made their elections, and coordinated schedules. By May 2009, all counsel had agreed that the preliminary inquiry would require approximately four days, and it was eventually set for May 13, 14, 17 and 18, 2010. Several of the co-accused entered guilty pleas or were severed from the information. By the time the preliminary inquiry commenced, there were five co-accused left on the information, including Mr. Jordan.

9 At the preliminary inquiry, it quickly became apparent that the initial time estimate of four days was too low. Crown counsel advised the preliminary inquiry judge that the Crown would be able to present all of the evidence against the four co-accused, but that the Crown would require significantly more [page646] court time to present the "mountain of evidence" it had in respect of Mr. Jordan. The parties sought and obtained continuation dates throughout 2010 and into 2011. In May 2011, Mr. Jordan (along with two co-accused) was committed to stand trial on all 14 counts. The preliminary inquiry - which ended up taking nine days of court time - had taken a full year to complete. It was now two and a half years since Mr. Jordan had been charged.

10 Following committal, the matter moved to the British Columbia Supreme Court. Crown counsel estimated that six weeks would be required for trial, and the trial was set for the first available six-week block - in September 2012. A new Crown counsel took over the file in July 2011, and wrote to Mr. Jordan's counsel advising of her estimate that only two to three weeks would be needed to present the Crown's case, and offering to seek earlier trial dates. Mr. Jordan's counsel did not respond to this offer. Later, in December 2011, one of the remaining two co-accused was severed from the information. Only Mr. Jordan and one co-accused remained.

11 As Mr. Jordan awaited trial, his liberty was restricted. He spent two months in custody following his arrest in December 2008, which was followed by close to four years of restrictive bail conditions. However, in July 2011, Mr. Jordan was convicted of prior drug charges and was sentenced to a 15-month conditional sentence order ("CSO"), which he served until October 2012. The conditions of the CSO were similar to the bail conditions Mr. Jordan was under for the charges at issue in this appeal. Therefore, for 15 months of the delay, Mr. Jordan's liberty was restricted by both the bail conditions and the CSO.

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12 At the start of his trial in September 2012, Mr. Jordan brought an application for a stay of proceedings alleging a breach of his s. 11(*b*) right to be tried within a reasonable time. This application was dismissed. The trial was adjourned, and it eventually concluded in February 2013 with his conviction on five drug-related offences. The total delay from Mr. Jordan's charges to the conclusion of the trial was 49.5 months.

III. Judgments Below

A. *British Columbia Supreme Court, 2012 BCSC 1735*

13 The trial judge found that the delay in bringing this matter to trial was not unreasonable, and declined to enter a stay of proceedings. In concluding there was no s. 11(*b*) breach, he applied the framework from this Court's decision in *R. v. Morin*, [1992] 1 S.C.R. 771, including the guidelines set out in it for how much institutional delay is generally tolerable.

14 The trial judge found that the inherent time requirements for this case were 10.5 months. He also found that, of the total delay, four months (incurred when Mr. Jordan changed counsel and requested an adjournment of his trial) were attributable to the defence, and two months were attributable to the Crown.

15 The bulk of the delay - 32.5 months - was attributable to institutional delay, of which 19 months occurred at the Provincial Court and 13.5 months occurred at the B.C. Supreme Court. This was, as the trial judge noted, well outside the *Morin* guidelines for tolerable institutional delay of eight to ten months in the provincial court, and six to eight months in the superior court. However, the trial judge held that institutional delay should be given less weight than Crown delay in the final balancing.

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16 The trial judge then considered the issue of prejudice. He reasoned that if the institutional delay had been within the *Morin* guidelines, the trial would have concluded by May 2011. Most of the additional delay coincided with the term of Mr. Jordan's CSO. The trial judge therefore found that Mr. Jordan's liberty interest was not significantly prejudiced by the delay. While Mr. Jordan's security of the person was affected, any prejudice was minimized by the fact that he was facing other outstanding charges for much of the delay. Finally, he found no prejudice to Mr. Jordan's right to make full answer and defence because the Crown's case did not depend on the memory of witnesses.

17 The trial judge balanced all of the factors and concluded that Mr. Jordan's s. 11(*b*) right had not been infringed, due primarily to the fact that Mr. Jordan did not suffer significant prejudice.

B. *British Columbia Court of Appeal, 2014 BCCA 241, 357 B.C.A.C. 137*

18 Mr. Jordan appealed. He argued that the trial judge erred in his assessment of prejudice and gave inadequate weight to the excessive institutional delay. The Court of Appeal found that the trial judge did not err in his attribution of the delay, or in his weighing of the institutional delay. Further, the trial judge's determination on prejudice was a finding of fact that was entitled to deference. Finally, the trial judge did not err by declining to infer prejudice based on the length of the delay alone. The appeal was dismissed.

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IV. Analysis

A. *The Right to Be Tried Within a Reasonable Time Is Important to Individuals and Society as a Whole*

19 As we have said, the right to be tried within a reasonable time is central to the administration of Canada's system of criminal justice. It finds expression in the familiar maxim: "Justice delayed is justice denied." An unreasonable delay denies justice to the accused, victims and their families, and the public as a whole.

20 Trials within a reasonable time are an essential part of our criminal justice system's commitment to treating presumptively innocent accused persons in a manner that protects their interests in liberty, security of the person, and a fair trial. Liberty is engaged because a timely trial means an accused person will spend as little time as possible held in pre-trial custody or living in the community under release conditions. Security of the person is impacted because a long-delayed trial means prolonging the stress, anxiety, and stigma an accused may suffer. Fair trial interests are affected because the longer a trial is delayed, the more likely it is that some accused will be prejudiced in mounting a defence, owing to faded memories, unavailability of witnesses, or lost or degraded evidence.

21 At the same time, we recognize that some accused persons who are in fact guilty of their charges are content to see their trials delayed for as long as possible. Indeed, there are incentives for them to remain passive in the face of delay. Accused persons may seek to avoid responsibility for their crimes by embracing delay, in the hope that the case against them will fall apart or they will obtain a stay of proceedings. This operates to the detriment of the public and of the system of justice as a whole. Section 11(*b*) was not intended to be [page650] a sword to frustrate the ends of justice (*Morin*, at pp. 801-2).

22 Of course, the interests protected by s. 11(*b*) extend beyond those of accused persons. Timely trials impact other people who play a role in and are affected by criminal trials, as well as the public's confidence in the administration of justice.

23 Victims of crime and their families may be devastated by criminal acts and therefore have a special interest in timely trials (*R. v. Askov*, [1990] 2 S.C.R. 1199, at pp. 1220-21). Delay aggravates victims' suffering, preventing them from moving on with their lives.

24 Timely trials allow victims and witnesses to make the best possible contribution to the trial, and minimize the "worry and frustration [they experience] until they have given their testimony" (*Askov*, at p. 1220). Repeated delays interrupt their personal, employment or business activities, creating inconvenience that may present a disincentive to their participation.

25 Last but certainly not least, timely trials are important to maintaining overall public confidence in the administration of justice. As McLachlin J. (as she then was) put it in *Morin*, "delays are of consequence not only to the accused, but may affect the public interest in the prompt and fair administration of justice" (p. 810). Crime is of serious concern to all members of the community. Unreasonable delay leaves the innocent in limbo and the guilty unpunished, thereby offending the community's sense of justice (see *Askov*, at p. 1220). Failure "to deal

fairly, quickly and efficiently with criminal trials inevitably leads to the community's frustration with the judicial system and eventually to a feeling of contempt for court procedures" (p. 1221).

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26 Extended delays undermine public confidence in the system. And public confidence is essential to the survival of the system itself, as "a fair and balanced criminal justice system simply cannot exist without the support of the community" (*Askov*, at p. 1221).

27 Canadians therefore rightly expect a system that can deliver quality justice in a reasonably efficient and timely manner. Fairness and timeliness are sometimes thought to be in mutual tension, but this is not so. As D. Geoffrey Cowper, Q.C., wrote in a report commissioned by the B.C. Justice Reform Initiative:

> ... the widely perceived conflict between justice and efficiency goals is not based in reason or sound analysis. The real experience of the system is that both must be pursued in order for each to be realised: they are, in practice, interdependent.

(*A Criminal Justice System for the 21st Century* (2012), at p. 75)

28 In short, timely trials further the interests of justice. They ensure that the system functions in a fair and efficient manner; tolerating trials after long delays does not. Swift, predictable justice, "the most powerful deterrent of crime" is seriously undermined and in some cases rendered illusory by delayed trials (McLachlin C.J., "The Challenges We Face", remarks to the Empire Club of Canada, published in (2007), 40 U.B.C. L. Rev. 819, at p. 825).

B. *Problems With the Current Framework*

29 While this Court has always recognized the importance of the right to a trial within a reasonable time, in our view, developments since *Morin* demonstrate that the system has lost its way. The framework set out in *Morin* has given rise to both [page652] doctrinal and practical problems, contributing to a culture of delay and complacency towards it.

30 The *Morin* framework requires courts to balance four factors in determining whether a breach of s. 11(*b*) has occurred: (1) the length of the delay; (2) defence waiver; (3) the reasons for the delay, including the inherent needs of the case, defence delay, Crown delay, institutional delay, and other reasons for delay; and (4) prejudice to the accused's interests in liberty, security of the person, and a fair trial. Prejudice can be either actual or inferred from the length of the delay. Institutional delay in particular is assessed against a set of guidelines developed by this Court in *Morin*: eight to ten months in the provincial court, and a further six to eight months after committal for trial in the superior court. The *Morin* guidelines reflect the fact that resources are finite and there must accordingly be some tolerance for institutional delay. Institutional delay within or close to the guidelines has generally been considered to be reasonable.

31 This framework suffers from a number of related doctrinal shortcomings.

32 First, its application is highly unpredictable. It has been interpreted so as to permit endless flexibility, making it difficult to determine whether a breach has occurred. The absence of a consistent standard has turned s. 11(*b*) into something of a dice roll, and has led to the proliferation of lengthy and often complex s. 11(*b*) applications, thereby further burdening the system.

33 Second, as the parties and interveners point out, the treatment of prejudice has become one of the most fraught areas in the s. 11(*b*) jurisprudence: it is confusing, hard to prove, and highly subjective. As to the confusion prejudice has caused, courts have struggled to distinguish between "actual" and [page653] "inferred" prejudice. And attempts to draw this distinction have led to apparent inconsistencies, such as that prejudice might be inferred even when the evidence shows that the accused suffered no actual prejudice. Further, actual prejudice can be quite difficult to establish, particularly prejudice to security of the person or fair trial interests. Courts have also found that "it may not always be easy" to distinguish between prejudice stemming from the delay versus the charge itself (*R. v. Pidskalny*, 2013 SKCA 74, 299 C.C.C. (3d) 396, at para. 43). And even if sufficient evidence is adduced, the interpretation of that evidence is a highly subjective enterprise.

34 Despite this confusion, prejudice has, as this case demonstrates, become an important if not determinative factor. Long delays are considered "reasonable" if the accused is unable to demonstrate significant actual prejudice to his or her protected interests. This is a problem because the accused's and the public's interests in a trial within a reasonable time does not necessarily turn on how much suffering an accused has endured. Delayed trials may also cause prejudice to the administration of justice.

35 Third, the *Morin* framework requires a retrospective inquiry, since the analysis of delay arises only after the delay has been incurred. Courts and parties are operating within a framework that is designed not to prevent delay, but only to redress (or not redress) it. As a consequence, they are not motivated to manage "each case in advance to achieve *future compliance* with consistent standards" (M. A. Code, *Trial Within a Reasonable Time* (1992), at p. 117 (emphasis in original)). Courts are instead left to pick up the pieces once the delay has transpired. This after-the-fact review of past delay is understandably frustrating for trial judges, who have only one remedial tool at their disposal - a stay of proceedings. It is therefore [page654] unsurprising that courts have occasionally strained in applying the *Morin* framework to avoid a stay.[1]

36 The retrospective analysis required by *Morin* also encourages parties to quibble over rationalizations for vast periods of pre-trial delay. Here, for example, the Crown argues that the trial judge erred in characterizing most of the delay as Crown or institutional delay. Had he assessed it properly, the argument goes, he would have attributed only 5 to 8 months as Crown or institutional delay, as opposed to 34.5 months. Competing after-the-fact explanations allow for potentially limitless variations in permissible delay. As the intervener the Criminal Lawyers' Association (Ontario) submits: "Boundless flexibility is incompatible with the concept of a *Charter* right and has proved to serve witnesses, victims, defendants and the justice system's reputation poorly" (I.F., at para. 12).

37 Finally, the *Morin* framework is unduly complex. The minute accounting it requires might fairly be considered the bane of every trial judge's existence. Although Cromwell J. warned in *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3, that courts must avoid failing to see the forest for the trees (para. 18), courts and litigants have often done just that. Each day of the proceedings from charge to trial is argued about, accounted for, and explained away. This micro-counting is inefficient, relies on judicial "guesstimations", and has been applied in a way that allows for tolerance of ever-increasing delay.

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38 In sum, from a doctrinal perspective, the s. 11(*b*) framework is too unpredictable, too confusing, and too complex. It has itself become a burden on already over-burdened trial courts.

39 These doctrinal problems have contributed to problems in practice.

40 As we have observed, a culture of complacency towards delay has emerged in the criminal justice system (see, e.g., Alberta Justice and Solicitor General, Criminal Justice Division, "Injecting a Sense of Urgency: A new approach to delivering justice in serious and violent criminal cases", report by G. Lepp (April 2013) (online), at p. 17; Cowper, at p. 4; P. J. LeSage and M. Code, *Report of the Review of Large and Complex Criminal Case Procedures* (2008), at p. 15; Canada, Department of Justice, "The Final Report on Early Case Consideration of the Steering Committee on Justice Efficiencies and Access to the Justice System" (2006) (online), at pp. 5-6). Unnecessary procedures and adjournments, inefficient practices, and inadequate institutional resources are accepted as the norm and give rise to ever-increasing delay. This culture of delay "causes great harm to public confidence in the justice system" (LeSage and Code, at p. 16). It "rewards the wrong behaviour, frustrates the well-intentioned, makes frequent users of the system cynical and disillusioned, and frustrates the rehabilitative goals of the system" (Cowper, at p. 48).

41 The *Morin* framework does not address this culture of complacency. Delay is condemned or rationalized at the back end. As a result, participants in the justice system - police, Crown counsel, defence counsel, courts, provincial legislatures, and Parliament - are not encouraged to take preventative measures to address inefficient practices and resourcing problems. Some courts, with the cooperation of counsel, have undertaken commendable efforts to change courtroom culture, maximize efficiency, and minimize delay, thereby showing that it is possible to do better. Some legislative changes [page656] and government initiatives have also been taken. In many cases, however, much remains to be done.

42 Aggravating the tolerance for delay is the increased complexity of pre-trial and trial processes since *Morin*. New offences, procedures, obligations on the Crown and police, and legal tests have emerged. Many of them put a premium on fairness, reasonableness, and a fact-specific analysis. They take time. They also take up judges, courtrooms, and other resources.

43 Complexity is sometimes unavoidable in order to achieve fairness or ensure that the state lives up to its constitutional obligations. But the quality of justice does not always increase

proportionally to the length and complexity of a trial. Unnecessary procedural steps and inefficient advocacy have the opposite effect, weighing down the entire system. A criminal proceeding does not take place in a vacuum. Each procedural step or motion that is improperly taken, or takes longer than it should, along with each charge that should not have been laid or pursued, deprives other worthy litigants of timely access to the courts.

44 The intervener Attorney General of Alberta submits that a change in courtroom culture is needed. This submission echoes former Chief Justice Lamer's two decades-old call for participants in the justice system to "find ways to retain a fair process ... that can achieve practical results in a reasonable time and at reasonable expense" ("The Role of Judges", address to the Empire Club of Canada, 1995 (online)).

45 We agree. And, along with other participants in the justice system, this Court has a role to play in [page657] changing courtroom culture and facilitating a more efficient criminal justice system, thereby protecting the right to trial within a reasonable time. We accept Mr. Jordan's invitation - which was echoed by the Criminal Lawyers' Association (Ontario), the British Columbia Civil Liberties Association, and Mr. Williamson in the companion appeal of *R. v. Williamson*, 2016 SCC 28, [2016] 1 S.C.R. 741 - to revise the s. 11(*b*) analysis. While departing from a precedent of this Court "is a step not to be lightly undertaken" (*Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at para. 56), as we have explained, "there are compelling reasons to do so" (*R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 44).

V. A New Framework for Section 11(*b*) Applications

A. *Summary*

46 At the heart of the new framework is a ceiling beyond which delay is presumptively unreasonable. The presumptive ceiling is set at 18 months for cases going to trial in the provincial court, and at 30 months for cases going to trial in the superior court (or cases going to trial in the provincial court after a preliminary inquiry).

47 If the total delay from the charge to the actual or anticipated end of trial (minus defence delay) *exceeds* the ceiling, then the delay is presumptively unreasonable. To rebut this presumption, the Crown must establish the presence of exceptional circumstances. If it cannot, the delay is unreasonable and a stay will follow.

48 If the total delay from the charge to the actual or anticipated end of trial (minus defence delay or a period of delay attributable to exceptional circumstances) falls *below* the presumptive ceiling, then the onus is on the defence to show that the [page658] delay is unreasonable. To do so, the defence must establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, *and* (2) the case took markedly longer than it reasonably should have. We expect stays beneath the ceiling to be rare, and limited to clear cases.

B. *The Presumptive Ceiling*

49 The most important feature of the new framework is that it sets a ceiling beyond which delay is presumptively unreasonable. For cases going to trial in the provincial court, the presumptive ceiling is 18 months from the charge to the actual or anticipated end of trial. For cases going to trial in the superior court, the presumptive ceiling is 30 months from the charge to the actual or anticipated end of trial.[2] We note the 30-month ceiling would also apply to cases going to trial in the provincial court after a preliminary inquiry.[3] As we will discuss, defence-waived or -caused delay does not count in calculating whether the presumptive ceiling has been reached - that is, such delay is to be discounted.

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50 A presumptive ceiling is required in order to give meaningful direction to the state on its constitutional obligations and to those who play an important role in ensuring that the trial concludes within a reasonable time: court administration, the police, Crown prosecutors, accused persons and their counsel, and judges. It is also intended to provide some assurance to accused persons, to victims and their families, to witnesses, and to the public that s. 11(*b*) is not a hollow promise.

51 While the presumptive ceiling will enhance analytical simplicity and foster constructive incentives, it is not the end of the exercise: as we will explain in greater detail, compelling case-specific factors remain relevant to assessing the reasonableness of a period of delay both above and below the ceiling. Obviously, reasonableness cannot be captured by a number alone, which is why the new framework is not solely a function of time. Contrary to what our colleague Cromwell J. asserts, we do not depart from the concept of reasonableness; we simply adopt a different view of how reasonableness should be assessed.

52 In setting the presumptive ceiling, we were guided by a number of considerations. First, it takes as a starting point the *Morin* guidelines.[4] In *Morin*, this Court set eight to ten months as a guide for institutional delay in the provincial court, and an additional six to eight months as a guide for institutional delay in the superior court following an accused's committal for trial. Thus, under *Morin*, a total of 14 to 18 months was the measure for proceedings involving both the provincial court and the superior court.

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53 Second, the presumptive ceiling also reflects additional time to account for the other factors that can reasonably contribute to the time it takes to prosecute a case. These factors include the inherent time requirements of the case and the increased complexity of criminal cases since *Morin*. In this way, the ceiling takes into account the significant role that process now plays in our criminal justice system.

54 Third, although prejudice will no longer play an explicit role in the s. 11(*b*) analysis, it informs the setting of the presumptive ceiling. Once the ceiling is breached, we presume that accused persons will have suffered prejudice to their *Charter*-protected liberty, security of the person, and fair trial interests. As this Court wrote in *Morin*, "prejudice to the accused can be inferred from

prolonged delay" (p. 801; see also *Godin*, at para. 37). This is not, we stress, a rebuttable presumption: once the ceiling is breached, an absence of actual prejudice cannot convert an unreasonable delay into a reasonable one.

55 Fourth, the presumptive ceiling has an important public interest component. The clarity and assurance it provides will build public confidence in the administration of justice.

56 We also make this observation about the presumptive ceiling. It is not an aspirational target. Rather, it is the point at which delay becomes presumptively unreasonable. The public should expect that most cases can and should be resolved before reaching the ceiling. For this reason, as we will explain, the Crown bears the onus of justifying delays that exceed the ceiling. It is also for this reason that an accused may in clear cases still demonstrate that his or her right to be tried within a reasonable time has been infringed, even before the ceiling has been breached.

57 There is little reason to be satisfied with a presumptive ceiling on trial delay set at 18 months for cases going to trial in the provincial court, and [page661] 30 months for cases going to trial in the superior court. This is a long time to wait for justice. But the ceiling reflects the realities we currently face. We may have to revisit these numbers and the considerations that inform them in the future.

58 Our colleague Cromwell J. misapprehends the effect of the presumptive ceiling, asserting that this framework "reduces reasonableness to two numerical ceilings" (para. 254). As we will explain in greater detail, this is clearly not so. The presumptive ceiling marks the point at which the burden shifts from the defence to prove that the delay was unreasonable, to the Crown to justify the length of time the case has taken. As our colleague acknowledges, pursuant to our framework, "the judge must look at the circumstances of the particular case at hand" in assessing the reasonableness of a delay (para. 301).

59 We now turn to discussing the various case-specific factors that must be accounted for both above and below the presumptive ceiling.

C. *Accounting for Defence Delay*

60 Application of this framework, as under the *Morin* framework, begins with calculating the total delay from the charge to the actual or anticipated end of trial. Once that is determined, delay attributable to the defence must be subtracted. The defence should not be allowed to benefit from its own delay-causing conduct. As Sopinka J. wrote in *Morin*: "The purpose of s. 11(*b*) is to expedite trials and minimize prejudice and not to avoid trials on the merits" (p. 802).

61 Defence delay has two components. The first is delay waived by the defence (*Askov*, at pp. 1228-29; *Morin*, at pp. 790-91). Waiver can be explicit or implicit, but in either case, it must be clear and [page662] unequivocal. The accused must have full knowledge of his or her rights, as well as the effect waiver will have on those rights. However, as in the past, "[i]n considering the issue of 'waiver' in the context of s. 11(*b*), it must be remembered that it is not the right itself

which is being waived, but merely the inclusion of specific periods in the overall assessment of reasonableness" (*R. v. Conway*, [1989] 1 S.C.R. 1659, per L'Heureux-Dubé J., at p. 1686).

62 Accused persons sometimes, either before or during their preliminary hearing, wish to re-elect from a superior court trial to a provincial court trial for legitimate reasons. To do so, the Crown's consent must be obtained (*Criminal Code*, R.S.C. 1985, c. C-46, s. 561). Of course, it would generally be open to the Crown to ask the accused to waive the delay stemming from the re-election as a condition of its consent.

63 The second component of defence delay is delay caused solely by the conduct of the defence. This kind of defence delay comprises "those situations where the accused's acts either directly caused the delay ... or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial" (*Askov*, at pp. 1227-28). Deliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests, are the most straightforward examples of defence delay. Trial judges should generally dismiss such applications and requests the moment it becomes apparent they are frivolous.

64 As another example, the defence will have directly caused the delay if the court and the Crown are ready to proceed, but the defence is not. The period of delay resulting from that unavailability will be attributed to the defence. However, periods of time during which the court and the Crown are unavailable will not constitute defence delay, even if defence counsel is also unavailable. This should discourage unnecessary inquiries into defence counsel availability at each appearance. Beyond defence [page663] unavailability, it will of course be open to trial judges to find that other defence actions or conduct have caused delay (see, e.g., *R. v. Elliott* (2003), 114 C.R.R. (2d) 1 (Ont. C.A.), at paras. 175-82).

65 To be clear, defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay. For example, the defence must be allowed preparation time, even where the court and the Crown are ready to proceed. In addition, defence applications and requests that are not frivolous will also generally not count against the defence. We have already accounted for procedural requirements in setting the ceiling. And such a deduction would run contrary to the accused's right to make full answer and defence. While this is by no means an exact science, first instance judges are uniquely positioned to gauge the legitimacy of defence actions.

66 To summarize, as a first step, total delay must be calculated, and defence delay must be deducted. Defence delay comprises delays waived by the defence, and delays caused solely or directly by the defence's conduct. Defence actions legitimately taken to respond to the charges do not constitute defence delay.

67 The next step of the analysis depends upon whether the remaining delay - that is, the delay which was not caused by the defence - is *above* or *below* the presumptive ceiling.

D. *Above the Ceiling - Presumptively Unreasonable Delay*

68 Delay (minus defence delay) that exceeds the ceiling is presumptively unreasonable. The Crown may rebut this presumption by showing that the delay is reasonable because of the presence of exceptional circumstances.

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Exceptional Circumstances

69 Exceptional circumstances lie *outside the Crown's control* in the sense that (1) they are reasonably unforeseen *or* reasonably unavoidable, *and* (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise. So long as they meet this definition, they will be considered exceptional. They need not meet a further hurdle of being rare or entirely uncommon.

70 It is not enough for the Crown, once the ceiling is breached, to point to a past difficulty. It must also show that it took reasonable available steps to avoid and address the problem *before* the delay exceeded the ceiling. This might include prompt resort to case management processes to seek the assistance of the court, or seeking assistance from the defence to streamline evidence or issues for trial or to coordinate pre-trial applications, or resorting to any other appropriate procedural means. The Crown, we emphasize, is not required to show that the steps it took were ultimately successful - rather, just that it took reasonable steps in an attempt to avoid the delay.

71 It is obviously impossible to identify in advance all circumstances that may qualify as "exceptional" for the purposes of adjudicating a s. 11(*b*) application. Ultimately, the determination of whether circumstances are "exceptional" will depend on the trial judge's good sense and experience. The list is not closed. However, in general, exceptional circumstances fall under two categories: discrete events and particularly complex cases.

72 Commencing with the former, by way of illustration, it is to be expected that medical or family emergencies (whether on the part of the accused, [page665] important witnesses, counsel or the trial judge) would generally qualify. Cases with an international dimension, such as cases requiring the extradition of an accused from a foreign jurisdiction, may also meet the definition.

73 Discrete, exceptional events that arise at trial may also qualify and require some elaboration. Trials are not well-oiled machines. Unforeseeable or unavoidable developments can cause cases to quickly go awry, leading to delay. For example, a complainant might unexpectedly recant while testifying, requiring the Crown to change its case. In addition, if the trial goes longer than reasonably expected - even where the parties have made a good faith effort to establish realistic time estimates - then it is likely the delay was unavoidable and may therefore amount to an exceptional circumstance.

74 Trial judges should be alive to the practical realities of trials, especially when the trial was scheduled to conclude below the ceiling but, in the end, exceeded it. In such cases, the focus should be on whether the Crown made reasonable efforts to respond and to conclude the trial

under the ceiling. Trial judges should also bear in mind that when an issue arises at trial close to the ceiling, it will be more difficult for the Crown and the court to respond with a timely solution. For this reason, it is likely that unforeseeable or unavoidable delays occurring during trials that are scheduled to wrap up close to the ceiling will qualify as presenting exceptional circumstances.

75 The period of delay caused by any discrete exceptional events must be subtracted from the total period of delay for the purpose of determining whether the ceiling has been exceeded. Of course, the Crown must always be prepared to mitigate [page666] the delay resulting from a discrete exceptional circumstance. So too must the justice system. Within reason, the Crown and the justice system should be capable of prioritizing cases that have faltered due to unforeseen events (see *R. v. Vassell*, 2016 SCC 26, [2016] 1 S.C.R. 625). Thus, any portion of the delay that the Crown and the system could reasonably have mitigated may not be subtracted (i.e. it may not be appropriate to subtract the entire period of delay occasioned by discrete exceptional events).

76 If the remaining delay falls below the ceiling, the accused may still demonstrate in clear cases that the delay is unreasonable as outlined below. If, however, the remaining delay exceeds the ceiling, the delay is unreasonable and a stay of proceedings must be entered.

77 As indicated, exceptional circumstances also cover a second category, namely, cases that are particularly complex. This too requires elaboration. Particularly complex cases are cases that, because of the nature of the *evidence* or the nature of the *issues*, require an inordinate amount of trial or preparation time such that the delay is justified. As for the nature of the evidence, hallmarks of particularly complex cases include voluminous disclosure, a large number of witnesses, significant requirements for expert evidence, and charges covering a long period of time. Particularly complex cases arising from the nature of the issues may be characterized by, among other things, a large number of charges and pre-trial applications, novel or complicated legal issues, and a large number of significant issues in dispute. Proceeding jointly against multiple co-accused, so long as it is in the interest of justice to do so, may also impact the complexity of the case.

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78 A typical murder trial will not usually be sufficiently complex to comprise an exceptional circumstance. However, if an inordinate amount of trial or preparation time is needed as a result of the nature of the evidence or the issues such that the time the case has taken is justified, the complexity of the case will qualify as presenting an exceptional circumstance.

79 It bears reiterating that such determinations fall well within the trial judge's expertise. And, of course, the trial judge will also want to consider whether the Crown, having initiated what could reasonably be expected to be a complex prosecution, developed and followed a concrete plan to minimize the delay occasioned by such complexity (*R. v. Auclair*, 2014 SCC 6, [2014] 1 S.C.R. 83, at para. 2). Where it has failed to do so, the Crown will not be able to show exceptional circumstances, because it will not be able to show that the circumstances were outside its control. In a similar vein, and for the same reason, the Crown may wish to consider

whether multiple charges for the same conduct, or trying multiple co-accused together, will unduly complicate a proceeding. While the court plays no supervisory role for such decisions, Crown counsel must be alive to the fact that any delay resulting from their prosecutorial discretion must conform to the accused's s. 11(*b*) right (see, e.g., *Vassell*). As this Court said in *R. v. Rodgerson*, 2015 SCC 38, [2015] 2 S.C.R. 760:

> Certainly, it is within the Crown's discretion to prosecute charges where the evidence would permit a reasonable jury to convict. However, some semblance of a cost-benefit analysis would serve the justice system well. Where the additional or heightened charges are marginal, and pursuing them would necessitate a substantially more complex trial process and jury charge, the Crown should carefully consider whether the public interest would be better served by either declining to prosecute the marginal charges from the outset or deciding not [page668] to pursue them once the evidence at trial is complete. [para. 45]

80 Where the trial judge finds that the case was particularly complex such that the time the case has taken is justified, the delay is reasonable and no stay will issue. No further analysis is required.

81 To be clear, the presence of exceptional circumstances is *the only basis* upon which the Crown can discharge its burden to justify a delay that exceeds the ceiling. As discussed, an exceptional circumstance can arise from a discrete event (such as an illness, extradition proceeding, or unexpected event at trial) or from a case's complexity. The seriousness or gravity of the offence cannot be relied on, although the more complex cases will often be those involving serious charges, such as terrorism, organized crime, and gang-related activity. Nor can chronic institutional delay be relied upon. Perhaps most significantly, the absence of prejudice can in no circumstances be used to justify delays after the ceiling is breached. Once so much time has elapsed, only circumstances that are genuinely outside the Crown's control and ability to remedy may furnish a sufficient excuse for the prolonged delay.

E. *Below the Presumptive Ceiling*

82 A delay may be unreasonable even if it falls below the presumptive ceiling. If the total delay from the charge to the actual or anticipated end of trial (minus defence delay and delay attributable to exceptional circumstances that are discrete in nature) is less than 18 months for cases going to trial in the provincial court, or 30 months for cases going to trial in the superior court, then the defence bears the onus to show that the delay is unreasonable. To do so, the defence must establish [page669] two things: (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, *and* (2) the case took markedly longer than it reasonably should have. Absent these two factors, the s. 11(*b*) application must fail.

83 We expect stays beneath the ceiling to be granted only in clear cases. As we have said, in setting the ceiling, we factored in the tolerance for reasonable institutional delay established in *Morin*, as well as the inherent needs and the increased complexity of most cases.

(1) Defence Initiative - Meaningful and Sustained Steps

84 To discharge its onus where delay falls below the ceiling, the defence must demonstrate that it took meaningful, sustained steps to expedite the proceedings. "Action or non-action by the accused which is inconsistent with a desire for a timely trial is something that the court must consider" (*Morin*, at p. 802). Here, the trial judge should consider what the defence could have done, and what it actually did, to get the case heard as quickly as possible. Substance matters, not form.

85 To satisfy this criterion, it is not enough for the defence to make token efforts such as to simply put on the record that it wanted an earlier trial date. Since the defence benefits from a strong presumption in favour of a stay once the ceiling is exceeded, it is incumbent on the defence, in order to justify a stay below the ceiling, to demonstrate having taken meaningful and sustained steps to be tried quickly. While the defence might not be able to resolve the Crown's or the trial court's challenges, it falls to the defence to show that it attempted to set the earliest possible hearing dates, was cooperative with and responsive to the Crown and the court, put the [page670] Crown on timely notice when delay was becoming a problem, and conducted all applications (including the s. 11(*b*) application) reasonably and expeditiously. At the same time, trial judges should not take this opportunity, with the benefit of hindsight, to question every decision made by the defence. The defence is required to act reasonably, not perfectly.

86 Our colleague Cromwell J. criticizes this requirement as diminishing the right to be tried within a reasonable time. We respectfully disagree. First, this Court already considers defence conduct in assessing s. 11(*b*) applications. And the level of diligence displayed by the accused is relevant in the context of other *Charter* rights as well, like the s. 10(*b*) right to counsel (*R. v. Tremblay*, [1987] 2 S.C.R. 435, at p. 439). Second, as mentioned, the requirement of defence initiative below the ceiling is a corollary to the Crown's justificatory burden above the ceiling. Third, this requirement reflects the practical reality that a level of cooperation between the parties is necessary in planning and conducting a trial. Encouraging the defence to be part of the solution will have positive ramifications not only for individual cases but for the entire justice system, thereby enhancing - rather than diminishing - timely justice.

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(2) Reasonable Time Requirements of the Case - Time Markedly Exceeded

87 Next, the defence must show that the time the case has taken markedly exceeds the reasonable time requirements of the case. The reasonable time requirements of a case derive from a variety of factors, including the complexity of the case, local considerations, and whether the Crown took reasonable steps to expedite the proceedings.

88 The reasonable time requirements of the case will increase proportionally to a case's complexity. As Sopinka J. wrote in *Morin*: "All other factors being equal, the more complicated a case, the longer it will take counsel to prepare for trial and for the trial to be conducted once it begins" (pp. 791-92).

89 In considering the reasonable time requirements of the case, trial judges should also employ the knowledge they have of their own jurisdiction, including how long a case of that nature typically takes to get to trial in light of the relevant local and systemic circumstances.

90 Where the Crown has done its part to ensure that the matter proceeds expeditiously - including genuinely responding to defence efforts, seeking opportunities to streamline the issues and evidence, and adapting to evolving circumstances as the case progresses - it is unlikely that the reasonable time requirements of the case will have been markedly exceeded. As with assessing the conduct of the defence, trial judges should not hold the Crown to a standard of perfection.

91 Determining whether the time the case has taken markedly exceeds what was reasonably required is not a matter of precise calculation. Trial judges should not parse each day or month, as has [page672] been the common practice since *Morin*, to determine whether each step was reasonably required. Instead, trial judges should step back from the minutiae and adopt a bird's-eye view of the case. All this said, this determination is a question of fact falling well within the expertise of the trial judge (*Morin*, per Sopinka J., at pp. 791-92).

F. *Applying the New Framework to Cases Already in the System*

92 When this Court released its decision in *Askov*, tens of thousands of charges were stayed in Ontario alone as a result of the abrupt change in the law. Such swift and drastic consequences risk undermining the integrity of the administration of justice.

93 We recognize that this new framework is a departure from the law that was applied to s. 11(*b*) applications in the past. A judicial change in the law is presumed to operate retroactively and apply to past conduct (*Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429, at para. 84). Slightly more relaxed rules apply to judicial changes to the interpretation of constitutional provisions (para. 88). Transition periods, suspended declarations of invalidity, and purely prospective remedies are part of the discretionary remedial framework of our constitutional law (paras. 88-92; *R. v. Brydges*, [1990] 1 S.C.R. 190, at pp. 217-18; *R. v. Feeney*, [1997] 2 S.C.R. 117).

94 Here, there are a variety of reasons to apply the framework contextually and flexibly for cases currently in the system, one being that it is not fair to strictly judge participants in the criminal justice system against standards of which they had no notice. Further, this new framework creates incentives for both the Crown and the defence to expedite criminal cases. However, in jurisdictions where [page673] prolonged delays are the norm, it will take time for these incentives to shift the culture. As well, the administration of justice cannot tolerate a recurrence of what transpired after the release of *Askov*, and this contextual application of the framework is intended to ensure that the post-*Askov* situation is not repeated.

95 The new framework, including the presumptive ceiling, applies to cases currently in the system, subject to two qualifications.

96 First, for cases in which the delay *exceeds* the ceiling, a transitional exceptional circumstance may arise where the charges were brought prior to the release of this decision. This transitional exceptional circumstance will apply when the Crown satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed. This requires a contextual assessment, sensitive to the manner in which the previous framework was applied, and the fact that the parties' behaviour cannot be judged strictly, against a standard of which they had no notice. For example, prejudice and the seriousness of the offence often played a decisive role in whether delay was unreasonable under the previous framework. For cases currently in the system, these considerations can therefore inform whether the parties' reliance on the previous state of the law was reasonable. Of course, if the parties have had time following the release of this decision to correct their behaviour, and the system has had some time to adapt, the trial judge should take this into account.

97 Moreover, the delay may exceed the ceiling because the case is of moderate complexity in a jurisdiction with significant institutional delay problems. Judges in jurisdictions plagued by lengthy, persistent, and notorious institutional delays should account for this reality, as Crown counsel's behaviour is constrained by systemic delay issues. Parliament, the legislatures, and Crown counsel need [page674] time to respond to this decision, and stays of proceedings cannot be granted *en masse* simply because problems with institutional delay currently exist. As we have said, the administration of justice cannot countenance a recurrence of *Askov*. This transitional exceptional circumstance recognizes that change takes time, and institutional delay - even if it is significant - will not automatically result in a stay of proceedings.

98 On the other hand, the s. 11(*b*) rights of all accused persons cannot be held in abeyance while the system works to respond to this new framework. Section 11(*b*) breaches will still be found and stays of proceedings will still be entered for cases currently in the system. For example, if the delay in a simple case vastly exceeds the ceiling because of repeated mistakes or missteps by the Crown, the delay might be unreasonable even though the parties were operating under the previous framework. The analysis must always be contextual. We rely on the good sense of trial judges to determine the reasonableness of the delay in the circumstances of each case.

99 The second qualification applies to cases currently in the system in which the total delay (minus defence delay) falls *below* the ceiling. For these cases, the two criteria - defence initiative and whether the time the case has taken markedly exceeds what was reasonably required - must also be applied contextually, sensitive to the parties' reliance on the previous state of the law. Specifically, the defence need not demonstrate having taken initiative to expedite matters for the period of delay preceding this decision. Since defence initiative was not expressly required by the *Morin* framework, it would be unfair to require it for the period of time before the release of this decision. However, in close cases, any defence initiative during that time [page675] would assist the defence in showing that the delay markedly exceeds what was reasonably required. The trial judge must also still consider action or inaction by the accused that may be inconsistent with a desire for a timely trial (*Morin*, at p. 802).

100 Further, if the delay was occasioned by an institutional delay that was reasonably acceptable in the relevant jurisdiction under the *Morin* framework before this decision was released, that institutional delay will be a component of the reasonable time requirements of the case for cases currently in the system.

101 We note that given the level of institutional delay tolerated under the previous approach, a stay of proceedings below the ceiling will be even more difficult to obtain for cases currently in the system. We also emphasize that for cases in which the charge is brought shortly after the release of this decision, the reasonable time requirements of the case must reflect this high level of tolerance for institutional delay in particular localities.

102 Ultimately, for most cases that are already in the system, the release of this decision should not automatically transform what would previously have been considered a reasonable delay into an unreasonable one. Change takes time. In his dissenting opinion in *Mills v. The Queen*, [1986] 1 S.C.R. 863, Lamer J. (as he then was) was alive to this concern and his comments are apposite here:

> This case is the first to have presented this Court with the opportunity of establishing appropriate guidelines for the application of s. 11(*b*). The full scope of the section, and the nature of the obligation it has imposed upon the [page676] government and the courts has remained uncertain for the period prior to the rendering of this judgment.
>
> Given this uncertainty and the terminative nature of the remedy for a violation of the section, i.e., a stay of proceedings, I am of the view that a transitional approach is appropriate, and indeed necessary, to enable the courts and the governments to properly discharge their burden under s. 11(*b*). This is not to say that different criteria ought to apply during the transitional period, that is, the period prior to the rendering of this judgment, but rather that the behaviour of the accused and the authorities must be evaluated in its proper context. In other words, it would be inaccurate to give effect to behaviour which occurred prior to this judgment against a standard the parameters of which were unknown to all. [Emphasis added; p. 948.]

103 We echo Lamer J.'s remarks. For cases already in the system, the presumptive ceiling still applies; however, "the behaviour of the accused and the authorities" - which is an important consideration in the new framework - "must be evaluated in its proper context" (*Mills*, at p. 948). The reasonableness of a period of time to prosecute a case takes its colour from the surrounding circumstances. Reliance on the law as it then stood is one such circumstance.

104 We disagree with Cromwell J. that our framework's allowance for present realities somehow creates a *Charter* amnesty. For cases currently in the system, the s. 11(*b*) right will receive no less protection than it does now. The point is that, on an ongoing basis, our framework has the potential to effect positive change within the justice system, rather than succumb to the culture of complacency we have described.

G. *Concluding Comments on the New Framework*

105 The new framework for s. 11(*b*) can be summarized as follows:

[page677]

* There is a ceiling beyond which delay becomes presumptively unreasonable. The presumptive ceiling is 18 months for cases tried in the provincial court, and 30 months for cases in the superior court (or cases tried in the provincial court after a preliminary inquiry). Defence delay does not count towards the presumptive ceiling.
* **Once the presumptive ceiling is exceeded**, the burden shifts to the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. Exceptional circumstances lie outside the Crown's control in that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) they cannot reasonably be remedied. If the exceptional circumstance relates to a discrete event, the delay reasonably attributable to that event is subtracted. If the exceptional circumstance arises from the case's complexity, the delay is reasonable.
* **Below the presumptive ceiling**, in clear cases, the defence may show that the delay is unreasonable. To do so, the defence must establish two things: (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings; and (2) the case took markedly longer than it reasonably should have.
* **For cases currently in the system**, the framework must be applied flexibly and contextually, with due sensitivity to the parties' reliance on the previous state of the law.

106 As part of the process of developing this framework, we conducted a qualitative review of nearly every reported s. 11(*b*) appellate decision from the past 10 years, and many decisions from trial courts. These cases assisted in developing the definition of exceptional circumstances, as they [page678] highlighted the types of circumstances that judges have found to justify prolonged delays. By reading these cases with the new framework in mind, we were able to get a rough sense of how the new framework would have played out in some past cases. Indeed, we note that in the seminal case of *Askov*, the delay was in the range of 30 months, as it was in *Godin* some 19 years later, and in both cases, this Court found the delays to be unreasonable.

107 It is also clear from this case law review that the ceiling will not permit the parties or the courts to operate business as usual. The ceiling is designed to encourage conduct and the allocation of resources that promote timely trials. The jurisprudence from the past decade demonstrates that the current approach to s. 11(*b*) does not encourage good behaviour. Finger pointing is more common than problem solving. This body of decisions makes it clear that the incentives inherent in the status quo fall short in the ways we have described.

108 We acknowledge that this new framework represents a significant shift from past practice. First, its standpoint is prospective. Participants in the criminal justice system will know, *in*

advance, the bounds of reasonableness so proactive measures can be taken to remedy any delay. And the public will more clearly understand what it means to hold a trial within a reasonable time. Enhanced clarity and predictability befits a *Charter* right of such fundamental importance to our criminal justice system.

109 Second, the new framework resolves the difficulties surrounding the concept of prejudice. Instead of being an express analytical factor, the concept of prejudice underpins the entire framework. Prejudice is accounted for in the creation of the ceiling. It also has a strong relationship with defence [page679] initiative, in that we can expect accused persons who are truly prejudiced to be proactive in moving the matter along.

110 Prejudice has been one of the most fraught areas of s. 11(*b*) jurisprudence for over two decades. Understanding prejudice as informing the setting of the ceiling, rather than treating prejudice as an express analytical factor, also better recognizes that, as we have said, prolonged delays cause prejudice to not just specific accused persons, but also victims, witnesses, and the system of justice as a whole.

111 Third, the new framework reduces, although does not eliminate, the need to engage in complicated micro-counting. While judges will still have to determine defence delay, the inquiry beneath the ceiling into whether the case took markedly longer than it reasonably should have replaces the micro-counting process with a global assessment. This inquiry need only arise if the accused has taken meaningful and sustained steps to expedite matters. And above the ceiling, a s. 11(*b*) analysis is triggered only where the Crown seeks to rely on exceptional circumstances. A framework that is simpler to apply is itself of value: "... we must remind ourselves that the best test will be relatively easy to apply; otherwise, stay applications themselves will contribute to the already heavy load on trial judges and compound the problem of delay" (*Morin*, per McLachlin J., at p. 810).

112 In addition, the new framework will help facilitate a much-needed shift in culture. In creating incentives for both sides, it seeks to enhance accountability by fostering proactive, preventative problem solving. From the Crown's perspective, the framework clarifies the content of the Crown's ever-present constitutional obligation to bring the accused to trial within a reasonable time. Above the [page680] ceiling, the Crown will only be able to discharge its burden if it can show that it should not be held accountable for the circumstances which caused the ceiling to be breached because they were genuinely outside its control. Crown counsel will be motivated to act proactively throughout the proceedings to preserve its ability to justify a delay that exceeds the ceiling, should the need arise. Below the ceiling, a diligent, proactive Crown will be a strong indication that the case did not take markedly longer than reasonably necessary.

113 The new framework also encourages the defence to be part of the solution. If an accused brings a s. 11(*b*) application when the total delay (minus defence delay and delay attributable to exceptional circumstances that are discrete in nature) falls below the ceiling, the defence must demonstrate that it took meaningful and sustained steps to expedite the proceedings as a prerequisite to a stay. Further, the deduction of defence delay from total delay as a starting point in the analysis clearly indicates that the defence cannot benefit from its own delay-causing action or inaction.

114 The new framework makes courts more accountable, too. Absent exceptional circumstances, the ceiling limits the extent to which judges can tolerate delays before a stay must be imposed. Indeed, courts are important players in changing courtroom culture. Many courts have developed robust case management and trial scheduling processes, focussing attention on possible sources of delay (such as pre-trial applications or unrealistic estimates of trial length) and thereby seeking to avoid or minimize unnecessary delay. Some courts, however, have not.

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115 As we have said, this Court also has a role to play. On many occasions, this Court has established detailed guidelines and minimum requirements to give meaningful content to constitutional rights in the criminal law context (see, e.g., *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, at para. 83; *Lavallee*, *Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at para. 49; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401, at paras. 53-56). Section 11(*b*) has received its content in much the same way. Cromwell J.'s framework, like ours, and like *Morin* and *Askov*, is entirely judicially created. And, like ours, and like *Morin* and *Askov*, it relies heavily on numerical guidelines (with such guidelines acting as guideposts, not absolute limitation periods). Our approach is entirely consistent with the judicial role.

116 Ultimately, all participants in the justice system must work in concert to achieve speedier trials. After all, everyone stands to benefit from these efforts. As Sharpe J.A. wrote in *R. v. Omar*, 2007 ONCA 117, 84 O.R. (3d) 493:

> The judicial system, like all other public institutions, has limited resources at its disposal, as do the litigants and legal aid... . It is in the interest of all constituencies - those accused of crimes, the police, Crown counsel, defence counsel, and judges both at trial and on appeal - to make the most of the limited resources at our disposal. [para. 32]

117 Sharpe J.A.'s reference to finite resources is an important point. We are aware that resource issues are rarely far below the surface of most s. 11(*b*) applications. By encouraging all justice system participants to be more proactive, some resource issues will naturally be resolved because parties will be encouraged to eliminate or avoid inefficient practices. At the same time, the new framework implicates the sufficiency of resources by reminding legislators and ministers that unreasonable delay in bringing [page682] accused persons to trial is not merely contrary to the public interest: it is constitutionally impermissible, and will be treated as such.

VI. Application to This Case

118 Having established the new framework for s. 11(*b*), we now turn to the case before us.

119 The first step in determining whether Mr. Jordan's s. 11(*b*) right was infringed is to

determine the total delay between the charges and the end of trial. In this case, the total delay was 49.5 months.

120 Turning to the first case-specific factor that must be accounted for, the next step is to determine whether any of that delay was waived or caused solely by the defence. We see no reason to interfere with the trial judge's finding that four months of this delay were waived by Mr. Jordan when he changed counsel shortly before the trial was set to begin, necessitating an adjournment.

121 The more difficult assessment is whether any of the remaining delay was caused solely by the action or inaction of the defence. The Crown argues that the trial judge erred by failing to attribute significant periods of delay to the defence, and that the defence was equally culpable in the delay in bringing this matter to trial. The Crown cited several examples: the defence consented to numerous adjournments; defence counsel initially suggested the four-day estimate for the preliminary inquiry; defence counsel's unavailability resulted in the preliminary inquiry not being completed as scheduled in December 2010; defence counsel failed to respond to the Crown's offer in July 2011 of an earlier trial; and there was no evidence that defence [page683] counsel would have been available for trial earlier than June 2012.

122 While these instances that the Crown points to are symptomatic of the systemic complacency towards delay that we have described, most of them are not attributable solely to the defence. The Crown and defence both share responsibility for the preliminary inquiry underestimation. Similarly, responsibility for the delay resulting from consent adjournments and the defence's failure to respond to the Crown's offer of a shorter trial time in July 2011 should not be borne solely by the defence. These adjournments were part of the legitimate procedural requirements of the case, and it does not appear from the record that any occurred when the Crown and court were otherwise ready to proceed. Further, there was no evidence that, had the defence responded to the Crown's offer of an earlier trial, the Crown and the court would have been able to accommodate an earlier date. Rather, the only evidence before the trial judge was that the earliest available trial dates were in September 2012.

123 The defence should, however, bear responsibility for the delay resulting from the adjournment of the preliminary inquiry necessitated by defence counsel's unavailability for closing submissions on December 22, 2010, the last day scheduled for the preliminary inquiry. We would only attribute one and a half months of that delay to the defence, however, given the evidence that Crown counsel was unable to attend at the first available continuation date for the preliminary inquiry of February 3, 2011.

124 In total then, four months of delay were waived by the defence and one and a half months of [page684] delay were caused solely by the defence. This leaves a remaining delay of 44 months, an amount that vastly exceeds the presumptive ceiling of 30 months in the superior court. The burden is therefore on the Crown to demonstrate that the delay is reasonable in light of exceptional circumstances.

125 There is nothing in the record to indicate that any discrete, exceptional circumstances arose. And although particularly complex cases may present an exceptional circumstance, this

is not one of those cases. In terms of the legal issues, while Mr. Jordan was initially charged along with nine other co-accused, this number quickly dropped as the case progressed. At the time of trial, only one co-accused remained on the indictment with Mr. Jordan. Further, none of the alleged offences involved novel or complex points of law. Relatively few pre-trial applications were scheduled. In short, the legal issues in Mr. Jordan's case were not particularly complex.

126 As for the evidence, it was substantial but it was relatively straightforward. It consisted of surveillance evidence by police officers, undercover buys by police officers, a small amount of expert evidence regarding how dial-a-dope operations are conducted, and a search warrant for Mr. Jordan's apartment. There was nothing particularly complex about this evidence.

127 In the end, while the case against Mr. Jordan may have been moderately complex given the amount of evidence and the number of co-accused, it was not so exceptionally complex that it would justify a delay of 44 months (excluding defence delay).

128 However, since Mr. Jordan's charges were brought prior to the release of this decision, we must also consider whether the transitional exceptional circumstance justifies the delay. In our view, it does not. We recognize that the Crown was operating without notice of this change in the law within [page685] a jurisdiction with some systemic delay issues. But a total delay of 44 months (excluding defence delay), of which the vast majority was either Crown or institutional delay, in an ordinary dial-a-dope trafficking prosecution is simply unreasonable regardless of the framework under which the Crown was operating. Therefore, it cannot be said that the Crown's reliance on the previous state of the law was reasonable.

129 We note that a good portion of the delay resulted from the inaccurate assessment of the time required for the preliminary inquiry, and in particular, the Crown's failure to communicate with the parties with a view to tying down the evidence that it needed to call at the preliminary inquiry. A similar problem occurred with the trial. While the fault for the delay in bringing this matter to trial certainly did not lie solely with Crown counsel, it is equally clear that the Crown prosecutors assigned to the case did not have a solid plan for bringing the matter to trial within a reasonable time. The Crown was aware of potential s. 11(*b*) issues as early as December 2010, yet it took few steps to expedite the matter. Instead, the Crown was content to rely on an overly large estimate of trial time without attempting to streamline the issues or consider severing the co-accused from the indictment.

130 The Crown did make a good faith effort to bring the matter to trial more quickly in light of the s. 11(*b*) issue when Crown counsel wrote to defence counsel in July 2011 with a revised estimate of the length of the Crown's case. But by this point, approximately 31 months had already elapsed from the date of Mr. Jordan's charges. This is a substantial length of time to wait before making efforts to expedite the matter. At this point, the scheduled trial was still more than a year away.

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131 While the Crown did make some efforts to bring the matter to trial more quickly, these efforts were too little and too late. The previous state of the law cannot reasonably support the

Crown's conduct. And the systemic delay problems that existed in the Surrey Provincial Court at the time cannot justify the delay either. As discussed, much of the institutional delay could have been avoided had the Crown proceeded on the basis of a more reasonable plan.

132 To the extent that the trial judge held that this delay was reasonable under the *Morin* framework, he erred. Citing the Court of Appeal's decision in *R. v. Ghavami*, 2010 BCCA 126, 253 C.C.C. (3d) 74, at para. 52, he incorrectly held that institutional delay is entitled to less weight than delay within the Crown's control. The parties agree that this was in error.

133 It follows that the delay was unreasonable and Mr. Jordan's s. 11(*b*) right was infringed.

VII. Conclusion

134 The right to a trial within a reasonable time has aptly been described as "discipline for the justice system", in that it may cause "discomfort in the short term but [it will bring] achievement in the long term" (Code, at pp. 133-34).

135 In this case, the system was undisciplined. It failed. Mr. Jordan's s. 11(*b*) right was breached when it took 49.5 months to bring him to trial. All the parties were operating within the culture of complacency towards delay that has pervaded the criminal justice system in recent years. There is simply no reasonable explanation for why the matter took as long as it did. The appeal must be allowed, the convictions set aside and a stay of proceedings entered.

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136 We agree with Cromwell J. that our differences of opinion are indeed fundamental. In our view, given the considerable doctrinal and practical problems confronting the *Morin* approach, further minor refinements to the model are incapable of responding to the challenges facing timely justice in this country.

137 Real change will require the efforts and coordination of all participants in the criminal justice system.[5]

138 For Crown counsel, this means making reasonable and responsible decisions regarding who to prosecute and for what, delivering on their disclosure obligations promptly with the cooperation of police, creating plans for complex prosecutions, and using court time efficiently. It may also require enhanced Crown discretion for resolving individual cases. For defence counsel, this means actively advancing their clients' right to a trial within a reasonable time, collaborating with Crown counsel when appropriate and, like Crown counsel, using court time efficiently. Both parties should focus on making reasonable admissions, streamlining the evidence, and anticipating issues that need to be resolved in advance.

139 For the courts, this means implementing more efficient procedures, including scheduling practices. Trial courts may wish to review their case management regimes to ensure that they provide the tools for parties to collaborate and conduct cases efficiently. Trial judges should

make reasonable efforts to control and manage the conduct of trials. Appellate courts must support these efforts by affording deference to case management choices made by courts below. All courts, including this [page688] Court, must be mindful of the impact of their decisions on the conduct of trials.

140 For provincial legislatures and Parliament, this may mean taking a fresh look at rules, procedures, and other areas of the criminal law to ensure that they are more conducive to timely justice and that the criminal process focusses on what is truly necessary to a fair trial. Legal Aid has a role to play in securing the participation of experienced defence counsel, particularly for long, complex trials. And Parliament may wish to consider the value of preliminary inquiries in light of expanded disclosure obligations. Government will also need to consider whether the criminal justice system (and any initiatives aimed at reducing delay) is adequately resourced.

141 Thus, broader structural and procedural changes, in addition to day-to-day efforts, are required to maintain the public's confidence by delivering justice in a timely manner. Timely trials are possible. More than that, they are constitutionally required.

The reasons of McLachlin C.J. and Cromwell, Wagner and Gascon JJ. were delivered by

CROMWELL J.

I. Introduction

II. *Overview*

142 Every person charged with an offence in Canada has a constitutional right to be tried within a reasonable time: *Canadian Charter of Rights and [page689] Freedoms*, s. 11(*b*). The right has ancient origins and finds expression across legal systems. In the Great Charter of 1215 (the *Magna Carta*) the King promised that "[t]o no one will we ... delay right or justice": clause 40. The *International Covenant on Civil and Political Rights* (1966), Can. T.S. 1976 No. 47, calls for trial "without undue delay": art. 14(3)(c). A right of this nature is also found in the United States, New Zealand, Australia, India, South Africa, the Caribbean, the United Kingdom, Ireland, and in the European Union, among others: see Justice C. Hill and J. Tatum, "Re-Chartering an Old Course Rather than Staying Anew in Remedying Unreasonable Delay under the Charter" (paper presented at the Crown Defence Conference in Winnipeg September 2012) (online), at p. 59.

143 This Court over the last 30 years has developed a sophisticated jurisprudence for dealing with allegations of s. 11(*b*) breaches: see *Mills v. The Queen*, [1986] 1 S.C.R. 863; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. Conway*, [1989] 1 S.C.R. 1659; *R. v. Smith*, [1989] 2 S.C.R. 1120; *R. v. Askov*, [1990] 2 S.C.R. 1199; *R. v. Morin*, [1992] 1 S.C.R. 771; and *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3. The framework developed in this jurisprudence, which is most fully set out in *Morin*, identifies the many considerations that should be taken into account in order to determine whether the time to try a particular criminal case is reasonable.

144 Determining reasonableness requires a court to balance a number of factors, including the length of the delay, waiver of any time periods by the accused, the reasons for the delay, including the time requirements for the case, the actions of the parties, limitations on institutional resources, and prejudice to the person charged. It is necessary to consider these factors on a case-by-case basis: the answer to the question of whether an accused is tried within a reasonable time is inherently case-specific.

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145 There is much wisdom, based on accumulated experience, in the Court's jurisprudence about unreasonable delay. But the Court has made adjustments over time and has been clear that further adjustments will likely need to be made in the future. As Sopinka J. wrote in *Morin*, "Embarking as we did on uncharted waters it is not surprising that the course we steered has required, and may require in the future, some alteration in its direction to accord with experience": p. 784. To be sure, some issues that need clarification have arisen in the case law and this appeal provides an opportunity to provide such clarification. But the orientation of our jurisprudence to case-specific determinations of reasonableness is sound. With modest adjustments to make the analysis more straightforward and with some additional clarification, that approach will continue to ensure that the constitutional right of accused persons to be tried in a reasonable time is defined and applied in a way that appropriately balances the many relevant considerations.

146 My reasons on this appeal and those of my colleagues, Justices Moldaver, Karakatsanis and Brown, present contrasting visions of how our s. 11(*b*) jurisprudence should develop.

147 My colleagues would define reasonableness by assigning a number of months of delay - "ceiling[s]" (para. 5) - that will be taken to be reasonable unless the accused establishes not only that the case took markedly longer that it reasonably should have, but also that he or she took meaningful steps that demonstrate a sustained effort to expedite the proceedings. As I see it, this is not an appropriate approach to interpreting and applying the s. 11(*b*) right for several reasons. First, reasonableness cannot be captured by a number; the ceilings substitute a right for "trial under the ceiling[s]" (para. 74) for the constitutional right to be tried within a reasonable time. Second, creating these [page691] types of ceilings is a task better left to legislation. Third, the ceilings are not supported by the record or by my colleagues' analysis of the last 10 years of s. 11(*b*) jurisprudence and have not been the subject of adversarial debate. Fourth, there is a serious risk that the introduction of these ceilings will put thousands of cases at risk of being judicially stayed. Fifth, the ceilings are unlikely to achieve the simplicity that is claimed for them. Finally, setting aside 30 years of jurisprudence and striking out in this new direction is unnecessary. My colleagues easily conclude that our existing jurisprudence supplies a clear answer to this appeal: paras. 125 and 128. I agree with them that it does: the appeal must be allowed and a stay of proceedings entered.

148 In contrast, my view is that a reasonable time for trial under s. 11(*b*) cannot and should not be defined by numerical ceilings. The accumulated wisdom of the past 30 years of jurisprudence, modestly clarified, provides a workable framework to determine whether the right

to be tried in a reasonable time has been breached in a particular case.

B. *The Nature of the Section 11(b) Right*

149 The right to be tried within a reasonable time is easy to state and understand: people charged with offences should be tried within a reasonable time. Determining whether the right has been breached in a specific case, however, may be far from straightforward. The right is by its very nature fact-sensitive and case-specific. There are several reasons for this.

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150 First, the term "delay" is not entirely apt. While delay has a pejorative connotation, delay, in the sense of the passage of time, is inherent in any legal proceeding. In fact, some delay may be desirable. As stated by Lamer J., dissenting but not on this point, with Dickson C.J. concurring, undue haste itself can make a trial unfair: see *Mills*, at p. 941. Therefore, delay only becomes problematic when it is unreasonable.

151 Second, unreasonableness is not conducive to being captured by a set of rules: a reasonable time for the disposition of one case may be entirely unreasonable for another. Reasonableness is an inherently contextual concept, the application of which depends on the particular circumstances of each case. This makes it difficult and in fact unwise to try to establish the reasonable time requirements of a case by a numerical guideline. Inevitably, the ceiling will be too high for some cases and too low for others. More fundamentally, a fixed guideline is inconsistent with the notion of reasonableness in the context of the infinitely varied situations that arise in real cases.

152 Third, the *Charter* protects only against state action. Even if a case took too long to be dealt with, there will only be a breach of the right if that unreasonable delay counts against the state. And so it follows that the focus is not on unreasonable delay in general, but on unreasonable delay that properly counts against the state. We must therefore attribute responsibility for the delay that has occurred and only factor in the delay which can fairly be counted against the state in deciding whether the *Charter* right has been infringed.

153 Finally, s. 11(*b*) implicates several distinct interests, both individual and societal. Excessive delay implicates the liberty, security, and fair trial [page693] interests of persons charged, as well as society's interest in the prompt disposition of criminal matters and in having criminal matters determined on their merits: *Morin*, at p. 786. Historically, the liberty interest was the focus: *Mills*, at p. 918, per Lamer J.; *Rahey*, at p. 642, per La Forest J., concurring.

154 More recently, the "overlong subjection to the vexations and vicissitudes of a pending criminal accusation" - the stigmatization, loss of privacy, stress and anxiety of those awaiting trial - has been recognized as implicating the security of the person charged: *Rahey*, at p. 605, per Lamer J., quoting A. G. Amsterdam, "Speedy Criminal Trial: Rights and Remedies" (1975), 27 Stan. L. Rev. 525, at p. 533; see also *Mills*, at pp. 919-20. As Cory J. for the majority put it in

Askov, at p. 1219:

> There could be no greater frustration imaginable for innocent persons charged with an offence than to be denied the opportunity of demonstrating their innocence for an unconscionable time as a result of unreasonable delays in their trial. The time awaiting trial must be exquisite agony for accused persons and their immediate family.

155 A third interest protected by s. 11(*b*) is the accused's interest in mounting a full and fair defence. As Sopinka J. said in *Morin*, the "right to a fair trial is protected [by s. 11(*b*)] by attempting to ensure that proceedings take place while evidence is available and fresh": p. 786. When delay is present, "justice may be denied. Witnesses forget, witnesses disappear. The quality of evidence may deteriorate": p. 810, per McLachlin J. (as she then was), concurring. Delay "can prejudice the ability of the defendant to lead evidence, cross-examine witnesses, or otherwise to raise a defence": *Godin*, at para. 30.

156 Finally, the right to be tried within a reasonable time has a societal dimension: see e.g. *Askov*, at p. 1219, per Cory J. But societal interests do not [page694] all point in the same direction. On one hand, the wider community has an interest in "ensuring that those who transgress the law are brought to trial and dealt with according to the law" (pp. 1219-20) and in "preventing an accused from using the [s. 11(*b*)] guarantee as a means of escaping trial": p. 1227. On the other hand, there is a broad societal interest in ensuring that individuals on trial are "treated fairly and justly": p. 1220. The community benefits "by the quick resolution of the case either by reintegrating into society the accused found to be innocent or if found guilty by dealing with the accused according to the law" and witnesses and victims benefit from a prompt resolution of a criminal matter: *ibid.*

157 While the right to be tried within a reasonable time implicates all of these interests, it is important to recognize that it is a free-standing right. As Martin J.A. put it in *R. v. Beason* (1983), 36 C.R. (3d) 73 (Ont. C.A.), at p. 96, cited with approval in *Morin*, at p. 786: "Trials held within a reasonable time have an intrinsic value." As such, actual impairment of the various interests protected by s. 11(*b*) "need not be proven by the accused to render the section operative": *Conway*, at p. 1694, per Lamer J.; see also *Mills*, at p. 926, per Lamer J. The proper approach is to "recognize that prejudice underlies the right, while recognizing at the same time that actual proven prejudice need not be, indeed, is not, relevant to establishing a violation of s. 11(*b*)": *Mills*, at p. 926, per Lamer J.

158 To sum up, the right to be tried in a reasonable time is multi-factored, fact-sensitive, and case-specific. Like other broadly expressed constitutional guarantees, its application to specific cases is unavoidably complex. Our experience to date suggests that the relevant factors and general approach set out in *Morin* respond to these complexities. However, experience also suggests that the way in which *Morin* has come to be applied is unduly complicated and that aspects of the relevant factors require clarification. This can be done without losing [page695] the case-specific focus on whether a particular case has been or will be tried within a reasonable time.

II. The Analytical Framework

159 The purpose of carrying out the s. 11(*b*) analysis is to decide whether the length of time to try the case which counts against the state is "substantially longer than can be justified on any acceptable basis": *Smith*, at p. 1138. If so, the delay is unreasonable and in breach of s. 11(*b*).

160 The *Morin* framework identifies and describes the many factors that are relevant to whether a delay is reasonable or unreasonable. But one of the limitations of the framework is that it provides little assistance as to how these various factors are to be weighed in order to reach a final conclusion. In order to simplify and clarify this analysis, it will be helpful to regroup the *Morin* considerations under four main analytical steps, which may be framed as questions to guide a court when confronted with a s. 11(*b*) claim. Doing so will make what is being considered and why more apparent, without losing the necessarily case-specific focus of the reasonableness inquiry. The questions are:

1. Is an unreasonable delay inquiry justified?
2. What is a reasonable time for the disposition of a case like this one?
3. How much of the delay that actually occurred counts against the state?
4. Was the delay that counts against the state unreasonable?

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161 This framework, along with elaboration of the relevant considerations, will clarify questions that have arisen in this case, namely: whether different periods of delay receive different weighting in the analysis; what is meant by "waiver" by the accused; and what is the role of prejudice in the analysis.

162 I will now turn to a brief elaboration of each of these four analytical steps.

A. *Is an Unreasonable Delay Inquiry Justified?*

163 The accused must establish as a threshold matter that there is a basis for the *Charter* inquiry. The court should look to the overall period between the charge and the completion of the trial to determine whether its length is such that it merits further inquiry. As stated by McLachlin J. in her concurring opinion in *Morin*, this determination can be made by referring to "'norms' representing the time reasonably taken to bring the offence charged to the point of trial in all the circumstances": p. 811. If there is no reasonable basis to think that the delay in question is excessive, the accused's s. 11(*b*) claim fails and the inquiry stops at this stage.

B. *What Is a Reasonable Time for the Disposition of a Case Like This One?*

164 This second analytical step is to determine on an objective basis what would be a reasonable time for the trial of a case like the one under review. The objective standard of

reasonableness has two components: institutional delay and inherent time requirements of the case. The period of institutional delay is the period that is reasonably required for the court to be ready to hear the case (including interlocutory motions) once the parties are ready to proceed. The reasonable inherent time requirements of the case represent the period of time that is reasonably required for the parties to be ready to proceed and to [page697] conclude the trial for a case similar in nature to the one before the court.

165 Both of these periods of time are to be determined objectively. The acceptable period of institutional delay is determined in accordance with the administrative guidelines for institutional delay set out by this Court in *Morin*: eight to ten months before the provincial courts and six to eight months before the superior courts (see *Morin*, at pp. 798-99). The inherent time requirements of a case, on the other hand, are to be determined on the basis of judicial experience, supplemented by submissions of counsel and evidence in relation to the reasonable time requirements of a case of a similar nature to the one before the court. As I will describe below, these two elements must be distinguished in the s. 11(*b*) analysis.

(1) Institutional Delay

166 Institutional delay is the period of time that results from the inadequacy of institutional resources. The period of institutional delay "starts to run when the parties are ready for trial but the system cannot accommodate them": *Morin*, at pp. 794-95. At this stage of the objective analysis, the court will determine an acceptable period of time for the court to be available to hear the case once the parties are ready to proceed.

(a) *The Morin Administrative Guidelines Are Appropriate for Determining Institutional Delay*

167 As stated in *Morin*, "institutional delay is the most common source of delay and the most difficult to reconcile with the dictates of s. 11(*b*) of the *Charter*": p. 794. The difficulty arises because we do not live in a "Utopia" in which there is always fully adequate funding, personnel, and facilities in order to administer criminal matters: p. 795. [page698] The courts must account for both the fact that the state does not have unlimited funds to attribute to the administration of the criminal justice system and the fact that an accused has a fundamental *Charter* right to be tried within a reasonable time: *ibid.*

168 The period of institutional delay is generally not case-specific, unlike the inherent time requirements of a particular case. Institutional delay is therefore more amenable to generalization based on evidence than is the element of the reasonable inherent time requirements of particular types of cases. Moreover, institutional delay is largely the result of government choices about how to allocate resources. Accordingly, the courts "cannot simply accede to the government's allocation of resources and tailor the period of permissible delay accordingly": *Morin*, at p. 795.

169 The *Morin* administrative guidelines, namely eight to ten months for trials in provincial courts and six to eight months for trials before the superior courts, were established on the basis

of extensive statistical and expert evidence. There is no basis in the record in this case to revise them and I would therefore confirm these guidelines as appropriate for determining reasonable institutional delay.

(b) *Determining Institutional Delay*

170 I would add two comments about determining institutional delay using the *Morin* administrative guidelines.

171 First, in determining where a particular case should fit within the range established by the *Morin* guidelines, the court should consider whether the accused is in remand custody pending trial or subject to stringent bail conditions in identifying a reasonable period of institutional delay for a particular type of case. The period of reasonable institutional delay should generally be at the lower end of the range in these circumstances because these types of cases [page699] should receive higher priority by the courts. This period might even be shortened below the range described in the guidelines. As Sopinka J. put it *Morin*:

> If an accused is in custody or, while not in custody, subject to restrictive bail terms or conditions or otherwise experiences substantial prejudice, the period of acceptable institutional delay may be shortened to reflect the court's concern. [p. 798]

172 Second, the guidelines should not be understood as precluding allowance for any "sudden and temporary strain on resources" that causes a temporary congestion in the courts: *Morin*, at p. 797. As I discuss at the final step of the analysis, even a properly resourced system will occasionally buckle under an unusually heavy onslaught of work.

(2) The Inherent Time Requirements of the Case

(a) *Introduction*

173 The inherent time requirements of a case include the time periods that are reasonably necessary to conclude the proceedings for a case similar in nature to the one before the court. In *Morin*, Sopinka J. described some of the inherent time requirements of the case as including the time required "in processing the charge, retention of counsel, applications for bail and other pre-trial procedures" along with "police and administration paperwork, disclosure, etc.": pp. 791-92. Separate consideration of these inherent time requirements is essential given the almost infinitely variable circumstances of particular cases.

174 As Lamer J. described in *Mills*, the inquiry into the inherent time requirements of a case will necessarily require judges to "rely heavily upon [page700] their practical experience and good sense": p. 932. Judges should "undertake an objective assessment of the delay which may be required in the circumstances of the case": *ibid.* This inquiry is "wholly objective" (p. 931):

> ... the court must fix an objective and realistic time period for the preparation of the type of case which is at bar. It must determine the period which would normally be required, taking into account the number of charges, the number of accused, the complexity and

> volume and similar objective elements, for the preparation and completion of the case ... . [Emphasis added; p. 932.]

In the end, we must rely on the good sense and experience of trial judges to determine what would constitute a reasonable period of time required for a particular type of case.

175 The inherent time requirements of a case are to be determined objectively on a case-by-case basis.

(b) *Determining the Inherent Time Requirements*

176 The elements to be considered are the amounts of time reasonably required in processing the charge, retaining counsel, applying for bail, completing police and administration paperwork, making disclosure, dealing with pre-trial applications, preparing for and arguing the preliminary inquiry and/or the trial, and trying a case similar in the nature to the one before the court. Included are such things as the time reasonably required to reschedule after a mistrial, the time to resolve legal issues, the time to convene a judicial pre-trial, and a reasonable time to try the case: see e.g. Hill and Tatum, at pp. 14-15.

177 If a case is more complex, the estimate of the reasonable time period required to dispose of the case will be higher. Given the type of case before the court, it may be expected that there [page701] will be more pre-trial motions, or particular types of motions. Most s. 11(*b*) applications are considered after the fact, and any incidental proceedings to a trial could help guide this analysis. However, courts should avoid *ex post facto* analysis focusing on whether certain motions in the case before them were unreasonably or unnecessarily taken. The objective nature of this inquiry involves an analysis of the type of case before the court, and all the motions and other pre-trial procedures that could reasonably be expected in such a case.

178 One example is a case involving a large amount of disclosure, where it could reasonably be expected that such disclosure would lengthen the inherent time requirements to try the case. However, disclosure may be a major factor contributing to delay and should be approached on the basis that the Crown has a duty to make disclosure fully, but also promptly. And defence counsel must not engage in unnecessary fishing expeditions. The reasonable estimation of the objective inherent time requirements of a case must assume both prompt disclosure and the absence of unnecessary fishing expeditions.

179 Also included in the inherent time requirements of a case is the time required for counsel, both Crown and defence, to be available and to prepare the case: see *Morin*, at p. 791. In *Morin*, Sopinka J. noted that the courts must take account of the fact that "counsel for the prosecution and the defence cannot be expected to devote their time exclusively to one case": p. 792. Or, as I put it in *Godin*, s. 11(*b*) does not require counsel to "hold themselves in a state of perpetual availability": para. 23. The court should estimate the reasonable amount of time required for Crown and defence counsel to prepare and to make themselves available in the type of case before them. This estimation is objective, and does not include an analysis of the record which

may demonstrate that counsel [page702] was available before or after this estimated time period.

180 *Morin* provides an example of how this may be done. Sopinka J. specifically found that "[a]n additional period for inherent time requirements must be allowed" for the post-preliminary inquiry "second stage": p. 793. He further inferred, absent concrete evidence to the contrary, that counsel would have required 2 months to make themselves prepared and available for trial and for the matter to be heard, leaving the other 12 months to institutional delay: pp. 804-6. Similarly, in *R. v. Sharma*, [1992] 1 S.C.R. 814, at pp. 825-26, Sopinka J. estimated 3 months of inherent time requirements in the 12-month period from the set date appearance to the trial date.

181 Finally, in estimating a reasonable time period for the inherent time requirements of a case, the court should also take into account the liberty interests of the accused. If an accused is in custody or under stringent conditions of release, such as house arrest, counsel and the court system should accord his or her case priority over those of accused persons subject to less onerous conditions pending trial.

(c) *Do the Periods of Institutional Delay and Inherent Time Requirements Overlap?*

182 The question has arisen of whether the periods of institutional delay (i.e. the time for the court to be ready to hear the matter) and inherent delay (i.e. the time reasonably required for the parties to be ready to proceed and to conclude the trial for a case similar in nature to the one before the court) overlap. On occasion, the elements of institutional and inherent requirements have been intermingled in the application of the s. 11(*b*) framework such as in considering periods of time during which both counsel and the court are unavailable: see e.g. C. Ruby, "Trial [page703] Within a Reasonable Time under Section 11(b): the Ontario Court of Appeal Disconnects from the Supreme Court" (2013), 2 C.R. (7th) 91, at p. 94, citing *Morin*, at p. 793. The short answer to this question of overlap, however, is that, on the objective determination of how much time the case should reasonably take, the two periods are distinct.

183 The reasonable inherent time requirements are concerned with identifying a reasonable period to get a case similar in nature to the one before the court ready for trial and to complete the trial. The inherent time requirements are not determined, for instance, with reference to the actual availability of particular counsel and court, but rather they are determined by an objective estimation. The other element, the acceptable period of institutional delay, is the amount of time reasonably required for the court to be ready to hear the case once the parties are ready to proceed. This is expressed with reference to the *Morin* guidelines. These guidelines do not relate to inherent time requirements; they reflect only the acceptable period of *institutional delay*.

(3) Conclusion on Objectively Reasonable Time Requirements

184 To sum up, in assessing a claim under s. 11(*b*), the courts must first determine the reasonable time requirements, objectively viewed, for the type of case before them. Simply put, the courts must determine how long the case should reasonably take (or have taken). This

consists, first, of the length of time required for that type of case to be prepared, heard, and decided (i.e. the case's inherent time requirements). The second element is the additional time required for the court to be available to hear the parties beyond the point at which they should be prepared to proceed (i.e. the period of institutional delay). This period of institutional delay is assessed by applying the administrative guidelines developed [page704] in *Askov* and *Morin*: eight to ten months in provincial court and six to eight months in superior court. These guidelines set some rough limits on the point at which inadequacy of state resources will be accepted as an excuse for excessive delay.

C. *How Much of the Delay That Actually Occurred Counts Against the State?*

185 Having addressed the objective elements of the analysis - the reasonable institutional delay and the reasonable inherent time requirements of the case - the judge moves on to compare those objectively reasonable time periods against the time actually taken in the case before the court, to determine whether the overall delay is reasonable. Delay in excess of the objectively required time may be reasonable if it is not attributable to the state. As mentioned at the outset, s. 11(*b*) protects only against unreasonable delay attributable to the state. The period fairly attributable to the state excludes any time period fairly attributable to the accused - including "waiver" - and any extraordinary and unavoidable delays that should not be counted against the state. The main task at this step of the analysis is to identify any portion of the actual elapsed time that should not count against the state.

(1) Delay Attributable to the Accused

186 Delay attributable to the accused includes any period "waived" by the accused, and other delays attributable to the accused.

(a) *Waiver*

187 The concept of "waiver" by the accused in the s. 11(*b*) context has given rise to some confusion and this case provides an opportunity to bring further clarity to that issue.

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188 First, the language of "waiver" in this context may be misleading. As stated by this Court in *Conway*, when the courts speak of "waiver" in the context of s. 11(*b*), "it is not the right itself which is being waived but merely the inclusion of specific periods in the overall assessment of reasonableness": p. 1686. This means that periods of time to which the accused has or is deemed to have agreed will not count towards any determination of unreasonable delay.

189 Second, there is admittedly some lack of clarity in our jurisprudence as to whether the accused's consent to an adjournment sought by the Crown constitutes "waiver" of the resulting delay. In *Smith*, this Court created a rebuttable inference of waiver if defence consents to a future trial date. This proposition was qualified, however, by the point that "inaction or

acquiescence on the part of the accused, short of waiver", does not result in a forfeiture of an accused's s. 11(*b*) rights: *Smith*, at p. 1136. In *Morin*, Sopinka J. explained that the accused's consent to a trial date "can give rise to an inference of waiver", but this is not the case "if consent to a date amounts to mere acquiescence in the inevitable": p. 790. This Court, albeit in very short decisions, upheld this approach in *R. v. Brassard*, [1993] 4 S.C.R. 287, at p. 287, and *R. v. Nuosci*, [1993] 4 S.C.R. 283, at p. 284, stating that consent to a future date *will* be characterized as waiver in the absence of evidence that it is acquiescence.

190 A rebuttable inference of waiver from the accused's consent to an adjournment does not sit well with the settled law that waiver must be clear, unequivocal and must be established by the Crown: see e.g. *Askov*, at p. 1232. As noted in *Morin*, the waiver must be done "with full knowledge of the rights the procedure was enacted to protect and of [page706] the effect that waiver will have on those rights", and such a test is "stringent": p. 790.

191 I conclude that, when the accused consents to a date for trial offered by the court or to an adjournment sought by the Crown, that consent, without more, does not amount to waiver. The onus is on the Crown to demonstrate that this period is waived, that is, that the accused's conduct reveals something more than "mere acquiescence in the inevitable" and that it meets the high bar of being clear, unequivocal, and informed acceptance that the period of time will not count against the state.

(b) *Other Delay Attributable to the Accused*

192 All steps that are reasonably necessary to make full answer and defence are properly part of the inherent time requirements of the case and do not count against either the Crown or the accused. However, delay resulting from unreasonable actions solely attributable to the accused must be subtracted from the period for which the state is responsible.

193 Unreasonable actions by the accused may take diverse forms, such as last-minute changes in counsel or adjournments flowing from a lack of diligence (e.g. failure to pursue or review disclosure in a timely way; pursuit of unnecessary information; failure to attend court appearances or to give timely notice of intended *Charter* applications, particularly during case scheduling; unreasonable rejection of earlier dates for preliminary hearing, trial or other court appearances (see Hill and Tatum, at pp. 17-18); and a lack of sufficient effort to accommodate dates available to the court and the prosecution). It is obvious that delays caused by attempts to obstruct the course of the trial, that amount to "deliberate and calculated tactic[s] employed to delay the trial", or [page707] other vexatious or bad faith conduct by the accused, cannot count against the state: *Askov*, at p. 1228.

194 The question of whether the actions of the accused were unreasonable must be viewed through the lens of reasonable conduct of counsel and the accused at the time the judgments had to be made, not with the benefit of hindsight. The accused must not be penalized for taking all reasonable steps to make full answer and defence even if, with the benefit of hindsight, they were not particularly fruitful.

(2) Extraordinary and Unavoidable Delays That Should Not Count Against the State

195 It is also necessary to subtract from the actual delay any periods that, although not fairly attributable to the defence, are nonetheless not fairly counted against the state. Such time periods could include unavoidable delays due to inclement weather or illness of a trial participant.

D. *Was the Delay That Counts Against the State Unreasonable?*

196 At this point in the analysis, the judge has determined the reasonable time a case ought to have taken, and the period of time that fairly counts against the state that it actually took. The next and final step is to determine whether this actual period of time exceeds the reasonable time by more than can be justified on any acceptable basis. This approach is a slight reorientation of the *Morin* framework because the focus is more explicitly on the period of delay which exceeds what would have been reasonable. But there is no change in principle.

[page708]

(1) Can the Delay Beyond What Would Have Been Reasonable Be Justified?

197 Determining whether the actual delay was longer than what would have been reasonable is a simple matter of arithmetic. However, qualifying the extent of that excess delay as justified or not requires evaluation. As stated in *Morin*, at p. 787: "The general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula" but rather by judicial determination.

198 Where the actual time exceeds what would have been reasonable for a case of that nature, the result will be a finding of unreasonable delay unless the Crown can show that the delay was justified having regard to the length of the excess delay balanced against certain other factors described below. The point at which the amount of time beyond what would have been a reasonable delay becomes unreasonable cannot be described with precision. We can say, however, that where the delay exceeds what would have been reasonable, justification is required and, as the length of the excess delay increases, justification will be more difficult. Even substantial excess delay may be justified and therefore reasonable where, for example, there is a particularly strong societal interest in the prosecution proceeding on its merits, or where the delay results from temporary and extraordinary pressures on counsel or the court system. However, it does not follow that in these conditions the excess period is invariably justified. As I will discuss, given proof of actual prejudice to the accused or of abusive or negligent conduct on the part of the Crown which contributed to the delay, justification may be found to be lacking.

199 The focus must remain on the fundamental question at this point in the analysis: whether the amount of excess delay can be "justified on any acceptable basis": *Smith*, at p. 1138.

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(2) The Role of Prejudice in the Analysis

200 The role of prejudice in the unreasonable delay analysis has become unduly complicated. The jurisprudence has distinguished between inferred and actual prejudice and, in some cases, it appears that it has been almost impossible to succeed on an unreasonable delay claim without proof of either type of prejudice.

201 I would clarify the role of prejudice in the following ways.

202 First, I would affirm the statements in previous cases to the effect that actual prejudice is not necessary to establish a breach of s. 11(*b*): see e.g. *Mills*, at p. 926, per Lamer J.; *Askov*, at p. 1232, per Cory J. The question is whether the delay is unreasonable, not whether an unreasonable delay has, in addition to being unreasonable, caused identifiable and actual prejudice.

203 Second, and as explained earlier, actual prejudice to the liberty interests of the accused, notably being detained in custody or subject to very restrictive bail conditions pending trial, is taken into account in deciding what a reasonable time for trial would be. Prejudice of this nature during the period of reasonable delay need not be considered again in the final assessment of whether the delay is unreasonable.

204 Third, prejudice to an accused's security and fair trial interests in the general sense - such as stress and stigma or the erosion of evidence - is already considered in this revised framework. Defining the reasonable time requirements of a case recognizes that delay beyond this point will cause such stress and erosion of fair trial interests, regardless of any evidence the Crown may bring to [page710] the contrary. Prejudice to these interests during the period of reasonable delay need not be explicitly considered as a separate factor in this final inquiry, and the court should not consider evidence on any vague, general effect that the delay may have had on the security or fair trial interests of the accused.

205 Fourth, specific examples of actual prejudice to an accused's security and fair trial rights, such as the loss of employment or death of a witness (this, of course, is not an exhaustive list), are properly considered at the final stage of the analysis.

206 Lastly, the absence of actual prejudice cannot make reasonable what would otherwise be an unreasonable delay. Actual prejudice need not be proved to find an infringement of s. 11(*b*) and its absence cannot be used to excuse otherwise unreasonable delay. However, even if the excess delay does not exceed the objectively determined reasonable time requirements of a case of that nature, the accused still may be able to demonstrate actual prejudice, thus making unreasonable (in the particular circumstances of the case) a delay that might otherwise be objectively viewed as reasonable.

(3) Extraordinary Reasons for the Delay

207 Exceptional cases may arise which merit further consideration of the various reasons for the delay at this final stage of the inquiry.

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208 In most cases, the elements of delay apart from delay attributable to the accused will be given equal weight, contrary to the approach in *R. v. Ghavami*, 2010 BCCA 126, 253 C.C.C. (3d) 74, at para. 52. Specifically, institutional delay and other delay that is counted against the state are generally given equal weight. Abusive or grossly negligent Crown conduct causing delay counts more heavily against the state in determining whether the excessive delay may be justified on any acceptable basis. Such conduct not only undermines the accused's rights, but is contrary to society's interest in an effective and fair justice system.

209 Conversely, institutional delay that is attributable to exceptional and temporary conditions in the justice system may be excused or given somewhat less weight against the state in the overall balancing and may in some cases justify excusing what would otherwise be excessive delay. This should generally be done, however, only if the state has made reasonable efforts to alleviate those conditions: *Askov*, at p. 1242.

(4) Are There Especially Strong Societal Interests in the Prosecution on the Merits of the Case?

210 As discussed above, s. 11(*b*) encompasses "a community or societal interest" to "see that the justice system works fairly, efficiently and with reasonable dispatch": *Askov*, at pp. 1219 and 1221. This societal interest supports prompt disposition of criminal cases. However, there is also a societal interest in "ensuring that those who transgress the law are brought to trial": pp. 1219-20. Societal interests must be considered "in conjunction" with the interests of the accused in the interpretation of s. 11(*b*): p. 1222.

211 In McLachlin J.'s concurring opinion in *Morin*, she held that the societal interests in bringing the accused to trial should be considered in the determination of s. 11(*b*) claims: the "true issue at stake" [page712] in a s. 11(*b*) analysis is the "determination of where the line should be drawn between conflicting interests", i.e. those of the accused and those of society: p. 809. Whether a delay becomes unreasonable, on the spectrum of delays apparent in criminal proceedings, must be determined by an analysis in which the interests of society in bringing those accused of crimes to trial are balanced against the rights of the person accused of a crime: pp. 809-10. To this I would add the societal interest in prompt disposition of criminal matters.

212 I agree with this balancing approach. Under the revised framework I propose, the delay in excess of the reasonable time requirements of the case and any actual prejudice arising from the overall delay must be evaluated in light of societal interests: on one hand, fair treatment *and* prompt trial of accused persons and, on the other, determination of cases on their merits. As noted by Cory J. in *Askov*, more serious offences will carry commensurately stronger societal demands that the accused be brought to trial: p. 1226. These interests, however, are in effect

factored into the determination of what would be a reasonable time for the disposition of a case like this one. But if there are exceptionally strong societal interests in the prosecution of a case against an accused which substantially outweigh the societal interest and the interest of the accused person in prompt trials, these can serve as an "acceptable basis" upon which exceeding the inherent and institutional requirements of a case can be justified.

E. *Summary of the Analytical Framework*

213 If the accused first establishes a basis that justifies a s. 11(*b*) inquiry, the court must then undertake an objective inquiry to determine what would be the reasonable time requirements to dispose of a case similar in nature to the one before the court (the inherent time requirements) and how [page713] long it would reasonably take the court to hear it once the parties are ready for hearing (the institutional delay).

214 Next, the court must consider how much of the actual delay in the case counts against the state. This is done by subtracting the periods attributable to the defence, including any waived time periods, from the overall period of delay from charge to trial.

215 Finally, the court must consider whether and to what extent the actual delay exceeds the reasonable time requirements of a case, and whether this can be "justified on any acceptable basis". If the actual delay that counts against the state is longer than the reasonable time requirements of a case, then the delay will generally be considered unreasonable. The converse is also the case. However, there may be countervailing considerations, such as the presence of actual prejudice, exceptionally strong societal interests, or exceptional circumstances such as Crown misconduct or exceptional and temporary conditions affecting the justice system. These may either shorten or lengthen the period that would otherwise be unreasonable delay.

216 This straightforward framework does not attempt to gloss over the inherent complexity of determining what delays are unreasonable. It merely clarifies where the various relevant considerations fit into the analysis and how they relate to each other. It also simplifies the analysis of prejudice and makes clear that, as a general rule, institutional and Crown delay should be given equal weight. It retains the focus on the circumstances of the particular case and builds on the accumulated experience found in 30 years of this Court's jurisprudence.

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III. Application

217 Although, as noted, this appeal would also be allowed applying the existing *Morin* analysis, it will be useful by way of illustration to analyze it under the modified framework that I have just described.

A. *Facts*

218 In 2008, the RCMP conducted a single, straightforward undercover investigation into a "dial-a-dope" operation involving the sale of drugs out of the Langley and Surrey areas of British Columbia. Undercover police officers purchased cocaine six times over seven months, calling a number associated with Mr. Jordan. On December 17, 2008, the police executed a search warrant, seizing 42.3 grams of heroin and just under 1.5 kilograms of cocaine and crack cocaine from the apartment that Mr. Jordan and his then-girlfriend, Ms. Kristina Gaudet, shared. On December 17, 2008, the police arrested Mr. Jordan and Ms. Gaudet. Mr. Jordan was charged with possession for the purposes of trafficking on December 18, and Ms. Gaudet was charged on February 20, 2009.

219 From December 18, 2008 to February 16, 2009, Mr. Jordan was in custody. He was released on February 16, on strict conditions, including house arrest. During this time, the Crown swore additional and amended informations. Ultimately, 10 accused were charged. Mr. Jordan, as the main target of the investigation and prosecution, faced six charges.

220 The accused elected to be tried in British Columbia Supreme Court. Crown and defence counsel agreed upon a preliminary hearing. For [page715] 24 months, the preliminary hearing process was held before the Provincial Court; it took another 16 months to obtain a Supreme Court trial date for the two remaining accused.

B. *Judicial History*

(1) British Columbia Supreme Court, 2012 BCSC 1735

221 Verhoeven J. of the British Columbia Supreme Court dismissed Mr. Jordan's s. 11(*b*) motion. He reached the following conclusions with respect to the total time to the end of the trial:

* Total length of delay: 49.5 months
* Inherent requirements: 10.5 months
* Crown delay: 2 months
* Institutional delay: 32.5 months
* Accused delay: 4 months

222 Some of the delay present in this case was due to an underestimation of the time required to conduct the preliminary inquiry. While the Crown argued that the subsequent delay should be attributable to the defence, the trial judge ultimately attributed it as institutional delay, citing a lack of evidence supporting the Crown's claims.

223 The trial judge ultimately concluded that the accused only waived four months of the delay, due to a last-minute change in counsel. He rejected the Crown's arguments that the delay before the superior court was waived. The Crown relied upon a letter it sent to defence counsel, asking whether the latter would be interested in an earlier trial date based upon a three-week (as opposed to a six-week) trial estimation. Defence counsel did not respond to this letter, and

there was no evidence as to the reason [page716] behind this. The trial judge found that this did not amount to clear and unequivocal waiver.

224 The trial judge estimated eight months of inherent time requirements before the provincial court (five months of intake requirements, two months for scheduling and preparation, and one month for the hearing and decision), and two and a half months before the superior court (two months to accommodate counsel scheduling, two weeks for the trial itself).

225 The trial judge found that no time was attributable to the accused, but that the Crown was responsible for two months due to unavailability to continue the preliminary inquiry.

226 The trial judge concluded that there was 19 months of institutional delay before the provincial court, noting the evidence supporting the shortage of institutional resources in those courts in British Columbia. He further concluded that there was 13.5 months of institutional delay before the superior court.

227 The trial judge then considered both actual prejudice and inferred prejudice. He concluded that the accused was not greatly prejudiced with respect to any of his liberty or fair trial interests but that he did suffer some prejudice to his security interests in the form of stress and worry. However, he held that the prior charges against Mr. Jordan "substantially reduc[e] the degree of prejudice" that would otherwise be assigned to Mr. Jordan's security interests: para. 124 (CanLII).

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228 The trial judge concluded that the delay present in Mr. Jordan's case "substantially exceeded" the guidelines: para. 138. However, the delay was not unreasonable given the seriousness of the offences charged, the lack of substantial prejudice against the accused, and the reduced weight attributed to institutional delay.

(2) British Columbia Court of Appeal, 2014 BCCA 241, 357 B.C.A.C. 137

229 The British Columbia Court of Appeal dismissed Mr. Jordan's appeal.

230 Justice Stromberg-Stein agreed with the facts laid out by the trial judge. She also confirmed that the "application judge identified and applied the correct legal authorities and principles": para. 13.

231 On the first ground of appeal, Mr. Jordan argued that the judge should have used the full 34.5 months of delay in his s. 11(*b*) analysis, instead of the 17 months outside of the *Morin* guidelines. However, the court concluded that the application judge correctly assessed the delay period.

232 Next, Mr. Jordan argued that the trial judge erred in attaching less weight to institutional delay. Justice Stromberg-Stein found that the judge's assessment of 34.5 months as institutional

delay was not based on a proper evidentiary record. However, this assessment was favourable to Mr. Jordan, and she declined to interfere with Verhoeven J.'s weighing of the institutional delay in comparison to other factors.

233 Finally, Mr. Jordan claimed that the trial judge erred in his assessment of prejudice: by using the wrong quantum of delay and by failing to make a meaningful finding of inferred prejudice. The application judge found that Mr. Jordan experienced "some degree" of prejudice, but not a "substantial" degree of prejudice: C.A. reasons, at para. 46. This finding of fact is reviewable on a standard of [page718] palpable and overriding error. The Court of Appeal found that the trial judge's assessment did not rise to this degree. The court affirmed the trial judge's findings regarding actual prejudice, and held that the judge was "alive to the possibility of inferring prejudice" and did, in fact, infer some degree of prejudice from the delay: para. 51.

C. *Analysis*

234 Applying the analytical framework from *Morin* as elaborated and clarified above, I conclude that Mr. Jordan's appeal should be allowed and the charges against him stayed because his constitutional right to be tried within a reasonable time was violated in this case. I will briefly consider the four steps in the analytic framework.

(1) Is an Unreasonable Delay Inquiry Justified?

235 I agree with the trial judge that the 49.5-month delay from the charges to the end of the scheduled trial date is sufficient to trigger an inquiry into whether the delay is unreasonable.

(2) What Is a Reasonable Time for the Disposition of a Case Like This One?

(a) *Inherent Time Requirements*

236 The trial judge identified the periods of inherent delay present in the case as being 10.5 months. While the trial judge did not approach this on a purely objective basis, I nonetheless find no reason to interfere with this assessment as representing the reasonable inherent time requirements of a case of this nature, even treating this case as involving an in-custody accused or an accused subject to very restrictive bail conditions.

[page719]

(b) *Institutional Delay*

237 This case proceeded through the Provincial Court and the Supreme Court of British Columbia. Under the *Morin* administrative guidelines, the reasonable institutional delays for both levels of court total between 14 and 18 months. Although it is debatable whether accepting the upper end of the range is appropriate in a case of this nature, for the purposes of my analysis I will proceed on the basis that 18 months of institutional delay would be reasonable.

238 It follows that a reasonable period for the disposition of this case was 28.5 months.

(3) How Much of the Delay That Actually Occurred Counts Against the State?

239 We know that this case took 49.5 months in total. To determine the amount of delay that counts against the state we must subtract any period attributable to the defence and any period of unusual or unforeseen delay not fairly counted against the Crown.

(a) *Delay Attributable to the Defence*

240 The Crown's main argument is that the trial judge erred in categorizing so much of the delay as institutional. The Crown makes multiple submissions regarding the categorization of delay between the charge to the arraignment hearing, from the arraignment hearing to the preliminary inquiry, of the adjournments of the preliminary inquiry, and in setting the six-week trial. For many of these submissions, the Crown argues that various periods should be considered "waiver" or conduct otherwise attributable to the defence.

[page720]

241 As stated above, for any period to be considered waived by the defence, the defence must have so indicated in clear and unequivocal terms. The trial judge noted that Mr. Jordan agreed that four months of the delay was "waived" because it resulted from his last-minute change in counsel. However, I see no reason to attribute any other period as being "waived" by Mr. Jordan. Moreover, I see no reason to classify any other period as being fairly attributable to Mr. Jordan.

(b) *Exceptional or Unavoidable Delay*

242 No such delay is present here.

(4) Was the Delay That Counts Against the State Unreasonable?

243 As discussed earlier, the reasonable time requirements for a case of this nature were 28.5 months. The case in fact took 49.5 months. The difference is 21 months. Of that, 4 months are attributable to the defence. The rest - a period of 17 months - counts against the state. In other words, this case took almost a year and a half longer than what would be a reasonable period to prosecute a case of this nature.

244 This is not a close case. The time to the end of trial greatly exceeds what would be a reasonable time to prosecute a case of this nature. While there are societal interests in the trial on the merits of the serious drug crimes alleged against Mr. Jordan, these cannot make reasonable the grossly excessive time that it took society to bring him to trial.

D. *Other Issues Raised*

245 The parties raised a number of other issues, explicitly or implicitly, to which I will briefly respond.

[page721]

(1) Should some delay where the courts are unavailable be classified as inherent requirements if defence counsel is also unavailable?

246 The inherent requirements of a case are determined objectively and when this is done as described earlier in my reasons, there is no overlap between the inherent requirements and institutional delay.

(2) Should institutional delay be accorded "less weight" in determining the overall reasonableness of the delay?

247 Under the revised framework, institutional delay is not given less weight than other delay that counts against the state.

(3) Does the accused's consent to an adjournment or later trial date constitute "waiver"?

248 The onus is on the Crown to demonstrate that, when an accused agrees to an adjournment initiated by the Crown or to a trial date, it amounts to "waiver" and not "mere acquiescence in the inevitable".

(4) Should inherent requirements be subtracted from the final quantum of delay when assessing the overall reasonableness of the delay?

249 Inherent requirements are not "subtracted" but are rather considered along with institutional delay in deciding what period of delay would be reasonable for a case of this nature.

(5) Can the constitutionally tolerable length of institutional delay be extended if the accused did not suffer "substantial" or "significant" prejudice?

[page722]

250 As explained earlier, the answer is no: proof of actual prejudice is not required to find unreasonable delay.

(6) Did the trial judge err in finding that the accused only suffered "some" and not "substantial" prejudice?

251 I see no reason to interfere with the trial judge's reasons to this effect.

(7) Did the trial judge err when categorizing the delays in this case, specifically in attributing so much of the delay to Crown and institutional delay?

252 I see no reason to interfere with the trial judge's classification of delay in this case.

E. *Conclusion*

253 I would allow the appeal and would stay the charges against Mr. Jordan.

IV. The Approach of Justices Moldaver, Karakatsanis and Brown

254 It will by now be obvious that I fundamentally disagree with the approach proposed by my colleagues. It is, in my respectful view, both unwarranted and unwise. The proposed approach reduces reasonableness to two numerical ceilings. But doing so uncouples the right to be tried within a reasonable time from the Constitution's text and purpose in a way that is difficult to square with our jurisprudence, exceeds the proper role of the Court by creating time periods which appear to have no basis or rationale in the evidence before the Court, and risks negative consequences for the administration of justice. Based on the limited evidence in the record, the presumptive time periods proposed by my colleagues are unlikely to improve the pace at which the vast majority of cases move through the [page723] system while risking judicial stays for potentially thousands of cases. Moreover, the increased simplicity which is said to flow from this approach is likely illusory. The complexity inherent in determining unreasonable delay has been moved into deciding whether to "rebut" the presumption that a delay is unreasonable if it exceeds the ceiling in particular cases: para. 47.

A. *Reasonableness Cannot Be Captured by a Number*

255 One of the themes that appears throughout the Court's jurisprudence on the right to be tried within a reasonable time is that reasonableness cannot be judicially defined with precision or captured by a number. The proposed ceilings are deeply inconsistent with this constant in our jurisprudence.

256 In *Mills*, where this Court first considered the scope of s. 11(*b*), Lamer J. wrote that a "reasonable" time to trial cannot be determined with reference to specific numbers:

> Reasonableness is an elusive concept which cannot be juridically defined with precision and certainty. Under s. 11(*b*), however, as we are dealing with reasonableness as regards the passage of time, we have the advantage of being able to refer to precise stages of proceedings and events.
>
> This is not to say that reasonableness can be predetermined with precision. That would be "falling victim to the tyranny of numbers". But the advantage to be found when dealing

> with time is that reasonableness can be determined with the help of the precision surrounding the happening of certain events, e.g. arraignment, the preliminary inquiry, the trial, and the time elapsed between. [p. 923]

[page724]

257 In *Conway*, L'Heureux-Dubé J. wrote for the majority that the "protection afforded by s. 11(*b*) of the *Charter* is not expressed in absolute terms" and that "the right to a speedy trial 'is necessarily relative. It is consistent with delays and depends upon circumstances'": p. 1672, quoting *Beavers v. Haubert*, 198 U.S. 77 (1905), at p. 87.

258 In *Smith*, Sopinka J. for the Court elaborated on this point:

> The question is, at what point does the delay become unreasonable? If this were simply a function of time, the matter could be easily resolved. Indeed a sliding scale of times could be developed with respect to specified offences which could be adjusted because of the special circumstances of the case. But it is not simply a function of time, but of time and several other factors. What those basic factors are is not the subject of disagreement. [p. 1131]

259 In *Askov* and *Morin*, this Court again reiterated the importance of the balancing test in determining reasonable delay. In fact, in *Morin*, this Court specifically declined to create an administrative guideline for the "inherent" or "intake" time requirements of a case, noting the "significant variation between some categories of offences": p. 792. Sopinka J. wrote that as "the number and complexity of [intake requirements of a case] increase, so does the amount of delay that is reasonable": *ibid.*

260 Thus, the Court has said on several occasions that reasonable inherent time requirements for cases do not lend themselves to the creation of administrative guidelines.

261 Moreover, a judicially fixed ceiling for overall case disposition is at odds with jurisprudence arising from every other jurisdiction with a speedy trial guarantee of which I am aware. In *Trial Within a Reasonable Time* (1992), Michael A. Code wrote that "[i]t is generally foreign to the U.S. speedy trial jurisprudence to establish numerical standards of [page725] any kind": p. 119. The presence of time limitations, whether judicial or statutory, are virtually unheard of in European jurisdictions. In *Can excessive length of proceedings be remedied?* (2007), the Venice Commission polled a number of jurisdictions ranging from Albania to the former Yugoslav Republic of Macedonia, all of which replied in the negative to the questions as to whether there was a deadline or fixed time frame in which the competent authorities need rule on a criminal matter: Section II (pp. 65-322). Statutory timelines are, of course, an entirely different matter and I will have more to say about them in a moment.

262 There is no parallel between the administrative guidelines for institutional delay adopted in *Askov* and *Morin* and the ceilings for overall delay proposed in my colleagues' reasons. As I have explained, institutional delay is concerned with how long one should have to wait for the court to be ready to hear the case. This is not a question that depends to any significant extent

on the particular circumstances of the case. It is mainly a question of resources. It is quintessentially a judicial function under the Constitution to set some clear limits on the point at which the state's plea of inadequate resources must give way to the constitutionally guaranteed right to be tried within a reasonable time. The administrative guidelines in *Askov* and *Morin* serve the reasonableness analysis by defining when state-provided court services should reasonably be available. Unlike the proposed ceilings, the administrative guidelines do not attempt to define what would be a reasonable time for trying all cases in all circumstances. Moreover, the administrative guidelines were intended to be generous and established "neither a limitation period nor a fixed ceiling on delay": *Morin*, at pp. 795-96.

[page726]

263 The proposed judicially created "ceilings" largely uncouple the right to be tried within a reasonable time from the concept of reasonableness which is the core of the right. The bedrock constitutional requirement of reasonableness in each particular case is replaced with a fixed ceiling and is thus converted into a requirement to comply with a judicially legislated metric. This is inconsistent with the purpose of the right, which after all, is to guarantee trial within a reasonable time. Reducing "reasonableness" to a judicially created ceiling, which applies regardless of context, does not achieve this purpose.

264 Moreover, this approach unjustifiably diminishes the right to be tried within a reasonable time. As I see it, a case is not tried within a reasonable time if it has taken "markedly longer than it reasonably should have" (para. 48) to be tried. Other than in very unusual circumstances, that is what an accused has to show to establish a breach of s. 11(*b*) of the *Charter*. But that is not enough under the proposed framework. When the elapsed time is below the ceiling, an accused would have to show not only that the case took "markedly longer" than it reasonably should have but also that he or she "took meaningful steps that demonstrate a sustained effort to expedite the proceedings": para. 48. This requirement has no bearing on whether the time to trial was unreasonable. It is, in effect, a judicially created diminishment of a constitutional right, and one for which there is no justification. I see no basis in the constitutional text or the jurisprudence for imposing this burden on an accused person.

265 My colleagues' "qualitative review of nearly every reported s. 11(*b*) appellate decision from the past 10 years, and many decisions from trial courts" (para. 106) suggests that my concerns on this score are not theoretical. That examination shows that our superior courts found unreasonable delay in 20 percent of the cases where the delay was at or under the 30-month ceiling. The percentage is about the [page727] same for the provincial court cases at or under the ceiling. But under the proposed framework, none of these cases could be stayed absent proof by the accused that they had attempted to actively expedite the process. Imposing this burden is contrary to the Court's holding in *Askov* that "it is the responsibility of the Crown to bring the accused to trial" and that "any inquiry into the conduct of the accused should in no way absolve the Crown from its responsibility to bring the accused to trial": p. 1227.

266 The proposed approach in effect substitutes a right to be "tried under the ceiling" for a right to be tried within a reasonable time. In doing so, it unjustifiably diminishes the right guaranteed by the *Charter* and sets aside a central teaching of our s. 11(*b*) jurisprudence - that

reasonableness cannot be captured by a number.

B. *Creating Presumptive Ceilings for Reasonableness Is a Legislative, Not a Judicial Task*

267 Creating fixed or presumptive ceilings is a task better left to legislatures. If such ceilings are to be created, Parliament should do so. As Lamer J. stated in *Mills*: "There is no magic moment beyond which a violation will be deemed to have occurred, and this Court should refrain from legislating same" (p. 942; see also *Conway*, at p. 1697 (concurring)).

268 Prof. P. W. Hogg's *Constitutional Law of Canada* (5th ed. Supp.) notes that a number of commentators have advocated that Parliament enact fixed time limits for trials: s. 52.5. The Law Reform Commission in *Trial Within a Reasonable Time: A Working Paper Prepared for the Law Reform Commission of Canada* (1994) ("*Working Paper*") pointed to a [page728] number of considerations that weigh in favour of legislative standards, instead of judicially imposed ceilings: pp. 5-6.

269 First, courts do not, and should not, function as legislatures. As the *Working Paper* put it:

> The courts have been given a greatly expanded role with the *Charter*, but their essential function has not changed. They do not function as legislating bodies; their principal task is adjudicating conflicts brought before them. Rather, it is the role of Parliament to advance and enhance constitutional rights through legislative standards which the *Charter*, by its very nature, can provide only in general terms. As Chief Justice Dickson stated in *Hunter v. Southam Inc.* [, [1984] 2 S.C.R. 145, at p. 169]:
>
> > While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. [p. 5]

270 The *Working Paper* also pointed out that legislative timelines can be more easily changed:

> Another advantage of statutory rules or internal court goals is that they can more easily be adjusted and fine-tuned: constitutional standards, in contrast, are difficult to amend. This will be particularly valuable in the case of the right to a trial within a reasonable time. [p. 6]

271 In addition, the *Working Paper* noted that legislation can more comprehensively address the root causes of delay:

> In addition, statutory provisions are not restricted to establishing time-limits. A *Charter* decision can do little beyond setting a maximum allowable delay and providing a remedy when it is exceeded. While this approach may be satisfactory from the perspective of the individual accused, it does not address the societal interest. [page729] Statutory provisions, on the other hand, can address the underlying causes of delay, rather than merely responding to failures to meet the standard. [p. 6]

272 Creating presumptive, fixed ceilings is a matter for Parliament, not for this Court, in my respectful view.

273 My colleagues write, and I agree, that giving meaningful content to constitutional rights is entirely consistent with the judicial role: para. 115. But that is not what the proposed ceilings do. The proposed ceilings do not so much define the content of the s. 11(*b*) right to a trial within a reasonable time as place new limits on the exercise of that right for reasons of administrative efficiency that have nothing to do with whether the delay in a given case was or was not excessive. In my respectful view, this is inconsistent with the judicial role.

C. *The Proposed Presumptive Ceilings Are Not Supported by the Record*

274 The proposed ceilings have no support in the record that was placed before the Court in this case. The Court did not hear argument about the impact of imposing them, which remains unknown.

275 Moreover, the ceilings appear to be illogical. The ceilings accept the *Morin* guidelines for institutional delay: 8 to 10 months in provincial courts and 14 to 18 months in cases involving a preliminary hearing and a trial (para. 52). This means that the proposed ceilings allow 8 to 10 months for the inherent time requirements of the case in provincial courts, which seems long, while allowing only marginally more inherent time requirements (12 to 16 months) for cases - generally significantly more complex cases - that involve a preliminary inquiry and a trial. As well, under the ceilings, the seriousness or gravity of the offence cannot be relied on to discharge the onus which the ceilings impose: para. 81. Yet under the transitional [page730] scheme, this remains a relevant factor: para. 96. The illogical result is that serious offences are more likely to be stayed under the ceilings than under the transitional scheme.

276 What evidence there is in the record suggests that it would be unwise to establish these sorts of ceilings. For the vast majority of cases, the ceilings are so high that they risk being meaningless. They are unlikely to address the culture of delay that is said to exist. If anything, such high ceilings are more likely to feed such a culture rather than eliminate it.

277 Consider the statistical information that we have in the record which is from the Provincial Court of British Columbia. It suggests that the proposed ceiling for the provincial courts is too high to be of any use in encouraging more expeditious justice in the vast majority of cases.

278 The proposed ceiling is set for 18 months in provincial courts. But the median time to disposition of matters in the Provincial Court of British Columbia was 95 days in 2011-2012, with the average being 259 days, both well below the proposed ceiling: B.C. Justice Reform Initiative, *A Criminal Justice System for the 21st Century* (2012), at p. 30. Of course, these statistics relate to all matters, the vast majority of which (about 95 percent) are disposed of without trial: p. 33. The time to trial varies widely by court location with the time to the commencement of trial for a 2-day case varying in the Provincial Court from 12 to 16 months: p. 34. (I note that this period does not include the period from intake until a trial date is set and measures only to the

beginning, not the end of the trial: "Justice Delayed: A Report of the Provincial Court of British Columbia Concerning Judicial Resources" (September 2010) (online), at p. 21.) But there is not much here to lead [page731] one to think that the ceilings will do anything to improve the timeliness of the vast majority of criminal cases in the Provincial Court. And, as I will discuss shortly, the ceilings put a small percentage of the total caseload, but a large number of long cases, at serious risk of judicial stay.

279 The "qualitative review" conducted by Justices Moldaver, Karakatsanis, and Brown "assisted in developing the definition of exceptional circumstances" and provided "a rough sense of how the new framework would have played out in some past cases": para. 106. This examination has not been the subject of adversarial scrutiny or debate, and how it "assisted" in developing the definition of exceptional circumstances is unstated. In any case, the examination as I have reviewed it suggests that the proposed ceilings are unrealistic and that their implementation risks large numbers of judicial stays.

280 What does this examination tell us about the appropriateness of the ceilings? Consider first the superior court cases over the past 10 years in which stays were granted. The average "net" delay was about 44 months, with the median "net" delay being about 37 months. This provides no support for a ceiling of 30 months for superior court cases. The examination is no more supportive in relation to the provincial courts. Looking at provincial court cases in which stays were granted, the average "net" delay was about 27 months and the median was 24.5 months (I have excluded Quebec from this calculation because of the distinctive jurisdiction of the Court of Québec). Once again, my colleagues' examination of the cases fails to support [page732] the proposed ceiling of 18 months for provincial court cases.

281 Developing the proposed ceilings in the absence of evidence and submissions by counsel contrasts with the Court's development of the administrative guidelines for institutional delay in *Askov* and *Morin*. In those cases, the Court had the benefit of extensive evidence including statistical information from comparable jurisdictions and expert opinion: *Morin*, at p. 797. The record in *Morin* included four volumes of evidence, largely consisting of evidence from three experts with exhibits on the issue of institutional delay across various jurisdictions in Canada - in fact, two volumes of the record were exclusively devoted to such information. This record contained evidence from a solicitor in the region of Durham, the region at issue in *Morin*, who was a member of the trial delay reduction committee in the region. His evidence included statistical information and information about the efforts made to reduce delay in the region. Furthermore, the record included extensive evidence from Professor Baar, who "has written and consulted extensively on court administration in general and case flow management in particular in Canada, the United States and other jurisdictions": *R. v. Morin* (1990), 55 C.C.C. (3d) 209 (Ont. C.A.), at p. 213. This extensive record enabled the Court to analyze the respective caseloads of provincial courts and superior courts, the increase in caseload in particular regions (including in Durham), reasons for the growth in this caseload, and the abilities of various courts to handle the increasing caseload: see *Morin* (S.C.C.), at pp. 798-99. The broad range set out in the administrative guidelines in *Morin* (eight to ten months in provincial court; six to eight months from committal to trial) was derived from the considerable mass of evidence then before the Court.

[page733]

D. *There Is a Significant Risk of Negative Consequences*

282 My colleagues acknowledge that, if their new framework were applied immediately, there would be a risk of thousands of cases being off-side the new ceilings and being judicially stayed as a result: para. 98. There are worrying signs in the limited record that we do have that large numbers of cases (although not a large percentage of the total cases dealt with by the courts) would be at risk if the presumptive ceilings were applied.

283 The record indicates that, in the British Columbia Provincial Court, as of March 31, 2010, there were over 2,000 adult criminal cases pending for over 18 months. As of 2011, this represented 13 percent of the caseload of the Provincial Court. As of 2012, 4 percent of pending cases in the Provincial Court had been in the system for more than two years: "Justice Delayed", at p. 23; B.C. Justice Reform Initiative, at p. 35. Thus the limited record that we do have suggests that the proposed ceiling of 18 months in provincial courts, if applied now, would put thousands of prosecutions in the Provincial Court at serious risk of being judicially stayed. Dramatic improvements for the group of cases at the top end of the delays would be required to avoid thousands of judicial stays under the proposed ceilings.

284 The examination of the case law undertaken by my colleagues increases rather than diminishes this concern. As I noted earlier, the average time for stays in superior courts, based on that analysis, is about 44 months, with the median being about 37 months. This time period significantly exceeds the proposed 30-month ceiling. If these figures can be relied on, they suggest that the proposed ceilings [page734] would require unrealistic and improbable improvement in case processing times to avoid many judicial stays.

285 The transitional regime which my colleagues propose is intended to avoid the problems that would arise from immediate application of the presumptive ceilings. In my view, these transitional provisions will not avoid the risk of thousands of judicial stays of proceedings.

286 Although my colleagues maintain that different criteria should not apply during the transitional period, they in fact establish different criteria for transitional cases. To take only one example, there will be a "transitional exceptional circumstance" if the parties reasonably relied on the law as it previously existed and have not had time "to correct their behaviour": para. 96. In other words, the ceilings do not apply to some transitional cases.

287 The basic problem with this is that transitional provisions create a *Charter* amnesty. What is unreasonable according to the Constitution is treated as if it were reasonable. The justification for this is that parties require time to correct their behaviour following the release of this decision. However, this sort of *Charter* amnesty is contrary to our s. 11(*b*) jurisprudence.

288 *Morin* ruled against transitional provisions in s. 11(*b*) cases and explained why purporting

to set up a parallel system of rules to govern existing cases is wrong in principle. Sopinka J. for the majority wrote, at pp. 797-98:

[page735]

> ... the Court of Appeal purported to apply a transitional period to accommodate the situation in Durham. While a transitional period may have been appropriate immediately after the *Charter* came into effect, it is not appropriate any longer. This Court so held in *Askov*. The use of a transitional period implies a fixed period during which unreasonable delay will be tolerated while the system adjusts to a new set of rules. It imposes a general moratorium on certain *Charter* rights. For this reason and quite apart from the statement in *Askov* that the transitional period had ended, I would not find it appropriate in this case. It appears to me undesirable to impose a moratorium on *Charter* rights every time a region of the country experiences unusual strain on its resources. It is preferable to simply treat this as one factor in the overall decision as to whether a particular delay is unreasonable. [Emphasis added.]

289 In my opinion, this teaching is both authoritative and sensible. I would continue to apply it.

290 Moreover, my colleagues indicate that the proposed transitional exception applies to problems of institutional delay. But it is hard to see how this can be justified by the need to give parties an opportunity to correct their behaviour. The guidelines for reasonable institutional delay were established (at the very latest) in *Morin*, almost a quarter of a century ago. Twenty-four years is long enough for parties to modify their behaviour to comply. No transitional arrangements for institutional delay can now be justified.

291 My colleagues write that the "contextual application of the [new] framework is intended to ensure that the post-*Askov* situation [in which tens of thousands of charges were stayed in Ontario alone] is not repeated": para. 94. In other words, the hope is that the presumptive ceilings that are unrealistic now will become realistic in the fairly near future. But there is no basis in the record or in logical reasoning to suppose that these ceilings, if dramatically unrealistic now, will become less unrealistic [page736] with the passage of time. In my respectful view, this Court should not impose on the criminal justice system the risk that thousands of prosecutions will be judicially stayed. Doing so is especially regrettable when it is done, as is proposed here, in a virtual factual vacuum, with no opportunity for submissions about either the wisdom of this approach or the accuracy of the assumptions on which it is based.

292 My colleagues maintain that there is a "culture of complacency towards delay" (para. 40) that has emerged in the criminal justice system, which is not addressed by the *Morin* framework. They argue that their revised approach to s. 11(*b*) is warranted, given that under the current framework "participants in the justice system ... are not encouraged to take preventative measures to address inefficient practices and resourcing problems": para. 41. But, contrary to these broad and unsupported generalizations, even the limited record before the Court indicates that the problem of excessive delay has been the focus of extensive attention by the British Columbia Provincial Court and by the governments of British Columbia, Alberta, Newfoundland and Labrador, and Ontario. The most recent statistics in the record indicate that the situation is,

if anything, getting better, not worse: see "The Semi-Annual Time to Trial Report of the Provincial Court of British Columbia to March 31, 2015" (online), at p. 5.

293 Imposing judicially created ceilings as an aspect of our s. 11(*b*) jurisprudence presents risks. If we are to take these risks through the imposition of ceilings or other time limits, these limits should be created by legislation and informed by facts.

[page737]

E. *The Promised Simplicity of the Ceilings Is Likely Illusory*

294 Even if creating ceilings were an appropriate task for the courts and even if there were an appropriate evidentiary basis for them, there is little reason to think these presumptive ceilings would avoid the complexities inherent in deciding whether a particular delay is unreasonable in all of the circumstances.

295 We can look to the experience of other jurisdictions. It appears that even fixed limitation periods set by legislatures have not succeeded in avoiding complexity. Various states in the United States have created statutory time limitation periods dealing with overall delay in criminal proceedings. At the federal level, there is the *Speedy Trial Act of 1974*, 18 U.S.C. s. 3161, and there are similar provisions in many states: W. R. LaFave et al., *Criminal Procedure* (5th ed. 2009), at pp. 892-93. These provisions create time limitations, but also include a number of contingencies to account for the plethora of different circumstances under which criminal cases may arise: pp. 895-97. In short, to be workable, the legislated limits inevitably require that a number of factors be balanced and considered in determining whether any case or charge should be dismissed: p. 897. But these contingencies and this balancing simply give rise to the sort of litigation that the limits were supposed to avoid: see S. Hopwood, "The Not So Speedy Trial Act" (2014), 89 *Wash. L. Rev*. 709, at p. 715.

296 Turning to the proposed scheme, it seems to me that rather than avoiding complexity, it simply moves the complexities of the analysis to a new location.

297 I turn first to cases in which the delay exceeds the presumptive ceiling. Departure from the ceiling may be required by a variety of circumstances: "discrete exceptional events" (para. 75), including delay caused by unexpected recantation [page738] by a complainant and other unforeseen trial delays; delay resulting from a case's particular "complexity" (para. 77); and whether particular periods of delay could reasonably have been mitigated. It is hard to see how this framework is likely to bring greater simplicity to the analysis.

298 The same applies to the burden on the defence in cases which fall below the ceilings. Under the proposed framework, the defence has the burden to show, first, that the time required to dispose of the case "markedly exceeds the reasonable time requirements of the case": para. 87. In order to consider a defence attempt to discharge this burden, the court will have to consider a variety of factors, including "the complexity of the case, local considerations, and

whether the Crown took reasonable steps to expedite the proceedings": *ibid.* These factors largely mirror the test under the existing jurisprudence.

299 The defence must also show that it took "meaningful, sustained steps to expedite the proceedings": para. 84. The defence must show that "it attempted to set the earliest possible hearing dates, was cooperative with and responsive to the Crown and the court, put the Crown on timely notice when delay was becoming a problem, and conducted all applications ... reasonably": para. 85. I have already explained why I think it is inappropriate to impose this burden. But putting that aside, the need for these inquiries increases rather than reduces the complexity of the analysis mandated by the existing jurisprudence.

300 Finally, consider the proposed transitional provisions. It is unexplained how the Crown will be able to satisfy the court that "the time the case has taken is justified based on the parties' reasonable [page739] reliance on the law as it previously existed" in the relevant jurisdiction, let alone how it will be shown that "the parties have [or have not] had time following the release of this decision to correct their behaviour": para. 96. Little imagination is needed to see the ballooning evidentiary implications of these elements of the scheme. Also, it seems that for transitional cases below the ceiling, unlike cases subject to the new template, the defence does not have to prove having taken initiative to expedite matters in the period preceding this decision in order to make out a case of unreasonable delay. But doing so will assist the defence claim of unreasonable delay. The result is that even in transitional cases, the parties will be parsing the record to show how the defence did, or did not, try to move things along.

301 These considerations suggest that the proposed presumptive ceilings will do little to simplify the task of determining whether the delay in a particular case violates the accused's right to be tried within a reasonable time. In one way or the other, the judge must look at the circumstances of the particular case at hand.

F. *Conclusion*

302 I am not convinced that this Court should impose the scheme proposed by my colleagues. It diminishes *Charter* rights. It casts aside three decades of the Court's jurisprudence when no participant in the appeal called for such a wholesale change - and this in the context of a case in which all of us agree that the result is clear under the existing jurisprudence. It has not been the subject of adversarial scrutiny or debate. The record does not support the particular ceilings selected. Nor, so far as I can tell, does the Court-conducted examination of reported cases. And it risks repetition of the *Askov* aftermath in which thousands of prosecutions were [page740] judicially stayed. In short, the proposed scheme is, in my respectful view, wrong in principle and unwise in practice.

V. Disposition

303 I would allow the appeal and enter a stay of proceedings.

Appeal allowed.

Solicitors:

Solicitors for the appellant: Peck and Company, Vancouver.

Solicitor for the respondent: Public Prosecution Service of Canada, Vancouver.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Calgary.

Solicitors for the intervener the British Columbia Civil Liberties Association: Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Addario Law Group, Toronto.

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1 We were not invited to revisit the question of remedy. Accordingly, we refrain from doing so.

2 This Court has held that s. 11(*b*) applies to sentencing proceedings (*R. v. MacDougall*, [1998] 3 S.C.R. 45). Some sentencing proceedings require significant time, for example, dangerous offender applications or situations in which expert reports are required, or extensive evidence is tendered. The issue of delay in sentencing, however, is not before us, and we make no comment about how this ceiling should apply to s. 11(*b*) applications brought after a conviction is entered, or whether additional time should be added to the ceiling in such cases.

3 While most proceedings with a preliminary inquiry are eventually tried in the superior court, this is not always the case. For example, a case may go to trial in the provincial court after a preliminary inquiry if the province in which the trial takes place offers this as an option (such as Quebec), or if the accused re-elects a trial in the provincial court following a preliminary inquiry. In either case, the 30-month ceiling would apply.

4 We note that the appellant and some of the interveners submitted that the *Morin* guidelines were intended to apply to the *entire period* of delay, rather than just the segment of delay caused by a shortfall of institutional resources. This is incorrect. The only reasonable reading of this Court's decisions in *Askov*, *Morin*, and *Godin* is that the guidelines were intended to apply only to institutional delay, not the entire period of delay.

5 See, for example, some of the recommendations contained in LeSage and Code.

SUPERIOR COURT OF JUSTICE
(EAST REGION)

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

-and-

DEIRDRE MOORE

Applicant

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