Date: 19990910
C.A.C. 147242

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Regan, 1999 NSCA 165

Freeman, Roscoe, and Cromwell, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN Appellant	)	Jack Watson, Q.C. for the appellant
- and -	)	Edward L. Greenspan, Q.C. and Marie Henein and
GERALD AUGUSTINE REGAN Respondent	)	Andrew Matheson for the respondent
- and -	)	Robert Frater for the Intervener
THE ATTORNEY GENERAL OF CANADA Intervener	)	Appeal heard: May 27 & 28, 1999 Judgment delivered: September 10, 1999

Editorial Note

Identifying information has been removed from this unofficial electronic version of the judgment.

THE COURT: Appeal allowed per reasons for judgment of Cromwell, J.A.; Roscoe, J.A. concurring; Freeman, J.A. dissenting.

FREEMAN J.A.: (Dissenting)

[1] On April 2, 1998, after some eighteen days of hearings related to charges of alleged sexual offences preferred by direct indictment against the respondent Gerald A. Regan, a former premier of Nova Scotia, the trial judge allowed a defence motion for a stay of nine of the eighteen counts on the ground that they constituted “the clearest of cases” of abuse of the court’s process, the high threshold that must be met in such matters.

[2] The Crown has appealed pursuant to s. 676(1) of the **Criminal Code**. The issues raised by the appeal relate not to the fairness of the trial itself but to the integrity of the process which brings a citizen before the courts on criminal charges.

[3] The stay application was denied with respect to the other nine counts and the trial continued before a jury. Mr. Regan was subsequently acquitted on eight of those counts. One charge of indecent assault remains to be tried.

Issue Overview

[4] The prosecution has been extraordinary and controversial, with many troubling aspects. None of the complainants came forward on her own, some having concluded that the incidents were too minor to warrant criminal proceedings even when they occurred two or three decades earlier. At that time the respondent, now 70, was still active in public life. The investigation was commenced on the information of an avowed

political enemy of the former premier. It involved a zealous search of Mr. Regan's past life for persons who might have complaints against him.

[5] 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 lesser charges to preserve the reputation of the administration of justice.

[6] The respondent's factum begins with this statement:

> The Respondent respectfully submits that he has been the target of most unfair and biased treatment throughout the prosecution and investigation of this case. While broad investigatory powers are afforded to the police and wide latitude is given to the Crown in exercising its discretion, it is expected and indeed mandated in a democratic society that these powers will be used in a fair, impartial and evenhanded manner. Furthermore, these investigatory and discretionary powers cannot be invoked by the state to make one citizen, whether a former government official or an ordinary citizen, the recipient of repeated and unrestrained abuse. It is respectfully submitted that the learned trial judge did not err in holding that, in the eyes of a reasonably informed member of the public, the unprecedented and unfair manner in which the Respondent was treated constituted reasonable grounds to conclude that the continued prosecution of the stayed charges would be a grave injustice.

[7] Justice Michael MacDonald of the Supreme Court of Nova Scotia, as he then was, found that the Crown had failed to preserve that level of objectivity necessary to the dispassionate discharge of its duties. In particular it had engaged in judge shopping and improper pre-charge interviewing of witnesses, tainting its ability to exercise

prosecutorial discretion in evaluating charges on which an accused person should face trial. As well, police identified Mr. Regan as a suspect in an investigation long before charges were laid.

[8] Justice MacDonald found that the right of accused persons to an objective decision by the Crown to prosecute was guaranteed as a residual right under the umbrella of fundamental justice in s. 7 of the **Canadian Charter of Rights and Freedoms**. In my view that guaranteed right becomes of particular importance when there are factors present, such as reluctant complainants and a multiplicity of old and relatively minor alleged offences, which could lead an objective Crown to conclude that, in the public interest, every possible count should not be prosecuted. Justice MacDonald applied a societal interest test in determining that society's interest in proceeding outweighed the prejudice suffered by the respondent and the system in the nine counts which remained before the jury.

[9] The Crown's appeal is grounded in alleged error of law by the trial judge in determining abuse of process at common law and infringement of s. 7 of the Charter. It asserts the rights of the respondent were not infringed, or if they were, the trial judge erred in the remedy he applied because any infringement did not justify a stay of proceedings.

[10] The Attorney General of Canada was granted leave to intervene on the issues of

the Crown's role in pre-trial witness interviews and the role of the courts in reviewing the exercise of prosecutorial discretion.

The Demarcation Line

[11] The issues turn on the need for police and the Crown to observe the demarcation line between their functions, particularly at the pre-charge stage. This was brightly drawn in a directive for the laying of charges issued in 1990 by Hon. Neil J. LeBlanc, then Solicitor General for the province, in response to recommendations made in 1989 by the Royal Commission on the Donald Marshall, Jr., prosecution, the *Marshall Report*. Mr. Marshall served eleven years in prison for a murder he did not commit. The *Marshall Report*, and the steps taken to implement its recommendations, were intended to identify and remedy flaws in the justice system perceived as causes of the miscarriage of justice, and thus to help rebuild the damaged reputation of the system. Justice MacDonald's decision referred frequently to passages in the *Marshall Report*, particularly with reference to relations between police and the Crown.

[12] The solicitor general's directive provided:

> 1. The police have ultimate right and duty to determine the form and content of charges to be laid in any particular case according to their best judgment, subject to the Crown's right to withdraw or stay the charges after they have been laid.
>
> 2. 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.

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.

4. Police officers are to be encouraged to consult with a Crown Prosecutor concerning the drafting of informations, where such consultation might be useful in their opinion.

The Flawed Decision

[13] What this directive contemplates, in the typical instance when there is no dispute, are prosecutions created from two distinct components, the police decision to charge and the Crown decision to prosecute the charge. Each function is discrete, with an integrity of its own, though both usually exist in harmony with one another. Courts presume these elements of fundamental justice guaranteed by the **Charter** have been regularly performed; the presumption is rebutted when an accused person discharges the onus of proving a **Charter** breach respecting them. What the trial judge found, essentially, was that in the case before him the two key elements were scrambled together or in his term, “homogenized.” They were therefore unable to play their constitutional role of protecting both the accused and the public perception of the administration of justice.

[14] In determining the appropriate standard of behavior for the Crown, Justice MacDonald relied on the classic statement of guiding principles expressed by Rand J. in **Boucher v. The Queen** (1954), 110 C.C.C. 1 (S.C.C.) p. 270 and the expert evidence

of leading Crown counsel called by both sides.

[15] He found clear evidence that a senior counsel for the Crown had engaged in judge shopping, advising police against scheduling an intended arraignment while a particular Provincial Court judge was presiding, and volunteering to monitor court calendars to seek a judge she considered favorable to police and Crown interests. She also departed from widely accepted standards of appropriate Crown behavior by entering the police domain to conduct pre-charge witness interviews intended, at least in part, to persuade reluctant complainants to change their minds about refusing to participate in charges against Mr. Regan. Justice MacDonald found that by collaborating this closely with the police at a decision making level, the Crown sacrificed the objectivity necessary to carrying out the role envisaged for it in the solicitor general's directive and by recognized standards of good practice. It interfered with the integrity of the police charging decision and lost the objectivity necessary for carrying out its own duty: dispassionately evaluating the police decision to charge and determining whether to prosecute or enter a stay. This tainted the process, and resulted in a joint charging decision damaging to the reputation of the administration of justice. That tainted decision was never disavowed, and there was no evidence of any attempt to rehabilitate it by subjecting it to an objective analysis. It became the basis for the indictment preferred by the Crown when it abandoned the preliminary inquiry process in favour of moving more directly. Whether the decision was fixable at that stage is not the issue. Justice MacDonald did not find it had been fixed.

[16] While another Crown prosecutor acting objectively might have arrived at a similar conclusion as to what charges to prosecute, just as a second trial ordered for an unfairly convicted accused may also result in a conviction, that never happened. The trial judge found from the law and the evidence that the manner in which Mr. Regan was brought to trial on eighteen historic counts was unfairly flawed by the Crown's loss of objectivity.

The Remedy

[17] Having found that a right of the accused integral to concepts of fundamental justice guaranteed by the **Charter** had been infringed, the trial judge was bound to take corrective action. He weighed the counts objectively to establish a hierarchy among them ranging from those society, which includes the complainants themselves, would deem most serious to those it would deem least serious. He balanced society's interest in proceeding against the accused's expectations of fairness. He determined that Mr. Regan should stand trial on the nine most serious counts, staying the nine lesser charges.

The Counts

[18] The counts which went to the jury and on which the respondent was acquitted were one of rape, two of attempted rape, three of indecent assault and two of unlawful confinement. He is yet to be tried on one count of indecent assault. The nine stayed

charges were all counts of indecent assault. The trial judge summarized the facts of each count as follows:

[19] (I might say as an aside at this point that despite its 61 pages the trial judge's decision is concisely written and does not lend itself to paraphrasing or summarizing. When it is necessary to refer to its contents I prefer to do so verbatim, recognizing this leads to rather lengthy excerpts. While the decision is widely available electronically, it does not appear to have been reported in printed form.)

> **(H.M. complainant - count 7)**-- This complainant while in her late teens claims to have babysat Mr. Regan's children. The Regans lived on Berlin Street in Halifax at the time (between 1965 and 1968). Allegedly the applicant sexually assaulted Ms. H.M. while he drove her home one evening from babysitting. He is alleged to have grabbed her, kissed her and touched one of her breasts.
>
> **(M.G. complainant - count 9)**--This complainant . . . too is said to have babysat the Regan children. Specifically while she was babysitting in the Regan home, the applicant allegedly "pounced" on her as she laid on a bed watching television. She was in her early to mid teens at the time (1965 to 1968).
>
> **(D.H. - (complainant - count 10)**--This complainant as well claims to have been sexually assaulted while babysitting the Regan children. It is said to have occurred during the summer of 1968 when Ms. D.H., then aged fourteen or fifteen, was employed at the [...] Inn, [...] County. She was asked to babysit the Regan children who were guests of the Inn at the time. While in the room with the sleeping children, she asserts that the applicant suddenly grabbed her, kissed her and placed his tongue in her mouth.
>
> **(B.C. complainant - count 11)**--This complainant worked as a * (*editorial note-removed to observe publication ban*) for the Regan family during the summer of 1969. She turned fifteen in June of that year. She alleges that one morning while alone with the applicant in the Regan home, he "French" kissed her and touched her breast.
>
> **(T.N. complainant - count 14)**--This complainant as well babysat the Regan children. She claims that while babysitting in the latter part of 1969 or some time in 1970 the applicant fondled her breast under the guise of attempting to take one of the children from her arms. The applicant also allegedly attempted to kiss her while driving her home that evening. Ms. T.N. was fourteen or fifteen at the time.
>
> **(C.E.R. complainant - count 15)**--This complainant claims to have been sexually assaulted by the applicant while being driven home from babysitting. The incident is said to have occurred in late 1970 or sometime in 1971. She would have been seventeen or eighteen years of age at the time (having turned seventeen on September 15, 1970). Ms. C.E.R. alleges that the applicant stopped the car at a secluded

location. The applicant forcefully kissed her, inserting his tongue deep into her mouth, and he then started groping at her breasts with his hand.

(C.M. complainant - count 16)--This complainant in May of 1976 was a twenty-four year old reporter covering the Maritime Premier's Conference in Windsor, Nova Scotia. In the course of covering this event, she sought to interview the applicant (then premier) in his hotel room. Once alone with him in the room, the applicant allegedly tried to kiss her. The applicant then pushed her onto the bed and groped around while lifting her skirt in the process.

(C.C. complainant - count 17)--In 1977 this complainant worked as a page at the Provincial Legislature while the applicant was premier. She would have turned nineteen in May of that year. One evening she met privately with the applicant in his office to discuss job opportunities. During this meeting the applicant allegedly grabbed Ms. C.C. and forcefully inserted his tongue in her mouth.

(R.D.T. complainant - count 18)--In the summer of 1978 this complainant, who turned twenty-one in August of that year, worked as a secretary in the Provincial Speaker's Office. One day the applicant, then Premier, approached Ms. R.D.T. while she was working alone in the Speaker's Office. He allegedly lunged towards her and grabbed her breast.

[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 counts was almost twenty years old at the time of the trial, and some were more than thirty. 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.

Genesis

[21] The first contact with police relating to any of the counts was made by Donald F. Ripley, an author and former stockbroker, who wrote in his book **Bagman**, **an Insider's View of Nova Scotia Politics**, that when he was told how the Regan government intended to deal with him and the company of which he was president he swore to

devote his life to “kicking Gerry Regan out of office.”

[22] In 1993 he filed a complaint with the New Minas, N.S. detachment of the R.C.M.P. alleging sexual impropriety by Mr. Regan. He claimed no personal information but referred to information he had discovered while doing research which had been prepared, but never broadcast, by Philip Mathias, a CBC journalist in 1980. Mr. Mathias was interviewed by RCMP in Milton, Ontario, who prepared a report containing varied allegations, many of them unconfirmed by Mr. Mathias or the RCMP. A “task force” of three officers, later expanded to five, headed by Staff Sergeant Brent Fraser of the RCMP, was formed to “confirm or deny Mathias’ allegations.”

[23] These facts support the respondent’s argument that the Regan prosecution had its genesis not in concerns to bring justice to the alleged victims but in a political enemy’s desire to cause harm to the former premier. The respondent further argues that there was pressure on the police and the prosecution service to react to criticism in the *Marshall Report* that the Nova Scotia justice system dealt more favorably with prominent persons than with ordinary citizens. He asserts the police and Crown over-reacted and singled him out for unfavorable treatment.

The Investigation

[24] On October 27, 1993, an RCMP media spokesperson confirmed to a reporter that Mr. Regan was under investigation for sexual assault. It was contrary to RCMP policy and to the Solicitor General’s policy directive giving effect to recommendations in

the Marshall Report to identify suspected persons before charges were laid. The story made national headlines some seventeen months before charges were laid.

[25] Staff Sergeant Fraser submitted a detailed report referring to twenty-two individuals of whom eight were alleged victims of criminal behavior who were willing to pursue criminal charges and testify accordingly. Of the others, three complained of behavior that was inappropriate but not criminal, six were unwilling to become involved in the court process, four did not wish to pursue criminal charges but would give similar fact evidence, and one was out of province. The report was referred by Chief Superintendent R.F. Falkingham, who had recently taken charge of criminal operations in the province, to John Pearson, then Nova Scotia Director of Public Prosecutions. Advice was sought from the Crown as to similar fact evidence, the need for specific dates, retroactivity of procedural law amendments, and appropriate or applicable charges.

[26] In his decision on the stay application the trial judge summarized Mr. Pearson's reply, and ensuing pre-charge events, as follows:

> Mr. Pearson replied to Falkingham's letter with a detailed report dated June 28, 1994 [Tab 25, Applicant's Motion Record]. After covering the first three inquiries, Mr. Pearson then addressed the important issue of "appropriate or applicable charges".
>
> Of the eight alleged victims who were willing to pursue charges (Fraser's fifth category), Mr. Pearson recommended proceeding with only four. Societal interests, he felt, dictated against proceeding with the remaining four.
>
> Mr. Pearson also suggested the police make another approach to those six alleged victims unwilling to become involved (Fraser's second category). He felt that the case against the applicant "would be significantly enhanced if some of the more recent incidents were proceeded with" [Tab 25, page 1 - Applicant's Motion Record]. He also urged investigators to meet with Senior Crown Attorney Susan Potts "to finalize the

> wording of any charge you decide to proceed with" [Tab 25, page 6 - Applicant's Motion Record].
>
> Shortly after forwarding his report, Mr. Pearson left this office and was replaced by Acting Director, Martin Herschorn. As well, in the summer of 1994, Ms. Potts became heavily involved in this matter. She expressed to the R.C.M.P. a desire to interview all alleged victims identified in the March 30th report. She then set about doing so. The original intention was to have formal charges laid in the fall of 1994. According to one police note, she was also prepared to judge shop so as to have the applicant initially appear before a judge who she felt "would be in our best interest" [Tab 28, Applicant's Motion Record].
>
> In any event, these pre-charge Crown interviews continued through the fall of 1994 and into 1995. The applicant has remained highly critical of the Crown's pro-active involvement with this stage of the process.
>
> Finally, on March 15, 1995 the sixteen count information was sworn. The applicant was arrested and arraigned that same day. The investigation continued with the amended information being laid on May 30, 1995. The applicant's preliminary inquiry began in April of 1996 and, as stated, ran off and on for about one year until it was aborted by the direct indictment, filed in April of 1997. The applicant takes issue with the motives and timing of the direct indictment; alleging that it too is symptomatic of the Crown's over-zealous quest to "get" him.

[27] The trial judge appears to have considered that the communications between Superintendent Falkingham and Mr. Pearson were in accordance not only with the Solicitor General's recommendation but with evidence called at the hearings as to appropriate conduct by the police and the Crown.

[28] He remarked:

> The Pearson Report was detailed and comprehensive. In my mind, it speaks volumes about what the Crown originally thought was fair to the applicant. For this reason, the Crown should not be seen to significantly change its position without valid reason.

[29] He referred to **R. v. Boutilier** (1995), 104 C.C.C. (3d) 327 (N.S.C.A.) in which it was held that the Crown, having exercised its discretion to proceed summarily in a motor vehicle matter, cannot change its mind arbitrarily and proceed by indictment on the same criteria to correct a drafting mistake in the information after the limitation

period expired.

[30] The appellant asserted **Boutilier** was wrongly decided on the authority of **R.v. Jans** (1990) 108 A.R. 324 (Alta. C.A.) and **R. v. Kelly** (1998), 128 C.C.C. (3d) 206, which arrived at contrary conclusions. However **Kelly** attempted to distinguish both **Boutilier** and the earlier Ontario Court of Appeal decision on which it relied, **Re Parkin and the Queen** (1986), 28 C.C.C. (3d) 252 (Ont. C.A.)

[31] In like vein O'Connor J. held the Crown had acted improperly, for tactical motives, in **R. v. Gordon**, [1999] O.J. No. 1425 (Q.L.). The Crown sought to reclassify a source willing to testify as an agent-witness as a confidential informer in order to avoid the need to disclose his identity: (at para 36)

> I disagree the Crown's discretion is entirely unfettered. When exercising a discretionary power the Crown must act fairly. Although Crown discretion is an essential feature of the criminal system, it must not be exercised for improper, arbitrary or tactical motives.

The Stay Application--Abuse of Process

[32] The trial judge stated the issues raised on the stay application as follows:

> The applicant cites numerous examples of alleged authoritative abuse throughout the investigation and court process to date. The cumulative effect of this abuse, he feels, should warrant a global stay of all charges. Alternatively on a count specific basis, he feels that many of the charges must be stayed.

[33] The trial judge then proceeded to instruct himself as to the law on abuse of process, arriving at the conclusion that courts have a duty to protect the administration of justice from abuse with remedies that include stays of proceedings, which are

reserved for the clearest of cases. His review of the law follows:

> The common law doctrine of abuse of process recognizes this court's mandate to guard against systemic injustice. It has a long history in Canada and before that in England. In the nineteenth century civil case of **Metro. Bank v. Pooley** (1885), 10 App. Cas. 210 (H.L.) Lord Blackburn beginning at page 220 stated:
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> But from early times (I rather think, though I have not looked at it enough to say, from the earliest times) the Court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing - the Court had the right to protect itself against such an abuse...It is obvious to my mind that as regards both that which was done under the common law jurisdiction of the Court and that which may be done under the more extensive jurisdiction now given to the Courts, although it should not be lightly done, yet it may often be required by the very essence of justice to be done.
>
> In the Canadian criminal context Dubin, J.A. (as he then was), in **R. v. Young** (1984), 13 C.C.C. (3d) 1 (Ont. C.A.), at page 31, issued what has become a classic statement on this doctrine:
>
> > ...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.
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> See also the subsequent cases of **R v. Jewitt** (1985), 21 C.C.C. (3d) 7 (S.C.C.); **Rourke v. The Queen** (1977), 35 C.C.C. (2d) 129 (S.C.C.); and **R v. Keyowski** (1988), 40 C.C.C. (3d) 481 (S.C.C.).
>
> Not surprisingly the Charter has had a discernable impact on this common law doctrine. In fact, the Supreme Court of Canada in **R. v. O'Connor** (1995), 103 C.C.C. (3d) 1 has recently confirmed that this doctrine is now subsumed by the **Charter.** The effect is to merge society's interest in a fair process with an accused's right to fair treatment. This approach is very helpful from my perspective. Whether I am protecting an accused's interest or society's interest the entire process can now be reviewed without the need to categorize. L'Heureux-Dubé, J. beginning at page 35 explains it this way:
>
> > ...Unfair trials will almost inevitably cause the administration of justice to fall into disrepute: R. v. Collins (1987), 33 C.C.C. (3d) 1, 38 D.L.R. (4th) 508, [1987] 1 S.C.R. 265; R. v. Elshaw (1991), 67 C.C.C. (3d) 97, [1991] 3 S.C.R. 24, 7 C.R. (4th) 333. 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.
> >
> > [64] 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), 85 C.C.C. (3d) 15 at p. 67, 107 D.L.R. (4th) 342 at p. 394, [1993] 3 S.C.R.

> 519, 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. [emphasis added]

Furthermore the "accused's right" aspect of the test is not limited to one particular section of the **Charter**. The Supreme Court as well recognized a residual category falling under the umbrella of s. 7. L'Heureux-Dubé J. explains at page 39:

> In addition, there is a residual category of conduct by section 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.

In fact, it is under this residual category that the applicant at bar seeks relief. His complaints are therefore not restricted to trial fairness *per se*. Instead the applicant highlights a litany of alleged authoritative abuse which he asserts should raise both societal and trial fairness concerns.

While the applicant's burden, now under the **Charter**, is on the balance of probabilities, the remedy of a stay remains reserved for only "the clearest of cases". L'Heureux-Dubé elaborates at page 43 of O'Connor, supra:

> 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 to continue.

Not surprisingly, the concept of **"clearest of cases"** defies categorization. In two pre-**O'Connor**, **supra** cases, the Supreme Court of Canada discussed this concept in the context of a common law abuse of process.

I refer to L'Heureux-Dubé J. in **R. v. Conway** (1989), 49 C.C.C. (3d) 289 (S.C.C.) where at page 302 she noted:

> [W]here the affront to fair play and decency is disproportionate to the societal interests in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings.

Again, L'Heureux-Dubé J., in **R. v. Power** (1994), 89 C.C.C. (3d) 1 (S.C.C.) at page 10 highlights the fact that such cases are rare indeed:

> I, therefore, conclude that, in criminal cases, courts have a residual

> discretion to remedy an abuse of the court's process but only in the "clearest of cases", which in my view, amounts to conduct which shocks 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.

Furthermore a stay must be seen as the only remedy available to counter the effects of the alleged abuse. To this end, the Supreme Court of Canada in **Canada (Minister of Citizenship and Immigration) v. Tobiass** (1997), 118 C.C.C. (3d) 443 at page 471, confirmed that this residual category commands two prerequisites to justify a stay:

> 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.
>
> [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. [O'Connor, supra, at para. 75]

The Court in **Tobiass**, continued at page 472 by adding a third potential consideration:

> [92] 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": R. v. Conway [1989] 1 S.C.R. 1659 at p. 1667, 49 C.C.C. (3d) 289. 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. 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. Rather, it merely recognizes that in certain cases, where it is unclear whether the abuse is sufficient to warrant a stay, a compelling societal interest in having a full hearing could tip the scales in favour of proceeding.

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?

> In approaching these questions I must carefully consider the investigative and prosecutorial process to date. In so doing, I must not ponder the nature and consequence of each alleged wrongdoing in isolation. Instead I must weigh the cumulative effect. This approach was recently highlighted by Chadwick, J. of the Ontario Court of Justice (General Division) in **R. v. Wise** (1996), 47 C.R. (4th) 6 where at page 11 he noted:
>
> > In reviewing the six specific factors put forward by the applicant, each in their own right may not justify a finding of abuse of process, however when they are all viewed cumulatively they may be sufficient to find s. 7 violations.
>
> Furthermore the alleged abuse need not be driven by *mala fides* to warrant a stay. While improper motives will certainly be relevant, they are not a prerequisite. In this regard, Wilson, J. **R. v. Keyowski** (1998), 40 C.C.C. (3d) 481 (S.C.C.) beginning at page 482 noted:
>
> > To define "oppressive" as requiring misconduct or an improper motive would, in my view, unduly restrict the operation of the doctrine. In this case, for example, where there is no suggestion of misconduct, such a definition would prevent any limit being placed on the number of trials that could take place. Prosecutorial conduct 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 exercise of its discretion to re-lay the indictment amounts to an abuse of process.
>
> The applicant before me suggests that the actions of both the Crown and the police were abusive. Before making such a determination, I must have a clear understanding of their respective roles.

Police and Crown

[34] Justice MacDonald then proceeded to review the function of police in Nova Scotia, the role of Crown counsel, and the relationship between the two. Again, I can find no fault with the careful manner in which he instructed himself respecting these key matters. He wrote as follows:

> The police are exclusively responsible for the investigation of crime and deciding what if any charges are to be laid. I refer to page 117 of the *Report of Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (Toronto: Queen's Press, 1993) [**The "Martin Report"**]:
>
> > The police, as criminal investigators, are duty bound to focus on objectively exploring leads that will ultimately provide reasonable and probable grounds for charging a person as the perpetrator of the criminal act in question. The emphasis, of course, is on assembling evidence, assessing it dispassionately, and making responsible charging decisions based on that assessment.

The police are placed on the front line interviewing witnesses and following leads. In this regard there is no prescribed blueprint for each criminal investigation. They require a certain amount of flexibility. L'Heureux-Dubé, J. in **R. v. S. (R.J.**) (1995), 96 C.C.C. (3d) 1 (S.C.C.) at page 106 commented:

> Much of investigation, however, relies upon hunches, instinct, the following up on anonymous or unsubstantiated tips and, more generally, the style and thoroughness of the investigator. Sometimes, the investigation advances by pure chance.

Police duties are by necessity restricted to the pre-charge or the investigative stage of the criminal process. Here, the Crown's role is limited to simply providing legal advice; advice which is not binding on the police. I refer again to the **Martin Report** at page 37:

> As a matter of law, police officers exercise their discretion in conducting investigations and laying charges entirely independently of Crown counsel. The police seek the advice of the Crown only where they think it appropriate. And while it is no doubt prudent to do so in many cases, the police are not bound to follow the advice of Crown counsel, as that advice relates to the conduct of the investigation and the laying of charges.

As well, from a Nova Scotia perspective, I refer to *Independence,* Accountability and Management in the *Nova Scotia Public Prosecution Service: A Review and Evaluation* [**The Ghiz/Archibald Report**] beginning at page 41:

> 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.

The Role of the Crown Counsel in Nova Scotia

By its very nature the role of Crown counsel is a very difficult and challenging one. The position calls for a quasi judicial minister of justice who must also serve as advocate. This function was eloquently stated by Rand J. in the leading case of **Boucher v. The Queen** (1954), 110 C.C.C. 1 (S.C.C.). At page 270 the learned justice stated:

> 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 the 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 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.

This dual role is further explained at pages 117 and 118 of the **Martin Report:**

> Crown counsel, whose duty it is to prosecute charges in court are, of course, likewise concerned with the quality of the evidence that supports an allegation of criminal conduct. But their concerns are also somewhat broader. As 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. And, as adversarial counsel for the prosecution, their task is to ensure that there is not only evidence to support a charge, but evidence that will stand up in court. 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.

The notion of the Crown as a "minister of justice" was dealt with in the *Royal Commission Report on the Donald Marshall Jr. Prosecution* (1989) [the "**Marshall Report**"]. I refer to pages 227 and 228:

> 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.

Further at page 238, the **Marshall Report** continues:

> While the courtroom setting is adversarial, the Crown prosecutor must make sure the criminal justice system itself functions in a manner that is scrupulously fair. The phrase "criminal justice system" is not a mistake of history - we do not have a "criminal convictions system". Justice is an ideal that requires strict adherence to the principles of fairness and impartiality. The Crown prosecutor as the representative of the State is responsible for seeing that the State's system of law enforcement works fairly.

Understandably, this dual function of advocate and justice minister can be an extremely challenging one.

The Relationship Between the Crown and the Police

From reviewing their respective roles it is clear that the relationship between the Crown and the police is a very important one. Thus while performing independent tasks, the Crown and police must obviously work well together. However the need for co-operation should never interfere their individual autonomy. Again I refer to the **Marshall Report** at page 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.

By separating their functions a reciprocating system of checks and balances is preserved. This is explained at page 39 of the **Martin Report**:

> ...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.
>
> Finally when criticizing police/Crown conduct, matters must be placed in perspective. The applicant is entitled to fair treatment not perfect treatment. This was highlighted by McLachlin, J. in **O'Connor**, supra at page 79:
>
> > Perfection in justice is as chimeric as perfection in any other social agency. What that law demands is not perfect justice, but fundamentally fair justice.
> >
> > With detailed reflection it is all too easy to say what the authorities should have done throughout every step of the process. That would be unfair. The actions of both the police and the Crown must be placed in context without the benefit of hindsight.

[35] The conclusion the trial judge reached in his analysis was against this background of Crown and police functions, each examined in the context of the other:

> 121 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. Co-operation 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.

Judge-Shopping and Lesser Complaints

[36] It was also against this background that Justice MacDonald then proceeded to examine the applicant respondent's allegations that both the police and the Crown had pursued Mr. Regan with a zeal so excessive that it became an abuse of the process. He said the respondent considered that he was a "target" singled out for special treatment because of his prominence as a former political leader. The respondent's thesis was that the authors of the **Marshall Report** had been critical of the justice system in Nova Scotia because they considered that people of prominence were

singled out for favorable treatment. The respondent argued that the authorities had overreacted and singled him out for special unfavorable treatment in the laying of charges because he had been prominent.

[37] Justice MacDonald rejected the respondent's argument that the formation of the task force to investigate a journalist's unpublished research was an example of overreaction. He saw the creation of the task force by Chief Superintendent Falkingham, who was new to the area and to provincial politics, as "a pragmatic reaction to a significant complaint."

[38] He was less dismissive of the RCMP confirmation to the media that Mr. Regan was under investigation, referring to it as a "serious error in judgment." The Marshall Report required "absolute confidentiality and secrecy" as to the identities of persons under investigation by police and the solicitor general of the day had followed up with such a directive. However Justice MacDonald did not consider that the police spokesman had acted in bad faith.

[39] The third allegation dealt with a submission that the police "pursued useless leads with suspicious enthusiasm." Justice MacDonald did not conclude "that their fervor was ill-motivated" and did not consider them "particularly troubling."

[40] He found that inaccurate and overstated internal RCMP reports which were sent to Ottawa, had "little impact" on Mr. Regan.

[41] The fifth allegation involved missing evidence and a missed opportunity for an interview with a witness who died. Justice MacDonald did not find the respondent to be "greatly prejudiced."

[42] He found no evidence leading to the conclusion that there had been any attempt to manipulate complainants' statements. He cited **R. v. Buric** (1996) 106 C.C.C. (3d) 97 to the effect that unreliable evidence does not render a trial unfair, and that it is for the jury to assess the quality of evidence.

[43] There was a serious breakdown in communications when police attempted to arrest Mr. Regan without warning in breach of an undertaking to advise his counsel in advance if charges were to be laid. "Fortunately it had little effect on the applicant."

[44] It was the conduct not of the police but of the Crown Attorneys that caused Justice MacDonald his most serious concerns. He reviewed the judge shopping incident as follows:

> Following John Pearson's June 28, 1994 report, Senior Crown Attorney Susan Potts requested a meeting with the task force. This was arranged for July 15, 1994. In attendance were Staff Sergeant Fraser, Staff Sergeant Nause, Sergeant Pretty and Ms. Potts. Staff Sergeant Fraser took notes of this meeting. These notes confirmed Ms. Potts' perplexing desire to interview all potential complainants. His notes also reveal the following passage attributable to Ms. Potts [Tab 28 - Applicant's Motion Record]:
>
> > There was some discussion in regards to where charges are laid and an appearance by Regan in court. 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.*
> >
> > 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] is even more disturbing. This gives the appearance of a Crown Attorney who is attempting to secure a conviction at all costs. It offends Rand, J.'s clear directive of over four decades ago in **Boucher**, supra. It contradicts everything that has been written on the subject since then. In referring to the "spectre" of judge shopping McLachlin, J. in **R. v. Scott** (1990), 61 C.C.C. (3d) 300 at page 329 said:
>
> > A system that allows the Crown an advantage in choosing or changing judges, a system which either in fact or appearance is partial, a system which permits a judge's ruling to be circumvented other than by the normal appeal process - such a system would be open to the charge that it offended the fundamental principles of justice upon which our society rests. By the same token, proceedings which permit such abuses might be characterized as "vexatious" or "unfair".
>
> In **R. v. Bird** [1996] A.J. No. 438, Berger, J. of the Alberta Court of Queen's Bench spoke of judge shopping in the context of the role of the Crown generally. At paragraph 15, he stated:
>
> > It follows that the Crown must be motivated by a desire to achieve fundamental fairness and not by any inclination whatsoever to obtain a tactical or strategic advantage in the trial setting. The Shortreed, Stainton and Henkel principles that governed and, I choose to believe, still govern the role of Crown counsel as ministers of justice in the courtrooms of this Province would, I dare say, be offended by the slightest suggestion that it is proper for Crown counsel to be concerned with the identity of the trial judge.
>
> Ms. Potts' statement has the effect of tainting her entire involvement in the process.

[45] The issue identified by the trial judge as the most contentious, and the one on which counsel have focused on appeal, is that of the pre-charge interviews conducted by the Crown. I will deal with this out of order below. The third issue involving the Crown was an alleged failure to exercise proper prosecutorial discretion post charge by ignoring weaknesses that would prompt an objective Crown to enter a stay. The trial judge agreed with the Crown that these were issues for a jury.

[46] The respondent also asked the trial judge to review prosecutorial discretion as to

the preferring of the direct indictment. The respondent acknowledged there was no right to a preliminary inquiry, but questioned whether the Crown preferred the indictment when it did to prevent Chief Judge Batiot of the Provincial Court, the preliminary inquiry judge, from dismissing some of the charges, and to avoid Ms. Potts having to testify at the preliminary. As well, the respondent was forced to subpoena CBC personnel who resisted all the way to the Supreme Court of Canada. When the respondent finally succeeded after long delay and great expense, the preliminary inquiry was aborted. Justice MacDonald acknowledged that while better communication might have saved the respondent time and money with respect to the CBC, he was not convinced the Crown acted in bad faith. The respondent did not pursue the issue of the preferred indictment on the appeal.

[47] I can find no fault with the careful manner in which the trial judge has painted in the background, nor in his reasoning, to this point. It would be difficult to disagree with his analysis that when the process is seriously abused, whether the approach emphasizes common law or Charter rights, staying the proceedings is available as a remedy in the clearest of cases. Of the three most serious instances raised by the respondent on his application, the premature confirmation of the investigation and, particularly, the judge-shopping incident, raised alarms as to the fairness of the process but do not appear to have been determinative. It is clear however from his statement with respect to abuse of process that he considered the cumulative effect of the main incidents.

Pre-Charge Interviewing

[48] The remaining issue, pre-charge interviewing, was key to Justice MacDonald's decision to stay, and therefore crucial to the outcome of this appeal. 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.

[49] The Crown's entry into a case is typically when the investigation is approaching completion and police have made their charging decision but have not yet laid charges. The charging decision is clearly recognized as lying within the exercise of the police recognized discretion. The decision whether to prosecute the charges determined by the police is an exercise of the independent discretion of the Crown, as Mr. Pearson pointed out in his letter to Chief Superintendent Falkingham. Police and the Crown appear to have a working understanding of the other's role, and there does not appear to be voluminous literature on the subject. Therefore when the Crown's alleged loss of objectivity, as evidenced by a clear departure from recognized practices, became the pivotal issue in the stay application, both sides called prosecuting officers as experts.

[50] The trial judge introduced the issue of the pre-charge Crown interviews with the following overview:

> This is by far the most contentious issue. In essence the applicant maintains that beginning in the summer of 1994 Crown counsel, particularly Ms. Potts, began the unprecedented and inappropriate process of becoming heavily involved with pre-charge

interviewing. This he feels has led to the Crown totally abandoning its role as quasi judicial and independent officers of the Court, mandated to ensure that the applicant is treated fairly. The applicant feels severely prejudiced by this. He refers specifically to the fact that on June 28th, 1994 prior to any such interviews, Mr. Pearson recommended proceeding with charges involving only four victims. After the pre-charge involvement of Crown counsel, he now faces eighteen charges involving thirteen alleged victims including charges that Pearson specifically felt should not go forward.

For its part the Crown states that its pre-charge involvement in the unique circumstances of this high profile case were justified. Acting Director Martin Herschorn in his January 18, 1995 letter to Chief Superintendent explained it this way [Tab 35 of the Applicant's Motion Record]:

> The Public Prosecution Service views these proceedings as a matter of high priority and has attempted to provide advice to your members at the pre-charge phase in a timely fashion. As we discussed at our meeting, it is desirable that the two Crown Attorneys participate along with your investigators in re-interviewing a number of potential complainants/witnesses to establish a rapport with the witnesses and to assist the Crown Attorneys in assessing the strength and weaknesses of those witnesses. It should be possible for these further interviews to be completed in a relatively short time frame.

Meanwhile in the earlier disclosure hearing before me, Ms. Smith for the Crown stated the purpose as follows [Tab 36 - Applicant's Motion Record]:

> The purpose of the interviews that we conducted prior to charges being laid was two-fold. Firstly 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, to make assessments of credibility about these witnesses, including their capacity for recall and general demeanor issues, and to prepare for a preliminary inquiry. With regard to the first purpose, it was also our aim to develop a rapport with these witnesses so as to ensure their comfort level for what was anticipated to be a rather difficult process.

In order to address this highly contentious issue, I must first analyse the role of the prosecutor specifically as it applies to interviewing potential complainants pre-charge.

[51] The trial judge concisely summarized the credentials and testimony of the expert Crowns as follows:

> I have heard a great deal of expert evidence on this issue. The applicant called two experts from Ontario. Both were firmly of the view Crown counsel should never interview pre-charge. To do so would perilously mire the roles of the Crown and police.
>
> The applicant's first expert was Mr. Clay Powell; an individual with over 30 years of hands-on experience in the area of Canadian criminal justice. He worked primarily as a crown attorney in Ontario, although he spent some time working on special prosecutions in British Columbia. He recently served as commission counsel to the Mount Cashel Inquiry. His practical approach to this issue was helpful to the Court. He views the crown

attorney as the most important instrument in the administration of criminal justice, representing a quasi judicial liaison between the community at large and the Court. To this end the Crown must independently assess the investigator's decision to lay charges. By interviewing pre-charge, the Crown in effect becomes part of the decision making process as it applies to the laying of charges. Thus he feels, this critical independent assessment evaporates in the process.

The applicant's second expert, Mr. Michael Code, agrees. Mr. Code as well comes well qualified to speak on this subject; having acquired over twenty years experience with both the defence and Crown in the Province of Ontario. Significantly, from 1991 to 1996, he served as that province's Assistant Deputy Attorney General. Mr. Code feels that an accused loses not one but two safeguards when the Crown interviews pre-charge. Not only is the Crown's independent assessment of the charging decision lost, he as well feels that the police's independent decision making function is also jeopardized. As well he views the Crown's independent assessment as a bulwark not only against intentional abuse but also against mistakes.

For its part, the Crown called several witness who maintain that in certain exceptional circumstances, it may be quite appropriate for the Crown to interview complainants pre-charge. Its first expert was Andrejs Berzins, the Chief Crown Attorney for Ontario's Ottawa-Carleton District. With approximately twenty-five years experience as a prosecutor in Ontario, he too is well qualified in this area. Mr. Berzins feels that in certain types of cases it may be prudent for the Crown to interview pre-charge. He refers specifically to sexual assault cases where there is usually no corroborative evidence. Therefore in order to establish the requisite reasonable prospect of conviction, the Crown may have to interview the complainant so as to properly assess his or her evidence. This, he feels, may best be done pre-charge so as to save an accused the embarrassment of being charged. This also saves the system financially. Mr. Berzins has done this on a few occasions in the past, particularly where the complainant's evidence was expected to be particularly fragile. He would do it more often if he had the time.

Other Crown experts shared this view. Mr. Glendon Abbott is New Brunswick's Director of Public Prosecutions. He too has over twenty years experience in this area. He explained New Brunswick's policy of pre-charge Crown screening; a system that is also employed in British Columbia and Quebec. In these provinces, the Crown's "reasonable prospect of conviction" test is determined pre-charge. The goal is to have only meritous charges processed. This, he feels saves both court time and money; in addition to sparing many suspects the embarrassment of being charged. Mr. Abbott has occasionally interviewed complainants pre-charge. Like Mr. Berzins these instances have been limited to cases where there is little or no corroboration and the reliability of the complainant's evidence is crucial.

Mr. Fred Ferguson is another New Brunswick prosecutor with vast experience in pre-charge screening. He has been a "front line" prosecutor for over twenty years, serving as the Regional Crown Prosecutor for the Miramichi area since the early 1980's. Like Mr. Abbott he has interviewed pre-charge occasionally where the evidence of the complainant will be pivotal.

The Crown also called Brian J. Gover, an experienced lawyer with a particular interest in the professional responsibility of lawyers. He has written extensively on the subject and has been involved in several high profile cases dealing specifically with the role of the crown attorney. Mr. Gover felt that despite Mr. Powell and Mr. Code's opinions, the practice and policy in Ontario (and presumably in Nova Scotia) was

sufficiently broad to accommodate pre-charge Crown interviews in exceptional circumstances. He concedes that this would be an unusual event designed primarily to protect the accused from being subjected to charges that might otherwise be stayed at a later time.

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.

Dr. Stenning felt that Mr. Code's view of a rigid demarcation between the role of the police and the role of the Crown is flawed. Instead he asserts that the relationship between the police and the Crown has been an evolving one. It is a fluid relationship that is driven by context and geography. What might be a tradition in one province is not in another. Therefore what may be right for Ontario in any given time might not be right for Nova Scotia. He therefore sees nothing fundamentally wrong with the Crown interviewing complainants pre-charge but does concede that such occasions would be rare.

Analysis by the Trial Judge

[52] The trial judge analyzed the Crown involvement as follows:

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.

It is clear that the police involvement at the pre-charge stage was to attempt to persuade reluctant “complainants” to change their mind.

The Crown in the case at bar has given its reasons for interviewing pre-charge. 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. I refer to the transit slip of Sergeant Jim Brown dated January 17, 1995 [Tab 34, Applicant's Motion Record]:

> The meeting surfaced that 6 of the victims or complainants have to be re-interviewed. These alleged victims were reluctant when first spoken to by police to proceed with charges and testify in court. Some had only been spoken to over the phone and others were interviewed in person and at that time were not prepared to proceed with criminal charges. 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]

From all this, one thing is clear to me. At no time was the protection of the

applicant a motivating factor. After all, the charge list grew from "Pearson's" four complainants and eight charges, to thirteen complainants with eighteen charges.

Placing the motive issue aside, it is nonetheless crucial for me to zero in on the precise issue at bar. For example the impropriety of Crown counsel becoming involved in the investigation is not an issue in this application. The Crown should never be involved in an investigation and they acknowledge this. Nor does this application directly involve the merits of Crown pre-charge screening. This is an accepted practice in at least three of our provinces. In fact John Pearson's June 28, 1994 report can arguably be viewed as a form of pre-charge screening. He provided a clear recommendation as to what charges should be laid and reminded the police of his ability to stay should they insist upon proceeding against his advice. At page four of his letter, he writes [Tab 25 - Applicant's Motion Record]:

> We have carefully reviewed the materials provided. We are mindful in providing charging recommendations that you are not obliged to accept our opinion and that the final charging decision rests with you. We are also cognizant of the duties and responsibilities of the Crown Counsel to consider whether or not it is appropriate to proceed with charges once they have been laid.

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.

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. Co-operation 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.

The Crown submits that it was not them but the police who, in disagreeing with Mr. Pearson, wanted the charges expanded. The police wanted the charges to reflect all aspects of the applicant's alleged criminal behaviour. They wanted the "complete picture" before the courts. That is understandable and in keeping with their role. They interview all the complainants. They see the case first hand. Their involvement is subjective by nature. It is understandable they would have strong feelings. It is also understandable they would impress those feelings upon the Crown with determination. 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.

Thus one can easily see the wisdom in the opinions of both Mr. Powell and Mr.

> Code. Someone must objectively and dispassionately review the charges to be laid. That task falls squarely within the mandate of the Crown. It 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?
>
> The Crown emphasizes the fact that they always interview complainants post-charge in any event. Therefore they submit the timing, whether pre-charge or post-charge should not be all that crucial. That, with respect, misses the point. The charging decision is crucial. It determines who the complainants will be. It must be reviewed with total objectivity. It therefore only makes sense to interview post-charge.
>
> . . . The bottom line is clear. As far as the police and the Crown are concerned cooperation should never lead to collaboration with the charging decision.

[53] The “serious concerns about the process” disclosed by the trial judge’s analysis, in particular the pre-charge Crown interviews, would manifest themselves in “the number and types of charges that were ultimately laid.” In rejecting the application for a global stay he determined that “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. A case-by-case analysis is therefore required.

[54] With respect to the first three charges that were allowed to go ahead, he found that “society’s interest in having a full and fair prosecution of these charges outweighs the cumulative effect of any concerns I have about the prosecutions to date. In short, this is not one of those **“clearest of cases”** that commands a stay." These charges, dating back over forty years, involved rape, unlawful confinement and indecent assault of a young girl. The analysis yielded similar results when applied to the next three

charges, attempted rape, unlawful confinement and indecent assault involving a young girl, and to another attempted rape and two indecent assault counts.

The Pearson Recommendations

[55] With respect to the stayed charges, the trial judge relied heavily on Mr. Pearson's recommendation on societal grounds against proceeding with certain indecent assault charges despite the existence of evidence which could have led to convictions. He followed similar criteria in staying other counts which had not been brought to Mr. Pearson's attention.

[56] In referring to the letter which Mr. Pearson had written to Chief Superintendent Falkingham he stated:

> Mr. Pearson was fully aware of the nature of these allegations and he recommended against charging. His reasons for doing so were detailed and persuasive. I refer to page five of his report [Tab 25 - Applicant's Motion Record]:
>
> **The Other Complainants**
>
> Concerning the other four complainants; H.M. (H.M.), C.E.R., C.O.S. and B.C. (D.), 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 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;
>
> 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.
>
> This analysis made sense to at least three Senior Crown Attorneys then [See Note 5 below] and it makes sense to me now. Their decision was not based on a perceived weakness with the evidence. In fact, they felt that these four charges could be sustained. Their motives were solely to protect society's interests in a fair process. The Crown's change of heart did not result from an objective re-analysis. It resulted from its subjective involvement with pre-charge interviews; which, as explained earlier, has flawed the process. In these circumstances I find that it would shock the community's sense of fair play and decency to proceed with this charge. To proceed would damage the integrity of the justice system. It is one of those "clearest of cases" where a stay is necessary and I so order.

[57] (*Note five* named the three senior counsel who had concurred with Mr. Pearson's advice to the police as Mr. Pearson, Ms. Potts and Marc C. Chisholm.)

[58] Justice MacDonald applied a similar analysis to all of the stayed charges. He reached his conclusions by sound legal reasoning, with every piece in its proper place. This led him to identify Crown conduct incompatible with principles of fundamental justice.

The Crown Discretion

[59] The exercise of Crown discretion has generally been treated deferentially by the courts but it is not unfettered, as the appellant and intervenor appear to argue it should be. When reasonable limits are exceeded, courts have both a jurisdiction and a duty to step in. Standards of professionalism which the Crown must meet, a key element of the Canadian system of justice, are evolving upward and courts must uphold them more strictly. Until the **Stinchcombe** decision in 1991, for example, courts tolerated Crown conduct respecting disclosure that today would result in stays or other remedies.

[60] The pronouncement of Rand J. In **Boucher** at p. 270 bears repetition:

> 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 the 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 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.

[61] That is not the expression of an impractical ideal. It is a principle of law, and that is how MacDonald, J., applied it, demanding of the Crown the dignity of a minister of justice and not accepting lapses by the Crown that could appear to the public to result from fervor to convict a prominent person.

[62] Given Justice MacDonald's awareness of the global context urged by the applicant, and his careful point by point analysis and disposition of the lesser allegations, it is apparent that the cumulative effect he referred to related to the three instances he considered most serious, the confirmation of the investigation to the media, the judge-shopping and the pre-charge interviews. However his decision was made in the context of all eighteen charges, and every allegation that he had to deal with. It could hardly be expected that he would avoid sensing the flavour of the whole in the course of narrowing his focus to three particular aspects. The superior familiarity of the trial judge with the context of a case is an important reason for an appeal court to show deference. By contrast, the focus of this appeal is the nine counts that were stayed, not the full eighteen counts with respect to which the trial judge was attempting to achieve a just balance. It does not detract from Justice MacDonald's conclusions if

he sensed from the context of the entire matter before him that the Crown had not managed the prosecution in a manner fair to Mr. Regan, provided the facts and principles upon which he rested the rationale of his decision are firmly established.

Crown Objectivity

[63] Justice MacDonald was clearly shocked by the judge-shopping incident and more so by the Crown's assumption of the police role in conducting pre-charge interviews to cause witnesses to change their minds in an obvious effort to increase the number of charges that could be brought. I would agree that any citizen knowledgeable of the principles involved would be equally shocked. Both of these instances demonstrate that whether the functions of police and prosecutor are separated by a clear line of demarcation or an evolving one, the separation itself is an essential component of the administration of justice. That safeguard was not operating when the decisions were made to charge the former premier with an indictment totaling eighteen counts.

[64] MacDonald J. had already instructed himself as to the principle expressed by L'Heureux-Dube J. in **O'Connor**, supra. He had stated:

> L'Heureux-Dubé J. explains at page 39:
>
> > In addition, there is a residual category of conduct caught by section 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.

[65] MacDonald J. added:

> In fact, it is under this residual category that the applicant at bar seeks relief. His complaints are therefore not restricted to trial fairness per se. Instead the applicant highlights a litany of alleged authoritative abuse which he asserts should raise both societal and trial fairness concerns.

[66] The trial judge had also instructed himself as to the statement in the dissenting judgment of McLachlin, J. in **R. v. Scott** (1999), 61 C.C.C. (3d) at page 329:

> A system that allows the Crown an advantage in choosing or changing judges, a system which either in fact or appearance is partial, a system which permits a judge's ruling to be circumvented other than by the normal appeal process - such a system would be open to the charge that it offended the fundamental principles of justice upon which our society rests. By the same token, proceedings which permit such abuses might be characterized as "vexatious" or "unfair".

[67] After his references to Rand J. in **Boucher**, supra, L'Heureux-Dube J. in **O'Connor** and McLachlin J. in **Scott,** supra it seems clear that Justice MacDonald had concluded that an accused person in Canada has a right to expect that the charging decision arrived at by police will be reviewed by Crown counsel exercising reasonable standards of objectivity. Such a right is implied, at least, in the authorities he cited, and its existence was attested to by the experienced Crown counsel called as expert witnesses by both the defence and the Crown. 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. MacDonald J. found Crown objectivity to be a residual value under the s. 11 umbrella of fundamental justice and he found a remedy under s. 24(2) of the Charter, not to guarantee a fair trial but to repair the harm that had been done to the administration of justice by the

appearance of an over-zealous Crown. In arriving at his conclusions he proceeded cautiously and even handedly, refusing to be distracted by non-essentials, building his rationale a step at a time.

[68] His repeated references to the **Marshall Report** reflect his concern for building respect for the justice system in Nova Scotia after the miscarriage of justice that resulted in the wrongful conviction of Donald Marshall Jr. The report stated at p. 238:

> While the courtroom setting is adversarial, the Crown Prosecutor must make sure the criminal justice system itself functions in a manner that is scrupulously fair. The phrase "criminal justice system" is not a mistake of history--we do not have a "criminal convictions system". Justice is an ideal that requires strict adherence to the principles of fairness and impartiality. The Crown prosecutor as the representative of the State is responsible for seeing that the State's system of law enforcement works fairly.

[69] In testifying before the Kaufman commission into the wrongful conviction in Ontario of Guy Paul Morin, Associate Professor Diane Martin of Osgoode Hall Law School spoke of "systemic and deeply embedded factors" that tended to lead to unjust results in research she had done into clearly established cases of wrongful conviction: twenty-five Canadian, eighteen American and thirty two from the United Kingdom. She referred to the Marshall case as "a classic" to demonstrate how tunnel vision by police as to guilt of an accused passed down the line. She said

> . . . [I]t's important to remember that we operate under a doctrine of constabulary independence in Canada, which means that there's a Chinese Wall between prosecutors and investigators. The Crown attorney doesn't direct the investigation, and indeed, attempts to keep hands off.

Analysis

[70] While there does not appear to be a precedent for application of a judicial stay in the precise circumstances of this case, it must be borne in mind that before the advent of the **Canadian Charter of Rights and Freedoms** it could be judicially doubted

whether the common law abuse of process doctrine remained a feature of Canadian law and whether the stay existed as a remedy. See **Rourke v. R.** (1977) 35 C.C.C. (2d) 129 (S.C.C.)

[71] Professor David M. Paciocco in his learned article, *The Stay of Proceedings as a Remedy iun Criminal Cases: Abusing the Abuse of Process Concept*, (1991) 15 C.L.J. 315, wrote that while "the concept of abuse of process was intended to perform the constitutional function of demarcating the legitimate scope of a court's authority to interfere with the powers of the executive, it was not surprising to see courts, moving away from its strictures because the Charter had given courts the power to render legislation inoperative and even to control the authority of the executive".

> Despite the fact that Canadian abuse of process authorities tend now to be analyzed as violations of Canada's unique constitutional instrument, the **Canadian Charter of Rights and Freedoms**, it is still possible to argue that **Charter** decisions are relevant to issues pertaining to the common law authority, even outside of Canada.

[72] The current evolution of the concept traces from **Jewitt**, (1985), 21 C.C.C. (3d) 7 (S.C.C.) in which the Supreme Court of Canada cited Lord Devlin in **Connelly v. Director of Public Prosecutions** [1964] A.C. 1254 at 1354 (H.L.) recognized that a discretion to stay proceedings exists at common law wherever

> . . . compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency [or] to prevent the abuse of a court's process through oppressive or vexatious proceedings.

[73] Professor Paciocco noted that abuse of process related in its strict sense to abuse of the court's own process, although the term was used less precisely when courts exercised their "sweeping powers of review over both prosecutors and the

police."

[74] He identified two underlying rationales for the jurisdiction to stay proceedings, the fair trial rationale referred to by Lord Devlin in **Connelly** as the "inescapable duty [of courts] to secure fair treatment for those who . . . are brought before them," and the reputation of the administration of justice rationale. The latter was expressed by Lord Diplock in **Hunter v. The Chief Constable** [19823] A.C. 529 at 536 (H.L.) as "the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which . . . would . . . bring the administration of justice into disrepute among right-thinking people." Professor Paciocco considers this the dominant theme in Canada.

[75] While many cases analyzed under abuse of process could be remedied without staying proceedings,

> . . . in a number of its more conventional applications the very use of the criminal process is said to be abusive because, in all of the circumstances of the case, no charge should have been laid. Where this is so, the obvious and only way to provide complete restitution is to stop the prosecution.

[76] Abuse of process is a well entrenched doctrine, the stay a frequently resorted to remedy, whether the abuse results from systemic problems as in the **Askov** [1990] 2 S.C.R. 1199 line or cases or from the behavior of the players as in cases following **Stinchcombe** [1995] 1 S.C.R. 759. To be sure, the stay is subject to the caveat that it is reserved for the clearest of cases, but it could not be clearer that Justice MacDonald found the Crown had engaged in behavior inconsistent with its role as justice minister

which had cost it its ability to carry out its duties objectively.

[77] MacDonald J. was not in error therefore in determining that the abuse of process analysis was the appropriate one, or that the stay was available as a remedy.

[78] As recognition of unjust practices becomes more sophisticated, it is inevitable that abuse will be seen in situations where it was not seen before. The residual category of abuse under s. 7 of the Charter contemplated in such cases as **O'Connor** and **Tobiass**, though small, remains open. And the judicial stay remains available as a remedy. As L'Heureux-Dube J. wrote in **Conway**, "

> When the affront to fair play and decency is disproportionate to the societal interests in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings.

[79] She added in **Power** that:

> Cases of this nature will be extremely rare.

[80] The right the trial judge identified was the right of an accused person to the assurance that before he or she must face criminal charges, a dispassionate Crown, operating independently of the police, will make an objective determination that the prosecution is required in the interests of justice. If this right exists, and it is supported both by authority and by expert evidence of good Crown practice, can it be said that accused persons exceptionally deprived of it are put at risk of their liberty and security in accordance with principles of fundamental justice?

[81] The duty on the Crown to act ministerially recognizes the extremely serious nature of a criminal charge to an individual, particularly one never before charged with criminal wrongdoing. Even if one's liberty is preserved by a successful defence, the process can be financially ruinous and devastating to one's reputation. Both the public and the accused person are entitled to draw certain assurances from the Crown's decision to prosecute following its review of the police charging decision. Based on considerations referred to above, the criteria for determining whether justice requires that a prosecution proceed would appear to include the following determinations:

* The case resulting from the police investigation is strong enough to proceed with in respect to each of the elements which must be proven, that is, there are reasonable prospects of a successful prosecution.

* Society's interests in proceeding with the prosecution have been balanced against the prejudice to the individual, taking into account the seriousness of the charges, their age, their effect upon alleged victims, and shifting social attitudes.

* The decision has not been unduly swayed by subjective elements such as media pressure to solve a crime, vengeance or vindictiveness, ambition to win a prominent case or to convict a prominent person, or other emotional factors.

[82] At least some of the learned commentary relied on by the trial judge related to cases of miscarriages of justice of which three have become household names in Canada: Marshall, Morin and Milgard. Failures by the Crown to provide independent leadership could be discerned among the elements of each.

[83] The appropriate Crown role is widely recognized: see **Boucher**, **O'Connor** and **Scott**. Importantly, the need for objectivity is also well recognized by leading Crown counsel such as those who are witnesses for the defence and the Crown on the stay

motion, and whose evidence was summarized above by the trial judge. What seems remarkable is that so well-known a standard should not have figured more frequently in the case law.

[84] That may be accounted for by the great reluctance of the courts to be seen to interfere with the exercise of the Crown's discretion, owing partly to constitutional division of powers considerations. A more practical reason may be that instances of breach of Crown objectivity standards are rare, and difficult to prove except with the assistance of hindsight in miscarriage of justice post mortems. Indeed, without the disclosure requirements mandated by **Stinchcombe**, supra they might be virtually impossible to prove on a pre-trial motion.

[85] If a true presumption of regularity does not protect Crown activities at the charging stage, the analogy nonetheless seems valid, although the onus on the accused to prove a **Charter** breach is analytically similar. The court is entitled to presume that the Crown has conducted itself in accordance with recognized standard practice until the contrary is shown. When, as in the present case, there is evidence before the court capable of rebutting such a presumption, it is not unreasonable that the onus should shift to the Crown to defend its actions. Here the court found that judge-shopping and pre-charge interviews of witnesses called into question whether the Crown had performed its function as an objective minister of justice. It was then open to the crown to show that it had acted reasonably. It might have done so by showing, for example, that a particular judge had a close personal association with the accused, or

that testimony by a problematic witness required further evaluation because it was a key to the decision to prosecute. It might have established that an adequate distance had been established between questionable acts by a particular prosecutor and the final decision. In the circumstances of the present case the trial judge found that Crown objectivity had been lost.

[86] In the result, he found that the Crown had participated too zealously with the police in the charging decision. The trial judge obviously considered that the conscience of the community would be shocked by eighteen counts, most of a similar nature, diligently sought out against a prominent accused on behalf of complainants who had never come forward, when other citizens were spared such scrutiny for want of resources. The Crown had given the appearance of an over-willingness to persuade reluctant witnesses and to lay as many charges as possible: so many that they created an appearance of oppressiveness and a concern that to proceed with them all would bring the administration of justice into disrepute.

[87] The example set by the former Director of Public Prosecutions was before the trial judge. Confronted with a thorough police report, Mr. Pearson applied public interest factors and concluded that proceeding with all the charges “may be seen as ‘persecution’.”

[88] When a breach of recognized standards of good Crown practice had been identified resulting in an unfair multiplicity of charges that the trial judge concludes

reflects an infringement of the s. 7 right to fundamental justice, it falls to the trial judge to craft a remedy under s. 24(2) of the **Charter**. In taking inventory of the remedies at his disposal, Justice MacDonald was clearly mindful of the test in **Tobiass**, which he had cited:

> (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.

[89] Having determined that s. 7 of the **Charter** had been breached, and that the breach was manifested by the multiplicity of charges, it was not surprising that Justice MacDonald, in seeking a remedy that would repair the damage to the reputation of the administration of justice, should hit upon the stays of a number of similar charges as his solution. While he clearly had great respect for the reasoning of Mr. Pearson, and reached similar results, they followed different routes. The Director applied public interest standards in the course of making an objective determination as to which charges should be proceeded with; the trial judge was seeking to remedy the breach of a Charter entitlement.

[90] Mr. Regan was required to go through a lengthy, grueling and very public trial for eight of the most serious offences with which he was originally charged. The investigation into allegations of sexual misconduct was announced to the public in 1993. He still must face another charge of indecent assault. The stays followed a year-long preliminary inquiry that was terminated by the preferred indictment before the preliminary inquiry judge could pronounce upon the necessity of Mr. Regan's standing

trial on all or any of the charges.

[91] Having found that there was a breach of s. 7 of the Charter, it was Justice MacDonald's duty to determine whether the abuse of the court's process was in the clearest of cases which would shock the conscience of the community. The determination whether the public's sense of fair play and decency required continuation with the other nine charges was for him alone. I am not prepared to say he was wrong.

The Chosen Remedy

[92] In my view Justice MacDonald did not err in the legal principles he relied on in determining that Crown objectivity is guaranteed as a residual value of fundamental justice in Canada under s. 7 of the **Charter**. He concluded as a matter of fact on the evidence before him that the respondent had been denied what any accused person is entitled to, an objective and dispassionate review by an objective Crown of the police charging decision. Rather, the investigators and prosecutors had collaborated to the extent that they had arrived at a joint charging decision. The result was that the accused was faced with a multiplicity of charges which had been determined without taking societal interests, including those of decency and fair play, into account. This was a breach of the **Charter** rights of the accused which cast on the trial judge the duty of crafting a remedy under s. 24(2) of the **Charter**.

[93] The remedy he arrived at was to stay the nine charges of indecent assault he considered least serious and requiring the respondent to face trial on the more serious

charges including rape and attempted rape. In arriving at this remedy he was clearly influenced by the advice given to the police by the Director of Public Prosecutions, John Pearson, who had reviewed a comprehensive but not exhaustive report before the Crown had involved itself in the activities Justice MacDonald found had cost it its objectivity. He urged the police to go ahead with the more serious charges, to re-interview reluctant witnesses in the more recent cases, but not to proceed with several of the charges he considered minor, even though they appeared to contain the elements of indecent assault, because of societal concerns: the more tolerant climate that prevailed when the offences were allegedly committed, and to avoid the appearance that the accused was being persecuted. Neither the trial judge nor Mr. Pearson's successors were bound by his letter of advice to the police of June 28, 1994, but Justice MacDonald was clearly persuaded by his reasoning. Justice MacDonald too concluded that societal interests favoured prosecution of the more serious charges but that the lesser ones should be stayed.

[94] A major concern of the appellant and the intervenor is that the stays represent an unacceptable judicial incursion into the sacrosanct territory of crown discretion at the charging stage. While interference is to be avoided to the greatest degree possible, the discretion is not unfettered, particularly since the **Charter**. When, as here, the Crown by its own acts has disabled itself from carrying out its duties in a manner that is visibly impartial and unbiased, courts are justified in intervening to protect the integrity of the administration of justice even in the absence of actual bad faith. Justice MacDonald only determined his duty to act after a painstaking review of the authorities, which establish

he was not proceeding on a wrong principle, and findings of fact clearly supported by the evidence.

[95] Justice MacDonald selected a stay of the less sustainable charges as the appropriate remedy in the clear recognition that it was available only in the clearest of cases. His analysis established that level of clarity with respect to the respondent's guaranteed right to an objective Crown review of the police charging decision. It was equally clear that the Crown's involvement had deprived the respondent of that right. Had it been accorded to him, as it had been while Mr. Pearson was director of Public Prosecutions, it was clear the right could have manifested itself in a lesser number of charges. The respondent would have been only the incidental beneficiary of such a decision, for its main purpose would have been to promote the reputation of the administration of justice, to avoid the appearance of oppressiveness in light of society's interest in decency and fair play. But there is no need to separate the interests of society and accused persons when they coincide. A reduction in the number of charges by pruning out the vexatious lesser ones and accommodating society's interest in proceeding with those of greater criminal consequence was not only the obvious remedy but the only effective one.

Standard of Review

[96] In my view the respondent's factum correctly sets forth the standard of review to be followed in appeals such as the present one:

> 79. The standard of appellate review from the decision of a trial judge granting a stay of proceedings is one of deference. As stated by Sopinka J., writing for the majority in

Regina v. Carosella:

> The trial judge found that a stay of proceedings was the appropriate remedy in the circumstances of this case. Section 24(1) of the *Charter* confers upon the court a discretionary power to provide "such remedy as the court considers appropriate and just in the circumstances". See *R. v. Simpson*, [1995] 1 S.C.R. 449, 95 C.C.C. (3d) 96 (S.C.C.). The appropriate standard of review of the exercise of a discretionary power was addressed by Gonthier J. in *Elsom v. Elsom*, [1989] 1 S.C.R. 1367 at p. 1375, 59 D.L.R. (4th) 591 (S.C.C.). Speaking for the Court, Gonthier J. stated:
>
> > The principles enunciated in the *Harper* case [[1980] 1 S.C.R. 2], indicate that an appellant 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. In my opinion, neither of these two circumstances are present in this case.

This Court has affirmed on a number of occasions that the standards of deference applicable in reviewing the decisions of trial judges generally apply equally to the remedial provisions of s. 24. See *R. v. Duguay*, [1989] 1 S.C.R. 93, 46 C.C.C. (3d) 1, 56 D.L.R. (4th) 46 (S.C.C.); *R. v. Greffe*, [1990] 1 S.C.R. 755 at p. 783, 55 C.C.C. (3d) 161 (S.C.C.); *R. v. Grant*, [1993] 3 S.C.R. 223, 84 C.C.C. (3d) 173 (S.C.C.); *R. v. Borden*, [1994] 3 S.C.R. 145, 92 C.C.C. (3d) 404, 119 D.L.R. (4th) 74 (S.C.C.); *R. v. Silveira*, [1995] 2 S.C.R. 297, 97 C.C.C. (3d) 450, 124 D.L.R. (4th 198 (S.C.C.)

In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at pp. 76-77, 88 D.L.R. (4th) 1 (S.C.C.), La Forest J. cited with approval the following passages from *Charles Osenton & Co. v. Johnston*, [1942] A.C. 130 (H.L.), at p. 138:

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due to the application of well-settled principles in an individual case. The appellant tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellant 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. But if the appellant tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to a relevant consideration such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

These principles were reaffirmed by this Court in *Reza v. Canada*, [1994] 2 S.C.R. 394 at pp. 404-5, 116 D.L.R. (4th) 61.

> It is only after reaching the conclusion that the discretion has not been exercised in accordance with these principles that an appellant court is entitled to exercise a discretion of its own. See *Manitoba (Attorney General) v. Metropolitan Stores Ltd.,* [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321 (S.C.C.).

Regina v. Carosella (1997), 112 C.C.C. (3d) 289 (S.C.C.) at 309-310, Sopinka J.

80. This point was recently reaffirmed by the Supreme Court in *Canada (Minister of Citizenship and Immigration) v. Tobiass*:

> A stay of proceedings is a discretionary remedy. Accordingly, an appellate court may not lightly interfere with a trial judge's decision to grant or not to grant a stay. The situation here is just as our colleague Gonthier J. described it in *Elsom v. Elsom*, [1989] 1 S.C.R. 1367 at p. 1375, 59 D.L.R. (4th) 591:
>
> > [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.

Canada (Minister of Citizenship and Immigration) v. Tobiass (1997), 118 C.C.C. (3d) 443 (S.C.C.) at 470.

Conclusion:

[97] I have had the benefit of perusing Justice Cromwell's judgment and I agree with his statements of the law; I respectfully differ with him as to how the law applies in the circumstances of this appeal. Attempting to take a global view of the Regan prosecution in the context of our system for the administration of justice, I cannot agree that Justice MacDonald's discretion was wrongfully exercised. (See **Friends of Oldman River Society v. Canada**, [1992] 1 S.C.R. 3) In my view he laid the foundations for its exercise in a careful and thorough manner; he did not misdirect himself and his decision is not so clearly wrong as to amount to an injustice: this court is therefore not justified in interfering with it. (See **Elsom v. Elsom** (1989), 96 N.R. 165 (S.C.C.) I would dismiss the appeal.

Freeman, J.A.

CROMWELL, J.A.:

I. INTRODUCTION:

[98] I have had the benefit of reviewing Justice Freeman's reasons. Nonetheless, I am persuaded that the trial judge erred in judicially staying these charges and that this

appeal should be allowed.

[99] I will set out at length my reasons for reaching this conclusion. It may be helpful, however, to summarize them briefly here.

[100] A judicial stay of proceedings, such as the one ordered by the trial judge in this case, is an order of a court putting an end to a prosecution. It is a drastic remedy because its effect is that the state is permanently prevented from prosecuting the alleged criminal act.

[101] The Supreme Court of Canada has emphasized two important principles which apply to judicial stays of proceedings. The first is that, if there can be a fair trial of the charge, a judicial stay should only be granted in rare and exceptional circumstances. In this case, the trial judge rejected all the arguments that a fair trial could not be held; the case must therefore be rare and exceptional for a stay to be granted. The second principle is that a judicial stay is not a remedy for misconduct in the past by the Crown or the police. The purpose of a judicial stay is not to remedy past misconduct, but to prevent further damage to the integrity of the judicial process which will result if the prosecution is not stopped. It follows from this second principle that a judicial stay should only be granted if there will be continuing or ongoing harm to the integrity of the judicial process if the prosecution is allowed to proceed. To use the language of the cases, a stay should only be granted if the continuation of the prosecution will manifest, perpetuate or aggravate the prejudice caused by the abuse in question.

[102] The decision to lay charges is made by the police. There was no finding by the judge that the police decision to lay these charges was wrong. The decision to prosecute those charges in court is made by the Crown. In making that decision, the Crown is to act fair-mindedly and in the public interest. The Crown has a discretion to refuse to prosecute (or, to use the technical language, stay) charges that, taking the public interest into account, it thinks should not be pursued.

[103] The crux of the trial judge's decision is that the Crown failed to act in a fair-minded way in exercising this discretion at the charging stage. In other words, the accused lost the chance, at that stage, that a fair-minded Crown would have decided not to proceed with some of the charges laid by the police.

[104] In my respectful view, there are several errors in the judge's reasoning and conclusions. Most fundamentally, however, there are two. First, the judge erred in law because he did not ask himself whether the continuation of the prosecution of the charges which he stayed would manifest, perpetuate or aggravate the prejudice caused by the Crown's failure to properly exercise its discretion at the charging stage. In short, the judge did not apply the correct legal test. The second fundamental error is related to the first. The judge erred by treating a judicial stay of proceedings as a remedy for past misconduct or as a remedy to restore to the accused something that he had lost as a result of that misconduct. This is an error because the Supreme Court of Canada has directed that a judicial stay is not a remedy of that nature.

[105] If the correct legal tests are applied to the facts, I think it is clear that the stay application should have been dismissed. If a fair trial is possible, and there is no ongoing effect from the misconduct, a stay should not be granted. The judge found that the Crown's discretion to prefer a direct indictment, some two years after the initial charges were laid, was properly exercised. The direct indictment required and received the approval of the Director of Public Prosecutions against whom no finding of misconduct of any kind was made. The preferring of the direct indictment reflected the Director's decision to proceed to trial on these charges. In light of the judge's finding that the Crown's discretion to prefer the indictment was properly exercised and in the absence of any finding of misconduct on the part of the Director, one must conclude that the decision to proceed was properly made at that time. It follows, in my view, that any ongoing effects of the earlier failure to properly exercise the Crown's discretion came to an end with this proper exercise of that discretion. The prosecution of the charges does not amount to an ongoing abuse and the charges should not have been judicially stayed.

II. SUMMARY OF APPLICABLE LEGAL PRINCIPLES:

[106] A judicial stay of proceedings is a remedy to prevent harm to the integrity of the judicial system which will result if a prosecution continues. It is a drastic remedy which, in effect, means that the state has disentitled itself from prosecuting an alleged criminal offence. A judicial stay is to be issued in only very clear cases and only if no other remedy can sufficiently protect the integrity of the judicial process from the anticipated harm.

[107] The applicant for a judicial stay must first show that the state has conducted a prosecution in a way that makes the proceedings unfair or that is otherwise damaging to the integrity of the judicial process. Even once that threshold requirement is established, a stay is by no means automatic. This is because a stay is not a remedy for past state misconduct. It is a remedy to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and community as a whole in the future: see **Canada v. Tobiass**, [1997] 3 S.C.R. 391 at 428. It follows that a stay is not issued to undo harm that has been done to an accused person in the past, but to prevent future harm to the integrity of the judicial process that will result if the prosecution is not stayed by the Court.

[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 **Scott v. The Queen**, [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 Crim. L.Q. 399 at 433.

[111] The residual category of abuse of process is the one relevant to this appeal because the trial judge rejected all of the respondent's arguments that there could not be a fair trial on these charges. This case, therefore, must be analyzed according to the principles applying to this residual category of abuse of process cases.

[112] There are three stages or steps in the analysis.

A. First Step:

[113] At the first step, as noted, the accused must show that there has been misconduct (or, I would add, circumstances have arisen apart from misconduct) which render the continuation of the prosecution damaging to the integrity of the judicial process. I would add this reference to circumstances apart from misconduct, because

neither improper motive nor misconduct is essential to a claim of abuse of process: **R. v. Keyowski**, [1988] 1 S.C.R. 657; (1988), 40 C.C.C. (3d) 481 (S.C.C.). For example, there may be a series of trials of the same accused on the same charge because the juries in each of the trials have been unable to reach a verdict. A point may be reached, however, at which subjecting the accused to yet another trial on the same charge constitutes an abuse, even though no agent of the state has engaged in any form of misconduct leading to the succession of trials.

B. Second Step:

[114] The question of whether a prosecution should be stayed as an abuse of process is resolved by striking an appropriate balance between two main concerns. On one hand, there is concern about the damage to the integrity of the judicial process which will result from the continuation of the prosecution; on the other is concern about the societal interest in the effective prosecution of alleged crimes. A stay is an appropriate and just remedy if the violation of the community's sense of "... fair play and decency [is] ... disproportionate to the societal interest in the effective prosecution of criminal cases." : see **R. v. Conway**, [1989] 1 S.C.R. 1659 at 1667; **R. v. Campbell**, [1999] 1 S.C.R. 565 at para. 22.

[115] There are two criteria which, if satisfied, indicate that the balance requires that a prosecution be stayed. They are, as set out by the Supreme Court in **Tobiass**, at 428:

> 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)

These requirements apply to residual category cases: see **Tobiass** at 428.

[116] As the Court said in **Tobiass**, the first of these two criteria, (i.e., that the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial or by its outcome) is critical. Its application ensures that 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. The Court described how this criterion could be satisfied in cases falling within the residual category at page 428:

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

[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.

[118] Although not mentioned in **Tobiass**, there is a third way in which the prejudice caused by the abuse may be manifested, perpetuated or aggravated through the conduct of the trial or by its outcome. This occurs in cases in which the conduct has the effect of setting the prosecution on a fundamentally different path than it would otherwise have followed. The entrapment cases are examples. As Lamer, J. (as he then was) put it in **R. v. Mack**, [1988] 2 S.C.R. 904 at 942, in entrapment cases, "... the court's sense of justice is offended by the spectacle of an accused's being convicted of an offence which is the work of the state...". The misconduct is the state improperly offering a person the opportunity, or inducing a person, to commit a crime. This conduct has ongoing effect on the prosecution because it is at the root of the criminal behaviour giving rise to the charge being prosecuted. The police conduct is not likely to be repeated in the course of the prosecution, but its effects on the course of the prosecution are ongoing.

[119] If the court concludes that the prejudice caused by the abuse will be manifested, perpetuated or aggravated by the continuation of the prosecution, in any of these ways,

the analysis proceeds to the second criterion. The second criterion concerns whether a remedy other than a stay is reasonably capable of removing the prejudice that will be manifested, perpetuated or aggravated by the continuation of the trial. Only if the prejudice caused by the abuse will be manifested, perpetuated or aggravated and a judicial stay of proceedings is the only remedy reasonably capable of removing that prejudice does the balance favour a judicial stay.

C. Third Step:

[120] The third step of the analysis should be considered if, after completing the analysis at the first two stages, it is unclear whether a stay is required. The third step addresses once again the balance between the societal interest in proceeding and the interests served by granting the stay. As the Court said in **Tobiass**, "... where it is unclear whether the abuse is sufficient to warrant a stay, a compelling societal interest in having a full hearing could tip the scales in favour of proceeding." at 479. It is helpful to consider how this third step in the analysis relates to the second.

[121] The two criteria at the second step set out in **Tobiass** were developed by Professor Paccioco in an important article. The purpose of the criteria is to identify cases in which the affront to fair play and decency resulting from allowing the prosecution to continue will be disproportionate to the societal interest in the effective prosecution of the case. This will be so only where the prejudice caused by the abuse in question would be manifested, perpetuated or aggravated through the conduct of the

trial, or its potential outcome, and where that prejudice cannot be otherwise removed : see David M. Paccioco, "*The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept*" (1991), 15 Crim.L.J. 315 at 340. The two criteria at the second stage of the analysis are, thus, designed to identify cases in which the balance of the competing factors requires a stay.

[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.

[123] It would seem that, by definition, conduct of this type is highly unlikely to leave the Court unclear about whether a stay is required. That sort of rare conduct, which is so exceedingly serious that to proceed in light of it would constitute new and ongoing abuse, is not conduct likely to be painted in grey or shrouded in mist. The conduct must be so offensive that it will almost always trump the societal interest in any prosecution, making it highly unlikely that the scales could be tipped by even the most compelling societal interest in proceeding.

[124] This point is emphasized in two passages of **Tobiass**. After having concluded that there was no likelihood of future misconduct in that case, the Court turned to consider whether the misconduct, on its own, was so egregious that a stay was required. The Court found that it was not, stating that the misconduct in issue in that case "... was not so serious as to warrant a stay without balancing the harm to the image of the justice system against the interest of society in seeing the alleged war criminals brought to justice." (at 436) In other words, only misconduct which is so egregious that it demands a stay without further consideration of the societal interest in proceeding is sufficient. In the same section of the judgment, the Court states that "[e]ven in the absence of an ongoing appearance of injustice, the very severity of the interference with judicial independence could weigh so heavily against any societal interest in continuing the proceedings that the balancing process would not be engaged. This would occur rarely and only in the clearest of cases." (emphasis added) I think these passages reinforce the point that absent likelihood of future misconduct (or, I would add, ongoing effects flowing from the misconduct), only misconduct which clearly outweighs the societal interest in prosecuting any crime will be sufficient to justify a stay.

[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.

III. THE TRIAL JUDGE'S FINDINGS:

[126] Abuse of process cases are dependent on their facts. I will summarize the judge's findings in this case using the three step analysis set out in **Tobiass**. The trial judge's decision is reported at (1998), 21 C.R. (5th) 366.

A. First Step: Conduct rendering the proceedings unfair or otherwise damaging to the integrity of the judicial system:

[127] There is no finding that the trial of these charges would be unfair. The case, therefore, falls into the residual category. The determination that there could be a fair trial was made on the pre-trial abuse of process motion. That determination, or my acceptance of it on appeal, does not, of course, preclude a trial judge from reassessing the fairness of a future trial.

[128] The trial judge made specific findings of misconduct on four matters, three of which were expressed as general findings and a fourth which related only to Count 16. The three general findings were: the public confirmation by the police of the investigation, the judge-shopping comments of Ms. Potts in relation to the planned first appearance of the accused, and the loss of objectivity by "the Crown" "at the charging stage" in relation to whether proceeding with the charges was in the public interest. Although there were these three general findings of misconduct, I agree with the respondent's submission that the trial judge's findings concerning two of them, i.e., the judge-shopping and premature announcement of the investigation, appear to have been incidental to his decision to grant the stay. Apart from Count 16, the trial judge saw the Crown's loss of objectivity at the charging stage in deciding whether the charges should or should not be proceeded with in the public interest as his central concern. 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.

[129] It is, in my opinion, critical to consider what the judge did **not** find:

(i) The judge did not find that the Crown was improperly involved in the investigation; his clear finding is the opposite. He accepted the Crown submission that it was not involved in the investigation.

(ii) There is no finding that the police acted wrongly in laying the charges. In fact, the judge found that in doing so the police acted "... in keeping with

their role." : at 21 C.R. (5th) 392.

(iii) The judge rejected the accused's submission that the preferring of the direct indictment was *mala fides* or for an improper purpose. The direct indictment was preferred well after Ms. Potts' involvement in the prosecution had been terminated. The indictment was signed by Mr. Reid and consented to by Mr. Pitzul, then Director of Public Prosecutions. The trial judge quashed a subpoena issued by the defence to Mr. Pitzul holding that there was no evidence of *mala fides* or flagrant impropriety on the part of the decision-maker.

(iv) The judge did not find that the loss of Crown objectivity extended beyond what he termed "the charging stage" by which he meant the time around which the first charges were laid in March of 1995. He seems, on the contrary, to have rejected the respondent's submission that it did: see 21 C.R. (5th) at 393.

(v) The judge acknowledged that Mr. Pearson's recommendations were not based on any perceived weakness with the evidence; on the contrary, it appears to have been Mr. Pearson's view that the charges could be sustained. Although the trial judge did not make a specific finding, it is not disputed on this appeal that an objective and fair-minded Crown Attorney could reasonably have formed the opinion that all the charges should be proceeded with in Court. In other words, a decision to proceed would not have, in any sense, been unreasonable.

(vi) There was no finding that, had proper objectivity been retained, these

charges would, in fact, have been stayed by the Crown.

(vii) There is no suggestion that the Crown encouraged the police to lay more charges. Putting the case for the respondent at its highest, the prosecutors decided to proceed with all the charges the police wished to lay. While the Crown, in the judge's view, failed in its duty to objectively review the charging decision of the police, the Crown certainly did not fail in its duty to accord the police freedom and independence in reaching their own charging decision.

[130] Aside from Count 16, the abuse of process found by the trial judge amounts to this. In his view, it was an abuse of the court's process to allow these charges to be tried because, as a result of the Crown's loss of objectivity at the charging stage, the Crown prosecuted charges which might have been stayed had proper objectivity been retained. This constituted an abuse even though: (a) there was sufficient evidence to justify proceeding; (b) the decision to prosecute was made in good faith and for no improper motive; (c) the decision to prosecute was one which a reasonable and objective Crown Attorney could have made; (d) the police throughout were anxious to lay the charges; (e) there could be a fair trial of the charges; (f) the loss of objectivity was confined to "the charging stage"; and (g) the Crown properly exercised its discretion to prefer a direct indictment roughly two years after the charges had first been laid (i.e. after "the charging stage"). It was the trial judge's opinion that the cumulative effect of the misconduct would not shock the community's sense of fair play and decency so as to warrant a stay of all charges because there was a strong societal interest in

proceeding with the charges which involved “very serious allegations”: 21 C.R. (5th) at 394. With respect to Count 16, the abuse was found to be that the charge was proceeded with for an improper motive.

B. Step Two: Is a Stay Appropriate?

1. First Criterion: the prejudice caused by the abuse will be manifested, perpetuated or aggravated through the conduct of the trial or by its outcome:

[131] The judge did not address this criterion explicitly. He, instead, focused on the seriousness of the misconduct, concluding that it justified a stay with respect to the less physically invasive allegations, but not the more physically invasive ones. However, his reasons do make findings which are relevant to this criterion which I will review here.

(1.1) Likelihood of future state misconduct: There is no finding by the trial judge of a likelihood of future state misconduct.

(1.2) Egregious conduct: In my view, the trial judge did not find the Crown’s conduct to be so egregious that, even absent the likelihood of future misconduct, a stay was required. He concluded that the conduct, while giving rise to “serious concerns”, “... would not shock the community’s sense of fair play and decency so as to warrant a stay of all charges...”. He found it necessary to further consider society’s interest in a decision on the merits and to engage in a case by case analysis. Implicit in this is a finding that consideration of the second step in the analysis left the judge unclear as to whether a stay was required. This could rarely, if ever, be the case

with respect to past misconduct which, on its own, was so egregious that to continue in spite of it would constitute a new and ongoing abuse.

(1.3) Ongoing effects of past misconduct: The judge did not explicitly find that the inappropriate loss of objectivity "at the charging stage" had ongoing impact on the prosecution. As I read his reasons, he rejected the respondent's argument that the loss of objectivity extended beyond "the charging stage" which I take to be the time around the laying of the initial set of charges in March of 1995. 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. At the same time, however, the judge did not find (nor, in my view, could he) that had Crown objectivity been retained, the Crown would in fact have stayed some of the charges. On occasion, the judge's findings of loss of objectivity are expressed in sweeping terms and described in such a way as to suggest that it had a tainting effect on the whole prosecution. On other occasions, however, the loss of objectivity finding is expressed more narrowly and, as mentioned, is confined to "the charging stage".

[132] I conclude that, with respect to the first criterion considered at step two, the judge found neither a likelihood of future misconduct, nor that the past misconduct was so egregious that it demanded a stay in the absence of ongoing misconduct. He made no explicit finding that the loss of objectivity had ongoing effects on the prosecution. In some places in the reasons, it is implied that, as a result of it, the respondent may have been facing more charges than would have been prosecuted had that objectivity been

retained and that the loss of objectivity “at the charging stage” tainted the prosecution.

2. Second Criterion: No other remedy is capable of removing the prejudice:

[133] The trial judge did not give explicit consideration to this part of the test. Specifically, there is no discussion of whether the preferring of the direct indictment and the removal of Ms. Potts from the prosecution could be said to have reasonably removed the prejudice flowing from the loss of objectivity at the charging stage.

C. Step Three: Further Balancing:

[134] The judge was unclear as to whether the misconduct required a stay of some of the charges. He, therefore, addressed the question of balancing as earlier described. He essentially adopted the approach that Mr. Pearson had set out in his letter, except with respect to Count 16, which the judge stayed because of a finding of improper motive.

IV. ANALYSIS:

A. The Judge’s Stay of Proceedings:

1. Step One: Findings of Misconduct

(1.1) Improper Motive Re Count 16:

[135] In my respectful view, the judge’s conclusion that Count 16 was added to the direct indictment because of an improper motive on the part of the Crown must be set aside. This finding of improper motive is contradicted by the judge’s other findings and,

in any event, the motive for proceeding with this count identified by the judge was not improper.

[136] The judge found that, aside from the judge shopping incident involving Ms. Potts, there were no *mala fides* or improper purpose with respect to the actions of any Crown counsel. He stated that "... it appears to me that all other Crown counsel were well-intentioned throughout this process. They appear to be otherwise hard-working and competent counsel who simply lost perspective during the charging process." (emphasis added) As mentioned, he also noted that there was no bad faith or improper purpose in the decision to prefer the direct indictment. Count 16, it will be remembered, was added to the list of charges for the first time when the direct indictment was preferred.

[137] The judge made a specific finding of improper motive with respect to the decision to proceed with Count 16 involving CM. His decision to stay this count was based on his finding that it was pursued to justify the admission of evidence respecting a complainant who allegedly had been assaulted in Alberta. That allegation could not be pursued in the Nova Scotia courts, and the judge found that the motivation for proceeding with CM's complaint was that it would arguably permit the evidence of the Alberta complainant to be adduced as similar fact evidence.

[138] As noted, Count 16 was added at the direct indictment stage. The Crown's discretion to prefer a direct indictment is reviewable in the courts on the grounds that it has been exercised in bad faith, for an improper purpose or that its exercise constitutes

an abuse of process: see e.g. **R. v. Boutilier** (1995), 104 C.C.C. (3d) 327 (N.S.C.A.) at 334 - 5.; **R v. T.(V.)**, [1992] 1 S.C.R. 749 at 762 - 4. The propriety of the preferred indictment was challenged before the trial judge. He rejected this challenge.

[139] The direct indictment was signed by Mr. Reid and consented to by Mr. Pitzul. The judge's finding of improper motive with respect to this Count 16, which was charged for the first time in the direct indictment, therefore contradicts his earlier conclusion that there was no evidence of *mala fides* or improper motive in the decision to prefer the direct indictment and his finding that there were no *mala fides* or improper purpose on the part of any Crown counsel other than Ms. Potts. The effect of the judge's reasons is that Mr. Reid and Mr. Pitzul were found to be well-intentioned on page 392, ((1998), 21 C.R. (5th) 366) were found to be acting in good faith and for no improper purpose in preferring the direct indictment on pages 393 and 394, but then, at page 400, they were found to be acting for an improper motive in proceeding with a count that was added for the first time at the direct indictment stage. In my view, these findings are self-contradictory and irreconcilable.

[140] Even apart from this contradiction, in my opinion, the judge's finding of improper motive with respect to Count 16 cannot stand. 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. Even Mr. Pearson, whose objectivity is not questioned, did exactly that when he opined

that proceeding with certain charges would enhance the prospects of conviction. The finding of improper motive with respect to Count 16 is, in my opinion, clearly wrong.

[141] The judge's findings respecting Crown loss of objectivity are sometimes expressed in general terms. However, with respect to Count 16, the judge stopped well short of making a specific finding of loss of objectivity on the part of the Crowns involved in the decision to proceed with that charge. Instead, the trial judge refers to the possibility that loss of objectivity played some part in the decision to proceed with that count. He stated, after finding that the prosecution of Count 16 had been undertaken for an improper motive, that "Perhaps if the Crown had not been so involved with interviewing witnesses pre-charge, they may have seen all this in a different light."(emphasis added) As I read his reasons, the loss of objectivity which the judge found "at the changing stage", with respect to the other stayed counts, did not apply to this one.

[142] It follows, in my view, that the threshold requirement for a stay with respect to Count 16 was not satisfied and the trial judge erred in entering a judicial stay with respect to it.

(1.2) Loss of Objectivity: The Other Stayed Counts:

[143] As noted, the trial judge found that these charges should be stayed as abusive because there had been a loss, by "the Crown" of its objectivity "at the charging stage" in deciding whether these charges should be prosecuted. He also found, however, that

the decision to prefer the direct indictment was proper. These two findings cannot stand together. In my view, a prosecution cannot be, on one hand, so irremediably tainted by loss of objectivity that its continuation is abusive, and yet, on the other hand, the Crown discretion to prefer a direct indictment be found, as it was here, to have been properly exercised. Yet both of these conclusions were reached by the trial judge. In my opinion, if the Crown's discretion to prefer the direct indictment was properly exercised as the trial judge found, it must be taken to have been exercised with proper regard to the public interest in whether these charges should be prosecuted. There is no challenge to the judge's finding concerning the direct indictment. I, therefore, conclude that any loss of objectivity otherwise evident did not improperly affect this exercise of Crown discretion. This conclusion is also consistent with what I understand to be the judge's finding that the loss of objectivity was confined to "the charging stage", that is, around the time the first charges were laid in March of 1995.

[144] The judge expresses, at various points in his reasons, the conclusion that "the Crown" lost its objectivity in sweeping terms. However, virtually all of the specific findings of misconduct relate exclusively or primarily to Ms. Potts. The pre-charge interviewing which, in the judge's opinion, provided the clearest evidence of a loss of objectivity was conducted at Ms. Potts' request. The acts which are central to the judge's reasoning occurred before or around the time the charges were initially laid in March of 1995. Mr. Reid, lead counsel for the Crown at trial and apparently at the preliminary inquiry, did not become involved until after the charges were laid (he appears to have become involved in December of 1995). There is no finding that Mr.

Pitzul, who was Director of Public Prosecutions at the time of the direct indictment in April of 1997, became inappropriately part of the charging decision.

[145] I have already given an example of the sweeping terms in which the Crown is sometimes referred to in the judge's reasons in relation to Count 16. As noted, the judge stated that "Perhaps if the Crown had not been so involved with interviewing witnesses pre-charge, they may have seen all this in a different light." (emphasis added) It is difficult to know who the "they" referred to includes. Elsewhere, he held that Crown counsel lost perspective "at the charging stage".

[146] Mr. Pearson's letter advised that Count 16 should be proceeded with if possible. He, obviously, was not "tainted" by any pre-charge witness interviews. Ms. Potts was out of the picture when this count was added to the direct indictment (her involvement ceased at the time of the preliminary inquiry which ran from April, 1996 to April of 1997.) Moreover, Ms. Potts was involved in the preparation of, and apparently agreed with, the Pearson letter. Whatever effect her involvement in pre-charge interviewing had on her opinions with respect to other complainants, she appears to have remained firm in the view she shared with Mr. Pearson that this allegation should be pursued if possible.

[147] Ms. Smith had been involved in the interviewing. While there was a general finding that Crown counsel lost perspective "at the charging stage", there is no specific finding of inappropriate conduct made as regards her. She continued, apparently without objection, as co-counsel of record throughout the trial of the counts which were

not stayed.

[148] Mr. Reid appears to have interviewed the complainant in Count 16 before the direct indictment was preferred, but, as noted, the trial judge stopped well short of making a specific finding of loss of objectivity on his part. Mr. Reid was not involved "at the charging stage", that is when the charges were first laid in March of 1995.

[149] There is no finding that Mr. Pitzul was, in any way, involved in inappropriate activity and he was not involved "at the charging stage". On the contrary, the trial judge quashed a subpoena issued to him, holding that there was no evidence of *mala fides* or flagrant impropriety on his part.

[150] On these facts, the use of the all inclusive "they", and the suggestion that pre-charge interviewing may have skewed "their" judgment, appears to me to be unsupported by the trial judge's specific findings.

[151] In my view, the trial judge erred in generalizing about misconduct by "the Crown" given the narrowness of his specific conclusions that the loss of objectivity occurred at the charging stage. The only specific finding of misconduct by anyone apart from Ms. Potts was the conclusion that Count 16 was added to the direct indictment for an improper motive, a finding which, in my opinion, contradicts other findings made by the judge and is wrong in any event. What remains is a specific finding of misconduct by one Crown Attorney whose involvement in the matter ended at the time of the

preliminary inquiry and before the direct indictment was, as the trial judge found, properly preferred.

[152] The trial judge states in his reasons that collaboration between the Crown and the police in the charging decision is wrong. With great respect, I disagree.

[153] There is no dispute on this appeal that the responsibility and authority to make the decision to charge criminal offences in this Province rests with the police. There is also no dispute that the Crown may, on request, properly give legal advice to the police in the course of an investigation, including advice about the strength of the case. Moreover, there is no dispute that the Crown has the authority to stay charges that have been laid by the police. Accordingly, there may be disagreement between the police and the Crown about whether charges should proceed. The trial judge seems to have been of the opinion that there is something inherently wrong with the two coming to an agreement after an initial disagreement so that the decision to charge is, in essence, a joint one in the sense that the Crown will prosecute the charges laid by the police.

[154] There is no basis in law for such a conclusion, in my view. Instructive in this regard is the policy of the Solicitor General which, in my opinion, contemplates what is, in essence, a joint charging decision as part of a protocol to resolve disagreements between the police and the Crown. There is no challenge to the legality or propriety of this Directive issued to the police in February, 1990. The Directive affirms the “ultimate right and duty” of the police to determine the form and content of charges to be laid, as

well as the Crown's right to withdraw or stay the charges after they have been laid. The Directive continues:

> 2. 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. (emphasis added)

[155] To my way of thinking, this Directive is not only lawful, but sensible. 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 them to attempt to avoid unnecessary disagreements about whether charges should proceed. Putting aside the risk to public confidence in the administration of justice which such disagreements may create, the interests of the potential accused person are also served by proper attempts to resolve them. The damage to a person that flows from the laying of a charge cannot be undone if it is subsequently stayed by the Crown. If the charge is not to be proceeded with, it is beneficial to the accused that it not be laid in the first place. I accordingly do not agree with the trial judge when he states that

"...cooperation [i.e. between the police and the Crown] should never lead [to] collaboration with the charging decision." In my view, there is nothing objectionable, let alone contrary to the **Charter of Rights**, in collaboration provided that the independence and distinctive roles of each are scrupulously respected and neither is improperly motivated.

[156] There is considerable discussion in the judge's reasons about pre-charge interviews of witnesses by the Crown.

[157] The trial judge expressed the view that pre-charge witness interviewing inevitably makes it humanly impossible for the Crown to properly exercise its authority to stay charges in the public interest. He stated that "[i]t is <u>impossible</u> to retain the requisite level of objectivity by conducting lengthy (and no doubt emotional) pre-charge interviews... <u>Human nature will just not allow it.</u>" With great respect, this conclusion is not correct.

[158] There is no dispute in this case that post-charge interviews by the Crown are acceptable and, indeed, commonplace. If that is so, and the trial judge is right that interviews inevitably result in improper loss of objectivity, how can the Crown ever exercise its authority fairly and in the public interest after post-charge interviews have occurred? The obligation to be fair-minded is ongoing, but on the trial judge's reasoning, human nature would not allow it to be fulfilled. The Crown frequently

exercises its power to stay proceedings well after charges have been laid, such as, for example, after the preliminary inquiry. On the judge's reasoning, these decisions would all be improper because it is not humanly possible for the Crown to act with proper objectivity after having interviewed the witnesses. I do not accept this reasoning which is so substantially at odds with experience and the ongoing responsibility of the Crown throughout the process.

[159] The trial judge recognized that, in certain cases, there is nothing objectionable about pre-charge witness interviewing by Crown Attorneys. These cases included youthful witnesses, historical sexual assaults, jailhouse informers, witnesses who claim to have recovered memories and witnesses of questionable motive. If interviewing is acceptable in these cases, there cannot be any inevitable tainting of a prosecution simply because a witness has been interviewed pre-charge.

[160] There also seem to me to be many sound practical and policy reasons for retaining flexibility on the question of Crown pre-charge interviews. Many of them were set out in the submissions of the Attorney General of Canada which I accept in large measure. They include:

(i) Several factors require close co-operation between investigators and prosecutors. The complexity of many modern prosecutions, particularly in drug and commercial crime cases, the requirements that the police comply with the **Charter**, and the requirement for pre-authorization of investigative techniques, especially wire-tap, are examples.

(ii) The trial judge's insistence on a strict separation of roles of the police and the Crown would make it difficult or impossible to maintain integrated offices comprised of lawyers and investigators in areas such a war-crimes, proceeds of crime and competition offences.

(iii) There are several provisions in the **Criminal Code** and other federal statutes that require the consent of the Attorney General of Canada to institute proceedings. I do not understand why it would be in the public interest to preclude the Attorney General, personally or through counsel, from interviewing witnesses in deciding whether to grant such consent.

(iv) The trial judge's decision, while expressly not dealing with pre-charge screening, seems to me to inevitably have an adverse effect on such screening. In my view, there is no good reason why such screening should depend solely on the police assessment of credibility, particularly in the case of witnesses such as "jail house " informers and those seeking immunity or other benefits. Any banning of pre-charge interviewing would not serve the administration of justice in such cases.

(v) There are sound policy arguments favouring a role for the Crown in charging decisions rather than confining the Crown's role to staying charges after they have been laid. As Edward L. Greenspan and George Jonas said in their book, *Greenspan The Case For the Defence (*1987) at page 16 : "Leaving the decision to lay charges up to the Crown may reduce the chances of frivolous or inhumane (and very costly) prosecutions. It may also reduce the needless overcrowding of the

courts." I do not make this point to cast doubt in any way on the clear position in this Province that the duty and responsibility for the form and content of charges laid belongs with the police. I simply note that, contrary to what the trial judge implies in his reasons, there is nothing inherently suspect about Crown involvement in the charging decision.

(vi) The prosecution policies of both New Brunswick and Ontario permit pre-charge witness interviewing. While the judge made no clear finding on this point, there was abundant evidence on the point which he apparently did not reject. It would be strange if an aspect of criminal practice which is acceptable in one Province should be found to offend the **Charter** in another.

[161] For all of these reasons, I cannot accept the view that pre-charge Crown interviews inevitably result in the inability of the Crown to discharge its duties fairly and in the public interest.

[162] It is unclear to me whether the trial judge intended his holding to go that far in any case. While there are passages in the reasons which seem to do so, there are others where the focus is much narrower. For example, he says at page 391 (21 C.R. (5th)) of his reasons:

> 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.

[163] It appears in this and the following passages that the judge based his holding on the narrower ground that the pre-charge interviewing in this case was not conducted for the purpose of reviewing whether the charges should proceed in the public interest and that this showed that the Crowns involved in such interviews denied the accused "... that hard objective second look (at the charging decision) which is so fundamental to the role of the Crown." Given my opinion that the broader basis of holding all pre-charge interviews to be wrong cannot be sustained, and that the trial judge's reasons are capable of this narrower reading, I will proceed on the basis that it represents the foundation of his reasoning. It follows that there is nothing inherently wrong with pre-charge Crown interviewing and while undertaking it in this case led, in the trial judge's view, to a loss of objectivity "at the charging stage", there was nothing inherently insidious about the activity.

[164] I should also address the respondent's submissions on appeal which implied that there is something wrong with the Crown encouraging reluctant complainants to come forward. The trial judge made no such finding. Particularly with respect to sexual offences in which victim confidence in the justice system appears to be especially low, there is nothing wrong with the Crown, by proper and ethical means, encouraging alleged victims to proceed to court.

2. Step Two:

(2.1) First criterion: will the prejudice caused by the abuse in question be manifested, perpetuated or aggravated through the conduct of the trial or its outcome?

[165] As the Supreme Court of Canada noted in **Tobiass**, this criterion is critical, because it focuses the analysis on the crucial point that a stay is not a remedy for past misconduct, but to prevent further damage to the integrity of the judicial process which will result if the prosecution is allowed to continue. In my view, the trial judge erred fundamentally with respect to this critical part of the analysis.

[166] In his summary of the legal principles, the trial judge said this:

> 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?

[167] This statement reflects the analysis conducted by the trial judge. In my view, both the statement and the approach to the case which it reflects are in error. They wrongly focus on the "alleged wrongdoings" rather than on the future harm to the integrity of the administration of justice. The latter, as the Supreme Court said in **Tobiass**, is the critical consideration. This statement by the trial judge is, in my view, an error of law which led the trial judge to ask himself the wrong question.

[168] The trial judge did not apply either of the two criteria set out at the second stage of the analysis in **Tobiass** to the facts as he found them. He made no finding that the prejudice flowing from the abuse would be manifested, perpetuated or aggravated by the trial or its outcome or that a stay was the only effective remedy. However, his 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.

[169] In my respectful view, this analysis overlooks the proper preferring of the direct indictment. Any finding of ongoing harm (which, of course, the trial judge did not make in any case) is inconsistent with a proper decision, reflected in the direct indictment, to proceed to trial on the charges. Moreover, in approaching the case in this way, the judge made two other errors. First, the premise of the judge’s approach appears to be that, had objectivity been retained, only the charges which Mr. Pearson advised the police to proceed with would, in fact, have gone ahead; however, this premise is not supported by the judge’s factual findings or by the record. The trial judge did not find, although he was urged by the respondent to do so, that the counts stayed by the trial judge would have been stayed by the Crown had Mr. Pearson remained in office. The record would clearly not sustain such a finding. Mr. Pearson’s letter falls far short of establishing that the respondent, in fact, was facing more charges than he would have had Crown objectivity been retained. Second, the judge asked himself the wrong question with respect to whether a stay should be granted. In my opinion, he, in effect,

asked himself how what he thought had been lost by the respondent could be restored, rather than whether the continuation of the prosecution would cause further harm to the integrity of the administration of justice.

[170] The trial judge made no explicit finding that future state misconduct was likely. Although it was argued by the respondent before the trial judge that the "... Crown's lack of objectivity extended beyond the charging stage...", the trial judge did not accept this submission. As I read the judge's reasons, the misconduct which he found to have occurred related to what he called the "charging stage" of the proceedings. He said that the accused had been "... denied a critical Crown review at the charging stage." In my view, there was no finding of a likelihood of future state misconduct.

[171] The suggestion that the loss of Crown objectivity at "the charging stage" found by the trial judge has ongoing and incurable effects on the prosecution must be based on two premises. These premises are, first, that the obligation of the Crown to consider whether the prosecution is in the public interest must be made, once and for all, at a particular moment in time, namely, immediately after charges are laid by the police and, second, that this decision cannot be revised or revisited thereafter. In short, the suggestion is that the wrong-headed actions early in the prosecution are irremediable. In my view, neither of these propositions is correct.

[172] There is no specific time-limited period in which the Crown must act fairly and in the public interest. It is a continuing obligation, not an obligation that is expended once

an initial decision has been made at “the charging stage”. The nature of the Crown’s duty and obligation does not change after an initial review of the charges. It is open to the Crown to revisit its initial judgment and either, to stay a proceeding at any time which it considers contrary to the public interest or, after staying proceedings, to decide to continue with them within one year of entering the stay: see **Criminal Code**, s. 579.

[173] Attributing drastic and incurable impact to any loss of objectivity at “the charging stage” ignores, in my view, the preferring of the direct indictment in April of 1997. The trial judge refused to interfere with the exercise of the Crown’s discretion in this regard. The finding that the discretion to prefer the direct indictment was properly exercised, in my opinion, puts an end to any ongoing effects of any earlier defects in the Crown’s consideration of whether to proceed. The decision to prefer the direct indictment reflected a decision to proceed to trial with these charges made with the personal consent of the Director of Public Prosecutions against whom no finding of loss of objectivity was made. A prosecution cannot on one hand be so irremediably tainted by Crown loss of objectivity that its continuation is abusive, and yet, on the other hand, the Crown’s discretion to prefer a direct indictment be found to have been properly exercised. Yet this is what the trial judge appears to have held. If there were ongoing harm from the loss of objectivity “at the charging stage”, it came to an end when the Crown’s discretion was properly exercised at the time the direct indictment was preferred.

[174] The defence has a further submission in this regard. It is submitted that the loss of objectivity, particularly by Ms. Potts, tainted all Crowns involved in the prosecution. This is so, it is argued, because the Crown is "indivisible." I cannot accept this argument.

[175] If this argument is correct, every serious error by an individual Crown prosecutor is incurable through subsequent proper action by other Crowns. This is not the law, as decisions such as **R. v. O'Connor**, [1995] 4 S.C.R. 411 and **Tobiass, supra** illustrate. In both of those cases, there was very serious misconduct by Crown counsel, but all other Crowns were not found to be tainted as a result.

[176] The respondent relies on **R. v. Young** (1984), 13 C.C.C.(3d) 1 (Ont.C.A.), but in my view, such reliance is misplaced. Dubin, J.A (as he then was) commented in that case at page 34 that the executive is indivisible . This was said in the context of his rejection of the Crown's submission that prior acts of the executive with respect to the accused should be ignored as irrelevant. In my view, Dubin J.A.'s comment is simply a statement, with which I agree, that all of the actions of the executive are relevant to assessing whether the continuation of the prosecution would offend the community's sense of fair play and decency. The comment provides no support for the proposition advanced by the respondent that improper actions proved to have been taken by one Crown Attorney are to be attributed to all other Crown Attorneys.

[177] In my view, what **Young** means, for the purpose of the case before us, is this. The actions of Ms. Potts are not to be ignored and the Crown is responsible for them; but her failings are not somehow to be attributed vicariously to all other Crowns involved. The fact that Ms. Potts lost objectivity is not evidence that anyone else did.

[178] I conclude that the judge did not find that the prejudice flowing from the abuse would be manifested, perpetuated or aggravated by the trial or its outcome. In any case, such a finding could not have been made given the judge's conclusion that the Crown's discretion to prefer the direct indictment was properly exercised.

[179] In granting the stay of proceedings, the judge, in effect, implemented Mr. Pearson's advice to the police. The judge stayed those charges which he thought, on the basis of Mr. Pearson's letter, that Mr. Pearson would not have proceeded with had he remained in office. In effect, and as the respondent submitted on this appeal, the trial judge remedied the past misconduct by attempting to reconstruct what would have happened had Mr. Pearson or his successors maintained the position set out in his letter of advice and stayed the charges which he advised the police not to lay. In other words, the trial judge remedied the loss of objectivity by giving effect, through a judicial stay, to Mr. Pearson's advice or, in the case of charges on which Mr. Pearson did not opine, the judge's view of what Mr. Pearson would have said, had he been asked.

[180] In my opinion, this approach reflects a fundamental misapprehension of the role of the court in considering the remedy of a stay for allegedly abusive proceedings. The

Supreme Court of Canada stated in **Tobiass** that a stay of proceedings for abuse of process is not a remedy for past wrongs of the state, but a remedy aimed at preventing the perpetuation or aggravation of the abuse. As the Court put it at 428, "... a stay of proceedings is a prospective remedy...[it] does not redress a wrong that has already been done. 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." The purpose of a stay of proceedings is not to restore the accused to the position he or she would have been in prior to the breach of duty by the state. The question on a stay application is not how to undo the errors of the past, but whether, in light of that misconduct, the present circumstances and other possible remedial actions short of a stay, the continuation of the proceedings will be damaging to the integrity of the judicial process.

[181] In my view, the trial judge focused incorrectly on how to provide a remedy for past misconduct rather than on the correct issue of the effect of the continuation of the proceedings on the integrity of the judicial process. As the respondent put it in his factum, the trial judge's use of the Pearson letter allowed the judge to "put the Respondent back in the position he would have been in had the Crown respected its role." This approach was wrong in law.

[182] Through his use of Mr. Pearson's letter, the trial judge tried to restore to the respondent the lost benefit of an objective review which might have resulted in having the Crown's discretion not to proceed with charges exercised in the respondent's

favour. As I mentioned earlier, I do not accept that this objective review was lost forever given the trial judge's finding that the Crown's discretion was properly exercised in relation to the direct indictment. But even if it was irretrievably lost, the proper question in relation to whether the proceedings should be stayed is whether they should be stayed as abusive given it has been lost, not whether a stay of proceedings will restore it to the respondent.

[183] In my respectful view, the trial judge's extensive reliance on the Pearson letter for this purpose was wrong. He stated that Mr. Pearson's letter should be "... afforded significant deference" in determining whether or not to stay the various counts. This approach, in my view, fundamentally misapprehends the role of the court in considering whether a prosecution should be stayed as an abuse of process.

[184] The discretionary considerations relevant to the Crown's decision to proceed or not with a charge are entirely different than the matters which must be considered by a court deciding whether proceedings should be stayed because they are abusive. The Crown may properly decide not to allow charges to proceed even though the prosecution of those charges would in no sense be abusive. The range of considerations which the Crown may properly take into account in exercising its discretion is very wide; the Crown may take account of the public interest in a broad sense of the word. This wide-ranging and discretionary mandate is in sharp contrast to the role of the court in granting a judicial stay of abusive proceedings. The Court is to act only on the basis of serious affronts to the most fundamental and deeply embedded

notions of justice in our society and is to issue a stay only in the clearest of cases.

[185] No one on this appeal took exception to Mr. Pearson's advice. By the same token, however, there is no dispute in this case that another objective and fair-minded Crown, with equal propriety, could have advised that all charges proceed. It is, therefore, wrong to adopt Mr. Pearson's advice as the basis for judicially staying these charges. The questions upon which Mr. Pearson gave advice bear no resemblance to the questions faced by a trial judge who is asked to stay allegedly abusive proceedings. Mr. Pearson had to decide what he thought, on balance, was in the best interests of the public, not, as does a judge, whether the continuation of the prosecution would be so damaging to the integrity of the judicial process that the only option is to stay it.

[186] As I read the trial judge's decision, he thought that the Crown's failure to give effect after charges were laid, to Mr. Pearson's pre-charge advice by staying the charges, made the Crown conduct improper. The judge seems to have been of the view that it was impermissible for the Crown later to depart from the opinion given by Mr. Pearson to the police. It is suggested that the Crown had somehow crystalized its position in Mr. Pearson's letter and there was some onus on the Crown to justify its "change" of position thereafter. I cannot accept these views.

[187] Mr. Pearson was offering advice to the police at their request. While he reminded them of both their independence in laying charges and his authority to stay them, he did not say that he would stay charges if they were laid. With respect to some

of the charges he recommended not be laid, Mr. Pearson was not opposed to attempting to introduce them as similar fact evidence if charges were laid, an option which, in the trial judge's view, was foreclosed after these charges were judicially stayed: see **R. v. Regan** (1998), 131 C.C.C. (3d) 286 (N.S.S.C.). Had the police persisted in laying the charges against his advice, it is a matter of speculation whether Mr. Pearson would have stayed the charges or not. It is one thing to provide advice that charges not be laid and quite another to refuse to proceed with them once they have been laid. Having taken no firm position, but simply offered advice before any charges were laid, it cannot be said, in my opinion, that there was any position to change.

[188] The respondent, like the trial judge, refers to the decision of this Court in **R. v. Boutilier** (1995), 104 C.C.C. (3d) 327 (N.S.C.A.), to support the proposition that there was an improper "change of position" by the Crown after Mr. Pearson's letter. I do not think **Boutilier** supports this submission. That case is concerned with the exercise of Crown discretion for an improper purpose. As Justice Freeman stated for the Court in **Boutilier, supra**, the Crown's discretion as to whether a charge will be proceeded with by indictment or on summary conviction is subject to judicial review "... only for flagrant impropriety or improper or arbitrary motives." : at 334 - 5. **Boutilier** is an example of such improper motives because the Court found that the choice of proceeding by indictment on a replacement information was for the purpose of avoiding the limitation period which would have barred proceeding by summary conviction. Justice Freeman

concluded at 341 : "The Crown discretion was to be used for the wrong purpose, a purpose precluded by its previous valid exercise, and one that could not stand up to objective scrutiny. Its use for an inappropriate purpose would be unfair and oppressive." (emphasis added)

[189] The correctness of **Boutilier** has been doubted: see, e.g., **R.v. Kelly** (1998), 128 C.C.C. (3d) 206 (Ont.C.A.). However, I do not think it necessary to revisit our decision in **Boutilier** because its reasoning proceeds from two principles that I think are not controversial. The first is that the Court is entitled to review the exercise of prosecutorial discretion where it is exercised for improper motives. This principle has been stated by the Supreme Court of Canada before and after **Boutilier** and I think is settled law. The second principle is that the use of the Crown's discretion for the purpose of circumventing a procedural defence may constitute such an improper motive. I do not think that the Ontario Court of Appeal would take issue with this proposition given its decision in **Re Parkin and The Queen** (1986), 28 C.C.C. (3d) 252 (Ont. C.A.). There a stay was granted where the Crown, part way through a trial, was granted permission to withdraw the summary charge and present a new information to be proceeded with indictably when it emerged that the evidence would likely support a finding that the alleged criminal activity had occurred beyond the six month time limit for summary proceedings. While, on the particular facts of **Boutilier**, there may be disagreement about whether the improper motive was established or whether it called for a stay of proceedings, I do not sense any disagreement in the cases with the two

fundamental principles relied on in **Boutilier**. As noted earlier, the trial judge here found no improper motive in proceeding with the charges (other than Count 16) and, therefore, the principles enunciated in **Boutilier** are not implicated with respect to them.

[190] Mr. Pearson's letter did not address four of the complainants' allegations because they were not advanced by the police as possible charges at the time of his letter. The trial judge nonetheless stayed these charges on the basis that Mr. Pearson would have recommended against proceeding had he considered the issue. In other words, Mr. Pearson's advice to the police on other potential charges, with no firm indication that he would stay those charges if laid, was used as the basis of a judicial stay of other charges which Mr. Pearson did not consider. With great respect, the "change of position" reasoning, even if valid in connection with the allegations actually considered by Mr. Pearson, has no relevance to an argument that the Crown "changed its position" in relation to allegations which Mr. Pearson did not consider. The Crown took no position on matters it had not even considered.

[191] The trial judge appears to have applied the "change of position" reasoning with respect to Count 9 (MG) even though there was no recommendation by Mr. Pearson with respect to this allegation. The police did not at the time propose to lay a charge with respect to it. In considering this count, the trial judge stated that his "... reasoning for granting a stay of the HM charge [count 7] applies equally to this [i.e., count 9] charge." (emphasis added). In his reasons respecting count 7, the trial judge referred to

the Crown's "change of heart" which refers to his earlier comments that "...the Crown should not be seen to significantly change its position without valid reason." The trial judge incorporated this reasoning as a basis for his conclusion with respect to count 9, but this is clearly in error. Even if the "change of position" reasoning is sound with respect to cases on which Mr. Pearson offered advice, it surely cannot be applied to cases where no advice was given.

[192] As the trial judge recognized, the "change of position" reasoning cannot be applied to Count 16 because Mr. Pearson did not recommend against proceeding with that charge. Far from it. With respect to that count, Mr. Pearson wrote: "... the case against Regan would be significantly enhanced if some of the more recent incidents were proceeded with. We recommend you make further contact with the women in cases "D" to "I" [Count 16 was case "I"] if you decide to proceed with charges relating to other incidents. ... They may be willing to assist if a prosecution is actually commenced." Even if Mr. Pearson's advice is taken to be "a position", there was no change of position by the Crown with respect to this count.

[193] I conclude that the change of position reasoning should not have been applied to any of the stayed counts because no firm position that any counts would be stayed by the Crown had been taken. Moreover, there clearly could have been no change of position with respect to Counts 9, 10, 14 and 18 because no recommendation was made by Mr. Pearson with respect to them. Similarly, as the trial judge recognized, there can be no "change of position" with respect to Count 16 because Mr. Pearson

favoured proceeding with it, if possible, because proceeding with a charge on that allegation would, in his view, “substantially enhance” the prospects of conviction.

[194] It may be that this “change of position” reasoning was not a substantial basis of the trial judge’s conclusions. The fact that he reached the same conclusion with respect to counts on which Mr. Pearson either did not opine or on which his opinion was in fact the opposite, suggests that the judge’s reliance on the “change of position” reasoning was not central to his decision to issue the stays. However, in my opinion, this reasoning does not to any degree support the conclusion that judicially staying these counts was appropriate.

[195] I conclude, therefore, that the judge erred in finding that the first criterion of the second stage, i.e., that the prejudice caused by the abuse will be manifested, perpetuated or aggravated through the conduct of the trial or by its outcome, had been established.

(2.2) No Other Remedy is Reasonably Capable of Removing that Prejudice:

[196] The judge did not expressly consider this criterion. In my view, it is clearly not satisfied here. The finding of improper motive with respect to Count 16 cannot stand. Ms. Potts’ removal from the case, and the proper exercise of Crown discretion with respect to the direct indictment, provide sufficient remedies for any further harm to the integrity of the judicial process which would otherwise be caused by the continuation of the prosecution.

3. Step Three: Revisiting the Balancing:

[197] In my view, if proper legal principles had been applied to the trial judge's specific and sustainable findings, the inevitable conclusion would have been that neither of the two criteria at the second stage were satisfied. The prejudice would not be manifested, perpetuated or aggravated by continuation of the prosecution and the steps already taken, i.e., Ms. Potts removal and the proper preferring of the direct indictment, were reasonably capable of removing any further prejudice flowing from the earlier misconduct. In my view, therefore, the third stage of the analysis is not reached in this case.

[198] Assuming for the moment that I am in error and that the judge was correct to revisit at the third stage the balance of interests served by granting the stay and the societal interest in proceeding, I think the judge erred in failing to consider such societal interest with respect to the cases which he stayed. In his discussion of the stayed counts, there is no mention of any societal interest in proceeding. It is impossible to do the required balancing if only one side of the scale is considered.

[199] For example, three of the stayed counts involve allegations of sexual offences against girls ranging in age between 13 and 16. They were allegedly employed by the respondent as babysitters or, in one case, as a live-in housekeeper. The alleged circumstances, particularly the age of the alleged victims and the employment relationship, could be viewed as giving rise to a relationship of trust. There were allegations in the record that some of the complainants felt abused and yet powerless to

proceed. While the societal interest in proceeding is heavily influenced by the seriousness of the charge, the degree of physical invasiveness is not the only measure of the seriousness of alleged sexual offences against children. Thus, although the alleged conduct is not as physically intrusive as is present in many charges of sexual offences, the circumstances of the alleged misconduct support a societal interest in proceeding which should have been taken into account. In addition, the use of judicial power to prevent a fair trial of a criminal charge on its merits is, itself, attended by some risk of damage to the integrity of the judicial process. This risk of staying the proceedings should also have been taken into account. I am not attempting to be exhaustive, but simply to illustrate that if, contrary to my conclusion, the further balancing at the third stage of societal interests in proceeding was appropriate here, the interest in proceeding side of the scale was not empty and the trial judge erred in failing to consider it. In saying this, I emphasize that at this pre-trial stage the circumstances to which I refer are unproved allegations and nothing more.

B. Should a Stay be Entered by the Court of Appeal?

[200] The respondent argues that even if, as I would hold, the trial judge committed reversible error, this Court should exercise its "independent discretion", pursuant to s. 686(8) of the **Criminal Code**, to stay these charges. In connection with this submission, the respondent also asks that we order production of any notes or other record of any contact with the complainants in the stayed counts which relate in any way to their willingness or unwillingness to proceed as complainants since the charges

were stayed on April 2, 1998. The respondent further seeks leave to adduce fresh evidence on the appeal relating to media reports concerning allegations against the respondent following the lifting of publication bans on such information and excerpts from the transcript of the trial of the respondent on the counts which were not stayed concerning the use of “tip sheets”. This relates to the record keeping practices of the police and specifically to whether information on tip sheets was accurate and could constitute prior statements of the witnesses whose comments were reported.

[201] In essence, the application for production is made in support of the respondent’s submission that the Court of Appeal should determine whether the complainants are willing to proceed and, if they are not, to stay the proceedings. In my view, that is not a proper function of an appellate court. An indication of unwillingness to proceed, if given, is not irrevocable; in my view, the Crown and the complainants are entitled to decide on the future of these charges in light of the decision of the Court on this appeal. It follows that I would not order production of the material sought in this regard.

[202] As for the fresh evidence, it is sought to bolster the submission that a future trial, if the stay is lifted, could not be fair. In my view, a claim that a future trial will be adjudicatively unfair should, in general, be considered by a trial judge, not at an evidentiary hearing in the Court of Appeal. This is especially the case with respect to the issues of pre-trial publicity and contamination of evidence which the respondent seeks to raise. I would dismiss the application to adduce the fresh evidence because its admission is sought in support of submissions which are not properly made in the

context of this appeal.

[203] There are also several submissions by the respondent which do not depend on the material sought to be produced or adduced as fresh evidence but which urge this Court to exercise its authority to stay these proceedings. Some of these submissions raise arguments which the trial judge rejected, others in essence re-state the findings of the trial judge. Having found reversible error on the part of the trial judge and that his conclusions could not be sustained if correct legal principles were applied, I would not exercise the independent discretion of the Court of Appeal to stay these charges.

V. DISPOSITION:

[204] For these reasons, I would allow the appeal and set aside the stays of proceedings entered by the trial judge.

Cromwell, J.A.

Concurred in:

Roscoe, J.A.