C.A.C. No. 118337

NOVA SCOTIA COURT OF APPEAL

Freeman, Pugsley and Flinn, JJ.A.

Cite as: R. v. Boutilier, 1995 NSCA 227

BETWEEN:

HER MAJESTY THE QUEEN Appellant - and - **ROBERT ENOS BOUTILIER** Respondent	Robert E. Lutes, Q.C. for the Appellant Christopher Manning for the Respondent Appeal Heard: November 17, 1995 Judgment Delivered: December 18, 1995

THE COURT: The appeal is dismissed per reasons for judgment of Freeman, J.A., Pugsley and Flinn, JJ.A., concurring.

FREEMAN, J.A.:

Following a crosswalk accident involving a pedestrian, on July 30, 1994, the respondent driver was charged, erroneously, with failing to stop after striking another vehicle, pursuant to s. 252(1)(b) of the **Criminal Code**. Section 252 creates hybrid offences, and the Crown elected to proceed with the matter as a summary conviction offence.

The Crown discovered its mistake too late to proceed again on summary conviction and proposed to proceed by indictment on a new Information. This appeal is from a stay of proceedings on that Information.

Section 252 provides as follows:

> 252. (1) Every person who has the care, charge or control of a vehicle, vessel or aircraft that is involved in an accident with
> (a) another person,
> (b) a vehicle, vessel, or aircraft, or
> (c) in the case of a vehicle, cattle in the charge of another person,
> and with intent to escape civil or criminal liability fails to stop the vehicle, vessel or, where possible, the aircraft, give his or her name and address and, where any person has been injured or appears to require assistance, offer assistance, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or is guilty of an offence punishable on summary conviction.

The Crown was aware from the Crown Sheet in its possession that the accident involved an injured pedestrian when it elected to proceed summarily on September 28, 1994. The erroneous Information was endorsed "summarily" by the court. The respondent pleaded not guilty and trial was set for April 27, 1995.

On the eve of the trial, the Crown discovered its mistake. The six-month limitation on summary conviction offences under s. 786(2) had by then expired. An election by the Crown to proceed by way of summary conviction on a hybrid offence is a nullity where the Information is laid outside the six-month limitation period; see **R. v. Phelps** (1993), 79 C.C.C. (3d) 550 (Ont. C.A.). Proceeding summarily on a new Information was no longer an option.

On the trial date, another Information was sworn under s. 252(1)(a)

alleging that the pedestrian was struck. Crown counsel advised that it would proceed by indictment on the second Information, and it was so endorsed. The Crown expressed its intention to stay the original Information, which it was entitled to do under s. 579 of the **Criminal Code**, and the matter was set for hearing on May 25, 1995. At that time, the trial judge stayed the second Information, endorsed it as stayed, and remarked:

> . . . from the comments of the -- both of you, both counsel and the briefs that were filed on the issue here regarding the fact that the wrong charge was laid initially by the -- in the matter and that a new charge had to be laid and after it -- it was only discovered after the six month time period from the summary conviction. I'm not prepared to correct the Crown's errors to be quite plain with you and I'm not prepared to go along with it. I'll stay the information. If the Crown makes an error, don't come to my court to get it corrected in this manner.

While findings of fact by the trial judge would have been of assistance, they are not essential in the present circumstances for the Crown has very fairly acknowledged what took place, providing a factual basis for conclusions by the trial judge and this court, as to whether abuse of process has occurred. While he did not say so specifically in ordering the stay, the trial judge obviously considered the process was being abused by the attempt to proceed by indictment.

The Crown's brief to the trial judge explained its position:

> On the scheduled date, the Crown asked for a Stay of Proceedings on the charge under section 252(1)(b) conceding that the wrong charge was laid; in that, the charge should have been laid under Section 252(1)(a) which properly would have read as: . . . that following an accident with "another person" . . . and thus the Crown had no other alternative but to proceed by way of indictment.

Nowhere in the Crown's brief to the trial judge, nor in this appeal, is it alleged that the involvement of a pedestrian rather than a vehicle altered the Crown's understanding of the seriousness of the circumstances so as to justify proceeding by way of indictment rather than by summary conviction. No explanation for proceeding by indictment rather than by summary proceedings is offered, save for the expiration

of the limitation period. The Crown's brief addressed this point before the trial judge:

> In the present case, the accused alleges that there is "no rational basis" for the Crown's decision to proceed by way of indictment save for the fact that the prescription period contained in Section 786(2) of the Criminal Code has elapsed.
>
> The Crown, however, respectfully submits that there is a rational basis to continue with the prosecution of the accused on the basis that the public has an interest in charges being properly tried. And, in the present circumstances, the trial of this charge would not offend the community's sense of fair play and decency. On the contrary, staying the proceedings would offend the community's sense of justice and thus bring the administration of justice into disrepute.

There is nothing in the submission to suggest that the Crown would not have proceeded by way of summary conviction with respect to the second Information if the limitation period had not expired.

The Crown has appealed on the following grounds:

1. THAT the trial judge erred in ordering a stay of proceedings on the indictment in the absence of evidence of abuse of the process of the Court.

2. THAT the trial judge erred in ordering the stay of proceedings on the indictment by applying the wrong test for determining an abuse of the process of the court.

There is not an evidentiary issue, as the first ground suggests, because the relevant facts were before the court. The Crown's factum filed in the appeal contains the following statements:

> The Crown on April 27 indicated that the only additional evidence that it had was the photographs of the young pedestrian which it was acknowledged were photographs that should have been in the possession of the current Crown prior to the date set for trial.
> . . .
> This Court, for the purposes of this appeal need only consider that the Crown and defence at the trial were of the view that the information was not amendable, . . . thus confirming no other option to the Crown but to proceed with a new information . . . .
>
> It is acknowledged that on September 7, 1994 the Crown elected to proceed by way of summary conviction, having received the Crown sheet indicating the victim had been injured.

Therefore the only issue in this appeal is whether it was an abuse of

process warranting a stay of proceedings for the Crown to re-elect to proceed by indictment, having previously elected to treat the matter as a summary conviction offence. In my view, that is a question of law to be determined from the acknowledged facts.

The creation by Parliament of summary conviction offences, indictable offences, and hybrid offences merely reflects the commonplace observation that some offences are more serious than others. The Crown is entrusted with classifying offences and, in the case of hybrid offences, with making the necessary determination whether to proceed summarily or by indictment. The choice is governed by the seriousness of the circumstances of each alleged offence; the object is to do justice expeditiously and fairly. The Crown's discretion in electing between summary proceedings and proceedings by indictment is virtually unfettered, and it is entitled to great respect.

In **R. v. Power**, [1994] 1 S.C.R. 601, (1994), 89 C.C.C. (3d) 1, a trial judge in Newfoundland erroneously refused to admit breathalyzer evidence on a charge of impaired driving causing death and injury and the Crown elected to call no further evidence. The Newfoundland Court of Appeal dismissed an appeal from the resulting acquittal. This was reversed on appeal to the Supreme Court of Canada, which found that the conduct of the prosecution did not meet the high threshold required to constitute an abuse of process. Writing for the majority, Justice L'Heureux-Dubé stated:

> That courts have been extremely reluctant to interfere with prosecutorial discretion is clear from the case law. They have been so as a matter of principle based on the doctrine of the separation of powers as well as a matter of policy founded on the efficiency of the system of criminal justice and the fact that prosecutorial discretion is especially ill-suited to judicial review.
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> In **Balderstone and the Queen** (1983), 8 C.C.C. (3d) 532 (Man. C.A.) (leave to appeal refused by the Supreme Court of Canada on December 15, 1983, [1983] 2 S.C.R. v), Monnin C.J. wrote, at p. 539:

> The judicial and the executive must not mix. These are two separate and distinct functions. The accusatorial officers lay infirmations or in some cases prefer indictments. Courts or the curia listen to cases brought to their attention and decide them on their merits or on meritorious preliminary matters. If a judge should attempt to review the actions or conduct of the Attorney-General — barring flagrant impropriety — he could be falling into a field which is not his and interfering with the administrative and accusatorial function of the Attorney-General or his officers. That a judge must not do. [Emphasis added in original.]

LaForest J. stated in **R. v. Beare**, [1988] 2 S.C.R. 387, at pp. l410-11:

> Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay charges, to arrest and to conduct incidental searches, as prosecutors do in deciding whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch an appeal and so on.
>
> The *Criminal Code* provides no guidelines for the exercise of discretion in any of these areas. The day to day operation of law enforcement and the criminal justice system nonetheless depends upon the exercise of that discretion.
>
> This court has already recognized that the existence of prosecutorial discretion does not offend the principles of fundamental justice; see *R. v. Lyons*, *supra*, at p. 348; see also *R. v. Jones*, [1986] 2 S.C.R. 284, at pp. 303-4. The Court did add that if, in a particular case, it was established that a discretion was exercised for improper or arbitrary motives, a remedy under s. 24 of the *Charter* would lie. . . . [Emphasis added in original.]

In the present appeal, the election to proceed by way of summary conviction, in September, 1994, was a proper and valid one. It must be presumed to have been a reasoned decision, regularly made, based on due consideration of all relevant circumstances, and tested by objective criteria. The offence the respondent was alleged to have committed was, therefore, in the eyes of the legal system and of the world, a summary conviction offence, that is, a relatively minor one, not serious enough to justify proceedings by indictment.

While s. 252 creates a hybrid offence, an individual does not commit a hybrid offence. The individual, in each set of circumstances, commits an offence. The mechanism for determining whether it will be prosecuted in a manner in which he or she will be guilty, on conviction, of an indictable offence or a summary conviction offence is the Crown discretion.

Technically, a hybrid offence is an indictable offence until the Crown elects to proceed by way of summary conviction; **R. v. Ellerbeck** (1981), 61 C.C.C. (2d) 573.

Section 34 (1) of the **Interpretation Act**, R.S.C. 1993, c. I-21 provides:

> 34. (1) Where an enactment creates an offence,
>
> (a) the offence is deemed to be an indictable offence if the enactment provides that the offender may be prosecuted for the offence by indictment;
>
> (b) the offence is deemed to be one for which the offender is punishable on summary conviction if there is nothing in the context to indicate that the offence is an indictable offence; and
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> (c) if the offence is one for which the offender may be prosecuted by indictment or for which the offender is punishable on summary conviction, no person shall be considered to have been convicted of an indictable offence by reason only of having been convicted of the offence on summary conviction.

In **Dallman v. R.**, [1942] 3 D.L.R. 145, the Supreme Court of Canada considered a provision of the **Criminal Code** creating the offence of conspiracy with respect to indictable offences. Kerwin, J., delivering the judgment of the court, stated:

> In our view . . . all that is meant by "indictable offence" in s. 573 of the *Code* is that the offence as to which a conspiracy is charged may be prosecuted by indictment.

If the Crown proceeds in a court with summary conviction jurisdiction but does not specify the mode of procedure, it is deemed to have elected to proceed summarily. See **R. v. Robert** (1973), 13 C.C.C. (2d) 43 (Ont. C.A.); **R. v. Bee** (1976), 28 C.C.C. (2d) 60 (B.C.C.A.) and **R. v. Dosangh** (1977), 35 C.C.C. (2d) 309 (B.C.C.A.).

In hybrid offences, the same essential elements must be proven whether

the Crown elects to proceed by way of indictment or by summary conviction. Once an offence under s. 252 has been determined by the Crown to be a summary conviction offence, the provisions of the **Criminal Code** relating to summary conviction offences apply, not procedures relating to indictable offences. The Crown's option has been exercised: the case has been determined to be less serious than an indictable offence and the procedure is less formal. The Crown cannot arbitrarily reverse its decision and arrive at a different result; there must be sound reasons to justify such a change. The Crown's election is protected by a strong presumption of regularity and the offence is deemed to have been correctly characterized. The exercise of the Crown's discretion is subject to judicial review only for "flagrant impropriety" (**Balderstone**) or "improper or arbitrary motives" (**Beare**).

The offence with which the respondent was charged was therefore a summary conviction offence because the legal system, by the device of the Crown discretion, had determined it to be a summary conviction offence. It was wrongly described in the Information, but the Crown acknowledges that it was not fooled by its own mistake — it was aware throughout the whole matter that an injured pedestrian was involved, not another vehicle. The circumstances to which the Crown initially applied its criteria for exercising its discretion did not change. It would strike at the integrity of the system if the Crown is permitted to disavow its original election, in the absence of supporting circumstances related to the offence itself, and make a second election which necessarily disregards its own criteria, simply to patch up a drafting mistake in one Information. (The same criteria, applied to the same circumstances, could not yield a conflicting result.) It is very clear that the Crown's motives were arbitrary. In my view, this system is too important, and works too well, to expose it to public disrepute in this way.

To permit proceedings by indictment in the circumstances of this case

would, in my view, damage the integrity of the system: integrity cannot be slightly violated any more than an eggshell can be slightly broken. It is an absolute concept. Either it is intact or it is not.

Fairness to the accused is a consideration in every case. There can be no doubt that proceedings by way of indictment are more prejudicial to an accused person than summary proceedings, if for no other reason than that the respondent in the present case would be liable to imprisonment for five years on indictment instead of a maximum sentence of six months in jail and a fine of $2,000 for a summary conviction offence. The additional procedural safeguards for indictable offences, the preliminary inquiry, and the right to a jury trial, attest to their seriousness and confront the accused with greater expense and delay. Indictable offences carry a greater stigma, of potential relevance to foreign travel, future employment, security clearance, and in the event of a subsequent offence. A pardon can be sought three years after conviction for a summary offence, but only after five years for an indictable offence. It would be callous to suggest the respondent's position has not worsened substantially if proceedings are not to be summary but by indictment. If the stay imposed by the trial judge is set aside, the respondent would be required to bear serious consequences flowing not from his own alleged misdeeds but merely from the Crown's, that is, the judicial system's, own inadvertence.

Martin's Annual Criminal Code, 1995, contains the following annotation to s. 786:

> There are conflicting decisions as to whether the attempt by the Crown to relay a charge and proceed by indictment on a Crown option offence in order to avoid the limitation period in this section will constitute an abuse of process. Thus in **Re Parkin and the Queen** (1986), 28 C.C.C. (3d) 252, 14 O.A.C., 150 (C.A.) and **R. v. Quinn** (1989), 54 C.C.C. (3d) 157, 73 C.R. (3d) 77, 48 C.R.R. 314 (Qué. C.A.) the courts did find an abuse of process in the particular circumstances. Those decisions should, however, be compared with **R. v. Belair** (1988), 41 C.C.C. (3d) 329, 64 C.R. (3d) 179 (Ont. C.A.) and **R. v. Jans** (1990), 59 C.C.C. (3d) 398, 108 A.R. 324(C.A.).

In **Jans** and **Belair**, the circumstances were significantly different from the present case in that the limitation periods for summary conviction offences had expired before the Crown purported to elect to treat the offences as such. Therefore, following **Phelps**, the purported elections were nullities and the system was not technically abused; I would distinguish those cases on that ground. Counsel for the respondent points out as well that the time periods between the first and second Crown elections were much shorter in those cases than in the present case. He argues that the eight-month delay between the incident and the decision to proceed by indictment operated unfairly to the accused, who was entitled to know the extent of his jeopardy from the date of his arraignment in September, 1994.

In **Parkin**, most but not all of the period during which sexual assaults were alleged fell outside the limitation period. Thorson, J.A., speaking for the Ontario Court of Appeal, said at p. 255 (C.C.C.):

> The election made by the Crown in this case was clearly a considered one and the product of a deliberate choice. At the opening of the trial on September 20, 1984, counsel for the Crown advised the court that the Crown would be proceeding by summary conviction for reasons which, he indicated, he had discussed with the complainant's mother earlier that day. Thereafter, the appellant's plea was taken, the trial began and the complainant gave her evidence.
>
> The election, therefore, must be taken to signify that the Crown was prepared to treat the charge against the appellant as not being sufficiently grave to warrant proceeding with it by indictment. In brief, it was willing to go ahead with the trial on the understanding that, if convicted, the appellant would be exposed to a less severe punishment than if the charge was proceeded with by indictment. The original information was sought to be withdrawn solely because counsel for the Crown came to realize, soon after the commencement of the trial, that he had a problem as a result of the limitation period in s. 721(2), and the second information was presented solely to get around that problem. No other reason was advanced for counsel's request to be allowed to withdraw the original information and "start again". That problem, of course, was one of the Crown's own making, in view of the election it made as to how it wished to proceed.
>
> In these circumstances and in light of the Crown's own assessment of the gravity of the offence charged against the appellant, as evidenced by its election to proceed by summary conviction, we are

> of the view that it would be abusive of the court's process to allow its authority to be lent to the course which the Crown seeks to follow in this case. As Dubin J.A., speaking for this Court in *R.* v. *Young* (1984), 13 C.C.C. (3d) 1, 46 O.R. (2d) 520, 40 C.R. (3d) 289, put the matter at p. 31 C.C.C., p. 329 C.R., in words subsequently adopted by the Supreme Court of Canada in *R. v. Jewitt* . . .
>
> > . . . 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.
>
> With deference, we are of the opinion that it would not accord with the community's sense of fair play to allow this prosecution to proceed upon the charge set out in the second information presented by the Crown. In our view, a stay of further proceedings on that information ought to have been directed in the very unusual circumstances of this case, having regard to the Crown's conduct of the proceedings to that time and, as well, the resulting added severity of the punishment to which the appellant, if convicted upon that information, would be exposed solely because of the Crown's conduct of the proceedings to that time.

In **Quinn**, the Québec Court of Appeal found abuse of process and stayed proceedings, although the facts are not as strong as in the present appeal. The Crown had not actually elected to proceed summarily although its intention to do so was made clear. The appellant was found in possession of a small quantity of cocaine. The six-month limitation period expired while police were awaiting the laboratory analysis report. Paré, J.A. noted that, following **R. v. Smythe** (1971), 3 C.C.C. (2d) 366, [1971] 1 S.C.R. 680 and **Re Saikaly v. R** (1979), 48 C.C.C. (2d) 192 (Ont. C.A.), courts have no power to interfere in the exercise of the discretion conferred on the Attorney General by the **Criminal Code** to determine whether to proceed by way of summary conviction or indictment. He stated at page 160:

> However, the present case is quite exceptional. The record shows that the prosecution initially intended, not to prosecute on indictment, but rather to prosecute by way of summary conviction. The prosecutor's intention moreover can be explained by the small quantity of cocaine (0.13 gr.) found in the appellant's possession, and the fact that this was his first offence. Realizing that it was too late to prosecute by way of summary conviction, Crown counsel on behalf of

> the Attorney-General refused to proceed with the case. However, several months later, a second Crown counsel agreed to prosecute but this time by way of an indictment. These facts, which the respondent does not contest, clearly demonstrate the prosecution's initial intention to prosecute the appellant by way of summary conviction. If the appellant were to suffer the prejudice of a prosecution by way of indictment, it would only be because the prescription period mentioned in s. 786(2) of the *Criminal Code* had been allowed to expire.

Those cases must be read in the light of the pronouncements of the Supreme Court of Canada on abuse of process, particularly in **R. v. Jewitt** (1985), 21 C.C.C. (3d) 7 and **R. v. Power**. In **Jewitt**, Chief Justice Dickson said at page 14:

> . . . Clearly, there is a need for this Court to clarify its position on such a fundamental and wide-reaching doctrine.
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> Lord Devlin has expressed the rationale supporting the existence of a judicial discretion to enter a stay of proceedings to control prosecutorial behaviour prejudicial to accused persons in *Connelly* v. *Director of Public Prosecutions*, [1964] A.C. 1254 at p. 1354 (H.L.):
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> > Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or who are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused.
>
> I would adopt the conclusions of the Ontario Court of Appeal in *R.* v. *Young* supra, and affirm that [at p. 31]:
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> > . . . 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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> I would also adopt the caveat added by the court in *Young* that this is a power which can be exercised only in the "clearest of cases."

In **Power**, L'Heureux-Dubé, J. reviewed the laws on abuse of process, confirming **Jewitt**, and stated at p. 10:

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

Power and **R. v. O'Connor** (1994), 29 C.R.(4th) 40 (B.C.C.A.) (which is on appeal to the Supreme Court of Canada) were criticized by Lee Stuesser, Associate Professor of Law at the University of Manitoba, in **Abuse of Process: The Need to Reconsider** published in 29 C.R. (4th) 92 as an annotation to **R. v. Mattingl**y (1994), 29 C.R. (4th) 105, as setting too high a standard for dealing with abuse of process.

Professor Stuesser wrote at p. 93:

> . . . Surely in light of the Supreme Court of Canada's decision in *Operation Dismantle* v. *R.* [[1985] 1 S.C.R. 441] it cannot seriously be suggested that courts cannot review decisions of the executive branch of government. Second, abuse of process is not about fettering prosecutorial discretion. There is no question that prosecutors have the power to exercise discretion. Abuse of process is concerned with the *way* in which the discretion is exercised or with the *judicial consequences* that flow from the decision. This is a fundamental distinction.

He cited **Jago v. District Court (New South Wales)** (1989), 1568 C.L.R. 213, 63 A.L.J.R. 640 in which Mason, J. wrote at p. 642 A.L.J.R.:

> . . . the judge's role is not that of prosecutor, the decision whether to prosecute is made at an executive level. These arguments misconceive the nature of the broader discretion which they seek to

> resist. The question is not whether the prosecution should have been brought, but whether the court, whose function is to dispense justice with impartiality and fairness both to the parties and to the community which it serves, should permit its processes to be employed in a manner which gives rise to unfairness.

Citing **Jewitt** and **R. v. Keyowski**, [1988] 1 S.C.R. 657, he noted that a stay should be granted when there was a violation of the community's sense of "fair play and decency" or when the court's process was "oppressive and vexatious".

He found the test fashioned by the British Columbia Court of Appeal, in **O'Connor**, was wrong in principle in making improper motives by the Crown an essential element of abuse of process and "flies in the face of Supreme Court of Canada precedent".

> What does it matter if the Crown was acting out of the best of intentions? The fact is that as a consequence of their conduct a trial is rendered unfair.

He emphasized the distinction between finding on a balance of probabilities that abuse has occurred, and imposing a stay of proceedings, which should be the remedy of last resort. An "arsenal of remedies" was available for abuses affecting the fairness of the trial such as those caused by delay or non-disclosure. These included adjournments, recalling witnesses, calling witnesses on behalf of the court, ordering disclosure or excluding evidence. But when the unfairness flowed from the institution of the proceedings, as in **Connelly v. Director of Public Prosecutions,** [1964] A.C. 1254 at 1280, 48 Cr.App.R. 183, [1964] 2 All E.R. 401 (H.L.), or **R. v. Mitchelson** (1992), 13 R.R. (4th) 73, 71 C.C.C. (3d) 471, 78 Man. R. (2d) 134, the only remedy would be a stay of proceedings.

Professor Stuesser suggests that:

> *Power* and *O'Connor* are illustrations of judicial excess. It was not necessary in either case to emasculate abuse of process as they did in order to achieve the desired end, which was to overturn the stays of proceeding. . . . There is a need for courts to identify and then respond to the principal concerns that underlie abuse of process. Only in this way can discipline be brought to the courts. Abuse of process

> is a worthy safeguard to preserve and deserves clarification — not emasculation.

He suggested the following process:

> If one accepts the principled approach outlined in this article, the process for determining an abuse of process and providing a remedy will be the same under the common law or under the *Charter*. Step one: under the *Charter*, the accused must prove a breach of the *Charter* on a balance of probabilities; under the common law, the accused must prove the abuse on a balance of probabilities. Step two: under the *Charter*, once a breach is shown the court turns to a remedy that is "appropriate and just" in the circumstances; under the common law, once the abuse is shown the court will look to appropriate remedies. Under both the common law and under the *Charter*, a stay of proceedings will only be appropriate when no other remedy can properly cleanse the prejudice. In other words, in both instances a stay of proceeding is a last resort.

While the standard in **Power** is undoubtedly a difficult one to meet, I am satisfied that the present appeal is sufficiently clear to justify a finding of abuse of process. The facts are acknowledged. There is no question as to what the Crown did, or any need to second-guess its intentions. More importantly, the detrimental effect of the proposed proceedings by indictment on the integrity of the system is equally clear. It is not reprehensible nor shocking nor likely to give rise to community outrage, but it is clear. 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.

The question whether the stay of proceedings is the appropriate remedy remains. The "arsenal of remedies" referred to by Professor Stuesser are not available because the issues do not relate to delay or non-disclosure. Here the unfairness flows from the way the proceedings were to be instituted, and there appears to be no alternative to the stay.

In **Jorgensen v. R**. (S.C.C. November 16, 1995 — Unreported) Chief Justice Lamer considered the defence of officially-induced error and in paragraphs 36 and 37 (Q.L.) made the following comments as to a stay of proceedings as an appropriate remedy:

> . . . Each person is not a law unto himself because this excuse does not affect culpability. Ignorance of the law remains blameworthy in and of itself. In these specific instances, however, the blame is, in a sense, shared with the state official who gave the erroneous advice.
>
> D. *Procedural Considerations*
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> As this excuse does not affect a determination of culpability, it is procedurally similar to entrapment. Both function as excuses rather than justifications in that they concede the wrongfulness of the action but assert that under the circumstances it should not be attributed to the actor. (See *R. v. Mack*, [1988] 2 S.C.R. 903, at pp. 944-45.) As in the case of entrapment, the accused has done nothing to entitle him to an acquittal, but the state has done something which disentitles it to a conviction (*Mack*, at p. 975). Like entrapment, the successful application of an officially induced error of law argument will lead to a judicial stay of proceedings rather than an acquittal. Consequently, as a stay can only be entered in the clearest of cases, an officially induced error of law argument will only be successful in the clearest of cases.

In the present appeal, the striking of the pedestrian in the crosswalk was a wrongful act subjecting the accused to prosecution for a summary conviction offence, not, as determined by the Crown in the valid exercise of its discretion, to proceedings by indictment. Assuming a prosecution would succeed on the evidence, the accused has done nothing to entitle him to an acquittal on a summary conviction offence, but the state has done something which disentitles it to a conviction on indictment. What the Crown did, and what motivated its actions, could not be more clear.

In the **Jans** case, the trial judge, suspecting possible abuse arising from the earlier ineffective election of summary proceedings, imposed a sentence appropriate to a summary conviction offence. The Alberta Court of Appeal considered this in a remedial context, and stated:

> The switch from summary to indictable proceedings has not made the appellant any worse off than if the Crown had elected at once to go by indictment. The appellant does not suggest otherwise. Indeed, he may be better off. The trial judge held that the offence might well warrant a sentence greater than six months. But because of the earlier Crown election, he only imposed six months, the maximum for a summary conviction offence.

On reflection, however, and with respect, attempting to remedy a suspected abuse by imposing a sentence for considerations foreign to proper sentencing principles, comes uncomfortably close to attempting to make a right of two

wrongs.

The trial judge considered a stay to be appropriate, and I have not been satisfied that he was in error. Accordingly, I would dismiss the appeal.

J.A.

Concurred in:

Pugsley, J.A.

Flinn, J.A.

C.A.C. No. 118337

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

HER MAJESTY THE QUEEN

Appelant

- and -

ROBERT ENOS BOUTILIER

Respondent

REASONS FOR JUDGMENT BY: FREEMAN, J.A.