NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Mitchell*, 2022 NSCA 77

Date: 20221213
Docket: CAC 508195
Registry: Halifax

Between:

His Majesty the King

Appellant

v.

Nicholas John Mitchell

Respondent

Judge:	The Honourable Justice Carole A. Beaton
Appeal Heard:	September 15, 2022, in Halifax, Nova Scotia
Subject:	Application – *Charter*; *Charter* s.7; Criminal; Reasons; Stay of proceedings; sufficiency of reasons.
Cases Considered:	*R. v. Stairs*, 2022 SCC 11; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Desmond*, 2020 NSCA 1; *Thanni v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 353; *R. v. Teskey*, 2007 SCC 25; *R. v. C.D.*, 2021 NUCA 21; *R. v. Algiak*, 2022 NUCA 5; *Nova Scotia (Minister of Community Services) v. J.P.*, 2021 NSCA 45; *R. v. Bellusci*, 2012 SCC 44; *R. v. Babos*, 2014 SCC 16; *R. v. Regan*, 2002 SCC 12; *R. v. Washington*, 2007 BCCA 540; *R. v. Chapman*, 2020 SKCA 11
Summary:	The judge heard a pre-trial application by the accused alleging a breach of his s.7 *Charter* rights and seeking imposition of a stay. The judge delivered oral reasons granting the stay, given the trial was pending. He advised written, more detailed reasons would follow. After the oral reasons the Crown filed a Notice of Appeal. The judge then

provided written reasons within the time timeframe he had identified in his oral remarks.

The judge granted the stay, applying the framework set out in *R. v. Babos*, 2014 SCC 16. He concluded the only appropriate sanction for the egregious conduct of the police, who had barged into the accused's residence late at night without a warrant, was a stay of all charges.

Issues: Should the judge's written decision, following after he rendered oral reasons, be disregarded on appeal?

Did the judge err in concluding the only remedy for breach of the accused's s.7 *Charter* right was a stay of proceedings?

Result: The Court is entitled to consider the judge's written reasons in assessing the record. Written reasons were expressly contemplated in the oral decision which had been given to avoid the parties preparing for trial. The written reasons did not materially alter the oral ones, despite the Crown having filed a Notice of Appeal in the interim between both sets of reasons. Nor did the written reasons appear to have incorporated results-driven reasoning.

The judge applied the correct test for imposition of a stay and exercised his discretion to balance the competing factors. The circumstances before him arguably justified the imposition of a stay and deference must be shown on appeal.

The appeal is dismissed.

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Appellant

v.

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Respondent

Judges:	Bryson, Van den Eynden and Beaton, JJ.A.
Appeal Heard:	September 15, 2022, in Halifax, Nova Scotia
Written Release:	December 13, 2022
Held:	Appeal dismissed, per reasons for judgment of Beaton J.A.; Bryson and Van den Eynden, JJ.A. concurring.
Counsel:	Glenn Hubbard, for the appellant Jack MacDonald, for the respondent

Reasons for judgment:

[1] The creed "a man's home is his castle" has endured for over four hundred years. Recently, in *R. v. Stairs*, 2022 SCC 11 the Supreme Court of Canada again commented on this widely understood legal principle in more modern terms:

> [49] This Court has emphasized time and again that a person's home attracts a high expectation of privacy. A fundamental and longstanding principle of a free society is that a person's home is their castle (*Eccles v. Bourque*, [1975] 2 S.C.R. 739, at pp. 742-43, per Dickson J. (as he then was), citing *Semayne's Case* (1604), 5 Co. Rep. 91a, 77 E.R. 194, at p. 195). The home is 'where our most intimate and private activities are most likely to take place' (*R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 22). Moreover, this Court recognized in *R. v. Silveira*, [1995] 2 S.C.R. 297, at para. 140, per Cory J., that '[t]here is no place on earth where persons can have a greater expectation of privacy than within their "dwelling-house".'

[2] The privacy of the respondent Mr. Mitchell's home was not respected when police entered it to arrest him without a warrant. In a hearing before the Honourable Judge Gregory Lenehan of the Provincial Court of Nova Scotia ("the judge"), the Crown properly conceded Mr. Mitchell's Section 8 *Charter* right to be secure against unreasonable search or seizure had been violated by the police conduct. Mr. Mitchell went further, submitting his Section 7 *Charter* right to life, liberty and security of the person had also been breached by the police, amounting to an abuse of process. The judge agreed. He concluded it was one of those "clearest of cases",[1] for which the only appropriate remedy was a stay of all the charges against Mr. Mitchell which had prompted the police visit to his home.

[3] The Crown appeals from the judge's decision on the s.7 *Charter* application. For the reasons that follow, I would dismiss the appeal.

[4] The events that unfolded at the home of Mr. Mitchell on March 4, 2020 provide context for the issue before the judge. At approximately 1 a.m. on that date, three members of the Tantallon, Nova Scotia detachment of the RCMP attended the home, intending to arrest Mr. Mitchell on 32 charges related to allegations of domestic violence arising from a relationship that had ended months earlier. The complainant had revealed her allegations a few hours prior to the police visit. At the time, Mr. Mitchell was required to abide by, among other conditions, a court-imposed daily curfew associated with other unrelated charges

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1 *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 68.

he was then facing. Thus, the officers expected to find him at home, and he opened the door to their knock. Informed the police wished to arrest him, and confirming they did not have a warrant to do so, Mr. Mitchell closed and locked his front door.

[5] The police response was exceedingly swift. Unaware dashcam video on the police cruiser parked closest to the home was recording the scene, it took the lead officer, who had been positioned farthest away from the home, a mere eight seconds after Mr. Mitchell shut his door to sprint across the yard and kick it open.

[6] All three officers entered the home. They later testified they had done so out of concern Mr. Mitchell would arm himself inside the home. In any event, a brief but intense physical struggle ensued. Mr. Mitchell was pulled down a stairwell by the officers and removed from his residence by force. Once outside (as the same dashcam recorded) the officers put a shirtless and barefoot Mr. Mitchell to the ground and placed him under arrest. Unbeknownst to the officers, Mr. Mitchell had previously undergone surgical reconstruction of his right hip joint, which he very soon after reported had been aggravated during the physical contest with the officers. Further details regarding the police conduct will be set out later in these reasons.

[7] At a July 9, 2021 pre-trial application, Mr. Mitchell argued his s.7 *Charter* rights had been breached by the improper police action. He sought a stay of all the charges arising from his former girlfriend's allegations. The judge received the evidence of the three officers, Mr. Mitchell and his then girlfriend, who was present in the home during the March 4 event. The judge also viewed the dashcam footage.

[8] The judge gave oral reasons on the application ("the oral decision") on July 13, 2021. Cognizant that trial of the matter was scheduled for August 18th, at the outset of his remarks the judge advised that he was providing an abbreviated decision to permit the parties to know whether to prepare for trial. He said:

> I will provide a more fulsome decision later with reasons. It is important today that counsel, Mr. Mitchell and the witnesses in this matter know whether the matter will be proceeding to trial as scheduled.

[9] Later in his remarks he again reserved the right to provide more extensive written reasons, indicating:

> As I said, I will provide more fulsome reasons at a later date and those reasons, hopefully, will be forwarded to Crown and Defence electronically and I'll endeavour to do so by mid-September.

[10] Regardless, the Crown filed its Notice of Appeal from the judge's oral decision on August 10, 2021. The judge released his written reasons ("the written decision") on September 14, 2021. He began that decision by noting "…I indicated that more fulsome reasons would follow. These are my comments provided at the time of the stay decision with those more fulsome reasons…".

[11] The Crown's focus in this appeal is that the judge erred in concluding the circumstances of the police entry into Mr. Mitchell's home constituted one of those clearest of cases, warranting the extreme remedy of imposition of a stay of all charges to properly sanction the conduct of the police. The Crown also maintains the judge's written decision should be disregarded in assessing the merits of the appeal, as it improperly and "fundamentally altered" the reasons found in the oral decision. To properly assess the Crown's chief complaint as to how the judge erred, I consider first which of the judge's decisions should factor into the analysis.

Should the written decision be disregarded?

[12] The Crown's position is that it would be inappropriate for this Court to consider the judge's written decision and that, for the purposes of this appeal, the analysis should be confined to his oral decision only.

[13] The Court must be satisfied there was no valid reason to provide the written decision following the oral decision, or that the alterations between the first and second decisions meant the latter was substantially different: *R. v. Desmond*, 2020 NSCA 1 at para. 19; *Thanni v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 353 at para. 19.

[14] In *Desmond*, an oral decision was provided by the trial judge, followed by the issuing of a transcript of the oral decision with minor editing, then followed by a written decision containing an analysis of the law not found in either of the earlier versions. The Court recognized there can be situations when:

> [10] …a judge may find it necessary to indicate they are providing a brief explanation or even just a bottom line in terms of a decision. When that is done, the judge should make it clear that more detailed reasons are to follow. This often occurs in the context of a trial, especially if there is a jury. When a ruling is made in the context of a jury trial, reasons will likely never be put before the jury. Reasons may be delivered at a later date for the benefit of the parties, for appeal, or for precedential value. The delayed rendering of reasons facilitates the continuation of the trial.

[15] *Desmond* distinguished between circumstances in which the decision-maker takes a second opportunity to "fill in any obligatory blanks that were missed the first time around" (para. 17), and those where "a court may indicate the result 'with reasons to follow'. In such cases, a court is entitled to deliver the reasons as promised, but it cannot alter the outcome as initially indicated" (para. 18).

[16] The Crown says this case parallels the circumstances in *Desmond*, as here the oral decision contains 31 paragraphs yet the written decision contains 48 paragraphs, an addition of 17 paragraphs. "Furthermore," says the Crown, "nine other paragraphs contain 'significant alterations' as between the first and second decisions", with the written reasons including "a detailed abuse of process analysis not present in the original oral decision".

[17] Mr. Mitchell argues the facts here differ from *Desmond*, and there is nothing to support the suggestion the judge did not meet his duty in terms of "the manner and timing of the issuance of his reasons" (*R. v. Teskey*, 2007 SCC 25, at para. 19).

[18] The Crown asserts the judge's delivery of the oral decision, with a promise of written reasons at a later time, is different from the many instances in which judges have restricted oral comments to their "bottom line" decision, followed by delivery on the promise of more thorough written reasons at a later date. The Crown maintains the judge effectively bolstered his oral decision with expanded reasons found in the written decision, which went much further than simple grammatical changes and extended to addressing matters not discussed in the oral decision.

[19] The Crown points to three specific factors that it says support a conclusion written reasons were unnecessary:

- there was no urgency to provide oral reasons given the trial was scheduled to take place more than a month away.

- the judge took several days to consider the application and craft reasons before he gave his oral decision.

- after the Crown filed its Notice of Appeal, the judge's written decision attempted to "fill in gaps in reasoning" not found in the oral decision.

[20] The Crown is concerned the effect of the written decision was to allow the judge to engage in "result-driven reasoning" in light of the already-filed Notice of Appeal. That difficulty was discussed in *Teskey*:

> [18] Reasons rendered long after a verdict, particularly where it is apparent that they were entirely crafted after the announcement of the verdict, may cause a reasonable person to apprehend that the trial judge may not have reviewed and considered the evidence with an open mind as he or she is duty-bound to do but, rather, that the judge has engaged in result-driven reasoning. In other words, having already announced the verdict, particularly a verdict of guilt, a question arises whether the post-decision review and analysis of the evidence was done, even subconsciously, with the view of defending the verdict rather than arriving at it. It is most important in a criminal case to guard against any result-driven consideration of the evidence because the accused is presumed innocent and entitled to the benefit of any reasonable doubt. A reasonable doubt is not always obvious. Its presence may be far more subtle and only discernible through the eyes of the person who keeps an open mind. It is in this sense that the trial judge who appears to have already committed to a verdict of guilt before completing the necessary analysis of the evidence may cause a reasonable person to apprehend that he or she has not kept an open mind. Further, if an appeal from the verdict has been launched, as here, and the reasons deal with certain issues raised on appeal, this may create the appearance that the trial judge is advocating a particular result rather than articulating the reasons that led him or her to the decision.
>
> [Emphasis added]

[21] *Teskey* recognizes a judge is not precluded from announcing a bottom line decision and indicating full written reasons will follow, even when a notice of appeal has been filed (para. 17). What is to be considered is whether the circumstances of the case, that ultimately led to both oral and written reasons, can reasonably be said to have impaired the presumption of judicial integrity and impartiality.

[22] *Teskey* concerned the presiding judge's exceedingly terse oral remarks on conviction, delivered with a promise of written reasons, and the issuing of those

reasons eleven months later, “within days of the Court of Appeal’s adjournment of the appeal from convictions and direction that the trial judge proceed to sentencing ‘with all deliberate speed’ " (para. 10). That is in sharp contrast to the circumstances surrounding this appeal.

[23] The Court in *Teskey* was persuaded the reasonable observer’s apprehension about after-the-fact justification would be informed by more than simply the delay in providing the written reasons:

> 23 However, the fact that the reasons do not appear written in answer to the accused’s appeal does not answer the broader question whether a reasonable person would apprehend that the written reasons are in effect an after-the-fact justification for the verdicts rather than the articulation of the reasoning that led to the decision. This question was not considered by the majority. On this issue, I agree with the conclusion reached by Berger J.A., in dissent, that the court could not reasonably be confident that the written reasons, delivered more than 11 months after the announcement of the verdicts of guilt, reflected the reasoning that led the trial judge to his decision. However, unlike Berger J.A., I am of the view that delay in rendering reasons, in and of itself, does not give rise to this apprehension. …it is the combination of the following factors that constitutes cogent evidence sufficient to rebut the presumption of integrity and impartiality and which amply supports Berger J.A.’s conclusion:
>
> · the trial judge’s obvious difficulty in arriving at a verdict in the months following the completion of the evidence;
> · the absolutely bare declaration of guilt without any indication of the underlying reasoning;
> · the trial judge’s expressed willingness to reconsider the verdicts immediately after their announcement;
> · the nature of the evidence that called for a detailed consideration and analysis before any verdict could be reached;
> · the failure of the trial judge to respond to repeated requests from counsel to give reasons;
> · the contents of the reasons referring to events long after the announcement of the verdict suggesting that they were crafted post-decision;
> · the inordinate delay in delivering the reasons coupled with the absence of any indication that his reasons were ready at any time during the 11 months that followed or that the trial judge had purposely deferred their issuance pending disposition of the dangerous offender application.

[24] Mr. Mitchell’s case concerns a very different situation with a very different timeline involved. One could not reasonably conclude the judge, having rendered a written decision at the time he said he would, and as he contemplated he would at

the outset of his oral decision, did anything that impaired the presumption of judicial integrity and impartiality, much less with an agenda to engage in after-the-fact reasoning so as to forestall appellate review. The judge specifically stated his oral decision was intended to be only a "bottom line". His written decision was not an unexpected event that only materialized once an appeal was underway. The Crown filed its Notice of Appeal aware that a written decision was pending.

[25] The written decision does not materially change the oral decision. It does provide greater explanation, but I am not persuaded it was generated for the purpose of responding to the Notice of Appeal.

[26] In its factum, the Crown cautioned about future implications if this Court is to rely on the judge's written reasons:

> 166. By endorsing the practice of delaying written reasons for 2 months following an oral decision, this Court would negatively impact trial fairness in the interests of justice, as notices of appeal are required by statute to be filed within 25 days of a decision being rendered (see *Civil Procedure Rules*, Rule 91.09).
>
> 167. To allow trial judges to routinely augment decisions, without sufficient cause, such as releasing a bottom-line decision in the midst of a jury trial, renders the 25-day time limit to file notices of appeal prejudicial to the appealing party.
>
> [Appellant's Factum, p. 39]

[27] My conclusions here should not be read to endorse wholesale the issuing of written reasons, simply as a matter of course, following an oral decision. Nor do I suggest merit in providing written reasons only in an effort to "augment" oral reasons. Each case must be considered on its own circumstances. As stated in *R. v. C.D.*, 2021 NUCA 21:

> [14] The issue of "supplemental reasons" can arise in different contexts:
>
> (a) A trial judge may simply declare an outcome with "reasons to follow": e.g. ***R.*** *v* ***Teskey***, 2007 SCC 25, [2007] 2 SCR 267 (verdict); ***R.*** *v* ***Sundman***, 2021 BCCA 53 at paras. 55-56 (mid-trial rulings);
>
> (b) The trial judge may have lengthy reasons prepared, and essentially finalized, but due to the length read only a summary, followed by

> immediate release of the longer version: e.g. ***R.*** v ***Vander Leeuw***, 2021 ABCA 61 at para. 9.
>
> (c) The trial judge may announce his or her decision, but then correct that decision when an obvious error or illegality is identified: e.g. ***R. v Vader***, 2019 ABCA 191 at paras. 56-57, 89 Alta LR (6th) 146.
>
> (d) The trial judge gives reasons that appear to deal with all the issues, and outline all of his or her reasons, but then releases truly "supplemental" reasons that add arguments or issues: e.g. ***Perpetual Energy*** at para. 61.
>
> The scope of permissible variations between the original oral reasons and the supplemental reasons varies with the context. In general terms, a trial judge may edit oral reasons for punctuation, grammatical errors, citations and the like, but may not revise, correct, or reconsider the words actually spoken or make changes of substance: ***R. v Wang***, 2010 ONCA 435 at para. 9, 256 CCC (3d) 225; ***R. v Desmond***, 2020 NSCA 1 at paras. 24-25, 384 CCC (3d) 461.
>
> [15] Similarly, the importance and treatment of supplementary reasons on appeal will vary. The parties are entitled to point out any differences between the oral and written reasons and argue their significance: ***Vander Leeuw*** at para. 9. In some cases, the supplemental reasons will simply be ignored: ***Teskey; Wilde v Archean Energy Ltd.***, 2007 ABCA 385 at para. 24, 82 Alta LR (4th) 203, 422 AR 41. The appellate court is, however, entitled to refer to both sets of reasons, either to support or undermine the decision under appeal: ***Perpetual Energy*** at para. 66; ***R. v Ball***, 2012 ABCA 184 at para. 4, 533 AR 102. Where appropriate, an appellate court is entitled to review the decision based on the original rationale: ***Nova Scotia (Minister of Community Services) v C.K.Z.***, 2016 NSCA 61 at paras. 61-63, 376 NSR (2d) 113.

[28] The Crown has not met its onus to establish the written decision is so substantially different from the oral decision that it should be disregarded. The written decision is consistent with the evidence found in the record, and it is not qualitatively different from the oral one. In that respect I agree with the observations in Mr. Mitchell's factum:

> These additions do not change the conclusions in the oral decision; they do not incorporate new facts or law not heard in court; they do not result in unfairness to the parties; they do not suggest an after-the-fact justification. The Trial Judge was particularly specific in advising the parties to expect a more detailed written decision and these paragraphs support that this was what was provided.

> The appellant has made no argument that these additional paragraphs, or any additional paragraphs in the written decision, do not reflect the evidence heard at trial. It is the duty of the trial judge to provide reasons for his decision and it is the standard practice to provide supplementary reasons, particularly where the trial judge reserves the ability to do so. [...]

[29] The content of the judge's written decision maintains the analysis found in the oral decision, albeit with greater detail. In that way the circumstances here differ from those in *Nova Scotia (Community Services) v. J.P.*, 2021 NSCA 45 where the judge:

> 30. ...gave oral reasons which she was going to 'reduce to writing'. The written decision did more than that. It transformed its oral predecessor. Factual and legal points exceeded what was in issue or argued and the written decision transcended the parameters of the motion and resulted in unfairness to the Minister.

[30] This case more closely resembles the recent decision *R. v. Algiak*, 2022 NUCA 5. There the court was satisfied the summary conviction appeal judge did not err in supplementing oral reasons on sentencing with later written reasons:

> [17] While the written reasons of the sentencing judge supplement what was said in the oral reasons in relation to the *Gladue* factors, the applicant has not demonstrated sufficient discrepancy between the oral reasons and the written reasons to justify granting leave to appeal on this issue in this case. […] The written reasons do not contain a different line of analysis from that set out in the oral decision, and the discussion and consideration of factors that were referenced by the summary conviction appeal judge are largely mentioned or referred to in the oral reasons. There is no reason to conclude that the decision of the summary conviction appeal judge would have been different had he limited the references in his judgment to the oral reasons alone.
>
> (Emphasis added)

[31] On my reading, the judge's written decision does not address issues that go beyond those touched on in his oral decision, despite the additional content. I am satisfied there is no uncertainty created by the judge having produced a written decision that amplified his oral decision. The judge did not materially change his reasoning as between the two decisions. He clearly indicated written reasons would follow his oral decision, expressing the intention to do so before he could have known a notice of appeal would be filed. He followed through on his intention, and did not materially change his reasons in the written decision. While a "less is more", economical approach to the length of the judge's oral reasons

may, with hindsight, have avoided that to which the Crown now objects, I do not accept that the rendering of the two decisions constitutes an error in the circumstances of this case.

[32] Taking into account the reason for the issuing of a second decision, and the timeline involved, I am not persuaded the judge erred. It is appropriate to consider the written reasons in assessing the Crown's chief concern with the judge's decision, to which I turn.

> *Did the judge err in concluding Mr. Mitchell's was one of those "clearest" cases for a stay?*

[33] The Crown says although the police acted unlawfully in entering Mr. Mitchell's home without a warrant, their conduct was not so egregious as to be one of those "clearest of cases" requiring a stay of proceedings. The Crown argues the judge erred in concluding the drastic remedy of a stay was warranted.

[34] Mr. Mitchell counters that regardless of whether he would ultimately have received a fair trial on the 32 charges, the egregious circumstances that resulted from the manner in which the police entered his property, without a warrant, was one of those clearest of cases warranting condemnation that could only be properly expressed through the imposition of a stay. Mr. Mitchell says there was no error by the judge.

[35] The Court owes deference to the judge's decision on the s.7 *Charter* application unless satisfied he "…misdirected himself in law, committed a reviewable error of fact or rendered a decision that is 'so clearly wrong to amount to an injustice'…" (*R. v. Bellusci*, 2012 SCC 44, at para. 19).

[36] There is no dispute between the parties that the nature of the impugned police conduct was not directly related to Mr. Mitchell's ability to secure a fair trial. The serious allegations of domestic violence he faced did not form the substance of Mr. Mitchell's s.7 *Charter* application. Thus, Mr. Mitchell adopts the same argument which was advanced by the appellants in *R. v. Babos*, 2014 SCC 16:

> [3] Notably, the appellants do not argue that they cannot receive a fair trial as a result of the alleged incidents of misconduct -- they accept that they can. They submit instead that this is one of the clearest of cases in which a stay of proceedings is necessary to preserve and protect the integrity of the justice

> system. Anything short of that would amount to judicial condonation of egregious misconduct and erode the public's confidence in the administration of justice.

[37] *Babos* distinguished between so-called "main category" and "residual category" cases:

> [30] A stay of proceedings is the most drastic remedy a criminal court can order (*R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 53). It permanently halts the prosecution of an accused. In doing so, the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits. In many cases, alleged victims of crime are deprived of their day in court.
>
> [31] Nonetheless, this Court has recognized that there are rare occasions -- the "clearest of cases" — when a stay of proceedings for an abuse of process will be warranted (*R. v. O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411, at para. 68). These cases generally fall into two categories: (1) where state conduct compromises the fairness of an accused's trial (the "main" category); and (2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the "residual" category) (*O'Connor*, at para. 73)…
>
> (Emphasis added)

The parties agree the circumstances of this case engage the "residual category" of analysis.

[38] *Babos* provided, and the parties agree the judge utilized, the test to be applied to assess whether a stay is warranted:

> [32] The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
>
> (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);
>
> (2) There must be no alternative remedy capable of redressing the prejudice; and
>
> (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of

> granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*ibid.*, at para. 57).

[39] That test is modified where, as here, the residual category is in play. *Babos* continues:

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

[40] The Crown says the judge's error came in the "balancing of interests" portion of the exercise he was to conduct. The Court in *Babos* explained the balancing exercise at the third stage of the test this way:

> [40] Finally, the balancing of interests that occurs at the third stage of the test takes on added significance when the residual category is invoked. This Court has stated that the balancing need only be undertaken where there is still uncertainty as to whether a stay is appropriate after the first two parts of the test have been completed (*Tobiass*, at para. 92). When the main category is invoked, it will often be clear by the time the balancing stage has been reached that trial fairness has not been prejudiced or, if it has, that another remedy short of a stay is available to address the concern. In those cases, no balancing is required. In rare cases, it will be evident that state conduct has permanently prevented a fair trial from taking place. In these "clearest of cases", the third and final balancing step will often add little to the inquiry, as society has no interest in unfair trials.
>
> [41] However, <u>when the residual category is invoked, the balancing stage takes on added importance. Where prejudice to the integrity of the justice system is alleged, the court is asked to decide which of two options better protects the integrity of the system: staying the proceedings, or having a trial despite the impugned conduct. This inquiry necessarily demands balancing</u>. The court must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits. Clearly, the more egregious the state conduct, the greater the need for

> the court to dissociate itself from it. When the conduct in question shocks the community's conscience and/or offends its sense of fair play and decency, it becomes less likely that society's interest in a full trial on the merits will prevail in the balancing process. But in residual category cases, balance must always be considered.
>
> (Emphasis added)

[41] The Crown is critical of the balancing performed by the judge, who it says erred when he invoked the ultimate remedy of a stay. The Crown asserts the judge incorrectly determined no lesser remedy could remove the prejudice to Mr. Mitchell occasioned by the police breach of his home to attempt a warrantless arrest.

[42] The Crown says the judge could not have reached such a conclusion given his reasons are absent of any finding the police acted with a "deliberate" attempt to avoid compliance with the *Charter*. With respect, while the judge may not have used the word "deliberate", it is difficult to reconcile the Crown's view with the judge's strong comments throughout his decision regarding the police behaviour:

> 7. A plan was devised by Cpl. Bezanson. The corporal instructed Cst. Lahaie and Cst. Graham to attend Mr. Mitchell's home under the pretense of performing a compliance check for the curfew. The corporal instructed the constables to get Mr. Mitchell to exit the house. He would be arrestable once he was outside his residence. The corporal told his constables above all else to not let Mr. Mitchell close the door. They were to put their foot in the door to prevent it from closing. There was no discussion about getting a *Feeney* warrant.
>
> 8. According to their testimonies all three police officers were aware of the requirement to have a *Feeney* warrant to enter a private residence to effect an arrest in the absence of fresh pursuit, exigent circumstances, or consent.
>
> …
>
> 18. As stated previously, <u>all officers attending the residence that evening were aware of the availability of a *Feeney* warrant and the requirement to have one in order to enter a private dwelling to make an arrest in the absence of exigent circumstances, fresh pursuit, or consent. They chose not to seek one.</u>
>
> …
>
> 24. I am finding there was a section 8 breach. I am also finding a section 7 breach. <u>Officers ignored the law.</u> The corporal deliberately attempted to employ an unlawful strategy and when that did not work, (as he testified to) out of

> frustration and anger stormed into a private dwelling attempting to justify through his own perspective that there was hot pursuit. He was followed by two officers. Both knew or ought to have known that their entry was unlawful. Cst. Graham admitted so in his testimony. They should have been hauling their corporal out of the home, not Mr. Mitchell.
>
> …
>
> 32. The officers attending at the residence all were aware of the requirement to possess judicial authorization to enter a dwelling-house to make an arrest in the absence of exigent circumstances, fresh pursuit, or consent. The Crown has conceded (despite Cpl. Bezanson's perception of fresh pursuit) none of those were present in this incident and agrees Section 8 of the Charter was breached.
>
> (Emphasis added)

[43] The Crown does not shrink from the judge's conclusion the police tactics, their unlawful entry and the ensuing struggle were egregious, but says because the judge was satisfied the police did not use either excessive force or bad language, as Mr. Mitchell had testified they did, there is nothing about the case that rises to the level of "exceptional". Again, it is difficult to reconcile the Crown's interpretation with the overall very pointed concerns, liberally expressed by the judge throughout, about the over-the-top conduct of the police while at Mr. Mitchell's home.

[44] As Mr. Mitchell notes, while the judge did not use the term "excessive force", he did state he was "certain" the officers had used various of their body parts – fists, knees and feet – in making contact with Mr. Mitchell and that "significant force" had been used. The judge found the police actions "completely illegal" and constituting "egregious conduct" when they "deliberately chose not to respect" Mr. Mitchell's right to be free from "police entering dwellings unlawfully and administering force…". The judge concluded Cpl. Bezanson had "grossly-overestimated the level of threat", and Cst. Graham "knew the entry was unlawful", but he felt compelled to enter on the grounds of officer safety.

[45] A stay is a prospective remedy. Therefore, the judge was required to find bad faith or a systemic problem to justify the imposition of that remedy.

[46] Can it be said the police were acting in good faith? Mr. Mitchell challenges the Crown's assertion in that regard. In *R. v. Washington*, 2007 BCCA 540, the British Columbia Court of Appeal discussed "bad faith":

> [78] The relative good or bad faith exercised by the police is one of the most important factors in determining the seriousness of a ***Charter*** breach. "Bad faith" can be easy to identify. The courts have had more difficulty with "good faith". Although good faith is not fully defined in the jurisprudence, the underlying notion is the good faith is present when the police have conducted themselves in manner that is consistent with what they subjectively, reasonably, and non-negligently believe to be the law. This is perhaps better understood as a contrast to situations where the police deliberately, flagrantly and wilfully breach a ***Charter*** right to gain some perceived advantage, that advantage usually being the avoidance of compliance with the ***Charter***.
>
> [79] In ***R. v. Smith***, 2005 BCCA 334, 199 C.C.C. (3d) 404 this Court reviewed the concept of good faith, noting at paras. 57-62:
>
> > In *R. v. Kokesch*, 1990 CanLII 55 (SCC), [1990] 3 S.C.R. 3, 61 C.C.C. (3d) 207, Mr. Justice Sopinka juxtaposed the terms "good faith" and "flagrant". He said, at p. 228:
> >
> > > An equally important aspect of the seriousness of the violation is the manner in which the police conducted themselves in deciding to execute this warrantless perimeter search. Was the s. 8 violation committed in "good faith", or was it "flagrant"? Both are terms of art in s. 24(2) cases.
> >
> > […]
>
> Thus, Sopinka J. does not equate a lack of good faith with bad faith. It seems to follow from this passage that in order to qualify as "bad faith" the actions of the police must be knowingly or intentionally wrong.
>
> To sum up, good faith connotes an honest and reasonably held belief. If the belief is honest, but not reasonably held, it cannot be said to constitute good faith. But it does not follow that it is therefore bad faith. To constitute bad faith the actions must be knowingly or intentionally wrong.

[47] The judge was satisfied Cpl. Bezanson instructed the officers to make sure they stuck a foot in Mr. Mitchell's door, which the judge characterized as "negligent" or "at a minimum willfully blind" toward *Charter* standards. Cpl. Bezanson admitted in cross-examination that he was "frustrated and angry" that the officers had not prevented Mr. Mitchell from closing his door to them. Cst. Graham acknowledged he knew a *Feeney* warrant would be needed to properly enter the home, but once Cpl. Bezanson breached the door, he then followed as he was subordinate to the lead officer. While the judge may not have used the

nomenclature “bad faith”, it is more than apparent from his findings and the language and tone of his reasons, that he was deeply concerned about the conduct of the police.

[48] The Crown maintains the judge also failed to identify the details of a systemic problem that required future prevention. “For example,” says the Crown, “the judge did not say if the problem with the police was local, provincial or national in scope and the judge only referred to one instance, that being the *Greek* decision of that court”,[2] and unnamed other cases of which he was aware were then before the Halifax location of the Provincial Court.

[49] The Crown says these were merely “vague” references by the judge, which have no analytical value. Furthermore, suggests the Crown, the judge “bolstered” his written decision by identifying four cases occurring between 1997 and 2010 which are no longer of precedential value.

[50] I cannot accept this argument. Mere age of a case does not determine its precedential value. Furthermore, the judge was entitled to rely on *Greek*, a recent case from the same court, bearing a disturbingly similar fact pattern. A closer look at the findings made in *Greek* illustrates the similarities between that case and the circumstances put before the judge. In *Greek*, the court found:

> [57] On cross-examination Cpl. Baker agreed when Mrs. Greek opened the house door there was no sign of distress or commotion. He also agreed he was not invited into the house. So, without apparent distress in the house he was asked: why not get a *Feeney* warrant? Cpl. Baker testified, “In my experience with people underaged and under the influence of alcohol, it was my concern to get Mr. Greek under control because of the incident that occurred earlier and with his background, and with the female inside possibly intoxicated, I did not feel at that time that we had enough time to back off and get a *Feeney* warrant which in my experience can take anywhere between 2 to 4 hours going through the JP Centre”. He testified, “I had exigent circumstances to effect an arrest and check on the female”, agreeing that he understood exigent circumstances would mean he did not need a *Feeney* warrant. He also agreed that he knew Mr. Greek was on conditions to remain in the residence.
>
> [58] Cpl. Baker also agreed on cross-examination that he did not ask Mrs. Greek to present the underage female, did not ask her about the condition of the female and did not explain to her that he was there to check on the condition of the female. He said, “given Mr. Greek’s previous history with the police, I

2 *R.* v. *Greek*, 2019 NSPC 50.

wanted to make sure he was under control before we started making inquiries." He agreed that Mr. Greek was not acting out when he presented himself six to eight feet from the door.

…

[77] I find Cpl. Baker's primary objective was effecting a warrantless arrest of Mr. Greek in the house should he not exit it. The secondary concern for checking Ms. Corkum was not significant as I find Cpl. Baker failed to initially address the state of Ms. Corkum with Mrs. Greek, his answer that he stepped into the house to stop Mrs. Greek from closing the door and his efforts to continue the arrest support my conclusion.

…

[87] I do not accept that exigent circumstances existed in this case. Rather, the officers should have, but did not turn their minds to obtaining a *Feeney* warrant. In all likelihood such a warrant could have been easily obtained and in short order given the fact the officers were aware Mr. Greek was in his residence subject to a recognizance requiring him to be there. …

[89] …I will also point out that it was clear from the beginning, despite contradictory evidence from the officers regarding their intention when attending the property, Cpl. Baker's understanding supported by the report of Cst. Scott was that Mr. Greek was "arrestable", and their purpose in attending was throughout effecting an arrest of Mr. Greek even if that meant entering the residence.

[97] I find on these facts that this is one of those "clearest of cases" justifying the granting of a stay. I find that this is a serious remedy to provide on a **Charter** breach however, I am mindful that intrusion into a darkened dwelling-house at 2 am without thought to the need to obtain a *Feeney* warrant is extremely serious. Despite the fact the police had already formed the intention to arrest Mr. Greek, before arriving at the residence, it was incumbent on them to continually reassess the situation and determine proper procedures. Once Mrs. Greek pointed out the need for a warrant, that should have given the officers pause. Yet despite this clear direction from the property owner Cpl. Baker insinuated himself into the home. That another officer not fully aware of what was happening at the door immediately pushed the door open, created a chaotic and dangerous situation that demonstrates a theme - lack of consideration for lawful authority.

…

[99] Privacy interests in dwelling houses are among the highest we hold in our society, and therefore the *Criminal Code* directs police officers to obtain warrants

> before entering one. This court cannot condone this type of intrusion by allowing the s. 270 charge to stand. Doing so risks sending a message to enforcement officers that an incursion of this nature could occur and not result in harm to a charge that arises when a person quite rightfully refuses to go along peacefully.
>
> (Emphasis added)

[51] Here, the judge was clearly alive to the timeliness of the issue of questionable police tactics when he discussed his understanding of the prevalence of the problem:

> 35. Secondly, I am to consider whether this conduct is indicative of an ongoing problem. This conduct of police unlawful entry is not an isolated incident. In June 2019, the court in *Greek* made it clear the police tactic of getting a foot in the door and then forcing entry is unlawful and stayed charges of assault on a police officer. Eight months later Cpl. Bezanson was instructing his colleagues to do the very same thing. The case law is otherwise replete with examples of police entering dwellings unlawfully and administering force against suspects, persons presumed by the courts to be innocent. To name a few I refer you to some of the cases provided by defence counsel in their brief: *R. v. Feeney* (1997] 2 S.C.R. 13, *R. v. Meier*, 2009 SKPC 30, *R. v. Noah*, 2010 NUCJ 25, and *R. v. Merrick*, 2007 ONCJ 260. There continue to be cases coming before the courts. I am aware of at least three on the dockets in Halifax Provincial Court in which unlawful police entry into dwellings is being argued.

[52] The judge committed no error in considering *Greek*, nor in adverting to and noting his awareness of the state of the docket in his court location involving allegations of similar police misconduct *(Nova Scotia (Minister of Community Services) v. J.P.*, 2021 NSCA 45 at paras. 47-49).

[53] I agree with Mr. Mitchell's observations that it was the "shocking" police conduct in all its aspects that led to the judge's conclusion to impose a stay. As was the case in *Greek*, the judge recognized there were no urgent circumstances that required the police to execute the arrest at the time of day and in the manner they did, all while "heavily armed".

[54] The judge undertook consideration of the range of possible responses to the police conduct and the merits of other lesser remedies to sanction it; all were rejected. The judge concluded staying only some of the charges associated with Mr. Mitchell's arrest would convey the message the police misconduct was trifling. He accepted that the remedies of a civil judgment or a reduction in sentence would

have little impact under the circumstances before him as the matter was not at the trial stage. The remedy of excluding Mr. Mitchell's statement to police was meaningless as he did not provide one.

[55] I am satisfied the judge gave proper attention to the impact of lesser remedies upon the conduct he sought to sanction. He exercised his discretion to weigh the merits of each possibility on the continuum of remedies. There is no basis upon which to now interfere with his conclusion that a stay of all charges was the appropriate sanction in the circumstances and that nothing else would properly address the police conduct in respect of the events which unfolded at Mr. Mitchell's home.

[56] The Crown also asks us to consider whether the judge's failure to properly balance the competing interests mirrors the error described in *R. v. Regan*, 2002 SCC 12, where the Supreme Court of Canada emphasized a proper balancing must include a full weighing of the "societal factors" (para. 123).

[57] The judge's decision indicates he carefully considered society's need to have the serious charges Mr. Mitchell faced disposed of on their merits. He weighed the societal factors:

> 38. I am required, as well, to examine the seriousness of the charges the accused faces and society's interest in having matters disposed on their merits. The more serious, the greater the argument that matters should be adjudicated fully. Mr. Mitchell faces charges of numerous instances of intimate partner violence with allegations of assaultive behaviour with choking, use of a knife, and breaking an ankle on one occasion. As the defence properly acknowledges, these are serious matters. The complainant deserves to have *her* allegations adjudicated. Society has an expectation that the courts will take seriously all allegations of domestic violence and to have them decided on their merits. The nature of these allegations, if proven, would require the sentencing court to consider statutorily aggravating circumstances: repeated instances of intimate partner violence, use or threatened use of weapons, and many of the actions being perpetrated within the home. As previously noted, conviction would in all likelihood lead to a significant custodial sentence. Such would be a reflection of society's demand that domestic violence be denounced and deterred.

[58] Nonetheless, the judge was satisfied a stay of the charges was the appropriate response, a conclusion he was equipped to reach on the application of the evidence before him to the *Babos* framework.

[59] It is clear the judge was persuaded that the police conduct was "so egregious that the mere fact of going forward in light of it would be offensive" (*R. v. Chapman*, 2020 SKCA 11 at para. 95). The judge was plain in his reasons, both oral and written, as to why the egregious actions of the police in entering Mr. Mitchell's home, contrasted against the community and the alleged victim's respective interests in the prosecution of serious allegations nonetheless warranted a stay. There is no basis upon which his decision, which is entitled to deference absent error, should be disturbed.

[60] For these reasons, I would dismiss the appeal.

Beaton, J.A.

Concurred in:

Bryson, J.A.

Van den Eynden, J.A.