R. *v*. Regan, [2002] 1 S.C.R. 297, 2002 SCC 12

Gerald Augustine Regan *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of Canada,
the Attorney General of Quebec and
the Attorney General for New Brunswick *Interveners*

Indexed as: R. *v*. Regan

Neutral citation: 2002 SCC 12.

File No.: 27541.

2001: March 15; 2002: February 14.

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

on appeal from the court of appeal for nova scotia

Criminal law – Remedies – Abuse of process – Stay of proceedings – Accused charged with sex-related offences – Police identifying accused as suspect before charges laid – Crown engaging in "judge shopping" and conducting

pre-charge interviews of complainants – Trial judge staying some of charges – Court of Appeal overturning stay – Whether conduct of Crown and police amounted to abuse of process – Whether partial stay of proceedings warranted – Whether Court of Appeal entitled to interfere with trial judge's decision to grant partial stay.

During the police investigation into allegations that the accused, a former Premier of Nova Scotia, had committed numerous sexual offences against a variety of young women who had worked for or with him, a police officer confirmed to a reporter that the accused was under investigation, in violation of police policy to remain silent about individual suspects until charges are laid. At the conclusion of the investigation, a report was submitted to the Director of Public Prosecutions ("DPP") requesting his opinion about the laying of charges. The DPP recommended that charges should be laid involving four of the eight Nova Scotia-based complainants who were willing to testify. He chose the incidents which involved the most serious physical violations. He also recommended that the police re-contact the six women who had been victims of apparent criminal conduct, but were unwilling to testify. The police did not agree with the DPP's charging recommendation, being of the view that a more complete picture of the allegations against the accused should be put before the court. After the Crown joined police in re-interviewing most of the original complainants, 19 counts for sex-related offences were laid against the accused. One year after the preliminary inquiry, the Crown decided to prefer a direct indictment setting out 18 counts of sex-related offences, including one new charge (count 16).

After the DPP's written recommendation, one of the Crown Attorneys met with police. At that recorded meeting, she suggested that it would not be "advisable" for charges to be brought before a particular judge, because she thought he might be a political appointment of the same party as the accused. Instead, she said she would

"keep monitoring the court docket to see who is sitting when and what would be in our best interest". Police and Crown also agreed to re-interview a number of the complainants.

Citing the cumulative effect of this Crown behaviour combined with the police premature identification of him as a suspect, the accused sought a stay of all of the charges. At trial, a partial stay – 9 of the 18 counts – was granted. One of the charges stayed was count 16, which was similar in fact to an incident alleged to have occurred in Alberta, and the trial judge was suspicious that the Crown's eagerness to put the Alberta facts before a Nova Scotia court motivated the Crown to lay this new, similar, Nova Scotia-based charge. The Court of Appeal, in a majority decision, allowed the Crown's appeal and set aside the stays of the nine counts.

Held (Iacobucci, Major, Binnie and Arbour JJ. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and L'Heureux-Dubé, Gonthier, Bastarache and LeBel JJ.: A stay of proceedings will only be granted as a remedy for an abuse of process in the "clearest of cases". Regardless of whether the abuse causes prejudice to the accused, because of an unfair trial, or to the integrity of the justice system, a stay of proceedings will only be appropriate when two criteria are met: (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and (2) no other remedy is reasonably capable of removing that prejudice. The first criterion is critically important, and reflects the fact that a stay of proceedings is a prospective rather than a retroactive remedy. While most cases of abuse of process will cause prejudice by rendering the trial unfair, under s. 7 of the *Canadian Charter of Rights and Freedoms* a small

residual category of abusive action exists which does not affect trial fairness, but still undermines the fundamental justice of the system. When dealing with an abuse which falls into the residual category, a stay of proceedings is generally speaking only appropriate when the abuse is likely to continue or be carried forward. Only in exceptional, relatively very rare cases will the past misconduct be so egregious that the mere fact of going forward in the light of it will be offensive. Where uncertainty persists about whether the abuse is sufficient to warrant the drastic remedy of a stay, a third criterion is considered: the interests that would be served by the granting of a stay of proceedings are balanced against the interest that society has in having a final decision on the merits.

The judge shopping in this case was offensive. Judge shopping is unacceptable both because of its unfairness to the accused, and because it tarnishes the reputation of the justice system. Furthermore, it should not infect the investigative process by involving police in a conspiracy to manipulate the process. The trial judge quite properly was seriously troubled by this evidence. He nevertheless was mindful that this single comment was not acted upon, and did not find it determinative in his ultimate conclusion that the process against the accused had been abusive to the point of necessitating a stay of proceedings.

Wide-ranging pre-charge Crown interviews are not, *per se*, an abuse of process. While the separation of police and Crown roles is a well-established principle of our criminal justice system, different provinces have implemented this principle in various ways. In some Canadian jurisdictions, pre-charge interviews by the Crown are a regular, even common practice. In these jurisdictions at least, it appears that public policy is served by the practice, and potentially harmful and arbitrary results are avoided by the refusal to draw a hard line at the decision to lay charges, before which

Crown counsel may not interview complainants. The pre-charge interviews in this case were done in accordance with the common practice of some other provinces, a practice more wide-ranging than the narrow, exceptional to rare practice the trial judge described. Furthermore, the Crown conducted an understandable review of the potential witnesses, in the wake of an early recommendation by the DPP that was not determinative. Given the uncertainty of the charges at that point, it could not be known whether the re-interviews led to more charges than would otherwise have been laid.

The trial judge was correct in his finding that the police error in releasing the accused's name as a suspect well in advance of any charges does not rise to the level of egregious abuse. While the police policy that the identity of suspects may be released only after charges have been laid is laudable, and a breach of it should not be condoned, other evidence on the record indicates that after this one misstep, the police exercised greater caution in preventing further information leaks until the process was truly public. Moreover, the prejudice experienced by the accused as a result of this early leak — humiliation and stress — cannot be attributed to this police error alone. The serious remedy of a stay of proceedings is not an appropriate method to denounce or punish past police conduct of this nature.

The trial judge erred in finding an abusive or improper purpose behind the laying of count 16. The trial judge's erroneous finding of a loss of Crown objectivity influenced this holding. If the trial judge had not started from the premise that the Crown had lost its objectivity, there would have been no justification for the trial judge to find the similarity between count 16 and the Alberta incident as the primary motivation for count 16, virtually ignoring the reasonable and probable grounds for laying count 16 in its own right.

There was no abuse of process in this case. The cumulative effect of the judge shopping, pre-charge Crown interviews, the improper police announcement, and the addition of count 16 in the direct indictment, while troubling in some respects, does not rise to the level of abuse of process which is egregious, vexatious, oppressive or which would offend the community's sense of decency and fair play. Moreover, this conduct, even if it did amount to an abuse, did not have an ongoing effect on the accused which would jeopardize the fairness of his trial.

The trial judge fell into error when he ordered the ultimate remedy of a partial stay of a number of charges. The trial judge misconceived the governing test for a stay of proceedings. Instead of inquiring into whether the abuse would be manifested, perpetuated or aggravated by ongoing proceedings, and then inquiring into whether any remedy other than a stay could cure this ongoing taint, the trial judge focussed his attention only on the final balancing exercise. The abuse found by the trial judge should be and was addressed by remedies other than a stay. Moreover, even if the trial judge had found an ongoing abuse which could only be remedied by a stay, the cumulative effect of the abuse still left some question about whether this was one of those clearest of cases warranting a stay. In his balancing analysis, the trial judge omitted some significant issues relevant to the public interest. Victims of sexual assault must be encouraged to trust the system and bring allegations to light. As the police saw it, there is evidence of a pattern of an assailant sexually attacking young girls and women who were in a subordinate power relationship with the accused, in some cases bordering on a relationship of trust. When viewed in this light, the charges are very serious and society has a strong interest in having the matter adjudicated, in order to convey the message that if such assaults are committed they will not be tolerated, and that young women must be protected from such abuse. In omitting to

consider any of these issues which favour proceeding with charges, the trial judge's discretion was not fully exercised and therefore cannot stand.

The decision to grant a stay is a discretionary one, which should not be lightly interfered with. However, where the trial judge made some palpable and overriding error which affected his assessment of the facts, the decision based on these facts may be reversed. Here, the trial judge made palpable and overriding factual errors which set his assessment of the facts askew. He was in error when he ruled that "pre-charge Crown interviewing in this country is . . . non-existent to rare". As well, the trial judge implied that the loss of Crown objectivity was abusive because it meant that the accused ultimately faced more charges, but no evidence can be found to support this deduction. The trial judge also misdirected himself regarding the law for granting a stay by overlooking key elements of the analysis, thereby committing an error which was properly reversed by the Court of Appeal.

Per Iacobucci, Major, Binnie and Arbour JJ. (dissenting): The trial judge found as a fact that there was no independent and objective review by the Crown prosecutors in this case. The absence of the usual and proper checks and balances would, he thought, shock the conscience of the community. He cited a number of concerns that reflected this institutional failure, but his listing of the symptoms should not be mistaken for his important and central finding of fact that the accused had been denied his constitutional right to a fair pre-trial procedure. No reason has been shown to set aside this critical finding of fact. The conclusion that well-informed people may reasonably take from the continued prosecution of what the former Director of Public Prosecutions described as "minor" allegations 24 to 34 years after the events are said to have taken place is that the accused is being pursued not so much for what he has

done as for who he is. Such a perception undermines public confidence in the impartiality and integrity of the criminal justice system.

The courts are very slow to second-guess the exercise of prosecutorial discretion and do so only in narrow circumstances, but these extensive discretionary powers must be exercised with objectivity and dispassion. Here, the failure of the proper and usual institutional checks and balances prevented the objective review of charges laid by the police that, because of their staleness, relatively minor nature (compared with those that did go to trial) and the potentially light sentences even if convicted, would likely have been stopped if an objective review had taken place.

The preferral of a direct indictment by the Attorney General did not "cleanse" the prior errors of judgment of the Crown attorneys. It was motivated by an understandable desire to bring to an end a preliminary inquiry that had lasted almost a year, and cannot be taken as having belatedly supplied the objective and dispassionate review of the original charging decision that, in the trial judge's view, had never taken place. A stay of proceedings was appropriate in this case. The absence of the proper checks and balances between police and prosecutor led to an increase in the number of charges laid against the accused. The trial judge concluded that the Crown's loss of objectivity and improper motive will be "manifested, perpetuated or aggravated" through the continued prosecution of the charges to which these abuses of process gave rise. If the trial itself would not have occurred but for the abusive conduct, then the trial itself necessarily perpetuates the abuse. The only way to halt this continued prejudice to the accused is a stay of proceedings.

Cases Cited

By LeBel J.

Referred to: *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. Conway*, [1989] 1 S.C.R. 1659; *R. v. Scott*, [1990] 3 S.C.R. 979; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44; *United States of America v. Cobb*, [2001] 1 S.C.R. 587, 2001 SCC 19; *Boucher v. The Queen*, [1955] S.C.R. 16; *R. v. S. (S.)*, [1990] 2 S.C.R. 254; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Darrach*, [2000] 2 S.C.R. 443, 2000 SCC 46; *Elsom v. Elsom*, [1989] 1 S.C.R. 1367; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *R. v. Oickle*, [2000] 2 S.C.R. 3, 2000 SCC 38; *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

By Binnie J. (dissenting)

R. v. Curragh Inc., [1997] 1 S.C.R. 537; *Boucher v. The Queen*, [1955] S.C.R. 16; *Lemay v. The King*, [1952] 1 S.C.R. 232; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *Elsom v. Elsom*, [1989] 1 S.C.R. 1367; *R. v. Carosella*, [1997] 1 S.C.R. 80; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Bain*, [1992] 1 S.C.R. 91; *Nelles v. Ontario*, [1989] 2 S.C.R. 170; *R. v. Chamandy* (1934), 61 C.C.C. 224; *R. v. G.D.B.*, [2000] 1 S.C.R. 520, 2000 SCC 22; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *In re Sproule* (1886), 12 S.C.R. 140; *R. v. Jewitt*, [1985] 2 S.C.R. 128; *R. v. Beare*, [1988] 2 S.C.R. 387; *R. v. Power*, [1994] 1 S.C.R. 601; *Smythe v. The Queen*, [1971] S.C.R. 680; *R. v. T. (V.)*, [1992] 1 S.C.R.

749; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Keyowski*, [1988] 1 S.C.R. 657; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391; *R. v. Sweitzer*, [1982] 1 S.C.R. 949; *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717; *R. v. Osborn*, [1971] S.C.R. 184; *Rourke v. The Queen*, [1978] 1 S.C.R. 1021; *R. v. Conway*, [1989] 1 S.C.R. 1659; *R. v. Scott*, [1990] 3 S.C.R. 979.

Statutes and Regulations Cited

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APPEAL from a judgment of the Nova Scotia Court of Appeal (1999), 179 N.S.R. (2d) 45, 137 C.C.C. (3d) 449, 28 C.R. (5th) 1, [1999] N.S.J. No. 293 (QL), allowing the Crown's appeal from a decision of the Nova Scotia Supreme Court (1998), 21 C.R. (5th) 366, 58 C.R.R. (2d) 283, [1998] N.S.J. No. 128 (QL). Appeal dismissed, Iacobucci, Major, Binnie and Arbour JJ. dissenting.

Edward L. Greenspan, Q.C., and *Marie Henein*, for the appellant.

Robert Morrison, Q.C., and *Heather Leonoff, Q.C.*, for the respondent.

Robert J. Frater and *Silvie Kovacevich*, for the intervener the Attorney General of Canada.

Mario Tremblay, for the intervener the Attorney General of Quebec.

John J. Walsh, for the intervener the Attorney General for New Brunswick.

The judgment of McLachlin C.J. and L'Heureux-Dubé, Gonthier, Bastarache and LeBel JJ. was delivered by

LEBEL J. –

I. Introduction

1 This case brought before the Court allegations of prosecutorial misdeeds, allegations of sexual interference and the harsh light of publicity surrounding the man at the centre, Nova Scotia's former Premier, Gerald Regan. The appellant Regan was ultimately charged with 18 counts of rape, attempted rape, indecent assault and unlawful confinement involving 13 women. He has already faced trial on eight of these counts, involving three women, for which he was acquitted. At the time of this hearing, one charge involving a fourth woman was still awaiting trial. The remaining charges were stayed by the trial judge because of Regan's claim that the Crown prosecutor was out to get him. The Court of Appeal overturned the stay. The Crown, itself, has since stayed two of the charges, and seven counts of sexual assault against Regan are currently pending.

2 The issue before this Court is whether the Crown and the police did indeed overstep their authority in the proceedings of this case, and if so, whether that abuse of the criminal justice process was so egregious as to warrant a stay of the proceedings. The ultimate question, as far as the appellant Regan is concerned, is whether or not he must return to trial to face the remaining charges of sex-related offences. Thus, the decision to uphold a stay of proceedings is a very serious one, which prevents, forever, the possibility of bringing charges of criminal behaviour before a judge and jury. In this case, the evidence does not disclose any serious abuse of process, or taint of the justice system, that would warrant such a drastic measure. I would dismiss Regan's appeal.

II. Facts

A. *Overview*

3 On March 15, 1995, Gerald Regan, by that time a former Premier of Nova Scotia, was charged with a long list of sexual offences, against a variety of women who had worked for or with him, dating back to the 1950s. The stories of alleged abuse had taken a long and winding path before finally surfacing. First, a CBC journalist spoke to a number of women who told of abusive acts they had allegedly suffered at the hands of the appellant. But that journalist did not broadcast the story. Several years later, while doing some research of his own, an avowed political foe of the appellant uncovered the information from the aborted news report. This informant took the stories to the police in July of 1993, and in September, an RCMP task force launched an investigation. During the investigation, a police officer responded to a reporter's request to confirm or deny that the appellant was under investigation. The police confirmed — a public admission which was in violation of police policy to remain silent about individual suspects until charges are laid. More than 300 interviews later, and 18 months after the story first broke about the Regan investigation, charges were laid.

B. *The Charges*

4 The decision to lay charges also has a convoluted history. At the conclusion of the police investigation, a report dated March 30, 1994 was submitted to the province's then Director of Public Prosecutions ("DPP"), John Pearson, with a request for his opinion about the laying of charges. The report identified 22 women complainants. Among them were six women who had been Regan's babysitters, one who had been his housekeeper, a political intern, a legislative page, a secretary, and a political reporter. The women were all young at the time of the alleged assaults, ranging in age from 14 to 24 years. One woman alleged she was raped when she was

14, two others alleged attempted rape. The other incidents involved sexual touching, exposure and kissing. The police report categorized the charges this way:

- three complainants who "may have been victims of sexual impropriety", but in the opinion of the police were not victims of criminal acts (although the acts showed a "*modus operandi*");

- six complainants who the police believed were victims of criminal offences, but who were "not willing to testify in a court of law";

- four complainants who were considered victims of criminal offences, but who did not want to testify as complainants, and were only willing to "co-operate by providing similar fact evidence at trial";

- and nine complainants of criminal acts who were willing to testify as complainants. Of these nine, one of them alleged the attack had occurred in Calgary, Alberta.

5 DPP Pearson responded to police by letter dated June 28, 1994, that he and two other prosecutors had reviewed the file. One of those was Susan Potts, then Senior Crown Attorney in charge of sexual assault prosecutions. Pearson recommended that charges should be laid involving four of the eight Nova Scotia-based complainants who were willing to testify. He chose the incidents which involved the most serious physical violations, including rape, attempted rape, and the one case where it was alleged the appellant had exposed his penis.

6 In the other four local cases of willing complainants, DPP Pearson recommended that the police not proceed with charges. These cases involved many similar accounts of the appellant trying to grope and "French kiss" the victim. DPP Pearson explained that although these acts would have been against the law at the time, "the allegations are minor in nature, especially when placed in the context of societal values at the time", and the "staleness" of the offences outweighed their "gravity". He thought that the minor charges could be sanctioned by proceeding against the more major ones, and he feared that otherwise the prosecution might appear to be a "persecution".

7 In addition, DPP Pearson advised that "the case against Regan would be significantly enhanced if some of the more recent incidents were proceeded with". He recommended that the police re-contact the six women who had been victims of apparent criminal conduct, but were unwilling to testify. He made no recommendation about the complainants who had apparently been victims of criminal behaviour, but were only willing to give similar fact evidence. Finally, DPP Pearson recommended that the police contact Alberta authorities with regard to the Calgary-based incident. He advised the police that "you are not obliged to accept our opinion and that the final charging decision rests with you. We are also cognizant of the duties and responsibilities of Crown Counsel to consider whether or not it is appropriate to proceed with charges once they have been laid." He suggested that police investigators "meet with [Crown counsel] Susan Potts to finalize the wording of any charge [the police] decide to proceed with".

8 The police did not agree with DPP Pearson's charging recommendation. They were of the view that a more complete picture of the allegations against the appellant should be put before the court. Chief Superintendent Falkingham testified:

> . . . over the several years I saw a pattern and an MO that Mr. Regan sexually assaulted, in my view, a number of young teenagers. . . . The MO was with babysitters, the MO was with – when he had an opportunity to be alone with a young girl, and I felt that that was all building into a large picture which indicated to me that there was a continuing criminal offence in my mind, together – as a global investigation.
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> . . .
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> My view is the matter of charges had to involve the large number of complainants and as a result of them – the continued offences over the years. . . .

9 After the Crown joined police in re-interviewing most of the original complainants, 16 counts for sex-related offences, involving 11 women, were laid against the appellant on March 15, 1995. On May 30, 1995, a revised information was sworn, which added two new complainants and three new counts, for a total of 19 counts related to 13 women.

10 The matter proceeded to a preliminary hearing in April 1996. One year later, the Crown decided to prefer a direct indictment. In that final charging decision, one complainant was dropped, a new one was added (count 16), and the charges concerning a third were amended to drop one count, bringing the final tally to 18 counts of sex-related offences, involving 13 women, laid against the appellant.

C. *Crown Conduct*

11 After DPP Pearson's written recommendations, Crown Potts met with police on July 15, 1994. At that recorded meeting, Crown Potts suggested that it would not be "advisable" that charges be brought before a particular judge, because she thought he would have political ties to the appellant. Instead, she said she would

"keep monitoring the court docket to see who is sitting when and what would be in our best interest" – an exercise commonly known as "judge shopping".

12 At the same meeting, Potts requested to read all the investigation reports, because "this would give her a clear picture of what was actually going on". Notes of a meeting on January 17, 1995, attended by the RCMP Chief Superintendent on the case, confirmed that Potts had by then re-read "the evidence and the victims' statements". Police and Crown then agreed that six complainants reluctant to testify "have to be re-interviewed". In the end, police and Crown counsel together re-interviewed many of the original 22 complainants, as well as five new women who came forward after the Pearson letter.

13 The purpose of the re-interviews was "[f]irstly and primarily, to provide information about the Court process to potential complainants so that they could make an informed decision as to their involvement in these proceedings; and secondly, to make assessments of credibility about these witnesses, including their capacity for recall and general demeanor issues, and to prepare for a preliminary inquiry". (Trial submissions of the Crown, Appellant's Record, p. 1089)

14 The re-interviews included 16 of the original 22 complainants: four of the six reluctant witnesses whom DPP Pearson had recommended should be re-approached; three of the four women only willing, at first, to give similar fact evidence; three of the four complainants for whom Pearson had recommended laying charges (the fourth refused to proceed further); all four willing complainants whom the police wanted to charge but for whom DPP Pearson had recommended that no charge be laid; the complainant in the Alberta-based incident; and one of the three complainants for whom, at first, it was thought there was no criminal offence.

15 Crown Potts was removed from the prosecution of this case by the time the preliminary inquiry began in April 1996. Crown Adrian Reid stepped in as lead counsel at the preliminary inquiry and trial. Crown Reid became involved with the case in December 1995 after charges were laid.

16 Citing the cumulative effect of this Crown behaviour combined with the police premature identification of him as a suspect, the appellant sought a global stay of all of the charges. At trial, a partial stay – 9 of the 18 counts – was granted.

III. Judicial History

A. *Nova Scotia Supreme Court* (1998), 21 C.R. (5th) 366

17 Michael MacDonald A.C.J. identified that the appellant was not claiming an abuse of process which had tainted the fairness of the trial, and was therefore seeking relief under the so-called residual category of procedural abuse, which will warrant a stay of proceedings. MacDonald A.C.J. noted, however, that the remedy of a stay remains reserved for only the clearest of cases, where it is the only remedy available to counter the effects of the abuse (*Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391).

18 MacDonald A.C.J. adopted the test for a stay articulated in *Tobiass*, at para. 90, where the Court held that in order to grant a stay, two criteria must be satisfied: (1) that the prejudice will be manifested, perpetuated or aggravated through the conduct of the trial or by its outcome, and (2) that no other remedy is reasonably capable of removing the prejudice flowing from the abuse. The Court added a third

factor which should be considered in cases where it remains unclear whether the abuse is sufficient to warrant the stay. It requires courts to engage in a weighing of the societal interests involved. Courts must then "balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits. This is not to say, of course, that something akin to an egregious act of misconduct could ever be overtaken by some passing public concern" (*Tobiass*, at para. 92). MacDonald A.C.J. acknowledged that this third criterion would play a significant part in his analysis. In approaching the issue, MacDonald A.C.J. noted that he had to weigh the cumulative effect of any alleged wrongdoing. He was also mindful that abuse of process need not be driven by evidence of *mala fides* to warrant a stay, although such evidence was certainly relevant.

19 MacDonald A.C.J. reviewed the respective roles of the police and of the Crown and noted that while performing independent tasks, they must work well together. A strict separation of their functions, however, creates a safeguard against misconduct by either one. This system of checks and balances is achieved by drawing a clear line between the investigation of charges, and their prosecution. He held that police in Nova Scotia are "exclusively responsible for the investigation of crime and deciding what if any charges are to be laid. . . . Here, the Crown's role is limited to simply providing legal advice; advice which is not binding on the police" (paras. 63 and 65). In contrast, the Crown must function as "a quasi judicial minister of justice who must also serve as advocate" (para. 67).

20 The appellant submitted a list of allegations of police and Crown misconduct, including the premature formation of a police task force to investigate allegations against Regan, and questionable investigative techniques and arrest

procedures. MacDonald A.C.J. concluded that these actions had little impact on the appellant. He did consider that the premature confirmation of Regan as a suspect in the police investigation was clearly wrong, as it contravened express police policy. He was troubled by this serious error in judgment.

21 MacDonald A.C.J. then reviewed the allegations of Crown misconduct. He found clear evidence of Crown Potts' blatant attempt at judge shopping, and found this offensive and most troubling. For MacDonald A.C.J., this gave the appearance of a Crown Attorney who was attempting to secure a conviction at all costs. He concluded that Potts' behaviour had the effect of tainting her entire involvement in the process.

22 The pre-charge Crown interviews of complainants were, however, the most contentious issue before MacDonald A.C.J. Crown counsel, particularly Ms. Potts, became heavily involved with pre-charge interviewing. He found that the practice of pre-charge Crown interviewing in this country is not entirely rejected, but where used, its scope is narrow. MacDonald A.C.J. observed that in the provinces like New Brunswick, where pre-charge Crown interviews are done, they serve only as a screen to protect a suspect from the humiliation of being charged, if charges are later dropped or stayed. In this case, he found that the purpose for at least some of the pre-charge Crown interviews was to have reluctant complainants change their minds and come forward to lay charges. MacDonald A.C.J. held that protection of the appellant was never a factor motivating the Crown's pre-charge interviews.

23 As a result, MacDonald A.C.J. found that this process had an impact on the number of charges that were ultimately laid. He held that the Crown was integrally immersed in the decision-making about charges. Cooperation led to consensus and

this collaboration homogenized the process which then became a joint charging decision. The Crown had lost its objectivity: the effect was to deny the appellant a hard, objective second look at the charging decision, which is fundamental to the role of the Crown. In MacDonald A.C.J.'s view (at para. 124),

> [i]t is impossible to retain the requisite level of objectivity by conducting lengthy (and no doubt emotional) pre-charge interviews with the complainants. Human nature just will not allow it. By doing so you hear first hand only one side of the story. How can you then objectively review the process which includes a consideration of the rights of the applicant?

Nevertheless, MacDonald A.C.J. found that the Crown did not get involved in the investigation, and apart from Crown Potts' inexcusable comment about judge shopping, all other Crown counsel involved in the case were well-intentioned throughout the process, yet they simply lost perspective during the charging procedure.

24 MacDonald A.C.J. found that the Crown had not acted in bad faith when preferring the direct indictment. The preliminary inquiry was very lengthy. If the Crown had been ill-motivated, it could have preferred the direct indictment at the outset or at least sooner than it did.

25 When viewing his concerns cumulatively, about judge shopping, the Crown's pre-charge interviews and to a lesser extent, the RCMP's premature confirmation that Regan was under investigation, in total this was not one of those clearest of cases of procedural abuse that demanded a global stay of all the charges. Instead, on a case-by-case review, he decided that for the nine charges concerning the

most serious allegations there was a strong societal interest in proceeding with the prosecution.

26 However, for the less serious charges, MacDonald A.C.J. pointed out that the Pearson Report was detailed and comprehensive and spoke volumes about what the Crown originally thought was fair to the appellant. The Crown should not be seen to significantly change its position without valid reason. He held that the Crown did change its position: the direct indictment proceeded with charges involving at least four and arguably six complainants who were initially on Mr. Pearson's recommended list to exclude. He concluded that the Pearson recommendations should be given significant deference. He followed the Pearson charging recommendation and also applied its criteria to charges which post-dated the Pearson report. In the end, MacDonald A.C.J. concluded by staying the remaining 9 of the 18 counts before him.

27 MacDonald A.C.J. added a final comment about count 16, which was among those he stayed. He held that the Crown had been motivated by an improper purpose in proceeding with this charge, which was first laid as part of the direct indictment. Count 16 was similar in fact to the incident alleged to have occurred in Alberta. The Alberta allegation could not be pursued in Nova Scotia. MacDonald A.C.J. was suspicious that the Crown's eagerness to put the Alberta facts before a Nova Scotia court motivated the Crown to lay this new, similar, Nova Scotia-based charge. MacDonald A.C.J. considered this an improper purpose which irretrievably tainted this count.

B. *Nova Scotia Court of Appeal* (1999), 179 N.S.R. (2d) 45

1. Cromwell J.A. (Roscoe J.A. concurring)

28 Cromwell J.A., for a majority of the Court of Appeal, found two significant errors in the trial judge's reasoning. First, the trial judge erred in law by not asking himself whether the continuation of the prosecution of the charges would manifest, perpetuate or aggravate the prejudice caused by the Crown's failure to properly exercise its discretion at the charging stage. Second, the trial judge also erred by treating a judicial stay of proceedings as a remedy for past misconduct.

29 The narrow, residual category of abuse of process applied in this case, because the trial judge had rejected all the appellant's arguments that he could not receive a fair trial. Cromwell J.A. observed that there must be exceptional circumstances here to warrant the granting of a stay, as "[o]nly in rare and unusual circumstances could holding a fair trial, of itself, be damaging to the integrity of the judicial process" (para. 108).

30 Cromwell J.A. recounted the three-step analysis for this residual category (*Tobiass*, *supra*). At the first step, the accused must show that there has been misconduct, or circumstances which have arisen apart from misconduct, which render the continuation of the prosecution damaging to the integrity of the judicial process. At the second step, the court must balance the integrity of the judicial process against the societal interest in the prosecution of alleged crimes. This is done by considering whether the prejudice caused by the abuse will be manifested, perpetuated or aggravated by the continuation of the prosecution. If so, then the court considers whether another remedy, short of a stay, is reasonably capable of removing the prejudice. Only if the abuse is ongoing, and no other remedy is tenable, does the balance favour a judicial stay.

31 Further analysing the elements of the second stage, Cromwell J.A. emphasized that the remedy of a stay is prospective rather than retroactive: "a stay of proceedings is not approached as a remedy to redress a wrong that has already been done, but rather as a remedy to prevent further damage to the integrity of the judicial process in the future caused by the continuation of the prosecution" (para. 116). The ongoing harm might be repeated in the future, or might plague the process in the sense that the misconduct is so egregious that the mere going forward with the proceedings is offensive. To these examples in the case law, Cromwell J.A. added a third possibility of ongoing prejudice. This would occur in cases where "the conduct has the effect of setting the prosecution on a fundamentally different path than it would otherwise have followed" (para. 118).

32 The third step in the analysis is only undertaken if, after completing the analysis at the first two stages, it is still unclear whether a stay is required. The third stage reconsiders the balance between society's interest in proceeding, and the interests served by granting the stay. At this stage, however, the emphasis is on whether the misconduct, on its own, is so egregious that a stay is warranted. Cromwell J.A. pointed out that in theory, such cases might exist, but in practice, it is unlikely that such egregious behaviour would not meet the criterion of ongoing harm at step two. Thus Cromwell J.A. concluded that to grant the remedy of a stay, evidence of ongoing harm from the abuse will almost always be key.

33 Cromwell J.A. noted that abuse of process cases are dependent on their facts. The trial judge made specific findings of misconduct on four matters: the premature announcement of Regan as a suspect, the judge-shopping comment, the Crown's loss of objectivity at the charging stage, and a fourth specific finding relating to count 16, the so-called similar fact count. Cromwell J.A. went on to outline what

the trial judge had specifically not found, including: the Crown was not improperly involved in the investigation; the police did not act wrongly in laying the charges; the Crown had not acted with *mala fides* or with an improper purpose when preferring the direct indictment; the Crown's loss of objectivity did not extend beyond the charging stage; and the Crown did not encourage the police to lay more charges nor did the Crown disregard police freedom and independence to make a decision on charges.

34 Generally, the trial judge appeared to leave out any direct consideration of the second step in the stay inquiry. There was no finding by the trial judge of a likelihood of future or ongoing misconduct, nor did he find that the cumulative abuse was so egregious, in itself, that a stay was required. Cromwell J.A. added: "However, he appears to have thought that the loss of objectivity had ongoing impact because it may have resulted in more charges proceeding than would have been prosecuted had objectivity been retained" (para. 131). Nevertheless, the trial judge expressly stated that the abuse was not serious enough to warrant a global stay. Furthermore, the trial judge gave no explicit consideration to whether another remedy was capable of removing the prejudice.

35 Cromwell J.A. proceeded to analyze each of the trial judge's findings of abuse. First was the misconduct found in the laying of count 16, the similar fact count. The trial judge concluded that count 16 was added to the direct indictment because of an improper motive. Cromwell J.A. found that this finding was contradicted by the judge's other findings that, aside from Ms. Potts, no Crown had acted improperly or with bad faith, and their perspective was lost only at the charging stage, "the time around which the first charges were laid in March of 1995" (para. 129) (not at the direct indictment, when count 16 was added). There was nothing inherently objectionable in the Crown considering questions of the admissibility of evidence and

its impact on the prospects of conviction when deciding to proceed with charges. Cromwell J.A. concluded the evidence surrounding count 16 disclosed no abuse, and thus failed step one of the stay analysis. The trial judge had erred in ordering a stay of count 16.

36 Next Cromwell J.A. dealt with the finding of the loss of Crown objectivity. The trial judge had reached two independent conclusions: at the charging stage, the Crown had lost its objectivity, and at the direct indictment stage, the Crown decision was proper. Cromwell J.A. found these two holdings could not stand together. If the Crown's discretion to prefer the direct indictment was properly exercised, it must be taken to have been exercised with proper regard to the public interest. This was consistent with the trial judge's finding that the Crown's loss of objectivity was confined to the charging stage. Cromwell J.A. also noted that virtually all of the specific findings of misconduct related exclusively or primarily to Ms. Potts. Her involvement in the matter ended at the time of the preliminary inquiry and before the direct indictment was preferred. Cromwell J.A. found that the trial judge erred in generalizing about misconduct by the Crown, given the narrowness of the specific conclusions that the loss of objectivity was at the charging stage, and misconduct was attributed only to Crown Potts.

37 Cromwell J.A. disagreed with the trial judge's finding that collaboration between the Crown and the police in the charging decision is wrong. He found no basis in law for such a conclusion. Provided that the independence and distinct roles of the police and the Crown are respected and that no improper purpose is being pursued, it is desirable for the Crown and police to avoid unnecessary disagreements about whether charges should proceed.

38 The trial judge had reasoned that human nature makes it impossible for the Crown to maintain objectivity if they interview witnesses pre-charge. Cromwell J.A. rejected this. If it were so, the Crown could never conduct witness interviews, pre- or post-charge, and still remain objective. Cromwell J.A. concluded instead that "[t]he obligation to be fair-minded is ongoing" (para. 158). There was nothing "inherently insidious" about the Crown's pre-charge interviews in this case, and Cromwell J.A. proceeded on the narrower ground identified by the trial judge that the Crown's pre-charge interviews were conducted without objectivity because they were not done "for the purpose of reviewing whether the charges should proceed in the public interest" (para. 163). In other words, the Crown did something more than charge screening in this case. However, Cromwell J.A. added that neither the trial judge nor he found anything wrong with the Crown encouraging, by ethical means, reluctant complainants to come forward, especially in cases of sexual assault, because those victims' confidence in the justice system is especially low.

39 Cromwell J.A. noted that the loss of Crown objectivity constituted the central concern regarding abuse of process in this case. The improper police announcement, and the judge-shopping comment appeared to be incidental to the decision to stay the nine charges. As a result, Cromwell J.A. did not deal with these issues at any great length.

40 Turning to the test for a stay of proceedings, Cromwell J.A. was of the view that the trial judge erred fundamentally at step two of this analysis because he focussed on the abuse rather than on the future harm to the integrity of the justice system. The trial judge did not find that the prejudice flowing from the abuse would be manifested, perpetuated or aggravated by the trial, nor did he turn his mind to any acceptable remedy short of a stay. However, the trial judge's reasons were consistent

with a conclusion that Regan was facing more charges than he might have been, if the Crown had not lost its objectivity. In this sense the abuse may have had ongoing effects. But granting a stay on this basis overlooked the proper preferring of the direct indictment.

41 Cromwell J.A. concluded that the trial judge erred in law by relying so heavily on the Pearson recommendation as a guide to his decision to stay some of the charges. The trial judge's approach intended to restore Regan to the position he would have enjoyed but for the Crown's subsequent loss of objectivity. This was wrong, as it was a retroactive cure for past misdeeds, instead of a prospective consideration of whether the abuse was ongoing, and what remedy would be best to address it. The Pearson letter had not crystallized the Crown's position on the charging decision — it was merely advice in response to police questions, and it did not even deal with three new charges, from five new complainants who surfaced after the Pearson letter.

42 Furthermore, the trial judge had not expressly considered the issue of whether another remedy was capable of removing the prejudice. Cromwell J.A. was of the view that this criterion could be satisfied without the need for a stay in this case. Crown Potts' removal from the case and the proper preferring of the direct indictment accrued to provide sufficient remedies to any past misconduct, and to prevent any future harm to the integrity of the judicial process.

43 From the errors committed in the stay inquiry, Cromwell J.A. concluded that the trial judge must have been unsure about the necessity of a stay at the completion of step two, and proceeded on to the balancing exercise at step three, on a case-by-case basis. In contrast, Cromwell J.A. ruled that the inevitable conclusion was that neither of the two criteria at the second stage of the test for a stay of

proceedings was satisfied. However, if he was in error and it was necessary to go on to the third stage, Cromwell J.A. thought the trial judge erred in failing to properly consider all of the interests affected by the cases he stayed. It is impossible to do the required balancing of interests if only one side of the scale is considered. The trial judge had considered Regan's interest in granting the stay, but did not consider the societal interests in proceeding. Cromwell J.A. was especially sensitive to the fact that three of the stayed counts involved teenagers, employed as babysitters or a housekeeper by the appellant, and he opined that, in such situations, the integrity of the justice system might be harmed by not proceeding to trial. In the result, he allowed the appeal and set aside the stays of all nine counts.

2. Freeman J.A. (dissenting)

44 Freeman J.A. found that this case turned on the need for police and the Crown to observe the demarcation line between their functions, particularly at the pre-charge stage. The trial judge had found that the police decision to charge and the Crown decision to prosecute the charge had been scrambled together, or homogenized. As a result, neither police nor Crown was able to discharge their constitutional role of protecting the accused and the public perception of the administration of justice. Freeman J.A. reviewed the trial judge's decision and found no fault with the careful manner in which the trial judge instructed himself respecting the role of the police and of the Crown.

45 A trial judge has superior familiarity with the context of a case. This is an important reason for an appeal court to show the trial decision deference. Freeman J.A. observed that the trial judge was shocked by the judge-shopping incident and even more so by the Crown's assumption of the police role in conducting pre-charge

interviews to encourage witnesses to pursue charges. The trial judge had also noted the context in which this had all occurred. Following the tragedy of the wrongful imprisonment of Donald Marshall, Jr., the criminal justice system in Nova Scotia was criticized for treating prominent people more favourably. The appellant argued that Regan was the victim of a backlash, specifically that the authorities in this case overreacted by singling him out for special, unfavourable treatment. Freeman J.A. agreed that any citizen knowledgeable of the principles and facts involved would be equally shocked.

46 Freeman J.A. was of the view that the trial judge had correctly applied the legal principles to determine that the appellant had been denied a dispassionate review of the charging decision, by an objective Crown. The result was that the accused faced a multiplicity of charges which had been determined without taking societal interests, including those of decency and fair play, into account. The trial judge had properly found this one of the clearest of cases to warrant a stay of some of the charges. A reduction in the number of charges by pruning out the less serious ones, and by accommodating society's interest by proceeding with the more serious criminal charges of rape and attempted rape, was not only the obvious remedy, but the only effective one. In conclusion, Freeman J.A. found that the trial judge had not misdirected himself and his decision was not so clearly wrong as to amount to an injustice.

IV. Legislation

47 *Canadian Charter of Rights and Freedoms*

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

> **24.** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

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

> **577.** In any prosecution,
>
> (*a*) where a preliminary inquiry has not been held, an indictment shall not be preferred, or
>
> (*b*) where a preliminary inquiry has been held and the accused has been discharged, an indictment shall not be preferred or a new information shall not be laid
>
> before any court without,
>
> (*c*) where the prosecution is conducted by the Attorney General or the Attorney General intervenes in the prosecution, the personal consent in writing of the Attorney General or Deputy Attorney General, or
>
> (*d*) where the prosecution is conducted by a prosecutor other than the Attorney General and the Attorney General does not intervene in the prosecution, the written order of a judge of that court.

V. Issues

48 1. Did the conduct of the Crown and police amount to an abuse of process under s. 7 of the *Canadian Charter of Rights and Freedoms*?

2. Was a partial stay of proceedings warranted?

3. Was the Court of Appeal entitled to interfere with the trial court's decision to grant a partial stay?

VI. Analysis

A. *Abuse of Process*

49 In the *Charter* era, the seminal discussion of abuse of process is found in *R. v. O'Connor*, [1995] 4 S.C.R. 411. The doctrine of abuse of process had been traditionally concerned with protecting society's interest in a fair process. However, in *O'Connor*, L'Heureux-Dubé J., writing for a unanimous Court on this issue (Lamer C.J. and Sopinka and Major JJ. dissenting on the application of law to the facts), subsumed the common law doctrine abuse of process into the principles of the *Charter* in the following terms, at para. 63:

> [I]t seems to me that conducting a prosecution in a manner that contravenes the community's basic sense of 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.

L'Heureux-Dubé J. also acknowledged the existence of a residual category of abuse of process in which the individual's right to a fair trial is not implicated. She described this category, which is invoked in the present appeal, as follows in *O'Connor*, at para. 73:

> This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

50 L'Heureux-Dubé J. thus held that now, when the courts are asked to consider whether the judicial process has been abused, the analysis under the common law and the *Charter* will dovetail (see *O'Connor*, at para. 71). In this manner, while

it acknowledged that the focus of the *Charter* had traditionally been the protection of individual right, the *O'Connor* decision reflected and accommodated the earlier concepts of abuse of process, described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). In an earlier judgment, McLachlin J. (as she then was) expressed it this way:

> . . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice. I add that I would read these criteria cumulatively.
>
> (*R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007)

51 Under the *Charter*, the violation of specific fair trial rights may also constitute an abuse of process, as will a breach of the more general right to fundamental justice (see *O'Connor*, at para. 73).

52 Finally, this Court's most recent consideration of the concept of abuse of process arose in the administrative context. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, it was held that a 30-month delay in processing a sexual harassment complaint through the British Columbia human rights system was not an abuse of process causing unfairness to the alleged harasser. For the majority, Bastarache J. came to this decision on the basis that abuse of process has a necessary causal element: the abuse "must have caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected" (para. 133). In Blencoe's case, it was held that the humiliation, job loss and

clinical depression which he suffered did not flow primarily from the delay, but from the complaint itself, and the publicity surrounding it (*Blencoe*, at para. 133; see also *United States of America v. Cobb*, [2001] 1 S.C.R. 587, 2001 SCC 19).

B. *Stay of Proceedings*

53 A stay of proceedings is only one remedy to an abuse of process, but the most drastic one: "that ultimate remedy", as this Court in *Tobiass*, *supra*, at para. 86, called it. It is ultimate in the sense that it is final. Charges that are stayed may never be prosecuted; an alleged victim will never get his or her day in court; society will never have the matter resolved by a trier of fact. For these reasons, a stay is reserved for only those cases of abuse where a very high threshold is met: "the threshold for obtaining a stay of proceedings remains, under the *Charter* as under the common law doctrine of abuse of process, the 'clearest of cases'" (*O'Connor*, *supra*, at para. 68).

54 Regardless of whether the abuse causes prejudice to the accused, because of an unfair trial, or to the integrity of the justice system, a stay of proceedings will only be appropriate when two criteria are met:

> (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
>
> (2) no other remedy is reasonably capable of removing that prejudice. [*O'Connor*, at para. 75]

The Court's judgment in *Tobiass*, at para. 91, emphasized that the first criterion is critically important. It reflects the fact that a stay of proceedings is a prospective rather than a retroactive remedy. A stay of proceedings does not merely redress a past

wrong. It aims to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole, in the future.

55 As discussed above, most cases of abuse of process will cause prejudice by rendering the trial unfair. Under s. 7 of the *Charter*, however, a small residual category of abusive action exists which does not affect trial fairness, but still undermines the fundamental justice of the system (*O'Connor*, at para. 73). Yet even in these cases, the important prospective nature of the stay as a remedy must still be satisfied: "[t]he mere fact that the state has treated an individual shabbily in the past is not enough to warrant a stay of proceedings" (*Tobiass*, at para. 91). When dealing with an abuse which falls into the residual category, generally speaking, a stay of proceedings is only appropriate when the abuse is likely to continue or be carried forward. Only in "exceptional", "relatively very rare" cases will the past misconduct be "so egregious that the mere fact of going forward in the light of it will be offensive" (*Tobiass*, at para. 91).

56 Any likelihood of abuse which will continue to manifest itself if the proceedings continue then must be considered in relation to possible remedies less drastic than a stay. Once it is determined that the abuse will continue to plague the judicial process, and that no remedy other than a stay can rectify the problem, a judge may exercise her or his discretion to grant a stay.

57 Finally, however, this Court in *Tobiass* instructed that there may still be cases where uncertainty persists about whether the abuse is sufficient to warrant the drastic remedy of a stay. In such cases, a third criterion is considered. This is the stage where a traditional balancing of interests is done: "it will be appropriate to balance the interests that would be served by the granting of a stay of proceedings

against the interest that society has in having a final decision on the merits". In these cases, "an egregious act of misconduct could [never] be overtaken by some passing public concern [although] . . . a compelling societal interest in having a full hearing could tip the scales in favour of proceeding" (*Tobiass*, at para. 92).

C. *Application to the Case at Bar*

1. Abuse of Process

58 In the case at bar, the trial judge was concerned with the cumulative effect of three elements of the proceedings brought against the appellant: "These include judge shopping; the Crown's pre-charge interviews, and to a lesser extent, the R.C.M.P.'s premature press release confirming the investigation" (para. 132). In addition to these events early in the proceedings, the trial judge found that the one count added to the direct indictment (count 16) was laid for an improper purpose.

(a) *Judge Shopping*

59 It is important to understand exactly what the Crown said and did in relation to judge shopping. There is direct evidence that the Senior Crown Attorney assigned to this case during the police investigation said in a meeting with police that the laying of charges should be delayed to avoid bringing them before a particular judge, whom she feared might be sympathetic to the accused. This impropriety was exacerbated by her comment that she would monitor the court docket, looking for a different judge who would be more sympathetic to the laying of charges against the accused. There is no evidence that the comment was made more than once, and no evidence that it was acted upon. Nevertheless, it was said to police involved in the

case, and set a tone of overzealous and unfair pursuit of a prosecution against the accused.

60 This Court has adverted to the impropriety of trying to influence the outcome of a proceeding by trying to "select" the judge. Where it appeared that the Crown had abandoned a case before one judge to avoid an unfavourable ruling, and then reinstated charges at a new trial before a new judge, McLachlin J. was quick to point out the affront to the integrity of the system (*Scott*, *supra*, at pp. 1008-9):

> The concern with "judge-shopping" arises from the use of the stay to avoid the consequences of an unfavourable ruling. Normally, Crown counsel faced with an unfavourable ruling is expected to accept it. The remedy is by way of appeal. . . .
>
> Such conduct also raises concern for the impartiality of the administration of justice, real and perceived. The use of the power to stay, combined with reinstitution of proceedings as a means of avoiding an unfavourable ruling, gives the Crown an advantage not available to the accused.

61 The judge shopping in this case was equally offensive. It illustrated another inequality between the Crown and defence, in that only the Crown has the power to influence which judge will hear its case by manipulating the timing of the laying of the charge. Even if this advantage was not ultimately exploited, it must be reasserted that judge shopping is unacceptable both because of its unfairness to the accused, and because it tarnishes the reputation of the justice system. Furthermore, it should not infect the investigative process by involving police in a conspiracy to manipulate the process. The trial judge quite properly was seriously troubled by this evidence. He nevertheless was mindful that this single comment was not acted upon, and did not find it determinative in his ultimate conclusion that the process against the accused had been abusive to the point of necessitating a stay of proceedings.

(b) *The Police/Crown Relationship*

62 The appellant contends that a bright line must be drawn at the stage where charges are laid, in order to keep the functions of the police separate from those of the prosecutors. This separation, he argues, is the only way to maintain the Crown's crucial objectivity when reviewing the appropriateness of charges. The trial judge adopted this approach in assessing the administration of justice now practised in Nova Scotia. Citing various studies on the police/Crown relationship, MacDonald A.C.J. identified the police role as limited to pure investigation pre-charge, and the subsequent decision of whether to lay a charge. This reserves for the Crown the role of "Minister of Justice", in the sense that the Crown must be both ardent prosecutor once charges have been laid, and objective defender of the general public interest in determining whether to prosecute the charges recommended by police. Recognizing that in practice the police and Crown must still work together, MacDonald A.C.J. nevertheless emphasized that "the need for co-operation should never interfere [with] their individual autonomy" (para. 72).

63 The trial judge determined that the practice of Crown pre-charge interviewing in this country is "non-existent to rare", and is only done for the benefit of the accused, that is for the purpose of screening out frivolous or unsupportable charges: "[o]n the occasions when it is performed, it serves as a screen designed to protect an accused from going through the embarrassment (humiliation) of being charged only to later have the charges dropped or stayed" (para. 117). Any other pre-charge contact with witnesses would unavoidably undermine the Crown's objectivity – MacDonald A.C.J. reasoned that human nature would prevent the Crown from considering any interest other than that of the witness. The trial judge concluded that

in this case, every charge laid subsequent to a Crown interview was suspect, and only DPP Pearson's paper-based assessment of the charges was objective.

64 The question before this Court is whether the Crown's objectivity is necessarily compromised if Crown counsel conduct pre-charge interviews of witnesses without the single, express intention of screening out charges before they are laid. In essence, this Court has been asked to consider whether, at law, Crown prosecutors must be prevented from engaging in wide-ranging pre-charge interviews in order to maintain their essential function as "Ministers of Justice". First, it is my view that different provinces have answered this question differently, and that the trial judge erred in his evaluation of the standard practice across the country on this issue. Furthermore, while the police tasks of investigation and charge-laying must remain distinct and independent from the Crown role of prosecution, I do not think it is the role of this Court to make a pronouncement on the details of the practice of how that separation must be maintained.

65 The seminal concept of the Crown as "Minister of Justice" is expressed by this Court's judgment in *Boucher v. The Queen*, [1955] S.C.R.16, in which Rand J. explained, at pp. 23-24:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility.

The issue before the Court in *Boucher, inter alia*, was whether the Crown counsel's personal opinion about the guilt of the accused was improper. It was so found. The exposition of the facts in *Boucher* helps to draw the distinction between Crown involvement with the case, pre-charge, and whether that inevitably leads to a loss of the Crown's necessary objectivity (at p. 27, *per* Locke J.):

> The [Crown's] statements were calculated to impress upon the jury the asserted fact that, before the accused had been arrested, the Crown, with its experts, had made a thorough investigation and was satisfied that he was guilty beyond a reasonable doubt. Introduced into the record in this manner, there could be no cross-examination to test their accuracy.
>
> . . .
>
> The Crown prosecutor, having improperly informed the jury that there had been an investigation by the Crown which satisfied the authorities that the accused was guilty, thus assured them on his own belief in his guilt and employed language calculated to inflame their feelings against him. [Emphasis added.]

Based on the underlined sections, it appears that the Crown was involved in the investigation, before the arrest, thus presumably pre-charge. Yet this alone was not troublesome to the Court. Instead, it was the subsequent Crown's personal conclusion drawn from this investigation, namely that the accused was guilty, which was then put before the jury in the manner of evidence, which the Court found inappropriate. This action revealed that the Crown had lost his objective stance as a Minister of Justice in the process. The example, I believe, helps to differentiate between the fact of pre-charge involvement by the Crown, and the loss of objectivity which may result.

66 The need for a separation between police and Crown functions has been reiterated in reports inquiring into miscarriages of justice which have sent innocent men to jail in Canada. The *Royal Commission on the Donald Marshall, Jr., Prosecution,* vol. 1, *Findings and Recommendations* (1989) ("Marshall Report")

speaks of the Crown's duty this way: "In addition to being accountable to the Attorney General for the performance of their duties, Crown prosecutors are accountable to the courts and the public. In that sense, the Crown prosecutor occupies what has sometimes been characterized as a quasi-judicial office, a unique position in our Anglo-Canadian legal tradition" (pp. 227-28). The Marshall Report emphasizes that this role must remain distinct from (while still cooperative with) that of the police (at p. 232):

> We recognize that cooperative and effective consultation between the police and the Crown is also essential to the proper administration of justice. But under our system, the policing function -- that of investigation and law enforcement – is distinct from the prosecuting function. We believe the maintenance of a distinct line between these two functions is essential to the proper administration of justice.

67 I note that investigation is not synonymous with interviewing for the purposes at issue in this appeal. The trial judge made a clear ruling that the Crown did not engage in "investigation" in this case. The distinct line appears to be that police, not the Crown, have the ultimate responsibility for deciding which charges should be laid. This can still be true after the Crown has made its own pre-charge assessment, and when the two arms of the criminal justice system disagree on whether to lay charges. (See testimony of Philip Stenning, Appellant's Record, at p. 975.) The Nova Scotia Solicitor General's Directive on Laying of Charges (1990), which responded to the Marshall inquiry, states:

> All Police Departments must implement the following protocol for the resolution of disputes between police and Crown over the laying of criminal charges:
>
> (i) no charge shall be laid, contrary to the advice of a Crown Prosecutor, until discussion concerning the matter has taken place between the Police Department and the Crown Prosecutor;

(ii) if there is no resolution of the disagreement at that level, the matter must be referred to a senior police official of the department, who will discuss the matter with the Regional Crown Prosecutor;

(iii) if, following such discussion, the police remain of the view that a charge is warranted, the charge shall be laid.

68 The protocol encourages a police and Crown joint assessment pre-charge: there is nothing in these recommendations that indicates that the separation between police and Crown functions must be implemented by preventing Crown contact with potential witnesses pre-charge. Therefore, while the Marshall Report speaks of a distinct line between police and Crown functions, it is one that may be drawn conceptually and figuratively, through conscious practice, rather than literally by the act of laying charges.

69 The appellant also drew the Court's attention to the 1998 Report of the Commission on Proceedings Involving Guy Paul Morin, which inquired into another recent instance of wrongful conviction, after which Morin spent several years in jail, before his innocence was recognized. This inquiry focussed on the Crown's failure of objectivity throughout the process as a result of too close contact between the Crown counsel and police. Justice Kaufman, who wrote the report, concluded that, at the root of the problems in the Morin case there had been a failure by the Crown prosecutor to assess objectively the reliability of evidence, before charges were laid (vol. 2, at pp. 909, 911 and 1069-70):

> The bottom line is this: [the Crown] failed to *objectively* assess the reliability of evidence which favoured the prosecution. It is difficult to determine the precise extent to which each of the prosecutors appreciated just how unreliable some of the evidence tendered was. . . .
>
> The prosecutors showed little or no introspection about these contaminating influences upon witnesses for two reasons: one, the evidence favoured the prosecution; this coloured their objectivity; two, their relationship with the police which, at times, blinded them, and

> prevented them from objectively and accurately assessing the reliability of the police officers who testified for the prosecution. . . .
>
> It is also understandable that this belief [of Morin's guilt] would affect the prosecutors' assessment of their own evidence and the evidence tendered by the defence. Their failing was that this belief so pervaded their thinking that they were unable, at times, to objectively view the evidence, and incapable at times to be at all introspective about the very serious reliability problems with a number of their own witnesses. As I have said earlier, their relationship with the police, at times, blinded them to the very serious reliability problems with their own officers. [Emphasis in original.]

70 The parties agree in the present case that Crown objectivity and the separation of Crown from police functions are elements of the judicial process which must be safeguarded. What the Morin inquiry shows is that objectivity can be lost without the Crown's involvement in pre-charge interviews, and that this loss of objectivity in fact did occur, in part, as a result of post-charge Crown interviews. It does not mean that the absence of pre-charge interviews would be, of itself, a guarantee of fair process or that the restrained use of such interviews may not be consistent with a separation of Crown and police functions.

(c) *Other Jurisdictions*

71 While the separation of police and Crown roles is a well-established principle of our criminal justice system, different provinces have implemented this principle in various ways. This Court has already recognized that some variation in provincial practices in the administration of the criminal law is to be expected and allowed in certain circumstances. In *R. v. S. (S.)*, [1990] 2 S.C.R. 254, Dickson C.J. observed, at pp. 289-90:

> It is necessary to bear in mind that differential application of federal law can be a legitimate means of forwarding the values of a federal

> system. In fact, in the context of the administration of the criminal law, differential application is constitutionally fostered by ss. 91(27) and 92(14) of the *Constitution Act, 1867*. The area of criminal law and its application is one in which the balancing of national interests and local concerns has been accomplished by a constitutional structure that both permits and encourages federal-provincial cooperation. A brief review of Canadian constitutional history clearly demonstrates that diversity in the criminal law, in terms of provincial application, has been recognized consistently as a means of furthering the values of federalism. Differential application arises from a recognition that different approaches to the administration of the criminal law are appropriate in different territorially based communities.

An examination of the practices in several Canadian provinces illustrates that different jurisdictions have approached the issue of Crown pre-charge interviews in different ways.

(i) New Brunswick

72 At trial, several witnesses gave evidence about the system of criminal prosecutions in the province of New Brunswick. Glendon Abbott, Director of Public Prosecutions for the province, was one. He described that part of the Crown's function as to

> provide advice to policing authorities. We in the Province of New Brunswick, at least, exercise a pre-charge screening function. The Attorney General has set out a threshold for charging and we review police files that are brought to us for that purpose, to make a decision on charging. And we exercise the prosecutorial duties to advance the case through the legal system. . . . The short form of the test [to determine whether a prosecution should proceed] is to be satisfied that there is a reasonable prospect of conviction.

73 Mr. Abbott also gave evidence about his understanding of New Brunswick's written policy on initiating prosecutions: "In my view, yes, implicitly it does speak to [Crown pre-charge interviews] and contemplates pre-charge contact with potential witnesses." The policy states:

> In making a decision as to sufficiency of evidence, the Crown prosecutor considers such factors as the availability and admissibility of evidence, the credibility of witnesses, and their likely impression on a judge or jury, the admissibility of any confessions, the reliability and admissibility of any identification, and generally will draw on experience to evaluate how strong the case is likely to be when presented in court. In addition, there are public interest factors that may be taken into account.
>
> (New Brunswick Criteria for Prosecutions, Appellant's Record, at pp. 519-520)

Mr. Abbott testified that based on this policy,

> in some cases . . . the prosecutor and myself from my own experience would want to interview some of the witnesses [pre-charge]. Not in every case, but in some cases. . . .
>
> Over approximately 23 or so years I've been with public prosecutions, this is not an uncommon practice. . . .
>
> I think as a category of offenses or alleged offenses, where there are allegations of sexual assault, this is more common.

Such Crown pre-charge interviews are conducted to assess credibility and weight of the complainant's evidence, for both youthful witnesses, and adults, and to inform potential witnesses of the legal process, while also testing their resolve to pursue the matter. Mr. Abbott acknowledged that as a result of his pre-charge interviews, "there were cases where it aided [him] in drawing a conclusion that there was a reasonable prospect of conviction and – well, not equally, but in many cases where there wasn't a reasonable prospect of conviction". He concluded, "I don't feel that interviewing the witness prior to the approval or not or approval [*sic*] of charges affects my ability to discharge my duty impartially."

74 Regional Crown Prosecutor for the rural Miramichi district of New Brunswick, Fred Ferguson, testified that he too does pre-charge interviewing, about

once a year. In his experience, such interviewing is done for young witnesses, historic sex assault allegations, and "where there's been a question of motive" to prosecute. He said that time and manpower have made it difficult to do more pre-charge interviews.

(ii) Quebec

75 The intervener Attorney General of Quebec made submissions before this Court that it is not unusual in that province for Crown counsel to interview witnesses pre-charge: [TRANSLATION] "[T]he intervener maintains that there is nothing heretical in a representative of the Attorney General meeting with or even questioning witnesses, including victims, before charges are laid" (Intervener's factum, at para. 3). In fact, pre-charge screening has been a "systematic" practice in Quebec for more than 30 years (Intervener's factum, at para. 4).

76 The system of Crown pre-charge screening in Quebec is much like that in New Brunswick, and was instituted to improve the administration of justice. In particular, the practice is done for a number of reasons:

> [TRANSLATION] The prosecutor's decision to authorize the laying of criminal charges presupposes that the conduct complained of constitutes an offence in law, that there are reasonable grounds to believe that the person under investigation is the perpetrator, that it is legally possible to prove it, and that it is appropriate to prosecute. In exercising prosecutorial discretion, the prosecutor must take into account various policy and social considerations. [Intervener's factum, at para. 14]

As almost all of the expert witnesses at trial testified, Crown pre-charge interviewing is especially useful in cases of sexual assault allegations. The Quebec experience further supports this:

> [TRANSLATION] Generally, the goals are to understand better the victim's reluctance to lodge a complaint or to testify, to reassure him or her and to create an atmosphere of trust, in order better to assess the witness's credibility if necessary or to get the witness to relate accurately the circumstances of the offence to the court or, in some cases, simply to explain the proceedings to the victim, including the examination and cross-examination, so that he or she is better prepared to face an experience that is very painful for a number of people. [Intervener's factum, at para. 36]

In fact, Quebec's Justice Minister has instructed that contact between sexual assault complainants and Crown counsel should occur at the beginning of the process of laying charges, and in cases of minors (under the age of 18) who make such complaints, pre-charge meetings with the Crown are mandatory. According to the *Manuel de directives aux substituts du procureur général* (rev. 1997), Directive No. INF-1, at para. 5, with certain exceptions, [TRANSLATION] "[t]he prosecutor must meet with the child before authorizing the laying of an information". (See also ministère de la Justice du Québec, *Crimes à caractère sexuel: Guide du poursuivant* (2000), at pp. 13 and 27.)

(iii) British Columbia

77 Several of the witnesses and interveners remarked that British Columbia also uses a system of pre-charge screening, similar to New Brunswick and Quebec. In British Columbia, Crown counsel must approve charges before the police can lay them, and this Crown approval may require witness interviews, pre-charge. The Crown charge screening function is intended to accomplish the same variety of systemic benefits as in New Brunswick, Quebec, and even Ontario (see below). A 1990 study by the Law Reform Commission of Canada, which looked at the role of Crown counsel in the criminal justice system, remarked that the pre-charge screening/interviewing procedures used in New Brunswick, Quebec and British

Columbia work well (Law Reform Commission of Canada, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor* (1990), Working Paper 62, at pp. 74-75).

(iv) Ontario

78 Michael Code, a witness for the appellant, described the most restrictive role for Crown pre-charge involvement, which he said is the practice in Ontario. According to Mr. Code, a former Assistant Deputy Attorney General — Criminal Law of the province, two dangers arise from pre-charge interviewing by the Crown. First, it can undermine the independence of police in deciding which charges to lay, and second, it can strip the Crown of its necessary objectivity in assessing whether to proceed with the charges laid by police. (I note here that the trial judge in this case made no finding that the police decision to lay charges was improper. Therefore, only the second concern will be further developed.)

79 To avoid these perversions of our system of police/Crown independence, Mr. Code was of the opinion that Crown counsel should not interview witnesses until after police have laid the charge, and after the Crown has decided to prosecute it. He testified that among the 10 very senior prosecutors he knows, they personally never conduct pre-charge interviews, have never heard of anyone else doing it, and think it is wrong, and inconsistent with their role as Crown counsel.

80 Despite Mr. Code's position, another witness from Ontario, Chief Crown Attorney for Ottawa-Carleton, Andrejs Berzins, testified that some pre-charge Crown interviewing is done in Ontario. Mr. Berzins has done one or two such pre-charge interviews every year.

81 Brian Gover, another expert witness from Ontario, confirmed this practice: "I regard it as an unusual event for a Crown counsel to interview a potential witness at a pre-charge stage. But, nonetheless, it's my view that Crown practice in Ontario is sufficiently flexible to accommodate that occurring." (Appellant's Record, p. 696) He added (at p. 717):

> . . . it's important that Crown counsel have paramount in his or her mind the role of the Crown as distinguished from the role of the police. It's essential that the Crown not engage in pre-charge evidence-gathering. But, as I said, there will be circumstances in which it is appropriate for the Crown to engage in a process of confirming in his or her own mind that the evidence attributed to a witness would, in fact, be given by that witness as part of the determination of whether reasonable grounds exist and whether there's a reasonable likelihood of conviction.

82 Therefore, even in Ontario, it cannot be said that Crown pre-charge interviews are non-existent, and in Quebec, New Brunswick and British Columbia they are common, and regularly conducted in sexual assault cases, especially when historic incidents or young complainants are involved.

(d) *Policy Considerations*

83 A lesson underscored by the report on the Morin case and the events which led to its tragic outcome is that the appellant's proposed "quick fix" to maintain Crown objectivity, by preventing Crown interviews pre-charge, is both misguided, and potentially harmful – because pre-charge Crown interviews may advance the interests of justice (see below), and because the pre- versus post-charge distinction may distract attention away from the necessary vigilance to maintain objectivity throughout the proceedings.

84 It is quite clear that there are many public policy reasons for which Crown counsel in some jurisdictions conduct witness interviews, pre-charge. Mr. Abbott and Mr. Gover both testified about efficiencies which are gained by pre-charge screening which protect the repute of the justice system, not only the personal interests of the accused. Complainants also benefit from a single decision to proceed with or avoid laying charges, rather than having to deal with the stress and publicity of a charge and then face the appearance that they have made a spurious accusation if the charge is later withdrawn. In addition, all of the expert witnesses with knowledge of the Crown practice of pre-charge interviewing told of the interests it serves in assessing witness credibility, demeanour and resolve, especially in sexual assault cases. Such pre-charge interviews are even more important when charges are "historic" or when complainants are young.

85 The evidence in this case also exposes the systemic concerns that sexual assault complainants often have. The RCMP report about the Regan investigation is very telling in this regard:

> In some cases, those strongly suspected of being a victim, would not discuss the incident with the investigators, leaving the member with the feeling that the incident had taken place however they preferred not to disclose. . . . [some] who were willing to confirm that an offence was committed. . . . are not in a position to become involved in any court process because of . . . the fear of repercussions. . . .
>
> The fact that the suspect, in some cases being the Premier of the Province or in other cases, a high-profile person within the community, coupled with the victim's fear and what the public reaction would be, especially in the 1950 's, '60 's and '70 's, is certainly reason to understand why victims failed to disclose.
>
> (Investigation Report, March 30, 1994, Appellant's Record, at pp. 1068-69)

Complainants may worry of retribution from the alleged assailant, and from their own families and community. They may also fear being "re-victimized" by the court system. They may not feel comfortable making complaints to police, or feel reassured by police regarding confidentiality, or the process in general. The extensive record of discussion between witnesses, police and Crown (see for example: continuation report, Respondent's Record, at pp. 716-18) here shows that, in some cases where police failed to assuage the concerns of some complainants, Crown counsel were successful. The interests of justice are not only served by screening out fruitless complaints but also served by encouraging proper charges to go forward, and by signalling to the larger society that complainants can bring sexual assault charges to the courts without further undue trauma, and that where charges are properly laid, they will be prosecuted.

86 Finally, quite apart from the specific aspects of sexual assault allegations, other examples abound of situations where the interests of justice may be served by the Crown conducting pre-charge interviews. For example: the protection of *Charter* rights during an investigation, cases involving jailhouse informants, and cases which have a statutory requirement for Crown consent to the laying of charges.

(e) *The Impact of the Trial Judge's Approach to Policy Issues*

87 It is also important that the justice system not be and not appear arbitrary. The trial judge explained the "crucial issue" before him as a narrow one: "It involves firstly, the Crown's determination to interview complainants pre-charge and secondly, the impact of that process on the number and types of charges that were ultimately laid" (para. 121). But the determination of the appropriateness of Crown influence on the charging decision based on when Crown interviews are conducted reveals a certain

arbitrariness. In the case at bar, the trial judge found abuse because the Crown interviewed complainants before charges were laid. The trial judge found that this extinguished the Crown's objectivity, and he implied that, as a result, more charges were laid than if objectivity had been retained. Yet, if the Crown had waited until after charges were laid to re-interview those complainants who initially had refused to come forward, it would still have been open to the Crown to recommend to police that these additional charges should be laid. It would have remained within police discretion to add charges based on that Crown advice. In fact, the May 30 amendment to the information did add new charges in relation to a new complainant. Yet, again, in the direct indictment, a new complainant was added and other charges were amended or dropped. The conclusion to be drawn from what could have happened and did happen is that the process is a fluid one. The expectation is that both the police and the Crown will act according to their distinct roles in the process, investigating allegations of criminal behaviour, and assessing the public interest in prosecuting, respectively. The exercise of these roles does not seem to be clearly or predictably altered by whether the formal act of the laying of charges has occurred.

88 The trial judge's more formalistic view might have negative policy consequences. MacDonald A.C.J. said: "The Crown emphasizes the fact that they always interview complainants post-charge in any event. . . . That, with respect, misses the point. The charging decision is crucial. It determines who the complainants will be" (para. 125). This approach, however, does not account for the fact, recognized by the expert witnesses, that in some cases, especially involving sexual assault, complainants may need information from the Crown to properly understand the process in order to decide whether to press charges. In the trial judge's scenario, this could never happen, because Crown counsel would only ever interview complainants who were already pressing charges.

89 There is another negative implication of arbitrarily drawing a hard line at the decision to lay charges. As Rand J. made clear in *Boucher*, *supra*, commitment to the case, belief in the allegations, and the desire to see justice done are not incompatible with objectivity and fairness. Objectivity requires that a rational assessment of facts be brought to bear in making decisions relating to the case. Awareness of one's strong feelings about a case can and should be kept in mind, as a check against tunnel vision. The danger with the trial judge's approach, that of drawing a bright line between pre- and post-charge interviews, is that it risks giving the false impression that remaining personally detached from complainants before charges are laid is the best (or the only necessary) effort to protect objectivity. So how does the Crown protect objectivity after the charge is laid? As all parties accept, objectivity and fairness is an ongoing responsibility of the Crown, at every stage of the process. The Court of Appeal, respondent and interveners point out that if subjectivity is the inevitable consequence of contact between the Crown and complainant, then even post-charge interviews are problematic because they would undermine Crown objectivity for every decision after these interviews have taken place.

90 Finally, the trial judge's concern about human nature must be addressed. The trial judge held that personal interaction in the form of interviews between the Crown and potential complainants inherently threatens the Crown's ability to be objective, because it is an inevitable fact of human nature that the Crown will become subjectively involved with the facts of the case. In the result, the trial judge found that a bright line should be drawn between pre- and post-charge interviews by the Crown. Yet he also ruled that pre-charge Crown interviews are quite proper for the limited purpose of charge screening, to spare the potential accused from the unnecessary embarrassment and harm to reputation that comes with a criminal charge. This begs

the question, however, of how a Crown in such proper pre-charge interviews would be able to overcome the natural impulse to favour the complainants, in order to reach the objective conclusion to recommend against laying charges.

91 Summing up, the evidence shows that in some Canadian jurisdictions, pre-charge interviews by the Crown are a regular, even common practice. In these jurisdictions at least, it appears that public policy is served by the practice, and potentially harmful and arbitrary results are avoided by the refusal to draw a hard line at the decision to lay charges, before which Crown counsel may not interview complainants. Viewed in this context, I cannot conclude that wide-ranging pre-charge Crown interviews, *per se,* are an abuse of process.

(f) *Police Conduct*

92 The trial judge found that the police were "clearly wrong" (para. 86) when they released Regan's name as a suspect, well in advance of any charges. This was in contravention of the express policy of law enforcement agencies that the identity of suspects may be released only after charges have been laid. However, MacDonald A.C.J. added that this lapse was not done in bad faith, and the judge himself further indicated that this police error influenced his finding of abuse of process "to a lesser extent" (para. 132).

93 This policy was adopted, no doubt, to protect the privacy and other interests of individuals who are merely questioned about a crime, with nothing more. There is no question that such a policy is laudable, and a breach of it should not be condoned. However, other evidence on the record indicates that after this one misstep, the police exercised greater caution in preventing further information leaks until the

process was truly public. For example, when the police delivered their investigation report to DPP Pearson, the letter included

> a control sheet asking that all persons who have control or access to please sign and date, to establish continuity. Throughout this investigation, the media has been diligent and persistent in obtaining information and for this reason security must remain a priority. I have implemented controls within the R.C.M.Police to limit access. I have not allowed any R.C.M.Police documents, pertaining to this investigation, to be disseminated outside this Headquarters, Halifax Sub Division and the Task Force investigators. Therefore, I am now asking that the same restriction occur within your office and this information be carefully protected.
>
> (Letter from Chief Superintendent Falkingham to DPP Pearson, May 19, 1994)

In addition, the police acceded to Regan's request to hold the arraignment outside Halifax, to try to avoid a media frenzy. In my view, this supports the finding of no bad faith.

94 I would add that following the dictum in *Blencoe*, the prejudice experienced by the appellant as a result of this early leak – humiliation and stress – cannot be attributed to this police error alone. This impact on Regan was a certainty no matter when his name was finally released in connection with these charges, and there is no question that there was sufficient evidence and subjective belief for the police to ultimately lay at least some of the charges. Furthermore, there is no evidence to suggest that the premature announcement had any effect on the separate question of whether the Crown properly proceeded with the charges. While the media may have been clamouring for information, it does not follow that this put pressure on the authorities to lay any particular number of charges, or any charges at all, for that matter.

95 For these reasons, I think the trial judge was correct in his finding that this police error either alone or in combination with the Crown conduct discussed above does not rise to the level of egregious abuse. The serious remedy of a stay of proceedings is not an appropriate method to denounce or punish past police conduct of this nature.

(g) *Count 16*

96 This count involved a woman who alleged that when she was a 24-year-old political reporter, she was pushed onto a hotel room bed and groped during an interview with then-Premier Regan. At the time of DPP Pearson's assessment of the allegations, this complainant was only willing to be a similar fact witness. Pearson suggested that she be re-interviewed. After a re-interview with police and Crown, this witness decided to press charges.

97 The trial judge was "unsettled" by the laying of this charge because it was factually similar to the Alberta-based incident. From this, MacDonald A.C.J. concluded: "The Crown therefore felt it needed [to lay count 16] so that [the Alberta complainant's] 'story could be told'. . . . Yet the Crown's goal as I see it was to have the jury hear and (presumably act upon) the [complaint of the Alberta woman], a similar fact witness" (paras. 157-58).

98 The trial judge did, however, recognize the validity of count 16 in its own right: "I realize that the Crown nonetheless considers [count 16] to be worthy of prosecuting. Yet I do not find this to be their primary motive" (para. 159). The reason the Crown's motive was improper, in MacDonald A.C.J.'s view, was because of his finding of the Crown's loss of objectivity: "When the Crown interviews pre-charge a

certain amount of objectivity is lost. The Crown's critical review of the charge list is gone. Perhaps if the Crown had not been so involved with interviewing witnesses pre-charge, they may have seen all this in a different light" (para. 160).

99 As I have already discussed, I find that the trial judge's finding of a loss of Crown objectivity cannot be supported by the evidence. This erroneous reading of the facts influenced the holding on count 16. If the trial judge had not started from the premise that the Crown had lost its objectivity, there would have been no justification for the trial judge to find the similarity between count 16 and the Alberta incident as the primary motivation for count 16, virtually ignoring the reasonable and probable grounds for laying count 16 in its own right. Furthermore, as Cromwell J.A. observed, in other respects the trial judge held that there was no improper purpose or *mala fides* underlying the preferral of the direct indictment. The trial judge found a loss of Crown objectivity only at the first charging decision, nearly a year before the direct indictment. Moreover, Cromwell J.A. pointed out, "[t]here is nothing inherently objectionable in the Crown considering questions of the admissibility of evidence and their impact on the prospects of conviction when deciding to proceed with charges" (para. 140). For these reasons I find the trial judge erred in finding an abusive or improper purpose behind the laying of count 16.

(h) *Cumulative Effect of Police and Crown Conduct*

100 In assessing the cumulative effect of this evidence of Crown and police misconduct, the trial judge concluded that Crown Potts' objectivity was hopelessly lost, and her influence on the case set other well-meaning Crown counsel astray. The trial judge seemed reinforced in this decision because in addition to Potts' judge-

shopping comment, he was troubled by "Ms. Potts' perplexing desire to interview all potential complainants" (para. 100).

101 On close review of the evidence, however, the Crown's intention to re-interview complainants does not seem perplexing at all. Police were of the opinion that a pattern of criminal behaviour emerged from a view of the full picture of the allegations. They disagreed with DPP Pearson's recommendation to lay charges in respect of only four complainants. Police were urging further review and Crown Potts undertook to read the voluminous, detailed investigation reports (which ultimately took her some six months).

102 In the course of that review, Crown Potts indicated that re-interviews would be appropriate, according to notes taken by Staff Sergeant Fraser: "Reports being reviewed by Potts. Interested in meeting with victims" (Fraser notes, August 17 and 18, 1994, Respondent's Record, at p. 501; see also Investigation Report, August 22, 1994, Respondent's Record, at p. 498). These re-interviews were done after DPP Pearson had already advised that the case which proceeded would be strengthened if the unwilling complainants with the more recent allegations would change their mind and come forward. Furthermore, DPP Pearson specifically recommended that six of the unwilling complainants should be interviewed, albeit by police. The police attended with the Crown at these re-interviews and appeared to agree that the joint interviews should be done: "It is now the investigators and the Crown's belief that if these persons could be re-interviewed with both the Crown Prosecutor and police investigator present there would be a greater chance of them changing their minds" (Police Transit Slip, January 17, 1995, Appellant's Record, at p. 1084). Finally, the expert testimony of Glendon Abbott, Fred Ferguson, Andrejs Berzins and Philip Stenning indicated that in a case such as this, it would be very likely that in other

provinces, some Crown counsel would interview complainants pre-charge: the allegations of sexual assault were historic, the alleged victims were young at the time of the incidents, the alleged perpetrator was high profile and the case was made further controversial by the involvement of the suspect's political enemy. In this context, I fail to see why a thorough re-interview of complainants by the Crown was perplexing, where the Crown would have wanted to assess first-hand the possible charges versus similar fact evidence, and to ensure that complainants fully understood the judicial process before deciding whether to press charges.

103 From this process, the trial judge seemed to infer that the appellant ended up facing more charges than he otherwise would have. Yet I do not see how re-interviewing the complainants for whom DPP Pearson had already recommended charges could have led to more charges in those cases. In the case of the unwilling and similar fact complainants, Pearson had made no charging recommendation. He did, however, generally recommend that some witnesses be re-approached, and that more recent allegations would strengthen the overall case. As some of these complainants decided to press charges, I do not understand why it was inappropriate to reassess the other cases, even where Pearson had initially recommended against laying charges. And of course, during this process, five new complainants surfaced. It is not known to what extent their allegations cast a new light or raised new questions in relation to the earlier list of complainants. In the end, it appears to me that the police had virtually made their charging decision – they wanted to lay charges in respect of the complete picture. The Crown's interviews appear to have provided a basis on which to make their own charging decision – which was also based on an assessment of the full, revised picture. The re-interviews were done to promote many of the policy reasons discussed above: to fully inform potential complainants of the process, to assess their evidence and credibility, for efficiency in the administration of justice, and

for the sake of the appearance of decisive action, taken in an already highly public and controversial case. Finally, as the Pearson charging recommendation was clearly preliminary, it is impossible to know whether, as a result of the Crown interviews, the appellant ended up facing more charges.

104 In summary, it is my view that there was no abuse of process in this case. The pre-charge interviews were done in accordance with the common practice of some other provinces, a practice more wide-ranging than the narrow, exceptional to rare practice the trial judge described. Furthermore, the Crown conducted an understandable review of the potential witnesses, in the wake of an early recommendation by DPP Pearson that was not determinative. Given the uncertainty of the charges at that point, it could not be known whether the re-interviews led to more charges than would otherwise have been laid. I conclude that, based on the evidence of judge shopping, pre-charge Crown interviews, the improper police announcement, and the addition of count 16 in the direct indictment, the cumulative effect of these actions, while troubling in some respects, does not rise to the level of abuse of process which is egregious, vexatious, oppressive or which would offend the community's sense of decency and fair play. Moreover, this conduct, even if it did amount to an abuse, did not have an ongoing effect on the accused, which would jeopardize the fairness of his trial. On that basis, I must now turn to the central issue decided by the Court of Appeal, namely the decision to lift the stay of proceedings ordered by the trial judge.

2. Stay of Proceedings

105 Having found an abuse of process under s. 7 of the *Charter* but ruled that it would not affect trial fairness, the trial judge recognized this put the case in the

narrow residual category of abuse where a stay may be granted only in exceptional cases. However, the trial judge misconceived the governing test for a stay of proceedings as outlined in *Tobiass*. At this stage of the analysis, instead of inquiring into whether the abuse would be manifested, perpetuated or aggravated by ongoing proceedings, and then inquiring into whether any remedy other than a stay could cure this ongoing taint, the trial judge focussed his attention only on the final balancing exercise (at paras. 58-59):

> This balancing act, so common to almost everything we do as judges, will play a significant role in my analysis in the case at bar.
>
> In summary, to justify a stay I must ask myself: Are the alleged wrongdoings so unfair to the applicant or so offensive to society so as to render a stay the only reasonable remedy? Is this one of those "*clearest of cases*" or, on the other hand, are there societal interests compelling enough to tip the scales in favour of proceeding? [Emphasis in original.]

106 This error was further emphasized when the judge turned his mind to the facts of the abuse of process, as he saw them (at para. 133):

> . . . the cumulative effect of these actions would not shock the community's sense of fair play and decency so as to warrant a stay of all charges outright. It is not one of those "*clearest of cases*" that demands a global stay. Some of these charges involve very serious allegations that by their very nature present a strong societal interest to have prosecuted through a full and fair hearing. As was explained in *Tobiass, supra*, I find that this "*compelling societal interest . . . tips the scales in favour of proceeding*" with at least some of these charges. [Emphasis in original.]

107 There was no discussion in the trial judge's reasons of any ongoing impact of the abuse he found. As discussed earlier, the embarrassment to the appellant of the premature police announcement was overtaken by the charges which would have been laid in any event. Therefore there was no continuing prejudice from this misconduct. One must also remember that the humiliation flowing from properly laid charges,

while unpleasant, is not an abuse of process. As for the trial judge's concern for loss of Crown objectivity, there was no evidence that this was in any way affected by the police misbehaviour. It was also discussed above that the evidence cannot support the inference that Crown pre-interviews or any loss of Crown objectivity inevitably led to the appellant facing more charges. It should be noted that DPP Pearson and the police had expressed a desire to re-interview all but three of the complainants, and that, since then, these three never pressed any charges. Therefore this conduct, even if abusive, cannot be said to be manifested or perpetuated if the process continues. The judge-shopping comment was restricted to one Crown counsel, on one occasion, without further action. In addition, that Crown counsel has long since left the prosecution of this case. Finally, there was simply nothing improper about the inclusion of count 16 in the direct indictment. To speak of ongoing abuse where none was ever apparent makes no sense. All told, even if this conduct did amount to abuse, it falls at the low end of the spectrum of seriousness, and is not significant enough that proceeding in its wake would, in and of itself, shock the community's sense of fairness and decency.

108 Thus, the trial judge fell into error when he ordered the ultimate remedy of a partial stay of a number of charges. The abuse that was found by the trial judge could be and was addressed by remedies other than a stay. Crown Potts was removed from the prosecution. A Crown not involved with the earlier stages of the case became lead counsel for the prosecution. The police instituted strict measures to maintain confidentiality of the investigation. And ultimately, there was a detailed review of the charges, signed by a new Director of Public Prosecutions when the direct indictment was preferred.

(a) *The Direct Indictment*

109 For the purposes of assessing any ongoing or lingering effects of the abuse of process found by the trial judge, the majority of the Court of Appeal relied heavily on the direct indictment as evidence of a fresh, objective review of the charges. Cromwell J.A. noted that the trial judge's finding of abuse was at "the charging stage", that is, when the information was sworn on May 30, 1995. The trial judge also found no impropriety in the Crown's decision to prefer the direct indictment. Cromwell J.A. therefore reasoned that even if Crown Potts' involvement in the process, and more generally the Crown's participation in pre-charge interviews, had tainted the process, by the time of the direct indictment, Crown Potts was no longer on the case, and the direct indictment itself amounted to a remedy which cleansed any earlier abuse.

110 Section 577 of the *Criminal Code*, R.S.C. 1985, c. C-46, requires that the Attorney General or his or her Deputy give personal consent in writing to prefer a direct indictment. It is predictable that there will be variation from office to office and province to province on the actual procedure involved to meet this requirement. I think it is fair to assume, however, that the case at bar would not have been treated as any garden variety, *pro forma* approval of a direct indictment. As Freeman J.A. (dissenting) pointed out, from the outset, this prosecution had been "extraordinary and controversial" (para. 4) as a result of "[t]he prominence of the accused and the high level of media interest in the case" (para. 5).

111 Not only would this sensitive context likely have drawn the close attention of the Attorney General of Nova Scotia (or his or her delegate), but there is direct evidence that the Crown paid close attention to the actual charges contained in the direct indictment. First, one complainant listed on the May 30, 1995 information was completely dropped from the direct indictment. Second, one count under s. 138(2) of the *Criminal Code*, S.C. 1953-54, c. 51, was dropped from the charges in relation to

a second complainant. Third, a count in relation to an entirely new complainant was added to the direct indictment. Furthermore, these changes were ultimately approved by Jerry Pitzul, a new Director of Public Prosecutions, who was not involved in the Pearson review, and was not the acting DPP immediately after Pearson left the post.

112 Finally, there is evidence of objectivity at the stage when the Crown was preparing the direct indictment. Two witnesses were interviewed by the Crown a second time in April 1997. In one case, the woman was included as an unwilling witness on the original list that went to DPP Pearson. At this final meeting, she expressed an interest in pressing charges against Regan, but the Crown decided not to include her in the direct indictment. In the other case, the woman had come forward after the Pearson recommendation with another, similar allegation against the accused. At that time, and at the time of the direct indictment, she was unwilling to get involved in the proceedings, and no charge was laid.

(b) *Balancing a Stay Against Proceeding to Trial*

113 Even if one assumes that by applying the proper test the trial judge had found an ongoing abuse which could only be remedied by a stay, the cumulative effect of the abuse still left some question about whether this was one of those clearest of cases warranting a stay. Indeed, that prompted the trial judge's charge-by-charge balancing analysis. Yet in his balancing analysis, the trial judge omitted some significant issues relevant to the public interest.

114 The trial judge "afforded significant deference" (para. 141) to the Pearson charging recommendation when reaching his conclusion about staying half of the total charges. In fact, the decision to proceed with charges relating to only four

complainants directly reflected DPP Pearson's advice. The trial judge explained that he was so highly influenced by Pearson's position because "the Crown should not be seen to significantly change its position without valid reason" (para. 135). The trial judge, however, did not seem to consider the inconclusive nature of the Pearson recommendation. First, the Pearson letter advised that the case would be strengthened if more complainants with more recent allegations were willing to come forward. Second, the Pearson letter specifically recommended that four complainants be re-interviewed. Police did re-interview those women, and others, accompanied by a Crown counsel. As a result, more women came forward, willing to lay charges. This constituted a valid reason to alter the original opinion regarding charges. Finally, the letter indicated that it was entirely within police discretion to accept or ignore the Pearson recommendation, and it was also open to the Crown to reconsider which charges to proceed with, following the police charging decision. These qualifications all signify a Crown recommendation which anticipated the possibility of change -- not one which was etched in stone. As a result of new complainants surfacing, of further interviews, and ongoing consideration of the charges by both police and the Crown, a charging decision was made which included the Pearson recommendation as well as additional charges. There was no reason to assume that the Pearson view of the matter was the Crown's final or most appropriate view.

115 The trial judge's differentiation between the charges he stayed and those he did not also reflected DPP Pearson's view of the "seriousness" of the alleged offences. As discussed above, the Pearson view emphasized physical invasiveness and overlooked the complainants' age, and their socially subordinate and relatively powerless positions in relation to the accused. The Pearson view also reflected the notion of social acceptance (as opposed to illegality) of the alleged crimes some 30 to 40 years ago. Charges brought before a modern court should not be trapped in a social

time warp. Once it is determined that past behaviour was an apparent violation of the contemporary law, then the benefit of current social mores should be brought to bear in assessing the advisability of pursuing charges. This approach is especially significant when sexual assault charges are at issue. This Court has recognized the disadvantage that women victims have suffered as a result of stereotypes in society and the justice system. (See, for example, *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *O'Connor*, *supra*; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Darrach*, [2000] 2 S.C.R. 443, 2000 SCC 46.) Without revisiting the thoughtful consideration of those judgments in the current case, it suffices to say that those gains would amount to nothing if modern charges of sexual assault for historic acts are viewed with blinkers and through a looking glass that sees an old stereotypic view rather than an enlightened one. It is not for this Court to judge the Crown's assessment of social interests in proceeding with historic sexual assault charges. It is, however, appropriate for this Court to review lower court decisions according to the standards of modern jurisprudence. Furthermore, when exercising their discretion to grant a stay, courts are bound to consider all significant factors, a requirement by which the Crown is not bound when making its charging decisions. It was not sufficient for the trial judge to merely follow the course set by DPP Pearson.

116 There are many societal interests engaged by this case, which the trial judge failed to factor into the balance. Victims of sexual assault must be encouraged to trust the system and bring allegations to light. As the police saw it, there is evidence of a pattern of an assailant sexually attacking young girls and women who were in a subordinate power relationship with the accused, in some cases bordering on a relationship of trust. When viewed in this light, the charges are very serious and society has a strong interest in having the matter adjudicated, in order to convey the message that if such assaults are committed they will not be tolerated, and that young

women must be protected from such abuse. In omitting to consider any of these issues which favour proceeding with charges, the trial judge's discretion was not fully exercised and therefore cannot stand.

D. *Standard of Review*

117 The decision to grant a stay is a discretionary one, which should not be lightly interfered with: "an appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice" (*Tobiass, supra*, at para. 87; *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375). Furthermore, where a trial judge exercises her or his discretion, that decision cannot be replaced simply because the appellate court has a different assessment of the facts (*Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; see also *R. v. Oickle*, [2000] 2 S.C.R. 3, 2000 SCC 38; *R. v. Van der Peet*, [1996] 2 S.C.R. 507).

118 This does not mean, however, that the trial judge is completely insulated from review. It is settled law that where the "trial judge made some palpable and overriding error which affected his assessment of the facts", the decision based on these facts may be reversed (*Kathy K*, at p. 808). In the present case, I find that the trial judge made palpable and overriding factual errors which set his assessment of the facts askew. I also find that he misdirected himself regarding the law for granting a stay by overlooking key elements of the analysis, thereby committing an error which was properly reversed by the Court of Appeal.

1. Error of Fact

119 I find that the trial judge's characterization of the scope of pre-charge interviewing done across the country was narrower than the expert evidence indicates. The trial judge concluded (at para. 117):

> Based upon my review of all of the above expert evidence, it seems to me that the scope of pre-charge Crown interviewing in this country is a very narrow one. It ranges from non-existent to rare. On the occasions when it is performed, it serves as a screen designed to protect an accused from going through the embarrassment (humiliation) of being charged only to later have the charges dropped or stayed.

He characterized the practice of pre-charge interviewing conducted by Crowns in New Brunswick, Quebec and British Columbia as "Crown pre-charge screening" (para. 120). By this, MacDonald A.C.J. meant that the only acceptable form of Crown pre-charge meetings with complainants occurs when the Crown is motivated solely by a desire to benefit the accused by screening out frivolous or unsustainable charges. The evidence of Glendon Abbott, Fred Ferguson, Andrejs Berzins and Philip Stenning clearly contradicts this. Pre-charge interviews in New Brunswick are done for a variety of policy reasons, only one of which is the protection of the potential accused. Furthermore, even in Ontario where the practice of Crown pre-charge interviewing is the most circumscribed, it does occur on a regular basis. The trial judge, with respect, was therefore in error when he ruled that "pre-charge Crown interviewing in this country is . . . non-existent to rare" (para. 117). The evidence before him disclosed that Crown pre-charge interviews range from a regularly although infrequently exercised practice in Ontario, to a commonly practised procedure in New Brunswick. While the practice is not used in every case, it appears that it is typically used in cases of sexual assault, especially when allegations are historic, the complainant is young, or there is some other reason for specific concern about the strength of the evidence. This palpable error of fact had significant ramifications on the trial judge's reasoning.

Based on his erroneous view, he found the Crown's conduct in this case at variance with standard practice across the country and therefore improper. From this impropriety he deduced a loss of objectivity in the Crown's decision to proceed with charges, and from that finding, he concluded that there was an abuse of process, where the other examples of police and Crown misconduct alone would not have risen to the level of procedural abuse where a stay might be warranted.

120 In addition, I find a second factual error in the trial judge's reasoning. Without ever explicitly stating it, the trial judge implies that the loss of objectivity was abusive because it meant that the appellant ultimately faced more charges. No evidence can be found to support this deduction. The recommendations of DPP Pearson were clearly given as part of a charging decision still in flux. Pearson stated that the police were not bound to follow his advice, nor was the Crown bound to proceed with any charges which the police decided to lay. Pearson expressly recommended that some complainants be reinterviewed and he suggested that more charges would strengthen the case. Finally, he could not have anticipated that five new complainants would come forward, subsequent to his charging recommendation (three of whom ultimately accepted that the Crown proceed with charges). All of these facts point to the conclusion that the Pearson recommendation to proceed with charges related to four complainants was an <u>interim</u> one, and that it would be impossible to know whether the process which followed the Pearson recommendation resulted in the appellant facing <u>more</u> charges – more charges in relation to what? However, this erroneous factual finding was a palpable error which served as a springboard for the trial judge to find an abuse of process, and to launch into the case-by-case assessment of which charges should be stayed. At any rate, it could not have been inappropriate to lay additional charges if they had an adequate factual foundation and probable cause could be ascertained.

2. Error of Law

121 In addition, the trial judge misdirected himself on the test for granting a stay. By incorrectly emphasizing the balancing stage, weighing the interests flowing from a stay against the public interest in proceeding, he skipped over the key assessment of whether the abuse (as he so found it) would be manifested, perpetuated or aggravated in the proceedings if they continued. He also ignored the step of the analysis which requires that other remedies be considered.

122 I agree with the Court of Appeal that if the trial judge had properly applied the law, he would have concluded that the abuse that he had identified was not ongoing, and that indeed, the remedies of removing Crown Potts from the prosecution and of recognizing, in the circumstances of this case, the direct indictment as a fresh, objective review of the charges put an end to any lingering doubt that the appellant was continuing to face a prosecution that was abusive, vexatious, oppressive or in any way an affront to decency and fair play.

123 Finally, if after having properly undertaken this analysis, the trial judge had still been in doubt as to whether a stay of proceedings was the proper remedy for the abuse of process he found, the balancing exercise which he ultimately undertook was also erroneous. The *Tobiass* test instructs that in such circumstances, the benefits of a stay must be considered in relation to the benefits of continuing the process. An egregious act of misconduct can overtake some passing public concern, but, in other circumstances, a compelling societal interest in proceeding can tip the scales against granting a stay. By the trial judge's own assessment, the case of abuse before him was not egregious enough to warrant a global stay of all the charges. Yet this less serious

example of abuse was not fully weighed against the compelling societal interests in signalling that allegations of sexual abuse of young, vulnerable girls and women will be heard, in encouraging all sexual assault complainants to trust the system and come forward, and in protecting the repute of a system of justice that is sensitive to these allegations of crime and the difficulties faced by the complainants who make them. If the societal factors had been fully weighed, the balancing exercise would have led to the conclusion that not one of these allegations was among the clearest of cases where a stay of proceedings was appropriate.

VII. Conclusion

124 As Freeman J.A., dissenting, put it: "On the hearing of the application for the stays, it was incumbent on the appellant to establish not only that he was entitled to a duty of objectivity on the part of the Crown in making its prosecuting decision, but that the duty was infringed so seriously that only a stay of proceedings could remedy the harm." There is no question, and the Crown readily concedes, that the principles of fairness and fundamental justice entitle an accused to a duty of objectivity exercised by the Crown in deciding to prosecute. However, even if the trial judge was correct in finding an abuse of process, when the facts at bar are correctly understood, and when the proper test for granting a stay of proceedings is applied, the appellant fails to establish that the Crown's duty of objectivity was infringed so seriously, either by the police, Crown Potts, or the Crown's involvement in pre-charge interviews, that only a stay can remedy the harm.

125 For these reasons I would dismiss the appeal.

The reasons of Iacobucci, Major, Binnie and Arbour JJ. were delivered by

126 BINNIE J. (dissenting) — This is an appeal from the discretionary order of Michael MacDonald A.C.J., who stayed the prosecution of nine charges of indecent assault against the appellant while permitting nine more serious charges to proceed. It was his view, after an 18-day hearing, that Crown prosecutors had manifested such a lack of objectivity in seeking the conviction of a prominent politician "at all costs" as to taint the integrity of the administration of justice in Nova Scotia. We ought to defer to his factual conclusions, in my opinion.

127 In the two most serious situations, which were allowed to proceed, the appellant was charged with rape (and attempted rape) and unlawful confinement. In a third situation, which also went to trial, he was charged with exposing his penis to a babysitter while grabbing her hand when driving her home. These charges involved teenage girls, one barely 14 years of age, about half the appellant's age at the time.

128 A Nova Scotia jury subsequently acquitted the appellant of all eight charges that have thus far gone to trial. One charge of indecent assault is outstanding.

129 The trial judge was favourably impressed by the opinion of the then Director of Public Prosecutions in Nova Scotia, Mr. John Pearson, when advising the RCMP in 1994 prior to the commencement of any proceedings. Mr. Pearson concluded that while the more serious charges should proceed against the appellant, the prosecution of the less serious charges (that are now 24 to 34 years old) "may be seen as 'persecution' in light of the facts, the staleness of the offences and the relatively insignificant sentence, which could be anticipated if convictions were entered". While Mr. Pearson did not say so, it appears he viewed the "lesser" incidents as matters that might have proceeded at the earlier time on summary conviction, in which case the applicable limitation period would have been six months.

130 The appellant claims that because of strong criticism of the Nova Scotia prosecutors' service in the case of Donald Marshall who served 11 years in jail for a crime he did not commit, and the controversies related to prosecutions arising out of the Westray mining disaster (discussed in part in *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537), the prosecutors failed in this case to perform their constitutional role as a check and balance on police power. In their determination not to be seen to be favouring the appellant, a former Premier of Nova Scotia, they leaned over backwards and denied him the "hard objective second look (at the charging decision)" ((1998), 21 C.R. (5th) 366, at para. 122) to which every citizen, of whatever rank or station, is entitled. In the trial judge's view the prosecutors, far from acting as a counterbalance to the police team, effectively became part of it.

131 Since obtaining a favourable decision from the Nova Scotia Court of Appeal the Crown has, on its own motion, stayed two of the nine charges on which it obtained a green light to proceed.

132 The remaining seven charges that were the subject of the stay involve allegations of sexual assault consisting of unwanted kissing, "French kissing", groping, fondling or similar acts between 1968 and 1978 with different complainants who, at the time, came into contact with the appellant as babysitters, a legislative page, a housekeeper, a hotel dishwasher and a news reporter. The complainants' ages varied from 14 to 24 years old. The trial judge acknowledged that all charges of sexual assault are serious. Nevertheless, he concluded that the Crown's failure to act objectively in this case amounted to an abuse of process. The policy concerns raised by the then Director of Public Prosecutions were never subsequently properly addressed, as they ought to have been, in the trial judge's view.

133 As the charges themselves were the direct product of the abuse, the logical remedy was to stay their further prosecution. No lesser remedy would eliminate the root of the abuse. The trial judge found the prosecution of the additional nine charges to arise out of a fundamentally unfair procedure and to be among the "clearest of cases" calling for a stay of proceedings.

134 In my view, the trial judge instructed himself properly on the law and there is no reversible error in his application of the law to the facts. His decision ought not to have been reversed by the majority judgment of the Nova Scotia Court of Appeal (Freeman J.A. dissenting). That court, in my view, simply substituted their own divided opinion on issues that were given to the trial judge to decide. I would allow the appeal.

I. Abuse of Process

135 Everyone in this country, however prominent or obscure, is entitled to the equal protection of the law. As a politician of some prominence, the appellant was not entitled to be treated any better than other individuals, but nor should he have been treated worse. An important element of the protection of the law is that where the Crown Attorneys are involved they stand independent both of the police and of persons suspected of crimes to determine in a fair and even-handed way whether and how charges laid by the police should proceed.

136 The appellant says that the Crown cannot point to any other instances where it was sought to prosecute a comparable series of 24- to 34-year-old allegations of sexual touching, serious as those allegations are, and his counsel draws the

conclusion that if the appellant had remained in obscurity as a sometime lawyer and sports announcer, Nova Scotia would not now be expending its considerable resources to obtain his conviction. The Crown Attorney's office, in his view, is not standing up as they should to the powerful pressures of the media and an aroused public opinion.

137 I agree with the trial judge as a matter of law that the Crown prosecutors must retain objectivity in their review of charges laid by the police, or their pre-charge involvement, and retain both the substance and appearance of even-handed independence from the police investigative role. This is the Crown Attorney's "Minister of Justice" function and its high standards are amply supported in the cases: *Boucher v. The Queen*, [1955] S.C.R. 16; *Lemay v. The King*, [1952] 1 S.C.R. 232, at p. 257, and *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, at p. 341. In *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor* (1990), Working Paper 62, the Law Reform Commission of Canada rightly observed that "prominent people, such as politicians . . . should be treated neither preferentially nor more harshly than others. If proceedings would not have been commenced against an ordinary individual, they ought also not to be commenced against the prominent individual" (p. 80).

138 The trial judge found as a fact that there was no independent and objective review by the Crown prosecutors in this case. The absence of the usual and proper checks and balances would, he thought, shock the conscience of the community. He cited a number of concerns that reflected this institutional failure (including premature disclosure of the investigation, improper Crown involvement in the charging decisions, laying a charge to bootstrap otherwise inadmissible similar fact evidence, and judge shopping), but his listing of the symptoms should not be mistaken for his important

and central finding of fact that the appellant had been denied his constitutional right to a fair pre-trial procedure.

A. *Standard of Review*

139 I agree with my colleague LeBel J. that the standard of review of the trial judge's decision to grant a remedy under s. 24(1) of the *Canadian Charter of Rights and Freedoms* was authoritatively stated by Gonthier J. in *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375, as follows: "[A]n appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice"; see also *R. v. Carosella*, [1997] 1 S.C.R. 80, at para. 48.

140 We should also keep in mind the well-established rule mentioned by La Forest J. in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 76:

> The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way.

B. *Review of Findings of Fact*

141 An appellate court should give appropriate deference to the findings of fact of a trial judge, who in this case heard nine days of evidence and nine days of legal argument. The relevant cases are gathered together in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, where Lamer C.J. concluded, at para. 81:

> It is a well-settled principle of law that when an appellate court reviews the decision of a trial judge that court must give considerable deference to the trial judge's findings of fact, particularly where those findings of fact are based on the trial judge's assessment of the testimony and credibility of witnesses.
>
> . . .
>
> I would also note that the principle of appellate court deference has been held to apply equally to findings of fact made on the basis of the trial judge's assessment of the credibility of the testimony of expert witnesses . . . .

142 For the reasons that follow, it is my view that the critical findings of fact of the trial judge in this case compel the issuance of a stay of proceedings.

C. *Approach of the Court of Appeal*

143 I agree with Cromwell J.A. in the Nova Scotia Court of Appeal ((1999), 179 N.S.R. (2d) 45) that the crux of the trial judge's reasoning was that as a result of the abuse of process which the trial judge found to exist, the appellant is facing charges that otherwise would never have been laid, or if laid would not have been prosecuted. (The excessive charges, to be specific, are the nine charges which are the subject of the stay.)

144 Cromwell J.A. put it this way at para. 128:

> Although the judge does not explicitly say so, it appears that he found that the respondent, as a result of the loss of objectivity, may have been facing many more charges than he would have had appropriate objectivity been retained. With respect to Count 16, the judge found that it was prosecuted for an improper motive.

145 On the other hand, with respect, I do not agree with the overall approach of the majority judgment of Cromwell J.A. when it takes the symptoms of institutional failure identified by the trial judge and (as I interpret his opinion) addresses each symptom in isolation from the others with a view to demonstrating that what was done was not necessarily and in all cases wrong. I think, with respect, this approach is incorrect. Quite apart from the trial judge's emphasis on the *cumulative* effect of the various elements of the conduct complained of, the majority opinion mistakes the symptoms for the diagnosis. The trial judge's concern was not so much at the level of the individual symptoms as it was with the failure in this case of the institutional checks and balances. The failure prevented the objective review of charges laid by the police that, because of their staleness, relatively minor nature (compared with those that did go to trial) and the potentially light sentences even if convicted, would likely have been stopped if an objective review had taken place.

146 As stated, these broader concerns found expression in the report of the then Director of Public Prosecutions for Nova Scotia, Mr. John Pearson, dated June 28, 1994. The trial judge accepted, of course, that Mr. Pearson's opinion was not binding upon the police or on subsequent prosecutors (and certainly not on the court). Still, it represented a bench mark of objectivity and even-handedness that he thought ought to have continued to guide consideration of both the charges Mr. Pearson considered and the others that followed. Mr. Pearson made the following observations about the potential charges that he recommended against proceeding with:

> **The Other Complainants**
>
> Concerning the other four complainants . . . it is our opinion that these allegations should not be proceeded with by way of criminal charges. We have concluded that acts contemplated by the indecent assault section of the *Criminal Code* of the day were present in these cases. However,

> consideration of the following public interest factors tips the scale in favour of not proceeding with these matters as criminal charges:
>
> i) the allegations are minor in nature, especially when placed in the context of societal values at the time (this fact is best illustrated in [the] incident [involving one complainant] where her father, upon learning of the facts, demanded an apology from the accused);
>
> ii) the "staleness" of the offences when compared with their gravity;
>
> iii) the prosecution of these charges may be seen as "persecution" in light of the facts, the staleness of the offences and the relatively insignificant sentence, which could be anticipated if convictions were entered;
>
> iv) other alternatives are available to sanction this behaviour, i.e. the prosecution of the more serious charges; and
>
> v) the maintenance of public confidence in the administration of justice can be sustained without these four charges proceeding.

147 The charges that were stayed by the trial judge were described by Freeman J.A., dissenting, as *historic* counts (at para. 20):

> Each count alleges a single impulsive act, an isolated incident without repetition, follow-up, or persistency on the part of the respondent. The most recent of the stayed counts was almost 20 years old at the time of the trial, and some were more than 30. None of the complainants had come forward to initiate contact with police. The director of public prosecutions who evaluated the police case before the charging decision was made, and before the Crown's objectivity had been compromised, had recommended against proceeding with historic counts of this nature.

148 The conclusion that well-informed people may reasonably take from the continued prosecution of what Mr. Pearson described as "minor" allegations 24 to 34 years after the events are said to have taken place is that the appellant is being pursued not so much for what he has done as for who he is. Such a perception undermines public confidence in the impartiality and integrity of the criminal justice system, in my opinion.

D. *Law Governing Abuse of Process*

149 There is no doubt that the prosecutorial misconduct found by the trial judge would not prevent the accused from receiving a fair trial on all charges. The appellant's complaints in that regard were all properly rejected.

150 The issues relevant to the "abuse of process" claim in this case are:

(i) the extent to which an objective and even-handed Crown Attorney is essential to the checks and balances at the stages of the criminal justice system in which he or she is involved, and

(ii) whether preferring a direct indictment and the holding of a subsequent fair trial cures the omission of an essential check and balance in the laying of the charges.

1. <u>The Importance of Checks and Balances</u>

151 It is clear that Crown Attorneys perform an essential "Minister of Justice" role at all stages of their work. Their role in considering or carrying forward a prosecution is of the highest importance for the integrity of our criminal justice system, and was perhaps most famously described by Rand J. in *Boucher*, *supra*, at pp. 23-24:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate

> strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

Many other statements of the highest authority can be found to the same effect. In *Stinchcombe*, *supra*, Sopinka J. for the Court stated as follows, at p. 341:

> The tradition of Crown counsel in this country in carrying out their role as "ministers of justice" and not as adversaries has generally been very high.

152 In *R. v. Bain*, [1992] 1 S.C.R. 91, Gonthier J. for himself, McLachlin and Iacobucci JJ., dissenting on other grounds, stated at p. 118:

> The single-minded pursuit of convictions cannot be compatible with the responsibilities of Crown prosecutors.

153 In *Nelles v. Ontario*, [1989] 2 S.C.R. 170, Lamer J. (as he then was) for himself, Dickson C.J. and Wilson J., stated at p. 191:

> Traditionally the Crown Attorney has been described as a "minister of justice" and "ought to regard himself as part of the Court rather than as an advocate".

154 See also *Lemay*, *supra*, *per* Cartwright J., dissenting on other grounds, at p. 257: "[T]he sole object of the proceedings is to make certain that justice should be done".

155 The "Minister of Justice" responsibility is not confined to the courtroom and attaches to the Crown Attorney in all dealings in relation to an accused person

whether before or after charges are laid. It is a responsibility "that should be conducted without feeling or animus on the part of the prosecution" (*R. v. Chamandy* (1934), 61 C.C.C. 224 (Ont. C.A.), *per* Riddell J.A., at p. 227).

156 These statements suggest at least three related but somewhat distinct components to the "Minister of Justice" concept. The first is objectivity, that is to say, the duty to deal dispassionately with the facts as they are, uncoloured by subjective emotions or prejudices. The second is independence from other interests that may have a bearing on the prosecution, including the police and the defence. The third, related to the first, is lack of animus – either negative or positive – towards the suspect or accused. The Crown Attorney is expected to act in an even-handed way.

157 In *R. v. G.D.B.*, [2000] 1 S.C.R. 520, 2000 SCC 22, at para. 24, we held that "the right to effective assistance of counsel" in the criminal justice system reflects a principle of fundamental justice within the meaning of s. 7 of the *Charter*. The duty of a Crown Attorney to respect his or her "Minister of Justice" obligations of objectivity and independence is no less fundamental. It is an essential protection of the citizen against the sometimes overzealous or misdirected exercise of state power. It is one of the more important checks and balances of our criminal justice system and easily satisfies the criteria first established in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 513:

> Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, *rationale* and essential role of that principle within the judicial process and in our legal system, as it evolves.

158 These requirements set a high standard. The courts rightly presume, such are the high traditions of the prosecutorial service in this country, that they are met in the thousands of decisions taken every day that so vitally impact the lives of those who find themselves in trouble – rightly or wrongly – with the law. Unfounded or trivial allegations will be given short shrift. In this case, however, the trial judge found that the departure from the expected standard was neither unfounded nor trivial. The extent of the departure was deeply troubling. The trial judge has much experience in the practicalities of criminal prosecutions. We are thus confronted in this case with a very exceptional set of facts.

159 The police investigate. Their task is to assemble evidence and, assessing it as dispassionately as they can, determine whether in their view it provides reasonable and probable grounds to lay charges. The prosecutors provide the initial checks and balances to the power of the police. As the late Mr. Justice Arthur Martin observed in his *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (1993) ("Martin Report"), at p. 117, "[a]s ministers of justice, their ultimate task is to see that the public interest is served, in so far as it can be, through the use, or non-use, of the criminal courts" (emphasis added). Further (at pp. 117-18):

> Discharging these responsibilities, therefore, inevitably requires Crown counsel to take into account many factors, discussed above, that may not necessarily have to be considered by even the most conscientious and responsible police officer preparing to swear an information charging someone with a criminal offence.

160 The Crown prosecutor thus stands as a buffer between the police and the citizen. As the Martin Report emphasized, at p. 39:

> . . . separating the investigative and prosecutorial powers of the state is an important safeguard against the misuse of both. Such separation of power, by inserting a level of independent review between the investigation and any prosecution that may ensue, also helps to ensure that both investigations and prosecutions are conducted more thoroughly, and thus more fairly. [Emphasis added.]

161 The appellant was as much entitled to this "level of independent review" as any other suspect. The trial judge concluded that the distinct roles of the Crown Attorney and the police became blurred and "homogenized". In the result, the appellant was deprived of the institutional protection to which he was, and is, entitled. This is how the trial judge put this crucial finding of fact (at para. 122):

> The Crown states that it was not involved in the investigation and I accept this. However it is clear to me that the Crown was integrally immersed in the decision-making process as it applied to the laying of charges. In so doing it became heavily involved with interviewing potential complainants. Unlike Mr. Pearson, they did not critically review a police report. Instead they collaborated fully with the police to create what in essence became a joint charging decision. Cooperation led to consensus, but only at the expense of the process which became homogenized. Thus the applicant was denied that hard objective second look (at the charging decision) which is so fundamental to the role of the Crown. [Emphasis added.]

162 These are findings of fact for which there was ample evidence.

163 No reason has been shown, in my view, for any interference in these findings of fact either by the Nova Scotia Court of Appeal or by this Court.

2. The "Residual Category" of the Law on Abuse of Process

164 The jurisprudence is clear that a fair trial cannot always cure an earlier default that taints the integrity of the justice system. In *R. v. O'Connor*, [1995] 4 S.C.R. 411, it was said at para. 73 that there is a

> residual category of conduct caught by s. 7 of the *Charter*. This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

165 The common law had developed a doctrine of abuse of process long before the *Charter*. In Canada it is sometimes traced to *In re Sproule* (1886), 12 S.C.R. 140. A rationale of the common law doctrine was adopted in *R. v. Jewitt*, [1985] 2 S.C.R. 128, in terms that are pertinent here, at p. 136:

> Lord Devlin has expressed the rationale supporting the existence of a judicial discretion to enter a stay of proceedings to control prosecutorial behaviour prejudicial to accused persons in *Connelly v. Director of Public Prosecutions*, [1964] A.C. 1254 (H.L.) at p. 1354:
>
> > Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or who are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused.

E. *Prosecutorial Discretion*

166 The trial judge in this case was careful not to understate or diminish the broad scope traditionally and properly afforded to prosecutorial discretion. Courts are very slow to second-guess the exercise of that discretion and do so only in narrow

circumstances. In *R. v. Beare*, [1988] 2 S.C.R. 387, for example, the Court noted that a system which did not confer a broad discretion on law enforcement and prosecutorial authorities would be unworkable, *per* La Forest J., at p. 410:

> Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay charges, to arrest and to conduct incidental searches, as prosecutors do in deciding whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch an appeal and so on.

See also: *R. v. Power*, [1994] 1 S.C.R. 601; *Smythe v. The Queen*, [1971] S.C.R. 680, at p. 686; *R. v. T. (V.)*, [1992] 1 S.C.R. 749; and *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 348.

167 Still, the corollary to these extensive discretionary powers is that they must be exercised with objectivity and dispassion. This principle has found its way into the Canadian Bar Association's *Code of Professional Conduct* (1988); see chapter IX, "The Lawyer as Advocate", s. 9 (Duties of Prosecutor):

> The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately.

168 Because the exercise of prosecutorial discretion is, within broad limits, effectively non-reviewable by the courts, it is all the more imperative that the discretion be exercised in a fair and objective way. Where objectivity is shown to be lacking, corrective action may be necessary (as here) to protect what *O'Connor* referred to as "the integrity" of the criminal justice system.

169 Wilson J., in *R. v. Keyowski*, [1988] 1 S.C.R. 657, developed the notion that abuse of process in this regard does *not* require a demonstration of prosecutorial bad faith. She wrote that courts should look at all relevant factors. "To define 'oppressive' as requiring misconduct or an improper motive would, in my view, unduly restrict the operation of the doctrine. . . . Prosecutorial misconduct and improper motivation are but two of many factors to be taken into account . . ." (p. 659).

170 In the present case, the overriding concern was the failure of the proper and usual institutional checks and balances.

171 The fact that *O'Connor* brought together the two streams of jurisprudence relating to abuse of power – the common law with its emphasis on the integrity of the criminal justice system and the *Charter* with its emphasis on individual rights – did not diminish judicial preoccupation with the integrity of the process. It was fairly observed in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, that cases of abuse of process that do *not* involve fair trial rights or other individual rights and freedoms can be expected to be few in number. This is because despite the fact that errors are made, the institutional *integrity* of our system of justice is rarely called into question successfully.

172 In my view, the Crown did not demonstrate that in finding an abuse of process in this case the trial judge either misdirected himself or that "his decision is so clearly wrong as to amount to an injustice" (*Elsom*, *supra*, at p. 1375).

173 I agree with Freeman J.A. in dissent when he said, at para. 5, that:

> The prominence of the accused and the high level of media interest in the case called for a disciplined and dispassionate approach by the Crown to ensure a perception that Mr. Regan was treated as even-handedly as any citizen has a right to expect. Instead the trial judge identified a number of lapses of judgment indicative of over-zealousness by the police and the Crown, three of which figured in his decision to stay what were considered to be lesser charges to preserve the reputation of the administration of justice.

174 As Freeman J.A. points out, the specific lapses were considered "indicative" (not exhaustive) of over-zealousness.

F. *Addressing the Symptoms*

175 Much of the reasons for judgment of the majority in the Nova Scotia Court of Appeal is devoted to pointing out what the trial judge did *not* find, or alleged inconsistencies in what he *did* find. In my view, with respect, the reasons of the trial judge read as a whole by a mind willing to understand are consistent and coherent. As stated, I disagree with the effort to divide his reasons into airtight compartments and then isolate and attack the compartments one by one. Nevertheless, I proceed with a consideration of the symptoms listed by the trial judge and addressed by the Court of Appeal in the order in which they arose in the earlier judgments.

1. Police Misconduct

176 The trial judge rejected almost all of the appellant's allegations of misconduct against the police, including the allegedly "premature" formation of a task force to investigate rumours and journalistic speculation about the appellant's behaviour, allegedly questionable investigative techniques, missing evidence and arrest procedures. He was nevertheless "troubled" by the "serious error in judgment"

(para. 87) by the police in confirming that the appellant was under investigation before any of the complainants had been interviewed let alone charges laid. This was contrary to the express direction of the provincial Solicitor General's Department dated February 6, 1990:

> 3. No police official shall disclose the fact of a police investigation, other than on a need-to-know basis within the Police Department, so as to maintain confidentiality and secrecy respecting the identity of a person who is the subject of an investigation.

The disclosure was not a slip. The trial judge found that the police officer checked with his superior officer before making the disclosure and issued the disclosure in the form of a press release. The effect, as pointed out by Freeman J.A., was that "[t]he story made national headlines some 17 months before charges were laid" (para. 24).

177 The majority judgment of the Nova Scotia Court of Appeal considered this event to be largely irrelevant to the issues under appeal because it relates to the police, not the prosecutors. I disagree. What this incident should have indicated to the Crown Attorney's office was that the police perceived themselves to be under a great deal of public pressure and that a "hard objective second look" at any charges ultimately laid would be of the highest importance to the fair and even-handed administration of justice. It is in such situations that the system of checks and balances is most severely tested.

2. Conduct of the Crown Prosecutors

178 There were three aspects, in particular, of the conduct of the prosecutors that indicated to the trial judge that the system of checks and balances did not operate in this case.

(a) *Judge Shopping*

179 The first aspect was the apparent willingness of the Senior Crown Attorney on the case, Ms. Susan Potts, to manipulate the court system to advantage the prosecution. This emerged in the RCMP minute of a meeting on July 15, 1994 between the Crown Attorney and RCMP investigators where she advocated judge shopping, i.e., using the Crown's scheduling privilege to get the case before a judge of its own choosing, a practice which undermines both the reality and the appearance of the impartial administration of justice. The RCMP minute reads:

> There was some discussion in regards to where charges are laid and an appearance by Regan in court. [Crown counsel] Potts said that Judge Randall is sitting in Sept and it is not advisable to bring the matter before him – political appointment (Liberals). Oct may be the appropriate month. Potts is to keep monitoring the court docket to see who is sitting when and <u>what would be in our best interest</u>. [Emphasis added.]

180 The trial judge considered the note important because of what it revealed, namely that the Senior Crown Attorney with day-to-day responsibilities for the case had identified herself with the police point of view, and was "attempting to secure a conviction at all costs". The trial judge wrote (at para. 101):

> This entry represents a blatant attempt at judge shopping, pure and simple. It is offensive and most troubling. The reference to avoiding a particular judge is one distressing thing, the flagrant attempt at "*monitoring the court docket to see who is sitting when and what would be in our best interest*" [emphasis added by MacDonald A.C.J.] is even

> more disturbing. This gives the appearance of a Crown Attorney who is attempting to secure a conviction at all costs. [Emphasis added.]

181 The Nova Scotia Court of Appeal pointed out that eventually Ms. Potts left the case in 1996. This is true, but the trial judge was concerned about the absence of an objective view at the time the charges were laid, at which point (for example, the critical meeting with the RCMP on January 17, 1995) Ms. Potts was very much the heart and sinews of the prosecution team. The Crown says that the "judge shopping" comment was neither repeated nor acted on. We do not know this. The appellant attempted to subpoena Ms. Potts to testify at the abuse of process hearing but it seems that her appearance was successfully blocked by Crown objections.

(b) *Joining Forces with the Police*

182 A few years before the investigation in this case, the prosecutorial branch in Nova Scotia was severely shaken by the findings of the *Royal Commission on the Donald Marshall, Jr., Prosecution*, vol. 1, *Findings and Recommendations* (1989) (the "Marshall Report"). In the course of inquiring into the wrongful conviction of Mr. Marshall, the Royal Commission found instances of political interference in charging decisions and differential treatment as between prominent citizens and the disadvantaged. The Marshall Report therefore recommended that the problems historically experienced in Nova Scotia be addressed by maintaining a "distinct line" between the police and the Crown law office (at p. 232):

> We recognize that cooperative and effective consultation between the police and the Crown is also essential to the proper administration of justice. But under our system, the policing function – that of investigation and law enforcement – is distinct from the prosecuting function. We believe the maintenance of a distinct line between these two functions is essential to the proper administration of justice. [Emphasis added.]

183 The accepted practice in Nova Scotia in the 1994-95 time period (i.e., the "local custom") was set out in a report submitted to the Minister of Justice for Nova Scotia concerning the status of the Public Prosecution Service in 1994, in which Professors Ghiz and Archibald of Dalhousie Law School stated as follows:

> In some Canadian jurisdictions, and in Nova Scotia prior to the Marshall Inquiry, prosecutors claimed the authority to direct the police in their general investigative duties (as well prior to as after the laying of charges), and sometimes purported to have the authority to order the police not to lay charges in specific cases. Pursuant to recommendations 36 and 37 of the Marshall Inquiry, as adopted by the Attorney General and the then Solicitor General, there is now a clearer understanding of the importance of separating the policing and prosecution functions. Fundamentally, one might say the police have the right to investigate and lay charges unimpeded by Crown Prosecutors, while Prosecutors have the right to stop charges once laid. However, there is often a need for both pre-charge and post-charge consultation since the normal scenario is a cooperative rather than antagonistic relationship between Crowns and police, both of whom share common goals in the administration of criminal justice. The nature of this advice sought by police and given by Crowns is usually limited as to the appropriateness of a specific charge under the *Criminal Code* or the interpretation of a *Criminal Code* section, but the advice may also extend to whether or not certain evidence that has been gathered would be sufficient to sustain a case in court. [Emphasis in original.]
>
> (J. A. Ghiz and B. P. Archibald, *Independence, Accountability and Management in the Nova Scotia Public Prosecution Service: A Review and Evaluation* (1994), at pp. 41-42)

184 In my view, the Nova Scotia Court of Appeal did not meet the trial judge's point when it attempted to show that pre-charge involvement of Crown Attorneys with the police varies somewhat from province to province and cannot be regarded as in all circumstances and for all purposes objectionable. I agree that the test is a principled test (i.e., have objectivity and independence been maintained?) rather than mechanical (e.g., did the interview take place pre-charge or post-charge?), and that in principle the charging decision does not represent a "bright line" prior to which the involvement of a Crown Attorney is presumptively suspect.

185 Moreover, I agree with my colleague LeBel J., at para. 83, that:

> . . . pre-charge Crown interviews may advance the interests of justice (see below), and because the pre- versus post-charge distinction may distract attention away from the necessary vigilance to maintain objectivity throughout the proceedings. [Emphasis in original.]

186 The trial judge's concern was a principled concern. He deplored what he found to be the absence of independence and objectivity on the part of Ms. Potts and her colleagues in the Crown office working on this case. Those who engaged in the pre-charge interviews had acquired, for whatever reason, tunnel vision under the pressures of a high profile investigation of a politically prominent individual.

187 The trial judge was not opposed to the pre-charge involvement of the Crown. He had no trouble, for example, with the pre-charge involvement of Mr. Pearson, the Director of Public Prosecutions. He stated his concern more narrowly (at para. 121):

> The crucial issue before me is a more narrow one. It involves firstly, the Crown's determination to interview complainants pre-charge and secondly, the impact of that process on the number and types of charges that were ultimately laid. [Emphasis added.]

188 Some of the trial judge's observations on the dangers of interviewing complainants pre-charge may have gone beyond the "narrow" issue he had identified for himself. I do not, for example, think he should be taken to say that pre-charge interviews *necessarily* give rise to a loss of objectivity. Not only did he endorse pre-charge interviews for certain limited purposes but he was dealing with a loss of objectivity that pre-dated even the initial Crown interviews. Ms. Potts made the judge-

shopping comment on July 15, 1994, but she did not begin her interviews of the complainants until over four months later, on November 17, 1994.

189 Taking his reasons as a whole, the trial judge appeared to accept (as I do) the correctness of the evidence of Dr. Philip Stenning, which the trial judge summarized as follows (at paras. 115-16):

> Dr. Philip Stenning was arguably the Crown's most qualified expert. He has dedicated his entire academic career to studying the role of the Crown and has published extensively on this topic. Like Mr. Gover, he feels it would be an over-simplification to decree that a prosecutor should never interview pre-charge. Everything must be placed in context he feels, and local customs must be acknowledged and respected. Despite what might be stated in the *Martin* and *Marshall Reports*, he feels there is still room for the Crown to interview pre-charge in appropriate circumstances.
>
> . . . [He] does concede that such occasions would be rare.

190 The specific problems here, therefore, were breach of what Dr. Stenning termed a "local custom" of maintaining a distinct division of responsibilities that was perhaps more emphasized in Nova Scotia than elsewhere due to well-publicized problems with the Crown Attorney's office over the preceding ten years or so, and the problematic motive for the breach. As to the former, the trial judge's concern was not with cross-Canada variations but whether or not the Crown Attorneys in Nova Scotia observed the local rules that had been put in place following the Marshall Report. Their willingness to ignore the "distinct line" between their role and that of the police, accepted by Nova Scotia following the Marshall Report, showed a zeal for the laying of more charges that "homogenized" what were supposed to be distinct and separate functions. Instead of the police laying charges and the Crown providing a "hard objective second look", the Crown had subordinated itself and become a supporting actor in the initial charging decision, which the trial judge described as a "joint . . .

decision". As to motive, the trial judge recognized several legitimate reasons to interview a complainant pre-charge, for example, to prevent an accused "from going through the embarrassment (humiliation) of being charged only to later have the charges dropped or stayed" (para. 117), rapport building to encourage informed willingness to participate, or assessing victim credibility. He said (at para. 118):

> The Crown in the case at bar has given its reasons for interviewing precharge. They include "rapport building" and assessing victim credibility. Yet, despite these stated intentions, it is clear according to one R.C.M.P. file reviewer that the purpose for at least some of these pre-charge Crown interviews was to have reluctant complainants change their minds and come forward. [Emphasis added.]

191 The purpose here, apparently, was not to "build rapport" with complainants who were worried about the court process, which would be a perfectly acceptable reason for a pre-charge interview. The trial judge saw the Crown involvement in "changing their minds" as simply another aspect of the Crown's joining the police team rather than exercising a "level of independent review". In this respect, he quoted (at para. 118) a contemporaneous RCMP internal note dated January 17, 1995, which recorded:

> It is now the investigators and the Crown's belief that if these persons could be re-interviewed with both the Crown Prosecutor and police investigator present there would be a greater chance of them changing their minds. [Emphasis added.]

This was to further the police strategy of a "broadly based prosecution", as it was described by counsel for the Crown in this Court. In my view, the trial judge was correct in his criticism. If the charges were examined and approved one by one, the Crown might wind up with a "broadly based prosecution", but the Crown ought not to start out with the objective of a broadly based prosecution and then *afterwards* look

to approve individual charges to make it happen. This is what the trial judge criticized (at para. 123):

> The Crown's role in response is to objectively assess the case globally. As ministers of justice they are to dispassionately protect the process which includes protecting the rights of the applicant. In this case the Crown did not review the investigators' charging decision. They became part of it. They interviewed all potential complainants. Their involvement became subjective by nature. Like the police, it is understandable that they would have strong feelings. Not surprisingly and as Mr. Reid confirmed, they eventually came to see the case the same way the police saw it. That would be fine if their review was totally objective; as was Mr. Pearson's. It becomes problematic when what was to be a review becomes a joint endeavour and a joint decision. That I believe is what happened in the case at bar.

192 On this point, Freeman J.A., dissenting, made the following comment, with which I agree (at para. 67):

> While expert opinions varied as to the rare circumstances in which pre-charge interviews may be engaged in by the Crown without imperiling Crown objectivity, there was agreement that Crown objectivity itself was an essential component of Canadian justice. If such a value exists then it must have a home within the system, and there must be remedies for lapses.

In my opinion, such a value exists and its home is in s. 7 of the *Charter*.

193 The Crown's effort to lay the responsibility for all this on the head of Ms. Susan Potts is unconvincing. As mentioned, when the defence attempted to subpoena Ms. Potts to testify about the extent and depth of alleged loss of objectivity among the prosecutors, the Crown resisted and she never had the opportunity to explain her conduct to the court. I do not say the Crown's objections to her testimony were either unfounded or unreasonable. I say only that the Crown cannot draw a self-

serving conclusion from this unfortunate situation when the critical evidence went unheard because of the Crown's objection.

(c) *Count 16*

194 This count related to a 24-year-old news reporter who says that in 1976 she was forcibly fondled by the appellant in a hotel room while being pushed onto a bed. She was unwilling to become involved as a complainant. The police wanted count 16 before the court because it would enable them to lead "similar fact" evidence of a more significant incident in Alberta in 1990. The police apparently thought this 1990 incident would add credibility to their "broadly based prosecution" strategy by making the series of charges appear less stale and more up to date. This strategy was reflected in Staff Sergeant Fraser's internal RCMP report of December 9, 1994:

> The investigation surfaced many victims and charges to be laid should reflect the whole picture. The report, dated 94-06-28, from the Public Prosecution Service [the Pearson opinion] recommended that charges be laid in respect to four victims. This in effect shows that the subject was active in his early years however the investigation surfaced evidence to support the fact that the offenses continued throughout the period 1960-1990. For this reason, it was requested by C/Supt. FALKINGHAM that Crown review the evidence and consider laying charges in all instances so that the gravity of the subject's actions be properly presented to give the full picture.

195 The obstacle to this "full picture" strategy is that the only complainant more recent than 1978 was the Alberta allegation that could not be prosecuted in Nova Scotia. The Crown therefore decided to prosecute count 16 as a gateway to introduce the Alberta evidence, thereby extending by 12 years "the full picture".

196 The majority judgment of the Nova Scotia Court of Appeal considered count 16 to be valid in its own right, and the trial judge's condemnation of the police strategy to be misconceived. Cromwell J.A. writes, at para. 140:

> There is nothing inherently objectionable in the Crown considering questions of the admissibility of evidence and their impact on the prospects of conviction when deciding to proceed with charges.

I agree, but that is not the point taken by the trial judge. His concern with count 16, as was his concern with the judge-shopping comment and the pre-charge interviews, was the Crown's apparent inability or unwillingness to assert its independence from the police strategies. On count 16 the trial judge said (at para. 158):

> Yet the Crown's goal as I see it was to have the jury hear and (presumably act upon) the complaint of A.R.S., a similar fact witness. Similar fact evidence is only admissible if relevant to proving the listed charge. You cannot lay a charge in order to get similar fact evidence in. Such a concept would be totally contrary to the very essence of this exclusionary rule.

197 In my view, the trial judge's concern was quite appropriate. Similar fact evidence is generally inadmissible but will be permitted where its probative value exceeds its prejudicial effect: *R. v. Sweitzer*, [1982] 1 S.C.R. 949, at p. 952, and *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717, at p. 735. The trial judge concluded that count 16 was to be used as a vehicle to get otherwise inadmissible evidence before the jury to extend and perhaps distort "the full picture". Whether or not a conviction was entered on count 16 was, according to the trial judge's finding of fact, of secondary importance to the police and the Crown. This was a reversal of the natural and proper order of considerations, and showed to his satisfaction that over-zealousness by the Crown was still operating more than a year after Ms. Potts left the case.

(d) *Preferring the Direct Indictment*

198 The majority decision of the Nova Scotia Court of Appeal concluded that even if proper procedures were not followed in the laying of the charges in 1995 (and the subsequently added charges), the omission was cured by the preferral of the direct indictment on April 10, 1997. In this respect, Cromwell J.A. in a number of passages interprets the trial judge's decision as saying the "discretion to prefer a direct indictment, some two years after the initial charges were laid, was properly exercised" (para. 105 (emphasis added); see also paras. 143 and 173). The "cleansing effect" of the direct indictment is endorsed by my colleague LeBel J. at para. 109.

199 I think the so-called "cleansing effect" of a direct indictment is overstated. While s. 577(*c*) of the *Criminal Code*, R.S.C. 1985, c. C-46, requires "the personal consent in writing of the Attorney General or Deputy Attorney General", the purpose of this provision is to engage the responsibility of senior officials, not necessarily to compel their sustained and undivided attention to the nuts and bolts of a prosecution. Under our notions of ministerial responsibility, much is done on the basis of the signature of a Minister or Deputy Minister that he or she could not possibly have reviewed in any detail. They rely (and it is expected that they rely) on advice from their officials. In this case, the officials were the very people whose conduct the appellant complains about.

200 The extracts of the record before us, which are restricted to factual matters relevant to the legal issues, exceed 1200 pages in length. I do not say that the Attorney General or his Deputy did not master the file, but I would require more evidence than we have been given before accepting as realistic the conclusion that they did so to the point of "cleansing" the failures in the system of checks and balances that had

occurred earlier. This is particularly so when the real explanation for the direct indictment is perfectly clear. The direct indictment was recommended to the Attorney General because the preliminary hearing had run the better part of a year and showed no signs of an early conclusion.

201 In any event, I view the trial judge's finding on this point somewhat differently than did the Nova Scotia Court of Appeal majority. What the trial judge said, in fact (at para. 131), is that he was

> not convinced that the Crown acted *mala fides* in its decision. The preliminary inquiry was very lengthy. If the Crown was so ill-motivated, it could have preferred the direct indictment at the outset or at least sooner than it did.

202 A finding of *mala fides* or bad faith is not, of course, a condition precedent to finding an abuse of process: *Keyowski*, *supra*, at p. 659. The trial judge found that the Crown had not acted in bad faith to shut down a preliminary inquiry that had already run from April 9, 1996 to February 25, 1997. His comment about *mala fides* did not address and was not intended to address the appellant's much broader complaint of a failure by the Crown, for whatever reason, to review in an objective and even-handed way the appropriateness of the "minor" charges that Mr. Pearson had earlier rejected, and charges in the same category laid subsequently, in light of all the factors touching on the public interest. As to the direct indictment issue, I agree with Freeman J.A. in dissent (at para. 15):

> Whether the decision was fixable at that stage [i.e., of the direct indictment] is not the issue. Justice MacDonald did not find it had been fixed.

203 In light of the trial judge's conclusion that the charging process was fundamentally flawed, and the fact that he eventually entered a stay against nine of the lesser charges, it is apparent that while he did not regard the direct indictment that cut short the preliminary inquiry as tainted with *mala fides* on that account, he nevertheless concluded that in limited respects it was inappropriate. He specifically so found in relation to count 16, which was not laid until the direct indictment, i.e., long after Ms. Potts had left the prosecution team.

204 The direct indictment in this case was not a cleanser. At best it was a missed opportunity.

205 I would not want to leave this branch of the case without repeating the apposite observations of McLachlin J. (as she then was) and Major J. in *Curragh, supra*. Although written in dissent, they are sentiments with which no member of the Court would disagree (at para. 120):

> [I]t is especially where pursuit of truth is righteous that we must guard against overreaching on the part of those charged with the authority to investigate and prosecute crimes. We cannot be tolerant of abusive conduct and dispose of due process, however serious the crimes charged. High profile trials, by their nature, attract strong public emotions. In our society the Crown is charged with the duty to ensure that every accused person is treated with fairness. . . . When the Crown allows its actions to be influenced by public pressure the essential fairness and legitimacy of our system is lost. We sink to the level of a mob looking for a tree.

206 I would uphold in this case the trial judge's conclusion that the nine charges that he stayed represented, in all the circumstances, an abuse of process.

II. Stay of Proceedings

207 Demonstration of an abuse of process does not, of course, lead to an automatic stay of proceedings.

208 This is particularly true where, as here, the trial judge concluded that notwithstanding the passage of time and the difficulty of getting to the bottom of momentary events that happened 24 to 34 years ago, the appellant's fair trial interests have not been prejudiced by the conduct found to amount to an abuse of process.

209 The inherent power of a superior court to stay proceedings that are an abuse of power was recognized in Canada in the nineteenth century, called into question in *R. v. Osborn*, [1971] S.C.R. 184, and *Rourke v. The Queen*, [1978] 1 S.C.R. 1021, but affirmed again with *Jewitt, supra*. In *Rourke*, Pigeon J., for the majority, concluded, consistent with earlier statements in *Osborn*, that "I cannot admit of any general discretionary power in courts of criminal jurisdiction to stay proceedings regularly instituted because the prosecution is considered oppressive" (p. 1043), while also stating that "[i]f there is the power", it "should only be exercised in the most exceptional circumstances" (p. 1044).

210 The controversy over whether the discretion to stay for abuse of process was an option that had been completely foreclosed in Canada remained in doubt until *Jewitt, supra*, where Dickson C.J., for a unanimous Court, affirmed the availability of a stay of proceedings to remedy an abuse of process and *Osborn* and *Rourke* were read narrowly. This Court affirmed the existence of the residual discretion of a trial judge to stay proceedings where "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or

vexatious proceedings" (pp. 136-37). Further, he added, the power can be exercised only in the "clearest of cases".

211 In *Jewitt*, Dickson C.J. alluded briefly to the concern about the defendant receiving a procedural windfall of sorts. "The stay of proceedings for abuse of process is given as a substitute for an acquittal because, while on the merits the accused may not deserve an acquittal, the Crown by its abuse of process is disentitled to a conviction" (p. 148). That concern was more fully developed, along with an elaboration of the abuse of process doctrine, in *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667, by L'Heureux-Dubé J. for the majority:

> Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge. The prosecution is set aside, not on the merits . . ., but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. The doctrine is one of the safeguards designed to ensure "that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society". . . . It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings. [Emphasis added.]

See also *R. v. Scott*, [1990] 3 S.C.R. 979, *per* McLachlin J., at pp. 1007-8.

212 The residual category of cases where a stay of proceedings is available notwithstanding the fact the abuse of process found to exist does not affect the fairness of the trial (or impair the more specific procedural rights in the *Charter*) was further elaborated in *O'Connor*, *supra*, *per* L'Heureux-Dubé J., at para. 73:

> This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

213 In *Tobiass, supra*, at para. 89, the Court characterizes the residual category as a "small one" and observes that fairness of the trial will occupy the "vast majority" of the cases. I do not treat that observation as deprecating the importance of the residual category. As previously suggested, it merely reflects the fact that on the whole our system of criminal justice functions justly. The cases where a stay of proceedings is required on this account are rare, not because of judicial *fiat* to limit their numbers but because the system works. The institutional checks and balances are observed.

214 *Tobiass* notes that a stay of proceedings is not intended to redress a past wrong but to prevent the perpetuation of a wrong that will continue to trouble the parties and community in the future. The mere fact of "shabby treatment" of an individual in the past does not satisfy the criterion (at para. 96):

> A stay is not a form of punishment. It is not a kind of retribution against the state and it is not a general deterrent. If it is appropriate to use punitive language at all, then probably the best way to describe a stay is as a specific deterrent – a remedy aimed at preventing the perpetuation or aggravation of a particular abuse.

215 Accordingly, in a unanimous pronouncement on the subject, this Court in *Tobiass* laid down a two-part analysis for considering the grant of a stay of proceedings (at para. 90):

> If it appears that the state has conducted a prosecution in a way that renders the proceedings unfair or is otherwise damaging to the integrity of the judicial system, two criteria must be satisfied before a stay will be appropriate. They are that:
>
> (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
>
> (2) no other remedy is reasonably capable of removing that prejudice.

To which a potential third step was added at para. 92:

> After considering these two requirements, the court may still find it necessary to consider a third factor. As L'Heureux-Dubé J. has written, "where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings". . . . We take this statement to mean that there may be instances in which it will be appropriate to balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits.

216 In my view, with respect, the criteria laid down in these cases, and recited by the trial judge in his reasons for judgment, are amply fulfilled by the findings of fact in this case.

217 The absence of the proper checks and balances between police and prosecutor in this case led to an increase in the number of charges laid against the appellant. The trial judge's reasons can be read in no other way. Cromwell J.A. noted, at paras. 168-69, that the trial judge's

> reasons are consistent with a conclusion that the respondent may have been facing more charges than he would have been had Crown objectivity been retained at "the charging stage". In other words, had objectivity been retained, some of the charges laid by the police might have been stayed by the Crown. If this is correct, the loss of objectivity found by the judge

> could be taken to have ongoing effects in the sense that it may have put the prosecution on a fundamentally different path than it would otherwise have followed. The judge sought to remedy the loss of objectivity by staying counts which he thought Mr. Pearson would not have proceeded with had he remained in office.
>
> In my respectful view, this analysis overlooks the proper preferring of the direct indictment.

218 I have already discussed my disagreement with Cromwell J.A.'s interpretation of the trial judge's treatment of the direct indictment.

219 It is clear to me, applying the first stage of the *Tobiass* test, that the trial judge concluded that the Crown's loss of objectivity and improper motive will be "manifested, perpetuated or aggravated" through the continued prosecution of the charges to which these abuses of process gave rise (*Tobiass*, at para. 90). If the trial itself would not have occurred but for the abusive conduct, then the trial itself necessarily perpetuates the abuse.

220 Secondly, the only way to halt this continued prejudice to the appellant is by bringing a halt to the charges going forward to trial, i.e., a stay of proceedings.

221 The trial judge's analysis of these first two elements in the *Tobiass* analysis draws support, I think, from the scholarly article that initially formulated these elements of the test (see *O'Connor*, *supra*, at para. 75):

> Where the abuse has caused no prejudice to the fairness of the trial itself, a stay will be appropriate where:
>
> > the abuse is in the very fact that a charge was laid, and the abuse in question or the prejudice it has caused is so significant relative to the seriousness of the offence that it is more important to the interests of justice that the court redress the abuse, than try the offence on its merits . . . . [Emphasis added.]

> (D. M. Paciocco, "The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept" (1991), 15 *Crim. L.J.* 315, at p. 350)

222 In this case, "the seriousness" of the offences was characterized as relatively "minor" and the importance which may be attached to their prosecution therefore does not outweigh the prejudice in this case to the integrity of the administration of justice.

223 The majority opinion in the Nova Scotia Court of Appeal largely rested on the view that the trial judge had failed to consider whether the continuation of the prosecution would "manifest, perpetuate or aggravate the prejudice" (para. 101). The trial judge cited that specific aspect of the test at para. 56 of his reasons and in my opinion he applied it and, given his findings of fact, he came to the right conclusion.

224 The *Tobiass* case, I note parenthetically, was decided on very different facts. Neither the original charges nor the conduct of the prosecutors assigned to the case were criticized. A meeting took place between the Chief Justice of the Federal Court and a senior member of the Justice Department (neither of whom had any direct role in *Tobiass* or its companion cases). At the meeting, *Tobiass* and its companion cases, amongst other cases of alleged war crimes, were referred to in terms of alleged scheduling delays. Defence counsel were not made aware of the meeting until after it had occurred. This Court found a serious breach of fairness had occurred, but the prejudice could be eliminated by ensuring that the participants in the meeting at issue had no further participation whatsoever in the case. No such limited remedy is possible in this case. So long as the charges stand, the prejudice will persist.

225 Finally, at the third stage of the *Tobiass* test, the court is to consider (if it still has any uncertainty) the balance between any harm to the justice system that would result from taking the charges to trial as against the public interest in having these charges disposed of on their merits. As mentioned, the balancing process was described by L'Heureux-Dubé J. in *Conway*, *supra*, at p. 1667:

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

226 This was expressly noted by the trial judge in this case, who said: "This balancing act, so common to almost everything we do as judges, will play a significant role in my analysis in the case at bar" (para. 58).

227 The key to the trial judge's "balance" was his view that despite the existence of allegations which, if believed, would constitute the offences charged, the group of charges stayed were less serious than those he allowed to proceed, and had never been objectively reviewed in light of what the Martin Report described as factors "that may not necessarily have to be considered by even the most conscientious and responsible police officer" (p. 118).

228 Society, like the Crown Attorney, has no specific interest in "winning or losing" but it does have an interest in placing the relevant facts before a court for determination on their merits. This factor militates against a stay, but in this case it is a factor that is overwhelmed by competing considerations.

229 The trial judge was clearly of the same view as the former Director of Public Prosecutions, Mr. John Pearson, who said that while on the one hand "acts

contemplated by the indecent assault section of the *Criminal Code* of the day were present in these cases", nevertheless, on the other side of the ledger, "consideration of the following public interest factors tips the scale in favour of not proceeding" (emphasis added) with the "minor" charges. For ease of reference, I repeat Mr. Pearson's public interest factors which the trial judge adopted:

> i) the allegations are minor in nature, especially when placed in the context of societal values at the time (this fact is best illustrated in the [C.E.R.] incident where her father, upon learning of the facts, demanded an apology from the accused);
>
> ii) the "staleness" of the offences when compared with their gravity;
>
> iii) the prosecution of these charges may be seen as "persecution" in light of the facts, the staleness of the offences and the relatively insignificant sentence, which could be anticipated if convictions were entered;
>
> iv) other alternatives are available to sanction this behaviour, i.e. the prosecution of the more serious charges; and
>
> v) the maintenance of public confidence in the administration of justice can be sustained without these four charges proceeding. [Emphasis added.]

230 The Pearson report was clearly not binding on the Crown or upon Mr. Pearson's successors, and the trial judge never suggested that it was. What he did suggest is that the factors put in the balance by Mr. Pearson were logical and pertinent. It was open to the trial judge to adopt the Pearson criteria as his own, and he did so. As I read his judgment, he concluded, that in light of his decision to send the appellant to trial on the nine more serious charges (eight of which, as stated, have now resulted in the appellant's acquittal), the prosecution of additional charges of a relatively minor nature that allegedly took place 24 to 34 years ago, and which if successful would carry a "relatively insignificant sentence", did not outweigh the public interest in

vindicating the importance of the role played by objective and independent Crown prosecutors.

231 The trial judge thought that in this way an appropriate balance had been struck between the public interest in having *all* charges dealt with on their merits against the public interest in having *all* charges stayed to show the court's determination to ensure the continued vigour of checks and balances in the criminal justice system. Whether or not this Court would draw the line precisely where the trial judge drew it is beside the point. After hearing evidence and argument for 18 days, he properly instructed himself on the law, carefully reviewed the facts, and made no palpable or overriding error in the inferences and conclusions that he reached.

III. Conclusion

232 I would therefore allow the appeal.

Appeal dismissed, IACOBUCCI, MAJOR, BINNIE *and* ARBOUR JJ. *dissenting*.

Solicitors for the appellant: Greenspan, Henein & White, Toronto.

Solicitor for the respondent: The Department of Justice, Winnipeg.

Solicitor for the intervener the Attorney General of Canada: The Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Quebec: The Attorney General of Quebec, Quebec.

Solicitor for the intervener the Attorney General for New Brunswick: *The Attorney General for New Brunswick, Miramichi.*