Date:
20000324 Docket: CAC 159465

NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. Cole, 2000 NSCA 42]

Chipman, Bateman and Flinn, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN	)	William D. Delaney
	)	for the appellant
Appellant	)	
	)	
- and -	)	
	)	
DAMON COLE	)	Stanley W. MacDonald
	)	for the respondent
Respondent	)	
	)	
	)	
	)	Appeal Heard:
	)	January 31, 2000
	)	
	)	
	)	
	)	Judgment Delivered:
	)	March 24, 2000
	)	
	)	

THE COURT: Leave to appeal is granted, the appeal is allowed and the order for costs against the Crown is set aside, as per reasons for judgment of Bateman, J.A., Chipman and Flinn, JJ.A., concurring

Bateman, J.A.:

[1] This is an appeal from a decision of Justice Suzanne Hood of the Supreme Court ordering the Crown to pay costs to the respondent, Damon Cole, an accused who had succeeded on an application for a stay of proceedings.

FACTS:

[2] On February 27, 1996, after trial in Supreme Court at Halifax, Mr. Cole, and five co-accused were convicted of the aggravated assault of Darren Watts contrary to s.268 of the **Criminal Code**. Mr. Cole and one other, Cyril Smith, were convicted, as well, of the aggravated assault of Robert Gillis. Two co-accused were convicted of the aggravated assault of John Charman. All of the counts were contained in a single indictment on which the six accused were jointly tried.

[3] We are advised that the charges arose out of an extensive investigation involving approximately fifty police officers who interviewed approximately one hundred fifty people. The complete police file in this investigation contained approximately seventeen hundred pages. In the view of the investigating officer, this was the most complex investigation he had been involved in during his twenty years as a police officer.

[4] On March 1, 1996, Mr. Cole and the five co-accused were sentenced to terms of imprisonment in a federal penitentiary. Mr. Cole appealed both the convictions and sentences. This Court heard his appeal on June 12, 1996, and delivered judgment on

August 23, 1996. The convictions were set aside and a new trial ordered on the two counts of aggravated assault.

[5] On September 19, 1996, in Supreme Court, Mr. Cole's new trial was set for January 20-24, 1997.

[6] The five co-accused also appealed their convictions and sentences. These appeals were heard, individually, on September 11, September 12, and December 11, 1996. Judgment on all was reserved.

[7] On December 18, 1996, Mr. Cole's counsel, Stanley MacDonald, received a letter from Crown attorney, Craig Botterill, advising that the Crown did not want to proceed with Mr. Cole's retrial in January. The Crown preferred to wait for the Appeal Court's decisions in relation to the five co-accused. If new trials were ordered the Crown planned to hold one retrial for all accused. Consequently, Mr. Botterill advised that the Crown had not subpoenaed witnesses for the trial in January. Mr. Cole's counsel responded that the Crown's letter did not "meet with his approval" and that "I do not wish to give the impression that I agree with any aspect of your letter". Mr. MacDonald further advised that he would seek instructions.

[8] On January 9, 1997, Crown Attorney Botterill, wrote to the Prothonotary directing a stay of proceedings, pursuant to s.579 of the **Criminal Code**. His letter stated in part:

> The decision of the Honourable Justice Saunders at the original trial that the aggravated assault on Darren Watts was a joint criminal enterprise was not disturbed on appeal. The case against each accused involves the same witnesses, who come from several jurisdictions throughout Canada. Multiple trials involving the same witnesses and facts would cost taxpayers a great deal of money, would waste valuable court time and resources, and are not in the public interest.
>
> The Crown believes that it is contrary to the ends of justice to proceed against Damon Cole without knowing what effect the subsequent Court of Appeal rulings would have on his trial. One result of proceeding before those judgments are delivered could be inconsistent verdicts.
>
> In coming to the decision to re-try the accused Damon Cole jointly with his co-accuseds, should they also be awarded new trials, the Crown has conducted a careful review of the case against Damon Cole and the Crown believes that there exists a reasonable likelihood of conviction.

[9] On January 15, 1997, the Court of Appeal, by a majority, dismissed the appeals from conviction by the five co-accused, although in some cases varying the sentences imposed.

[10] In Notices of Appeal filed between February 10, 1997 and February 12, 1997, the five co-accused appealed as of right, to the Supreme Court of Canada. That court heard these appeals on December 5, 1997 but reserved judgment. On January 6, 1998 the Crown recommenced proceedings against Mr. Cole. Section 579(2) authorizes the Crown to reinstate a charged stayed pursuant to s.579(1), but only within the year.

[11] On February 19, 1998, the Supreme Court delivered its judgment on the appeals by the co-accused. Cyril Smith was granted a new trial in respect of the assault upon Robert Gillis. A new trial was ordered for another co-accused, Stacey Skinner, on the alleged assault upon Darren Watts. In all other respects the appeals were dismissed.

[12] On May 20, 1998, Justice Suzanne Hood of the Supreme Court, on Mr. Cole's motion, directed a stay of proceedings. Mr. Cole requested costs against the Crown on the successful application. In a written judgment dated September 22, 1999, Justice Hood ordered the Crown to pay costs to Mr. Cole in the amount of $12,000.00

GROUNDS OF APPEAL:

[13] The Crown submits:

> 1. That the Supreme Court Judge erred in ordering costs against the Crown in the absence of exceptional circumstances justifying an order for costs.
>
> 2. That the amount of the costs ordered by the Supreme Court Judge was excessive.

STANDARD OF REVIEW:

[14] The Crown appeals this order for costs pursuant to s.676.1 of the **Criminal Code** which states:

> A party who is ordered to pay costs may, with leave of the court of appeal or a judge of a court of appeal, appeal the order or the amount of costs ordered.

[15] This being a discretionary order, we will interfere only if wrong principles of law have been applied or patent injustice would result (**Exco Corporation Limited v. Nova Scotia Savings and Loan** et al. (1983), 59 N.S.R. (2d) 331; 125 A.P.R. 331).

ANALYSIS:

[16] The Crown has appealed only the order for costs and not the stay of proceedings.

[17] Mr. Cole's application for a stay of proceedings was made pursuant to s.7 of the **Charter** [**Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Part I**] which provides that "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." The judge accepted Mr. Cole's claim that the Crown, in directing a stay of proceedings pursuant to s.579 of the **Criminal Code** had abused the process of the court. In view of her decision on the s.7 application, the judge found it unnecessary to deal with a companion application for a stay due to unreasonable delay (s.11(b) of the **Charter**).

[18] An order for costs against the Crown in a criminal prosecution is an exceptional remedy. Costs do not automatically follow a finding of abuse of process or the granting of a stay. In reviewing the costs order we must consider whether the

Crown's conduct which, in the judge's opinion, was an abuse of process warranting a stay of proceedings, was such that it should attract the additional remedy of costs.

[19] The primary facts which are set out in detail above are not in dispute. Briefly summarizing: Mr. Cole had successfully appealed his conviction and a new trial was ordered. The Crown initially agreed to a date for the new trial, but shortly before that trial was to begin, entered a stay of proceedings pursuant to s.579(1) of the **Criminal Code**. The Crown wanted to await the outcome of the appeals of the co-accused, with the intention that there would be a joint trial if new trials were ordered for any or all accused. The original trial was a joint one.

[20] The actions of the Crown which in the judge's opinion were deserving of censure, were described in her judgment (reported as **R. v. Cole** at (1998), 126 C.C.C. (3d) 159 at pp. 182-184) as follows:

> . . . the stay was never intended to be a permanent one, that it was always the Crown's intent to try Damon Cole and that the reason for the stay was to have a joint trial which would save expense and inconvenience to witnesses. There is no question as to what the Crown did nor any need to "second-guess the prosecutor's motives" (*R. v. Power*, p. 10). He has stated them very clearly.
>
> What then is the substance of this stay? It was to adjourn the Cole trial until it was known first, if the Court of Appeal would order re-trials for any of the others and second, if the Supreme Court of Canada would order any re-trials.
>
> The Crown admits that seeking an adjournment was an option. It gives no reason for not making that choice. It chose instead to enter a stay for the purpose of postponing the Damon Cole re-trial until it was known whether there would be other re-trials.
>
> The trial judge has the discretion to grant adjournments, but in deciding whether to grant or refuse the adjournment the judge must exercise that discretion judicially. . . .
>
> . . .

> It was clearly within the power of the trial judge to determine if an adjournment of the Damon Cole trial should be granted. In making that determination, the trial judge would have heard from both the Crown and the accused.
>
> The use of its discretion under s.579 to enter a stay gave the Crown a maximum one-year period to wait for the Supreme Court of Canada ruling before it had to re-institute charges against Damon Cole. When that one-year period was almost at an end and the Supreme Court of Canada ruling had not yet been released, the Crown could wait no longer and re-instituted proceedings against Damon Cole.
>
> The actions of the Crown circumvented the court making a ruling at all on the granting of an adjournment. The Crown chose not to take the risk of getting an adverse ruling. This is "conspicuous evidence" of improper motives (*Power*, p. 10) on the part of the Crown.
>
> . . .
>
> In September 1996, trial dates, to which the Crown agreed, were set for Damon Cole alone. At that time, the other appeals to the Court of Appeal had been heard, but no decision rendered. The Crown advised defence counsel in December 1996 that it did not intend to proceed to trial in January. Damon Cole's counsel immediately advised that the defence did not agree to a delay of the trial. The Crown had not at that time subpoenaed witnesses for the trial and did not do so. The Crown then entered a stay pursuant to s.579 of the **Criminal Code**. It gave as its reasons for doing so the fact that they were awaiting the Court of Appeal decision and the desirability of a joint trial if any other re-trials were ordered, as well as the cost and inconvenience to witnesses of more than one trial. The Crown did not seek an adjournment from the trial judge. At the time the stay was entered, the Crown intended to prosecute Damon Cole. The stay continued from January 9, 1997 until January 6, 1998, just before its expiration at the end of a one-year period. The Crown re-instituted proceedings against Damon Cole before the Supreme Court of Canada rendered its decisions with respect to the other accused. The new trial dates were almost 16 months after the originally set trial dates (January 20-24, 1997 to May 11- 15, 1998).
>
> I conclude that in the circumstances of this case, the actions of the Crown in totality constituted an abuse of process. Put in its simplest terms the Crown unilaterally obtained a 16-month adjournment in circumstances where it was the court's decision to determine if an adjournment should be granted. The court made no decision and Damon Cole had no say. There was no right of appeal. Damon Cole did not consent to the adjournment and wanted the trial to proceed in January 1997. Because of the Crown's actions, the trial has not yet been held.
>
> (Emphasis added)

[21] The judge's finding of abuse of process, the granting of the stay and, ultimately, the award of costs all arise from her conclusion that the Crown's use of s.579

to postpone Mr. Cole's trial, while awaiting the outcome of the appeals by the co-accused, was an "improper motive". In ordering costs, the judge relied substantially upon her characterization of the Crown's conduct when concluding that she should enter the stay. It is, therefore, impossible to evaluate the propriety of the costs order without also reviewing the judge's assessment of the underlying Crown conduct which in her opinion warranted the stay. Relevant to this appraisal is the law concerning prosecutorial discretion, abuse of process and stays of proceedings as well as that pertaining to costs in criminal proceedings.

(i) Prosecutorial Discretion:

[22] The Crown's power to direct a stay of proceedings is a discretionary one granted by statute. The **Criminal Code** provides:

> 579. (1) The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated.
>
> (2) Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new information or preferring a new indictment, as the case may be, by the Attorney General or counsel instructed by him for that purpose giving notice of the recommencement to the clerk of the court in which the stay of the proceedings was entered, but where no such notice is given within one year after the entry of the stay of proceedings, or before the expiration of the time within which the proceedings could have been commenced, whichever is the earlier, the proceedings shall be deemed never to have been commenced.

[23] Courts are loath to interfere with the exercise of prosecutorial discretion. In **R. v. Power** (1994), 89 C.C.C. (3d) 1 (S.C.C.) L'Heureux-Dubé J., after conducting an extensive review of the reasons why this is so, said at p. 15:

> That courts have been extremely reluctant to interfere with prosecutorial discretion is clear from the case-law. They have been so as a matter of principle based on the doctrine of separation of powers as well as a matter of policy founded on the efficiency of the system of criminal justice and the fact that prosecutorial discretion is especially ill-suited to judicial review.

[24] The wide latitude accorded the Crown in discretionary matters is exemplified in **R. v. Scott** (1989), 61 C.C.C (3d) 301 (S.C.C.). There, during a drug trafficking trial, the defence sought to question the investigating officer about why the accused had been arrested. Crown counsel objected because cross-examination on that point would reveal the identity of an informer. The trial judge refused to hear argument on the issue and ruled that he would allow the questions. Crown counsel immediately stayed the proceedings under s.579 [formerly s.508] of the **Code**, recommencing a short time later. The accused applied for a judicial stay on the basis that the recommencement amounted to an abuse of process. The stay application was dismissed which dismissal formed part of the accused's appeal from conviction. The majority of the court held that the Crown acted properly and within its discretion in staying and recommencing proceedings in order to protect an informer.

[25] In support of her view that the Crown's resort to s.579 here was improper, Justice Hood referred to several Provincial Court decisions. In **R. v. McAnish and Cook** (1974), 15 C.C.C. (2d) 494 (B.C. Prov. Ct.), for example, the Crown's request for

an adjournment of a trial was refused. Rather than continuing with the trial the Crown directed a stay and recommenced proceedings on a new Information before a different judge. In a brief decision wherein the judge imposed a stay of the new charge, the Court admonished the Crown for the course it took "to render the exercise of judicial discretion completely nugatory by entering a stay of proceedings". It was this judge's view that the Crown, having chosen to request an adjournment, should have appealed the adverse ruling. He noted, however, that it would have been appropriate for the Crown to direct a stay of proceedings instead of applying for the adjournment. He said at p. 495:

> . . . The prosecution must not be permitted to render the exercise of judicial discretion, completely nugatory, by entering a stay of proceedings, "for the reason that the Court will not grant the adjournment", then proceed with a new information upon the identical charge before a different Judge not of the same Court.
>
> It is not too difficult to contemplate the evils where such a procedure could be extended to manoeuvre any trial proceeding before a Judge of choice. Section 508(1) empowers the Attorney-General to direct a stay of proceedings. Subsection (2) . . . of s.508 of the *Criminal Code* sets out that "Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new charge". Why that particular procedure has not been pursued in this case I do not know.

[26] Also cited by Justice Hood was **R. v. Scheller et al. (No. 1)** (1977), 32 C.C.C. (2d) 273 (Ont. Prov. Ct.). There, on the day fixed for trial, the Crown asked for an adjournment because one of its witnesses was in England. Finding that the Crown had not shown that the witness was detained on some urgent matter, the judge denied the request. The accused, **Scheller**, was arraigned and a plea of not guilty was

accepted over the Crown's attempt to withdraw the charge. The charge was dismissed on the Crown calling no evidence.

[27] In the same trial a similar dismissal occurred with three co-accused, William John Tomlinson, Robert Frank Tomlinson and Samuel Tomlinson, hereafter referred to as the Tomlinsons, the Crown taking the position that the charge was withdrawn and therefore calling no evidence. In relation to the accused Tomlinsons, the Crown advised the court that there were five intended witnesses but none were present although only one was unavailable. The trial date had been set on consent some two months before the appearance before the Judge. The Crown had notified the accused that it would be seeking an adjournment. The accused did not consent and came to court prepared for trial.

[28] Upon the dismissals, the Crown relaid the charges against Scheller and the Tomlinsons. The accused made application for a stay of the new proceedings as an abuse of process. The trial judge described the conduct of the Crown at p. 279, as follows:

> In this case the Crown has chosen to ignore the orders of dismissal of Judge McEwan and simply treat the matter as if no such dismissals were made. They argue that the dismissals were made without jurisdiction because the informations were withdrawn. Surely whether or not the purported withdrawal was effective is for a higher Court to decide since the record quite clearly shows that Judge McEwan dismissed the informations. In this case one cannot treat the purported withdrawal in the abstract because it is inextricably bound up with the unsuccessful attempt to have the informations kept alive by seeking an adjournment. (Emphasis added)

[29] And at p. 283:

> When the accused is brought back to face the same charge that was disposed of by the Court, without any ruling by a higher Court as to the propriety of the lower Court's ruling, it does not appear to the accused or the public, that the administration of justice is impartial, but rather that it is something to be manipulated by the Crown. Respect for the Courts by the public can not be maintained if the Crown is allowed to use the withdrawal power in this way.

[30] Similarly, in **R. v. Weightman and Cunningham** (1977), 37 C.C.C. (2d) 303 (Ont. Prov. Ct. (Crim. Div.)), cited by Hood, J., on the date set for trial, the Crown requested an adjournment on the ground that one of the police witnesses was away on his honeymoon. Defence counsel had not been notified in advance that the Crown would be seeking an adjournment. Finding that the Crown had not given sufficient reason for the adjournment, the judge denied the request. The Crown then withdrew the charges and laid an identical Information. The accused applied to stay the proceedings as an abuse of process. The judge found that “the critical feature of this case and that which constitutes an abuse of process of the court is the withdrawal of the charge for the purpose of relaying the same with the oblique motive of circumventing the decision of the Judge to refuse an adjournment at the request of the Crown.” (at p. 318)

[31] To similar effect, she cited **R. v. Hickey** (1978), 44 C.C.C. (2d) 367 (Ont. Prov. Ct. (Crim. Div.)) which involved a withdrawal and relaying of the charge by the Crown in the face of an adverse ruling on a request for an adjournment.

[32] In my view, none of these cases canvass circumstances analogous to those presented here. All but **McAnish** involved the exercise of the Crown's common law power to withdraw a charge, not the entry of a stay pursuant to s.579. In both **McAnish** and **Scheller** the court had purported to finally dispose of the proceeding, which result was ignored by the Crown. Here, there was no final disposition by the Court nor had there been an adverse ruling by the court which could have been the subject of an appeal.

[33] In any event, the decision of the Ontario Court of Appeal in **Re Ball and The Queen** (1979), 44 C.C.C. (2d) 533, renders the decisions in the above cases of questionable authority. There, on the first date set for trial the Crown asked for an adjournment because an essential witness was evading service of a subpoena. The adjournment was granted but on the next trial date the witness was still unavailable. On the third trial date, as the witness remained unavailable, the Crown did not seek a further adjournment but withdrew the charge. The witness was found the following day and a new, identical Information was laid. The trial judge refused the accused's application for a stay based upon an abuse of process. On an application for prohibition by the accused to the High Court the matter was stayed. On further appeal the unanimous court found that there was not the oppression, prejudice, harassment, or manifest hardship on the accused necessary to invoke the doctrine of abuse of process and that it was not a case of exceptional circumstances.

[34] Similarly, in **Re Panarctic Oils Limited and The Queen** (1982), 69 C.C.C. (2d) 393 (N.T.S.C.), upon the trial judge refusing the Crown's request for an adjournment, the Crown stayed the proceedings and recommenced. In dismissing an application by the accused for prohibition deWeerdt, J. commented at p.400:

> The motive of Crown counsel was surely never in doubt. There was nothing oblique or indirect about it. He did what he understood to be necessary to protect the Crown's interests in maintaining the prosecution in question. The alternative was to see the applicant acquitted for lack of evidence. The only point of the stays was to leave the way open for a recommencement. . . .

[35] Relevant, as well, is the decision in **R. v. Rogers**, [1981] B.C.J. No. 852 (B.C.S.C.). There, during a trial in Provincial Court and after some evidence had been adduced, Crown counsel concluded that the case could not be proven and directed the clerk to enter a stay. Upon discovering additional evidence which the Crown thought might overcome the difficulties that prompted the stay, the Crown recommenced. The accused applied for relief in the nature of prohibition to prevent any judge of the Provincial Court from proceeding with a trial on the new Information, alleging abuse of process. MacEachern, C.J.S.C. concluded that it was not an appropriate case in which to grant the relief sought.

[36] Finally, in **R. v. Durack**, [1998] S.J. No. 203 (Sask.C.A.) the accused was charged with unlawful confinement and sexual assault. At the commencement of the preliminary hearing the Crown directed a stay of proceedings pursuant to s.579(1). The victim was unable to appear because her emotional health was unstable allegedly because of the trauma of the sexual assault. This was not communicated to the court

or to the defence at the time. Eight months later, notice of recommencement was filed. After the complainant testified at the preliminary hearing the defence agreed to a consent committal to stand trial. The defence then applied for an order staying the proceedings on the basis that the Crown's stay violated the principles of fundamental justice protected under ss.7 and 11(d) of the **Charter** or, alternatively, that the accused was deprived of his right to be tried within a reasonable time contrary to s.11(b) of the **Charter**. On appeal from the trial judge's dismissal of the application, the court agreed that the Crown's exercise of its right to direct a stay then recommence proceedings was not an infringement of the accused's **Charter** rights or an abuse of process.

(ii) Abuse of Process:

[37] While the courts' reluctance to interfere with prosecutorial discretion is well established, it is accepted that the exercise of that discretion must conform to **Charter** principles. A **Charter** challenge must, however, be evaluated in the context of the wide latitude afforded when the exercise of Crown discretion is at the core of the complaint. In **Power**, **supra**, the accused was charged with impaired driving following a motor vehicle collision in which one of his passengers was killed and another two injured. At trial the accused objected to the admission of the results of the breath samples on the ground that the police had violated his s.10 **Charter** rights. The trial judge, on a *voir dire*, agreed that his **Charter** rights had been violated and excluded the evidence. Crown counsel declined to call further evidence and the trial judge charged the jury to acquit. The Court of Appeal dismissed an appeal from the acquittal (Goodridge, C.J.

dissenting), although finding that the trial judge erred in excluding the evidence. It was the majority view that entry of an acquittal was appropriate on the ground that there had been an abuse of process in that, instead of proceeding with the trial when faced with the adverse ruling the Crown, unreasonably in its view, declined to call further evidence which resulted in the acquittal of the respondent on all counts.

[38] At issue on further appeal to the Supreme Court of Canada was whether s. 686(4) of the **Criminal Code** included a residual discretion for a court of appeal to refuse to order a new trial although finding that there was an error of law at trial which could reasonably have affected the verdict. In this context, the court discussed the exercise of Crown discretion. L'Heureux-Dubé wrote, for the majority, at p. 10:

> To conclude that the situation "is tainted to such a degree" and that it amounts to one of the "clearest of cases", as the abuse of process has been characterized by the jurisprudence, requires overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice. As will be developed in more detail further in these reasons, the Attorney General is a member of the executive and as such reflects, through his or her prosecutorial function, the interest of the community to see that justice is properly done. The Attorney General's role in this regard is not only to protect the public, but also to honour and express the community's sense of justice. Accordingly, courts should be careful before they attempt to "second-guess" the prosecutor's motives when he or she makes a decision. Where there is conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed, then, and only then, should courts intervene to prevent an abuse of process which could bring the administration of justice into disrepute. Cases of this nature will be extremely rare.
>
> . . .
>
> That the Crown prosecutor may have acted precipitously or may have exercised poor judgment in deciding not to adduce further evidence, even if true, fails to establish misconduct of such a nature as to shock the community's sense of fairness or to warrant the application of the doctrine of abuse of process.

[39] Every abuse of process does not lead to a stay of proceedings. Generally a stay is granted only where the court concludes that the accused could not receive a fair trial should the prosecution continue. There are, however, situations in which a matter will be stayed, although the trial would not be unfair. This has become known as the "residual category" of abuse of process. Justice Hood did not suggest that Mr. Cole could not receive a fair trial nor did she find that there would be prejudice to him, should the prosecution continue. She held that this case fell within the "residual category". The Supreme Court of Canada in **Canada (Minister of Citizenship and Immigration) v. Tobiass** (1997), 118 C.C.C. (3d) 443, at para 89, described the residual category as follows:

> [89] Most often a stay of proceedings is sought to remedy some unfairness to the individual that has resulted from state misconduct. However, there is a "residual category" of cases in which a stay may be warranted. L'Heureux-Dubé J. described it this way, in *R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.), 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.
>
> The residual category, it bears noting, is a small one. In the vast majority of cases, the concern will be about the fairness of the trial.
>
> (Emphasis added)

[40] The reason why this "residual category" is so limited was explained by Cromwell, J.A. of this Court, for the majority, in **R. v. Regan** (1999), 137 C.C.C. (3d)

449. He emphasized how rare a stay will be absent a finding of prejudice to the accused:

> [108] As the Supreme Court said in *Tobiass*, the concern in abuse of process cases will usually be that the accused cannot receive a fair trial. Only rarely will a prosecution be stayed if a fair trial of the charge is possible. This makes perfect common sense. Our rules of criminal procedure and evidence and many of the rights guaranteed under the *Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Part I*, exist for the purpose of ensuring fair trials. Only in rare and unusual circumstances could holding a fair trial, of itself, be damaging to the integrity of the judicial process. It follows that only in rare and unusual circumstances will a prosecution be stayed if the accused can receive a fair trial.
>
> [109] Such circumstances do exist, however. Within the already exceptional category of prosecutions which will be stayed because their continuation constitutes an abuse of process, there is a sub-category, called the residual category by the Supreme Court of Canada, in which the continuation of a prosecution is abusive even though the charge may be tried fairly. The Court has described this residual subset of abuse of process cases as a small one: see *Tobiass* at 427.
>
> [110] Abuse of process cases are, by their nature, fact specific. However, reference to a few recent decisions from the Supreme Court of Canada underlines the point that stays of proceedings in residual category cases are extremely rare. The Court held that a new trial was the only appropriate remedy in *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537 in spite of a trial judge's *ex parte* conversation with a senior member of the Attorney General's Department to secure removal of the prosecutor and what Sopinka, J. termed an "egregious" breach of the Crown's obligation to disclose. In *R. v. Latimer*, [1997] 1 S.C.R. 217, Crown counsel and the police had administered a questionnaire to discover what prospective jurors thought about moral issues that would arise in the course of the trial. The Court described the conduct as "a flagrant abuse of process" (at para. 43), but a new trial was apparently viewed as an adequate remedy: see *Tobiass* at 434. In *Tobiass* itself, there had been *ex parte* communications between the Assistant Deputy Attorney General responsible for civil litigation and the Chief Justice of the Federal Court relating to ongoing litigation in that Court. The Supreme Court, while holding that a reasonable observer would perceive that the Chief Justice and Associate Chief Justice of the Federal Court had been improperly and unduly influenced by the Assistant Deputy Attorney General and that judicial independence had suffered a serious affront, nevertheless refused to grant a stay of proceedings. In *R. v Scott*, [1990] 3 S.C.R. 979, Crown counsel stayed a proceeding in the middle of a trial for the purpose of avoiding an evidentiary ruling by the trial judge and then, shortly after, recommenced the proceedings. The Court upheld the refusal of a judicial stay of proceedings. One commentator has gone so far as to say that where a fair trial is possible and, in the absence of continuing abuse, "... it is difficult to imagine realistic scenarios ... [which] will now merit stays of proceedings.": Kent Roach, "*The Evolving Test for Stays of Proceedings*" (1998), 40 C.L.Q. 400 at 433.
>
> (Emphasis added)

[41] As Cromwell, J.A. discussed in **Regan**, a finding that an abuse of process fits within the residual category requires a three-step analysis. The accused must first show that there has been misconduct that would render the continuation of the proceeding damaging to the integrity of the judicial process.

[42] Secondly, a balance must be struck between two main concerns: the damage to the integrity of the judicial process that will result from the continuation of the prosecution as against the societal interest in the effective prosecution of alleged crimes. (Cromwell, J.A., at para 114) In this regard, two criteria must be satisfied if one is to conclude that the balance requires a stay:

> 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.
>
> (Emphasis added)

[43] The “prejudice” referred to here is prejudice to the administration of justice, not prejudice to the accused. As Cromwell, J.A. explained:

> [117] *Tobiass* thus sets out two ways in which the prejudice caused by the abuse in question may be manifested, perpetuated or aggravated through the conduct of the trial or by its outcome. The first will be present when there is a likelihood that state misconduct will be repeated in the future. The second consists of past misconduct which was "... so egregious that the mere fact of going forward in the light of it will be offensive.": *Tobiass* at 428. Later in the reasons, the Court described this as an abuse "... serious enough [that] public confidence in the administration of justice could be so undermined that the mere act of going forward in the light of it would constitute a new and ongoing abuse sufficient to warrant a stay... However, only exceedingly serious abuse could ever bring such continuing disrepute upon the administration of justice." *Tobiass* at 430.
> (Emphasis added)

[44] The third step of the analysis will be necessary only if, after considering the first two steps, it is unclear whether a stay is required. This step again addresses the balance between the societal interest in proceeding and the interests served by granting the stay. Cromwell, J.A. continued:

> [122] When the application of these two criteria does not result in a clear answer to the question of where that balance lies, the interests that would be served by granting a stay and the interest that society has in having a final decision on the merits may be explicitly considered. However, where there is no likelihood of future misconduct and no ongoing effects of the misconduct, the rebalancing at the third stage will rarely, if ever, be reached. In the absence of those two conditions, a stay could only be justified, according to *Tobiass*, by past egregious conduct which was so serious that to continue in light of it would be offensive.

[45] Cromwell, J.A. summarized the direction in **Tobiass** as follows:

> [125] I conclude that in a residual category case (i.e. one in which a fair trial can be held), it is normally necessary for the applicant to show at the second stage of the analysis a likelihood of future misconduct or some ongoing impact flowing from the past misconduct which will not be removed unless a stay is granted. If, having considered these criteria, the Court is left unclear about whether a stay is required, the balancing of the interests that would be served by granting a stay and the interest that society has in having a final decision on the merits, which is reflected in the criteria themselves, may be explicitly revisited. However, in exceptional cases, even in the absence of a likelihood of future misconduct or of ongoing effects of past misconduct, a stay may be justified purely by past misconduct. Such conduct must be so egregious that the mere act of carrying forward in the light of it would constitute a new and ongoing abuse. In these rare and exceptional cases, there is unlikely to be any further balancing at the third stage of the inquiry because misconduct of this nature will almost invariably outweigh the societal interest in carrying forward any prosecution. (Emphasis added)

[46] Justice Hood found that moving to the third step was unnecessary. She said: "I find that it is not one of those cases where it is unclear after considering the first two requirements, whether the abuse is sufficient to warrant a stay." (at para 90) Although she did not find a likelihood of future misconduct or some ongoing impact flowing from the past misconduct which would not be removed unless a stay was granted, Justice

Hood accepted that the Crown conduct was “so egregious that the mere act of carrying forward in light of it would constitute a new and ongoing abuse.” It is this same conduct that Justice Hood later decided mandated the additional remedy of costs. In granting the stay she said:

> . . .these are past events. As Justice L'Heureux-Dubé said: " - society will not take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue." However, she did acknowledge that: "There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive." This is just such a situation. To continue this prosecution under all these circumstances would "offend society's sense of justice." (L'Heureux -Dubé, J. at p. 472). The past conduct is so unfair and oppressive that it offends the community's sense of decency and fair play. The prosecution cannot continue in the face of it.
>
> Furthermore, the first criterion refers to abuse which will be "perpetuated" through the conduct of the trial. To continue this prosecution, in light of all the circumstances surrounding the improper 16 month adjournment achieved unilaterally by the Crown, would "perpetuate" that abuse.
>
> A stay of proceedings is entered on the basis of abuse of process.
>
> (Emphasis added)

[47] Central to the judge’s condemnation of the Crown’s conduct was her conclusion that the Crown’s use of the stay to postpone Mr. Cole’s retrial until the appeals of the co-accused were decided amounted to an improper motive. The Supreme Court of Canada in **R. v. Crawford** (1995), 96 C.C.C (3d) 481 recognized, however, that “there exist strong policy reasons for accused persons charged with offences arising out of the same event or series of events to be tried jointly” (per Sopinka J. at p. 497). The avoidance of inconsistent verdicts and the economies of a single trial are recognized as legitimate objectives. This is particularly so where the alleged offence is a common enterprise, as here. (see for example **R. v. Quiring** (1974), 19 C.C.C. (2d) 337 (Sask.C.A.); **R. v. Agawa** (1975), 28 C.C.C. (2d) 379

(Ont.C.A.)) Justice Hood disparaged the Crown's objective to have a single trial which would save public funds and court time, and reduce the inconvenience to witnesses. She said; "There is a risk to the integrity of the system in putting cost-saving measures or the convenience of witnesses ahead of the rights of accused persons to have a fair trial." But she had not found that Mr. Cole's trial would not be fair should it proceed, nor did she find there to be unreasonable delay. While it is accepted that **Charter** concerns may trump the Crown's objective of holding a single trial, Justice Hood did not identify any prejudice to Mr. Cole, should the trial be postponed.

[48] Donna C. Morgan, in "*Controlling Prosecutorial Powers -- Judicial Review, Abuse of Process and Section 7 of The Charter*" (1986-87), 29 Crim. L.Q. 15, at pp. 39 to 43 reviews some situations in which courts have found that the prosecutor acted with an improper motive, i.e., one not consonant with the spirit of the criminal justice process:

1. Where the criminal justice process is being used to enforce a civil claim;

2. Where the Crown acts with deliberate intention of prejudicing the accused's ability to make full answer and defence;

3. Where the Crown has acted to circumvent an adverse ruling, otherwise improve on an unfavourable result or cure some procedural defect;

4. Where the Crown has breached an undertaking to the accused who has acted in reliance upon it;

5. In situations of entrapment.

[49] Justice Hood's finding that the Crown's entry of the stay in these circumstances was for "improper motives" is a novel interpretation of the limits of Crown discretion under s.579 of the **Code**. Even if one accepts that the Crown should not have directed a stay in these circumstances Justice Hood does not articulate a basis for her conclusion that the Crown's conduct amounted to an abuse of process of such proportion so as to require a stay. It cannot be said that the alleged breach was a deliberate one, as occurs in disclosure cases, or one which contravened an adverse ruling by the court. The judge did not find that Mr. Cole could not receive a fair trial or that the time delay occasioned by the stay violated his s.11(b) rights. The correctness of the decision to stay the charges against Mr. Cole is not before us, save as it relates to the costs order, however, I have grave doubts as to the propriety of the ruling.

(iii) Costs:

[50] As I have already stated, an award of costs in a criminal proceeding is a rare and exceptional remedy. (see **Berry v. British Transport Commission**, [1961] 3 ALL E.R. 65 (C.A.) and **R. v. M (C.A.)** (1996), 105 C.C.C. (3d) 327 (S.C.C.)). In **R. v. Pawlowski** (1993), 79 C.C.C. (3d) 353 (Ont.C.A.) Galligan J.A., for the court, acknowledged that ". . . s.24(1) of the **Charter** has enlarged the grounds upon which a court could exercise its discretion to grant costs" to include a **Charter** infringement (at p.356). Although finding that an appeal from the costs order did not lie in the circumstances of that case, he emphasized that notwithstanding this expanded

foundation for a court to order costs against the Crown, such relief remains an exceptional remedy.

[51] Costs do not automatically follow a finding that there has been an abuse of process, nor even, the granting of a stay. Before ordering costs, the court must conduct a separate inquiry to determine whether the Crown or police actions which led to the stay support the additional remedy. In this regard, it is instructive to review past cases where costs against the Crown have been ordered.

[52] In **R . v . Jedynack** 1994 CarswellOnt 826 (Ont.G.D.) the Crown had inadvertently not disclosed some relevant documents until just before the commencement of the trial. The Provincial Court judge ordered costs. On appeal, Goodearle, J. acknowledged that, although s.24(1) of the **Charter** has had the effect of enlarging the grounds upon which costs may be awarded,:

> [36] . . . such an order should only be made in circumstances where:
>
> 1) The acts or failures to act, collectively amount to something well beyond inadvertent or careless failure to discharge a duty;
>
> 2) Rather the conduct would have to fall within the realm of recklessness, conscious indifference to duty, or whether conscious or otherwise, a marked and unacceptable departure from usual and reasonable standards of prosecution;
>
> 3) Such conduct must be seen to have resulted in an indisputable and clearly measurable infringement or denial of a right;
>
> 4) Where the costs order is intended to ensure compliance with an order or show disapproval for conduct which resulted in serious prejudice to the accused it should, as well, be founded in circumstances of clear and obvious compensatory need.
>
> [37] Nothing even close to a standard of perfection should be imposed on prosecutors who, in this day and age, are overburdened with work, and as was

> the case here, often largely dependant upon outside resources over which they have little daily control in the development of their cases, which many times impact on the discharge or the manner in which they are able to discharge their duties.

[53] In **R. v. Dostaler** (1994), 91 C.C.C. (3d) 444 (N.W.T.S.C.), on the third day of a narcotics trafficking trial, the court granted the accused's motion for a mistrial and directed a new trial. Before trial the defence had given notice to the Crown that it would challenge the search warrant issued by the Justice of the Peace. The defence requested copies of any notes made by the investigating officer on the evening that he obtained the warrant. The Crown did not provide copies of the notes despite the defence request, nor was the defence told of the existence of the notes. Additionally, one page of the Information to obtain the warrant was missing when it was presented to the Justice of the Peace. This was not communicated to defence counsel who assumed that the Justice of the Peace had the full Information before him. Not until the third day of the trial, and only after the warrant was ruled valid, did the Crown provide the requested notes. Richard J. ruled that the Crown's failure to produce the notes was "more than inadvertence" and "a clear departure from the normal standards of prosecution" (at p.446). In awarding costs the judge noted that the accused had incurred wasted travel and counsel costs of the aborted trial which expenses would be duplicated for the new trial. He said at p.446:

> This is, in my respectful view, one of those clear cases where the Court should exercise its discretion to award costs against the Crown. The following factors, in particular, require it:
>
> (a) there was a serious interference with the accused's right to fundamental justice;

(b) the Crown and police conduct amounted to more than mere inadvertence;

(c) the Court ought to demonstrate its disapproval of this and police conduct;

(d) the accused has a clear compensatory need.

[54] In **R. v. McKillip** 1996 CarswellOnt 2977 the accused was charged with one count of sexual assault. At a pre-trial hearing defence counsel revealed to the Crown attorney three possible elements of the defence and asked for disclosure of any material relating to these points. Because of the defence request, the Crown asked the police to investigate the three areas raised by the defence and report back, which the police did. Included in the report were 26 pages of relevant material that the Crown did not reveal. After a week of proceedings, upon discovering the non-disclosure, the judge declared a mistrial. The judge refused to grant a stay but ordered that the Crown pay costs of the aborted trial. He accepted that the circumstances fit within the guidelines outlined in **Jedynack**, **supra**. The judge found that, in view of the clear obligation on the Crown to disclose as outlined in **R. v. Stinchcombe,** [1991] 3 S.C.R. 326, **R. v. Chaplin** (1995), 96 C.C.C. (3d) 225 (S.C.C.) and **R. v Egger** (1993), 82 C.C.C. (3d) 193 (S.C.C.), the failure to produce the information was a “marked and unacceptable departure from the usual and reasonable standards of prosecution” (at para 9).

[55] In **R . v . Crowe** 1996 CarswellOnt 1302 (O.C.J.), however, the two accused were charged in 1988 with environmental offences. In 1994 they were charged again under s.165 of the **Criminal Code**. Sedgwick, J. found that the 1994 offences arose

from substantially the same conduct that formed the subject matter of the 1988 offences and stayed the **Criminal Code** charge. Although granting the stay, the judge denied the additional remedy of costs, heeding the direction in **R. v. Pawlowski**, **supra**, that "the discretion to award costs against the Crown ought to be exercised sparingly and not as a matter of routine."

[56] In **R. v. Corkum** (1997), 163 N.S.R. (2d) 197 (N.S.S.C.) Mr. Corkum was convicted on two counts of robbery. During the trial, because of non-disclosure by the Crown, the accused applied for a stay of proceedings. The application for a stay was dismissed. The non-disclosure had, however, resulted in extensive adjournments causing additional costs to the accused. In ordering the Crown to pay costs, Justice Davison found that the Crown or the police had not acted with simple inadvertence but that there had been "an indifference to be fair" and that "there was a recklessness with respect to the duty to disclose" which amounted to a "marked departure" as in **Jedynack**, **supra**.

> [12] . . . In my view, we are not dealing with a simple disclosure slip-up. In my view we are not dealing with simple inadvertence. Extensive documents were not disclosed and I can only infer that there was an indifference to be fair by the police or by the crown, or both. . .
>
> [13] It is my judgment that they have not and did not obey the principles set down by these cases. It is my further judgment that dealing with the test enunciated by the Ontario Court of Appeal in the *Jedynack* case that there was a recklessness with respect to the duty to disclose. One of the statements not disclosed made reference to a possible alibi defence. I find there was "a marked and unacceptable departure from usual and reasonable standards of prosecution" and "an indisputable and clearly measurable infringement or denial of a right".
>
> [14] I also find from representations made before me that there is a clear and obvious compensatory need. Accordingly, I am prepared to award costs to the defence.

[57] The accused in **R. v. Lee**, 1996 CarswellOnt 1254 (Ont.C.J.) was charged with various offences arising out of a home invasion. The Crown failed to disclose audiotapes of a conversation between the police and a person inside the house during the home invasion. The transcript of the conversation contained serious inconsistencies when compared with the tape. A motion for disclosure was commenced but abandoned when the Crown agreed to make the tape available. The Crown did not provide a copy of the tape until the fifth week of trial. The defence did not succeed on its motion to exclude the tape, the judge finding that the admission of the tape would not render the trial unfair or otherwise prejudice the accused. Costs, however, were ordered on both the abandoned disclosure motion and the costs of the application for exclusion. In so ordering the judge noted that the police were in possession of the tape and aware of the disclosure request. The Crown's failure to honor, on a timely basis, its undertaking to produce the tape amounted to a breach of a court order.

[58] Most recently in **R. v. Greganti**, [2000] O.J. No. 395 (Ont.H.C.), Stayshyn, J., having granted a stay of proceedings, ordered costs where the Crown was "in serious and deliberate violation" of the clear law of disclosure as outlined in **Stinchcombe (supra)**. He found that the Crown's late disclosure deprived the accused of the ability to make full answer and defence.

[59] Finally, in **R. v. Robinson**, [1999] A.J. No. 1469 (C.A.) the majority of the court confirmed that "some degree of misconduct or an unacceptable degree of

negligence must be present before costs are ordered against the Crown under s.24(1) of the **Charter**." This was in response to the view expressed by Berger, J.A., concurring by separate reasons, that "a finding of a clear *Charter* breach and a causal connection to the costs incurred are the only prerequisites to an award of costs as a remedy under s.24(1) of the *Charter*" (per McFadyen, J.A. at para 28). The divergence of opinion in **Robinson, supra** raises an interesting issue as to whether there should be a less onerous test applied in circumstances where costs against the Crown are found to be an appropriate remedy for expenses "thrown away" by the accused in cases of non-disclosure or other abusive conduct, where a stay of proceedings is not granted but a trial must be delayed or recommenced. Here it is unnecessary to develop this distinction as the costs ordered by Justice Hood were not the remedy for the alleged **Charter** breach but were granted in addition to the stay.

[60] Justice Hood rejected a costs analysis based upon the **Jedynack, supra** "guidelines", referring to the remarks of Harradence, J.A. in **R. v. Pang** (1995), 95 C.C.C. (3d) 60 (Alta.C.A.). There, the issue was whether a provincial court has jurisdiction under s.24(1) of the **Charter** to award costs. Finding that the court did have jurisdiction Harradence, J.A., commented in *obiter*:

> I note that Goodearle J. in *Jedynack*, supra, provides general guidelines as to when it would be appropriate for a court of competent jurisdiction to award costs. I do not think it useful to establish guidelines, general or specific. Provincial Court Judges who are confronted with a variety of situations each and every day ought to exercise their discretion as they see fit. They are best equipped to assess the circumstances of the particular case before them.

[61] While I would agree that those guidelines should not be treated as an exhaustive list of prerequisites to an order for costs, they do represent a reasonable starting point for a principled assessment of the issue. In **R. v. Robinson**, **supra**, the Alberta Court of Appeal noted that, despite that court's reluctance in **R. v. Pang** to endorse the **Jedynack** guidelines, the discretion to award costs is not entirely unrestricted. As in all cases, a court's discretion must be exercised judicially (see **Grimshaw v. Dunbar**, [1953] 1 All E.R. 351 (H.L.) and **Ward v. James**, [1965] 1 All E.R. 563 (C.A.)). While in many matters calling for an exercise of discretion there may be no right answer dictated by positive settled law, a judge can find guidance through a review of past cases where an analogous issue has been considered. (See **British Columbia v. Worthington (Canada) Inc**, [1988] B.C.J. No. 1214 (B.C.C.A.) per Lambert J.A.)

[62] In my opinion Justice Hood erred when she failed to undertake an independent review of the Crown's conduct to ascertain whether it warranted the additional remedy of costs. Instead she simply referred back to her characterization of that conduct as found in her decision on the stay application. Accordingly, she did not focus upon relevant considerations when assessing the claim for costs. This is an error of law.

[63] Indeed, had the Crown's conduct been weighed against appropriate factors

Justice Hood could not reasonably have ordered costs. Militating against an order for costs are the following:

1. The judge's restriction on the Crown's use of s.579 is a novel interpretation of the law - in contrast to that in disclosure cases where the law is settled and the Crown's obligation clear;

2. The judge did not find any prejudice to the accused;

3. The accused did not suffer increased expense or costs thrown away due to the s.579 stay;

4. The desirability of joint trials, which was the purpose of the Crown stay, is a legitimate objective;

5. The Crown's motive in entering the stay was not "oblique";

6. There was no evidence that this was a marked departure from the usual Crown practice in regard to s.579;

7. In entering the stay and recommencing proceedings the Crown was not acting with intention to prejudice the ability of the accused to make full answer and defence;

8. The Crown was not acting to circumvent an adverse ruling;

9. The Crown did not act in contravention of a court order.

10. Had the stay not been entered, Mr. Cole would have faced the costs of a full trial. He was spared that expense through the imposition of the stay.

[64] It is my view that the judge erred in ordering costs against the Crown.

DISPOSITION:

[65] I would grant leave, allow the appeal and set aside the order for costs against the Crown.

Bateman, J.A.

Concurred in: Chipman, J.A.

Flinn, J.A.