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R. v. Leduc

Regina v. Leduc

176 C.C.C. (3d) 321

Ontario Court of Appeal
Court File No. C36077
Laskin, Feldman and Gillese JJ.A.

October 24, 2002October 25, 2002;
; July 24, 2003

Application for leave to appeal to the Supreme Court of Canada
was filed September 22, 2003 (Court File No. 29958).

Trial — Conduct of trial — Recusal for bias — Accused charged with sexual assault — During trial, accused bringing application to stay proceedings for non-disclosure — Early on application, trial judge aware that situation requiring recusal from application to prevent reasonable apprehension of bias - - Trial judge arranging for another judge to conduct application — Application judge imposing stay of proceedings — Crown appeal allowed on other grounds — Normally, when apprehension of bias becomes an issue, trial judge should declare mistrial and entire proceedings recommence before another judge — Unusual circumstances occurring in this case — Bias issue had not yet infected trial as whole, just application for stay — Jurisdiction of second judge found in powers of superior court judge acting under s. 24(1) of Charter — Power also found in provisions of Criminal Code permitting another judge to continue proceedings when original judge "for any reason unable to continue" — Recusal for bias a legitimate reason not to continue — Canadian Charter of Rights and Freedoms, s. 24(1) — Cr. Code, s. 669.2(1).

Courts — Jurisdiction — Change of judge — Recusal for bias — Accused charged with sexual assault — During trial, accused bringing application to stay proceedings for non-disclosure — Early on application, trial judge aware that situation requiring recusal from application to prevent reasonable apprehension of bias — Trial judge arranging for another judge to conduct application — Application judge imposing stay of proceedings — Crown appeal allowed on other grounds — Normally, when apprehension of bias becomes an issue, trial judge should declare mistrial and entire proceedings recommence before another judge — Unusual circumstances occurring in this case — Bias issue had not yet infected trial as whole, just application for stay — Jurisdiction of second judge found in powers of superior court judge acting under s. 24(1) of Charter — Power also found in provisions of Criminal Code permitting another judge to continue proceedings when original judge "for any reason unable to continue" — Recusal for bias a legitimate reason not to continue — Canadian Charter of Rights and Freedoms, s. 24(1) — Cr. Code, s. 669.2(1).

Charter of Rights — Enforcement of rights — Court of competent jurisdiction — Recusal for bias — Accused charged with sexual assault — During ***[page322]*** *trial, accused bringing application to stay proceedings for non- disclosure — Early on application, trial judge aware that situation requiring recusal from application to prevent reasonable apprehension of bias — Trial judge arranging for another judge to conduct application — Application judge imposing stay of proceedings — Crown appeal allowed on other grounds — Normally, when apprehension of bias becomes an issue, trial judge should declare mistrial and entire proceedings recommence before another judge — Unusual circumstances occurring in this case — Bias issue had not yet infected trial as whole, just application for stay — Jurisdiction of second judge found in powers of superior court judge acting under s. 24(1) of Charter — Power also found in provisions of Criminal Code permitting another judge to continue proceedings when original judge "for any reason unable to continue" — Recusal for bias a legitimate reason not to continue — Canadian Charter of Rights and Freedoms, s. 24(1) — Cr. Code, s. 669.2(1).*

Practice, process and procedure — Notice — Allegation of Crown misconduct — Accused charged with sexual assault — Late disclosure made in case and accused applying for stay of proceedings — Notice given pursuant to provincial rules alleging misconduct by police — During closing arguments, after evidence and submissions, accused's counsel alleging misconduct on part of Crown — Proceedings stayed for non-disclosure — Crown appeal allowed on other grounds — Notice given by accused far from ideal, but adequate in circumstances — Common courtesy and decency requiring that Crown counsel be apprised that integrity would be attacked on application — Nevertheless, Crown having opportunity to respond to allegations satisfactorily — Crown not complaining of notice before application judge — Not desirable to establish special, inflexible rule regarding notice to be given to Crown in circumstances — Provincial rules of court drawing proper line between fairness to Crown and accused's right to full answer and defence — Canadian Charter of Rights and Freedoms, ss. 7, 24(1) — Criminal Proceedings Rules, SI/ 92-99, 2.01, 2.02, 27.03.

Charter of Rights — Fundamental justice — Full answer and defence — Disclosure — Accused charged with sexual assault — During course of trial, non-disclosure of witness statement discovered — Accused applying for stay of proceedings — Accused ultimately alleging wilful non-disclosure by Crown — Trial judge staying proceedings and ordering costs of trial and application against Crown — Crown appeal allowed — Trial judge erred in finding wilful non-disclosure — Finding entitled to deference, but tainted by palpable and overriding error — Trial judge misapprehending letter relevant to disclosure and evidence respecting error — Neither supporting trial judge's conclusion — Trial judge appearing to make adverse inference from failure of Crown to testify on motion — Preferable if Crown had withdrawn and another Crown conducted motion — However, trial judge not warning of adverse inference, nor recommending Crown withdraw — No basis for trial judge to reject explanation of Crown that non-disclosure inadvertent — Even if Crown's conduct wilful, insufficient basis to stay proceedings — Non-disclosure must irreparably damage accused's right to make full answer or defence, or ***[page323]*** *irreparably damage integrity of justice system if prosecution allowed to continue — Neither standard established in this case — Trial judge also basing stay decision on unreasonable delay — Application judge not sufficiently aware of procedural history to make determination on unreasonable delay — Application judge making erroneous findings of prejudice in relation to delay — Canadian Charter of Rights and Freedoms, ss. 7, 11(b), 24(1).*

Disclosure — Duty on Crown — Accused charged with sexual assault — During course of trial, non-disclosure of witness statement discovered — Accused applying for stay of proceedings — Accused ultimately alleging wilful non- disclosure by Crown — Trial judge staying proceedings and ordering costs of trial and application against Crown — Crown appeal allowed — Trial judge erred in finding wilful non-disclosure — Finding entitled to deference, but tainted by palpable and overriding error — Trial judge misapprehending letter relevant to disclosure and evidence respecting error — Neither supporting trial judge's conclusion — Trial judge appearing to make adverse inference from failure of Crown to testify on motion — Preferable if Crown had withdrawn and another Crown conducted motion — However, trial judge not warning of adverse inference, nor recommending Crown withdraw — No basis for trial judge to reject explanation of Crown that non-disclosure inadvertent — Even if Crown's conduct wilful, insufficient basis to stay proceedings — Non-disclosure must irreparably damage accused's right to make full answer or defence, or irreparably damage integrity of justice system if prosecution allowed to continue — Neither standard established in this case — Trial judge also basing stay decision on unreasonable delay — Application judge not sufficiently aware of procedural history to make determination on unreasonable delay — Application judge making erroneous findings of prejudice in relation to delay — Canadian Charter of Rights and Freedoms, ss. 7, 11(b), 24(1).

Disclosure — Remedies — Stay of proceedings — Accused charged with sexual assault — During course of trial, non-disclosure of witness statement discovered — Accused applying for stay of proceedings — Accused ultimately alleging wilful non-disclosure by Crown — Trial judge staying proceedings and ordering costs of trial and application against Crown — Crown appeal allowed - - Trial judge erred in finding wilful non-disclosure — Finding entitled to deference, but tainted by palpable and overriding error — Trial judge misapprehending letter relevant to disclosure and evidence respecting error — Neither supporting trial judge's conclusion — Trial judge appearing to make adverse inference from failure of Crown to testify on motion — Preferable if Crown had withdrawn and another Crown conducted motion — However, trial judge not warning of adverse inference, nor recommending Crown withdraw — No basis for trial judge to reject explanation of Crown that non-disclosure inadvertent — Even if Crown's conduct wilful, insufficient basis to stay proceedings — Non-disclosure must irreparably damage accused's right to make full answer or defence, or irreparably damage integrity of justice system if prosecution allowed to continue — Neither standard established in this case — Trial judge also basing stay decision on unreasonable delay — Application judge not ***[page324]*** *sufficiently aware of procedural history to make determination on unreasonable delay — Application judge making erroneous findings of prejudice in relation to delay — Canadian Charter of Rights and Freedoms, ss. 7, 11(b), 24(1).*

Charter of Rights — Enforcement of rights — Costs — Accused charged with sexual assault — Late disclosure made in case and accused moving to stay proceedings — Due to reasonable apprehension of bias, different judge hearing application to stay proceedings — Application judge finding wilful non- disclosure and staying proceedings and ordering Crown to pay costs of trial and motion — Crown appeal allowed — No basis for finding of wilful non- disclosure and no basis to stay proceedings — Order for costs set aside — Costs awarded only in "circumstances of a marked and unacceptable departure from the reasonable standards expected of the prosecution" — Failure to disclose innocent and inadvertent — Canadian Charter of Rights and Freedoms, ss. 7, 24(1).

Disclosure — Remedies — Costs — Accused charged with sexual assault — Late disclosure made in case and accused moving to stay proceedings — Due to reasonable apprehension of bias, different judge hearing application to stay proceedings — Application judge finding wilful non-disclosure and staying proceedings and ordering Crown to pay costs of trial and motion — Crown appeal allowed — No basis for finding of wilful non-disclosure and no basis to stay proceedings — Order for costs set aside — Costs awarded only in "circumstances of a marked and unacceptable departure from the reasonable standards expected of the prosecution" — Failure to disclose innocent and inadvertent — Canadian Charter of Rights and Freedoms, s. 24(1).

The accused was charged with eight counts of alleged sexual abuse. The allegations against the accused arose from a larger investigation called "Project Truth", which focused on allegations of sexual abuse in Cornwall, Ontario. D., an ex-police officer, had been the first to expose allegations in Cornwall. When the mother of one of the complainant testified at the accused's trial, she mentioned two telephone calls she had with D. These calls had not been disclosed to the accused, although they were referred to in D.'s notes and in his will say statement. The Crown in the case, H., reviewed D.'s notes in relation to a related prosecution and had not seen the references to the accused's case. D. was of the view that sexual abuse occurred in Cornwall by many high-ranking individuals. The accused was counsel to the Catholic diocese and was a target of D.'s allegations. D. had no official role in Project Truth, but injected himself, without authorization, into the investigation. He conducted his own interviews with witnesses and complainants. The police were concerned that D. was attempting to taint their evidence. In the spring of 2000, D. handed over all his notes and a will say statement. He resigned from the police force later that year.

The trial began in January of 2001. The trial judge heard the evidence of two complainants and some other supporting witnesses. When the mother of one of the complainants testified, she said that she had spoken to D. twice by telephone. He offered to speak to the complainant if it would be beneficial, but the complainant declined to speak to D. The complainant's mother had not advised the Crown of this ***[page325]*** contact with D. At the request of defence counsel, further disclosure was given to the accused. Initially defence counsel suggested that the police had deliberately withheld information in relation to D. because they were afraid D.'s involvement would contaminate the proceedings against the accused. H. took responsibility for the non-disclosure, but disclaimed any knowledge that D. was connected to the case against the accused. Defence counsel initially made no allegations against the Crown. Because of the trial judge's previous involvement as a lawyer with the Cornwall Police Service, and with D., the trial judge recused himself from the case. The defence changed its focus to allege misconduct by the Crown, H. The application judge found that H. had wilfully failed to disclose materials relating to D. and entered a stay of proceedings. He also awarded costs of the trial and the application to the accused.

On appeal by the Crown from a stay of proceedings, held, the appeal should be allowed.

The application judge had jurisdiction to hear the application. Usually, once an apprehension of bias is demonstrated, the trial judge has no jurisdiction to continue the proceedings. A mistrial is usually granted. This case presented a unique problem because the appearance of bias had not yet affected the trial given that it was contained to the stay application. The jurisdiction to hear the case came from the jurisdiction of a superior court judge hearing an application under s. 24(1) of the Canadian Charter of Rights and Freedoms. Jurisdiction could also be found in s. 669.2(1) of the Criminal Code which permits the transfer of jurisdiction from a trial judge to another judge when a trial judge is unable to continue to preside "for any reason". The trial judge's recusal for bias was a valid reason under this provision.

Counsel for the accused did not give the Crown ideal notice that its main allegation in support of a stay of proceedings was wilful non-disclosure on the part of the Crown, H., as opposed to the police. It was only in the closing arguments on the stay application that this became apparent. While notice was not ideal, it was adequate. The Crown should not be permitted to raise the adequacy of notice as a ground of appeal. H. was essentially able to respond to the allegations. She did not object to the adequacy of the notice. As a matter of professional courtesy and decency, it is highly desirable that the Crown receive specific notice of misconduct. However, it is not necessary to impose firm notice requirements. Crown counsel is not a party to criminal proceedings. The position of the Crown on a stay application is not comparable to an individual who stands accused before a governing body, like a law society. In this latter context, procedural fairness requires specific and adequate notice. The Criminal Proceedings Rules, SI/92-99, strike a fair balance between specificity and flexibility sufficient to protect the interests of accused persons to make full answer and defence. Moreover, a judge acting under the Criminal Proceedings Rules can control the proceedings in a manner necessary to secure a just determination of issues in dispute, such as by granting an adjournment to remedy inadequate notice.

The application judge erred in finding that H. had wilfully failed to disclose the material relating to D. The Crown was obliged to disclose D.'s materials. The failure to do so constituted a breach of the accused's rights under s. 7 of the Charter. ***[page326]***

This does not automatically entitle an accused to a stay of proceedings; the accused must demonstrate that it is one of the clearest of cases or that there would be irreparable prejudice caused to the integrity of the justice system. The right to make full answer and defence was not irreparably prejudiced. The finding of wilful non-disclosure is a finding of fact entitled to deference that can only be set aside if there is palpable or overriding error. H. had received the D. materials earlier in 2000 and had written to a police officer in July 4, 2000, stating that she would review the materials in connection with a related prosecution. A copy of this letter was provided to counsel for the accused a day prior to the stay application. The application judge found that this letter, along with the evidence of a police officer, demonstrated that H. had engaged in more than a cursory review of the materials, that she withheld this letter from the defence to avoid contaminating the accused's trial with D.'s involvement. There was nothing in this letter or in the evidence that suggested that H. had seen the references in D.'s materials relevant to the accused's case. Instead, a proper reading of the letter suggests the opposite. The application judge misinterpreted the letter. H. disclosed the materials in the related case, making deliberate withholding in the accused's case implausible. Moreover, the trial judge did not take

into account that in reviewing the D. materials, H. was focused on the related case, and she was not on the lookout for materials relevant to the accused. The materials lead to one conclusion -- that H. made an honest and inadvertent mistake. H.'s innocent explanation, which there was no reason to reject, also provides an additional reason for setting aside the finding. The trial judge seemed to draw an adverse inference from the fact that H. did not testify. H. should have stepped aside as counsel so she could give her explanation from the witness box. However, H. had no forewarning from counsel or the judge that her explanation would not be accepted. The application judge took an informal approach to the application. In the circumstances, it was unfair for him to have made an adverse finding against H. without at least warning her.

Even if the trial judge's finding of wilful non-disclosure could stand, a stay of proceedings was not warranted. The order is so clearly wrong that it amounts to an injustice. Prosecutorial misconduct alone did not warrant a stay. The accused was not irreparably prejudiced. The case did not fall into the rare category of cases where the integrity of the justice system was irreparably prejudiced. There was also a real interest in the charges in this case being determined on their merits. Moreover, the application judge ultimately seemed to justify a stay on the ground that the accused's rights under s. 11(b) would be breached bydeclaring a mistrial. There was no basis for this finding and the application judge did not follow the guiding authorities for determining this issue. The application judge was not aware of many of the historical procedural facts of the case suggesting that s. 11(b) was not breached. Moreover, the trial judge found prejudice even though the accused did not testify. The accused did not establish prejudice due to the passage of time as opposed to having to defend a properly initiated prosecution.

The order for costs against the Crown cannot stand. A court may award costs as a remedy under s. 24(1) for a Charter breach. Costs awards have been restricted to cases where there are "circumstances of a marked and unacceptable departure from the reasonable standards expected of the prosecution". The failure to disclose in this case was innocent and inadvertent. ***[page327]***

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Statutes referred to Canadian Charter of Rights and Freedoms s. 7 s. 11(b) s. 24(1) Criminal Code s. 669.2(1) [enacted R.S.C. 1985, c. 27 (1st Supp.), s. 137]

Rules referred to Criminal Proceedings Rules, SI/92-99 rule 2.01 rule 2.02 Rule 27 rule 27.03 rule 27.05

Authorities referred to Proulx, Michel, and David Layton, Ethics and Canadian Criminal Law (Toronto: Irwin Law, 2001)

APPEAL by the Crown from an order of Chadwick J., 84 C.R.R. (2d) 200, 49 W.C.B. (2d) 394, staying proceedings and awarding costs against the Crown.

John C. Pearson, for the Crown, appellant.

Marlys Edwardh, Breese Davies and Heather Pringle, for accused, respondent.

P. Andras Schreck and Mara Greene, for intervener, Criminal Lawyers' Association.

Paul J.J. Cavalluzzo, for intervener, Ontario Crown Attorneys' Association. ***[page329]***

The judgment of the court was delivered by

LASKIN J.A.

LASKIN J.A.

LASKIN J.A.:—

A. Introduction

¶ 1 A trial of eight counts of sexual abuse alleged to have been committed by the respondent Jacques Leduc, a Cornwall lawyer, was stayed on the ground of wilful non-disclosure by a senior Crown prosecutor. The principal issue on this Crown appeal is whether the finding of wilful non-disclosure is supported by the evidence. In my view it is not. I have not found any evidence in the record to sustain this finding. I would, therefore, set aside the stay and order a new trial.

B. Overview

¶ 2 Leduc was charged with sexually abusing three teenaged boys. The charges resulted from "Project Truth", an Ontario Provincial Police ("OPP") investigation into allegations of

widespread sexual abuse by prominent members of the Cornwall community. Ms. Shelley Hallett, a senior Crown counsel, was assigned to prosecute the Leduc case.

¶ 3 During the trial, Mrs. M., the mother of one of the complainants, testified that she had had two telephone conversations with Perry Dunlop, an ex-Cornwall police officer. Dunlop had been the first officer to try to expose sexual abuse in the Cornwall area. The OPP were concerned that in his zealousness to do so, he may have tainted the evidence of witnesses in Project Truth cases.

¶ 4 Mrs. M.'s evidence took Ms. Hallett and counsel for Leduc by surprise. Although the conversations between Dunlop and Mrs. M. were referred to in Dunlop'snotes and will say statement, and in the notebook of an OPP officer, these materials had not been disclosed to Leduc. And although Ms. Hallett had received Dunlop's materials to make disclosure in another Project Truth case, she said that she had not seen the references to Dunlop's telephone conversations with Mrs. M. After Mrs. M. testified, Ms. Hallett gave copies of these materials to Leduc.

¶ 5 Nonetheless, Leduc brought an application to stay the charges against him on the ground of wilful non-disclosure. On the first day of the application, the trial judge McKinnon J. recused himself for possible bias. With the agreement of counsel, Chadwick J. heard the application. ***[page330]***

¶ 6 Leduc initially contended that the police deliberately withheld Dunlop's materials and the officer's notes. During the stay application, however, Leduc obtained from a Project Truth investigator and produced a copy of a letter Ms. Hallett had written the investigator on July 4, 2000. The letter stated that she intended to review the Dunlop materials later that month in connection with another Project Truth case. Armed with this letter, Leduc claimed that Ms. Hallett, not the police, had deliberately withheld Dunlop's materials.

¶ 7 On March 1, 2001, after a three-day hearing, the application judge gave an oral decision. He found that Ms. Hallett had wilfully failed to disclose Dunlop's materials to prevent him from contaminating the prosecution. He also concluded that Leduc's right to a fair trial within a reasonable time had been irreparably prejudiced. He therefore stayed the charges. And he ordered that the Crown pay Leduc's costs of the trial and of the application [reported 84 C.R.R. (2d) 200].

¶ 8 The Crown appeals. The Ontario Crown Attorneys' Association and the Criminal Lawyers' Association were granted leave to intervene on the question of the appropriate notice of an allegation of Crown misconduct. The appeal raises these issues:1. Did the application judge have jurisdiction to hear the application?2. (a) Did Crown counsel receive reasonable notice of the allegation against her? (b) Should the court propound a special rule for notice to Crown counsel of an allegation of wilful non-disclosure?3. Did the application judge err in finding that Crown counsel wilfully failed to disclose Dunlop's materials and her July 4, 2000 letter?4. Did the application judge err in granting a stay of proceedings?5. Did the application judge err in awarding costs against the Crown?

C. Background Facts

¶ 9 The stay application turned mainly on whether Ms. Hallett intentionally did not disclose information about the two telephone calls between the mother of one of the complainants and Dunlop. The respondent contended that Ms. Hallett deliberately withheld disclosure of this information because, in the words of the application judge, she "did not want the portal to open to make Dunlop's evidence relevant to the Leduc case". ***[page331]***

(a) Perry Dunlop and Project Truth

¶ 10 Perry Dunlop was a constable with the Cornwall Police Service. Counsel for Leduc labelled him a "rogue police officer" and a "witness contaminator".

¶ 11 In the mid-1990s, Dunlop set out to expose what he believed was a massive conspiracy among high-ranking members of the community. According to Dunlop, the conspiracy was aimed at preventing the public from finding out about a ring of pedophiles operating in the Cornwall area. Dunlop alleged that members of the Cornwall Police Service, the Crown Attorney's Office and the Catholic Church had paid off a complainant and had collaborated to cover up sexual abuse. Leduc was counsel to the Catholic diocese. He thus became a target of Dunlop's allegations.

¶ 12 In 1997, Dunlop gave to the London Chief of Police a number of witness statements that alleged sexual abuse by prominent members of the Cornwall community. Significantly, none of these statements alleged that Leduc had committed sexual abuse. The statements were turned over to the OPP. In July 1997, the OPP established Project Truth to investigate the sexual abuse allegations.

¶ 13 The Project Truth team interviewed approximately 850 people. Dunlop had no official role in the investigation. Nonetheless, he maintained an interest in Project Truth, and managed, without authorization, to inject himself into the OPP investigation. The Project Truth investigators soon became concerned that Dunlop was interviewing both witnesses and complainants and trying to colour their evidence. They viewed him as a potential obstacle to successful prosecutions, and made numerous attempts -- mostly unsuccessful -- to stop him from contacting complainants or witnesses in any Project Truth inquiry.

¶ 14 The investigators also repeatedly asked Dunlop to surrender all his notes and to produce a detailed history in the form of a will say statement recounting his involvement in Project Truth matters. At a meeting on July 23, 1998, Dunlop was told to turn over his notes as they were needed for inclusion in disclosure briefs for defence counsel on a number of Project Truth cases. He refused to comply. Not until the spring of 2000 did Dunlop hand over to the investigators his notes, a will say statement and other materials. As I will discuss, two items in his notes and in his will say statement precipitated the stay application. ***[page332]***

¶ 15 In the fall of 2000, Dunlop resigned from the Cornwall Police Service and moved to British Columbia. He did not testify on the stay application.

(b) The charges against Leduc

¶ 16 The Project Truth investigation let to sexual abuse charges against 15 Cornwall residents. One of those charged was Leduc. Of the 15 accused, some had been identified earlier as sexual abusers by Dunlop. However, Leduc was not among this group. A friend of the family of one of the complainants first identified Leduc to the police.

¶ 17 Leduc was eventually committed for trial before a judge alone on eight counts of sexual abuse against three complainants. The bare details of his arrest and pre-trial procedures are as follows:

¶ 18 On May 7, 1998, the first of the three complainants, Cory M., together with his mother, went to the OPP and alleged that Leduc had sexually abused him. On June 22, 1998, Leduc was arrested and charged with six sexual offences. On July 17, 1998, a replacement information alleged 12 counts against two complainants, Cory M. and Shawn P. That month Ms. Hallett was assigned to prosecute the case.

¶ 19 In March 1999, just before his preliminary inquiry was to begin, Leduc was re-arrested and charged with additional sexual offences against a third complainant, Stuart L. The information now contained 16 charges of sexual abuse against three complainants.

¶ 20 From October 1998 onward, Leduc's counsel had made ongoing requests for disclosure and had complained about incomplete disclosure. Indeed, Dunlop's will say statement records that Leduc's lawyer was "screaming for disclosure". In response to these requests and complaints, in the spring of 1999, Ms. Hallett gave the defence several volumes of additional disclosure. These additional materials prompted Leduc's counsel to ask for an adjournment to review the new disclosure. The adjournment was granted.

¶ 21 In November 1999, Leduc elected to be tried by judge and jury. On December 2, 1999, after a six-day preliminary inquiry, Leduc was committed for trial on 13 of the 16 counts. At the hearing Dunlop was not called as a witness. None of the three complainants was questioned about any contact with Dunlop or about any influence Dunlop may have exerted over each's decision to press charges.

¶ 22 On March 31, 2000, the court fixed a trial date of January 15, 2001. Earlier dates were available but Leduc's counsel was not. ***[page333]***

Leduc waived his rights under s. 11(b) of the Canadian Charter of Rights and Freedoms to an earlier trial.

¶ 23 On January 11, 2001, four days before the trial was to begin, the Crown decided to proceed on a new indictment containing only eight counts: six counts of sexual exploitation, one count of sexual interference and one count of offering sexual services for consideration. Leduc re-elected to be tried by a judge alone because he was concerned about finding a fair and impartial jury.

(c) The trial before McKinnon J.

(i) The position of the Crown and the defence

¶ 24 On January 17, 2001, Leduc was arraigned before McKinnon J. and pleaded not guilty to all eight counts. The Crown's case was based on the evidence of the three complainants and one similar fact witness. Leduc's defence rested on the theory that the complaints were fabricated and the product of collusion. Leduc maintained that both fabrication and collusion were live issues when the stay application was heard.

¶ 25 Before that application brought the trial to a halt, McKinnon J. heard the evidence of two of the complainants: Shawn P. and Cory M., and the evidence of 16 supporting witnesses. The application judge heard none of this evidence.

¶ 26 Shawn P. testified that he started doing yard work and other chores for Leduc in 1995 when he was 15 years old. He gave evidence that the respondent fondled his penis, that they masturbated each other and that they engaged in anal penetration -- in all eight incidents between the fall of 1997 and January 1998.

¶ 27 Cory M. testified that he did chores for Leduc for about seven years, from 1989, when he was 12 years old, until 1996, when he was 19. He gave evidence of numerous incidents of sexual activity with Leduc, especially in the years 1991 to 1992. He said that these incidents included fondling of genitals, oral sex, masturbation and anal sex. The incidents took place at Leduc's home, at his cottage, at his law office and even at a Toronto hotel.

(ii) The testimony of Cory M.'s mother

¶ 28 On February 7, 2001, the mother of Cory M. testified. She was the eighth witness for the Crown. During her cross-examination she gave some unexpected evidence: she said that she had spoken twice by telephone with Perry Dunlop. She had been trying to get some counselling for her son, and a woman at the welfare office gave her Dunlop's name. Mrs. M. telephoned him. Dunlop offered ***[page334]*** "to talk to Cory if Cory was willing, that he had gone through all this before and that he could help him, maybe, you know, deal with it". Dunlop also gave her some advice about suing the respondent. He said that the "better way to hurt the accused, is by suing them for everything they have".

¶ 29 Sometime later, by coincidence, when Detective Constable Dupuis, one of the Project Truth investigators, was at her home, Mrs. M. received a telephone call from Dunlop. He simply asked, "How is Cory dealing with it, is he okay?"

¶ 30 These two telephone calls were the only contacts between the mother of Cory M. and Dunlop. Moreover, Mrs. M. testified that she "definitely" never spoke to a Crown attorney about her conversations with Dunlop. Equally significant, although Dunlop offered to speak to Cory M. if he was willing to do so, apparently Cory M. was not willing. The two never spoke to each other.

¶ 31 After Mrs. M.'s evidence and before the stay application was heard, the Crown called 10 more witnesses.

(iii) The undisclosed information in Dunlop's materials and Dupuis's notebook

¶ 32 Both Ms. Hallett and counsel for Leduc said that Mrs. M.'s evidence took them by surprise. Ms. Hallett told the trial judge that she had not been aware of any contact between Perry Dunlop and a potential witness in the case against the respondent. She instructed Detective Constable Dupuis to review his notes to see when and where the contact with Dunlop occurred. On February 12, 2001, the defence wrote to the Crown asking for "complete disclosure about the role of Perry Dunlop and matters surrounding the Project Truth investigation".

¶ 33 The following day, February 13, 2001, the Crown gave the defence three things: Perry Dunlop's personal handwritten notes, which were 184 pages long; Dunlop's typed will say statement, which, with appendices, was 430 pages; and a five-line entry dated June 15, 1998, in Dupuis' notebook.

¶ 34 Dunlop's notes contained two brief entries on which the respondent relied: a May 8, 1998 entry recording his first telephone call with Cory M.'s mother; and a July 23, 1998 entry recording a discussion about the call with a Project Truth investigator. In the May 8th entry, Dunlop wrote that the mother of Cory M. had called ***[page335]*** him and told him that her son "was sexually assaulted by J. Leduc from the time he was 12 to 17 yrs. Has gone to OPP". In the July 23rd entry, Dunlop wrote that Detective Inspector Smith asked why he had called Cory M.'s mother and he answered "only to ask, check on her son". In his will say statement Dunlop reproduced his two handwritten entries, the second in a slightly expanded form:8th May 1998 -- B.M. calls my home, to state that her son Cory was sexually assaulted by Jacques Leduc when he was 12- 17. I told her to go to O.P.P. -- Project Truth states that has already been done.23rd July 1998 -- 15:10 Hrs. 10-19 (Attend station) Cst. Sauve advise me at the station to see Inspector Wells. Attend Wells office, he advises to go see Inspector Trew. I attend Inspector Trew's office. Present are Inspector Trew, Inspector Tim Smith and Det. Sergeant Pat Hall. Inspector Tim Smith inquires about my wife's comment to the press: "Every parent should be knocking down the O.P.P.'s door demanding to know who these pedophiles are." Wants to know about certain issues my wife has brought up. I indicated that maybe he should ask her.Inspector Tim Smith tells me he won't be intimidated by the media, lawyers or public pressure. I told him that I won't be intimidated either. He stated that it makes it hard for victims to come forward if they had no confidence. Indicates that victims will not come forward if this continues.Inspector Tim Smith wants to know about B.M. I stated that I spoke to her and directed her to Project Truth. Inspector Tim Smith indicated that I called her back. Three weeks later I called B.M. back out of concern she was very upset the first time she called me. Out of concern that a normal caring person has I called her back to make sure she was O.K.Detective Sergeant Pat Hall indicates that there may be a problem with where statements were taken. Indicates that Neville and Edilson, lawyers for the accused Charles MacDonald and Jacques Leduc are screaming for disclosure.

¶ 35 Dunlop's notes and will say statement also contained two other references to Leduc. Dunlop wrote that on March 30, 1997, he saw Leduc and a senior Crown attorney having lunch; and he wrote that on July 11, 1997, Inspector Smith said that Leduc "had no involvement" in settling a civil case against the Catholic Church. Neither of these references seems even marginally relevant to the prosecution of the respondent.

¶ 36 The June 15, 1998 entry from Dupuis' notebook refers to the second telephone call between Dunlop and Cory M.'s mother:10:54 Picked up Project Guardian tape from the M.s. Mrs. M.

stated that she had received [back] a call from Perry Dunlop. Wanting to know how the investigation was proceeding. ***[page336]***

¶ 37 None of these pieces of information disclosed to the defence on February 13, 2001, had been included in the disclosure brief prepared by the police and given both to the Crown and the defence before the trial started. When those briefs were prepared, the police did not yet have Dunlop's notes or his will say statement. They did, however, have Dupuis' notebook. As Dupuis later testified, he simply overlooked the June 15th entry.

D. The Stay Application

(a) The submissions of counsel on February 14, 2001: the defence's intent to bring a stay application and Crown counsel's explanation for the late disclosure

¶ 38 On February 14, 2001, after the Crown had given the defence the additional disclosure, both counsel addressed the trial judge.

¶ 39 Counsel for Leduc said that he intended to move to stay the prosecution of his client. He contended that the police deliberately did not disclose Dunlop's connection to Cory M.'s mother to prevent Dunlop from contaminating the prosecution of the respondent. He did not suggest misconduct by the Crown. Instead he said:Based upon our review, we intend to bring a motion to stay the proceedings before this court, pursuant to s. 24(1) of the Charter. In addition, we will be seeking costs pursuant to s. 24(1) of the Charter. The basis of our motion will be in brief, deliberate non-disclosure by one of the officers in charge of this case, Detective Constable Dupuis and several senior ranking police officers in the Project Truth investigation. It will be the position of the defence on the motion, that these officers colluded and conspired to suppress all information in their possession relating to Perry Dunlop's participation in this case.

¶ 40 Later in his submissions, after referring to the contact between Dunlop and Cory M., counsel for Leduc observed that the defence "are not satisfied that there wasn't other connection or contact with Mr. Dunlop and other complainants in this matter". However, the evidence called on the stay application disclosed no other connection or contact.

¶ 41 Ms. Hallett responded at length to the defence's position. In her submissions to the trial judge she essentially made four points. First, she accepted responsibility for the late disclosure. Even the respondent acknowledged that this was the honourable thing to do.

¶ 42 Second, she stated clearly that she previously had no knowledge of any connection between Dunlop and the criminal charges against Leduc. Thus, for example, when dealing with the entry in Dupuis' notebook she said to the Court: ***[page337]*** However, naturally, the memo book entry and the fact that Constable Dupuis was there, at the time apparently, that this call from Constable Dunlop came through, was of such a nature as to cause dismay for me because, of course, this is the porthole through which the ghost of Constable Dunlop can now infiltrate this case and these proceedings, Your Honour. And I frankly had not ever anticipated that a defence in this case would be based on any connection that Constable Dunlop had with this case because I have honestly believed, all the way through, that there absolutely was no connection.

¶ 43 Third, Ms. Hallett stated that she had received Dunlop's personal notes and will say statement in the spring of 2000, and had reviewed them in "a cursory way". She then explained why she did not perceive that the Dunlop material should be disclosed to the respondent:As I say, Your Honour, it was not my understanding that there was any, any contact by Constable Dunlop and any witness or victim in the Leduc matter and I did not perceive these items from Constable Dunlop to be relevant to the issue of disclosure to generate any disclosure obligation on my part. And, as I say, this judgment of mine was based on the preliminary inquiry that had already been conducted by that time and my knowledge of the ages and backgrounds of the various complainants in this matter and the fact that they didn't know each other. And also the fact that I didn't know about this call that Ms. M. had placed to Constable Dunlop.

¶ 44 And fourth, Ms. Hallett acknowledged that Dunlop had spoken to victims and witnesses in other cases. One of those other cases was the prosecution of Father Charles MacDonald, for which Ms. Hallett was also responsible. Knowing of Dunlop's connection to the MacDonald case, she had "ensured that there would be disclosure of anything relating to Constable Dunlop to defence counsel . . . for Father MacDonald". She reiterated that although she had disclosed the Dunlop materials to counsel for MacDonald, she had not seen any connection between those materials and Leduc:As I say, I perused these documents in a cursory way to satisfy myself, essentially, that they should be disclosed to defence counsel for Father MacDonald. However, because of my unawareness of any connection between Constable Dunlop and the witnesses for the Leduc matter, I did not pour over each document to see whether there was anything that would be relevant to Mr. Leduc's defence. And I take responsibility for that, however, as I say, by that point in time, we had had the preliminary inquiry.

¶ 45 Against the backdrop of these submissions the respondent launched his stay application.

(b) Leduc's Notice of Application

¶ 46 Whether Ms. Hallett received fair notice of the allegation of deliberate non-disclosure is an issue in this appeal. ***[page338]***

¶ 47 On February 15, 2001, Leduc gave the Crown written notice of his application, which was to be heard on February 19, 2001. He sought a stay of the proceedings against him under s. 24(1) of the Charter. In his notice, Leduc alleged that "information about Perry Dunlop's contact with [Mrs. M.] and the subsequent investigation of it, was deliberately not disclosed to counsel for the Applicant despite the awareness of the police that it was sought by counsel and of potential significance to the defence". Leduc made no allegation of non-disclosure against Ms. Hallett.

(c) McKinnon J. recuses himself

¶ 48 The first witness on the stay application questioned the trial judge's impartiality. The witness pointed out that while a member of the Bar the trial judge had previously acted for the Cornwall Police Service. The trial judge adjourned the application and reviewed the Police Service's files to discover whether the witness's concern had any merit. The trial judge discovered that he had drafted a discipline charge against Dunlop in connection with the investigation of allegations of sexual abuse against a priest, who was later charged with sexual

offences by Project Truth. The trial judge concluded that this previous retainer would give rise to a reasonable apprehension of bias should he hear the stay application. On February 20, 2001, he decided to recuse himself. Neither counsel disagreed with his decision.

¶ 49 In deciding not to hear the application, the trial judge made this significant observation:As I have stated numerous times in this case, this particular case and others that accompany it have riveted the community. Perhaps there is no more important case that requires that justice be seen to be done than this series of cases, these cases including the case against Jacques Leduc.

¶ 50 The trial judge arranged for Chadwick J. to hear the stay application. Although in this court the Crown contended that Chadwick J. had no jurisdiction to hear the application, Ms. Hallett did not take that position. Indeed, she expressly agreed with the trial judge's decision to have another judge hear the application. She did, however, submit that, should the stay application be dismissed, McKinnon J. could not continue as the trial judge because he would not be perceived to be impartial as long as Perry Dunlop was a factor in the case. McKinnon J. did not rule on this submission. He said only, "Well this may or may not be premature, I don't know." ***[page339]***

(d) The proceedings before Chadwick J.

¶ 51 The stay application before Chadwick J. began on February 21, 2001. I will deal with the evidence and submissions on the application in more detail when I discuss the issues on the appeal.

¶ 52 Evidence was called over three days, February 21, 22 and 26. Four Project Truth investigators testified, including Inspector Hall, Detective Constable Dupuis and Constable Genier. The defence put in evidence a letter dated July 4, 2000 (Exhibit 22), from Ms. Hallett to Dupuis, in which she said that she would be reviewing the Dunlop materials for the purpose of disclosure in the Father MacDonald case. Leduc relied on this letter and the circumstances of its disclosure in support of his application.

¶ 53 All three complainants testified. Each said that he had had no contact withPerry Dunlop and had not been influenced by him. Leduc did not challenge this evidence or lead evidence to rebut it.

¶ 54 In their oral submissions the two counsel for the defence changed the focus of their application from wilful non-disclosure by the police to wilful non-disclosure by Ms. Hallett. In her submissions, Ms. Hallett again explained that her failure to disclose was inadvertent, not intentional. She did not testify.

(e) The application judge's ruling

¶ 55 The application judge found that the Dunlop materials were relevant to the prosecution of Leduc and should have been disclosed. And he found that "the failure to disclose by the Crown was wilful" [para. 37]. He concluded that "the holding back of the July 4, 2000 letter and the Dunlop notes and will-say statements, which had been reviewed in depth by the Crown, show

that the Crown did not want the portal to open to make Dunlop's evidence relevant to the Leduc case".

¶ 56 The application judge then turned to the appropriate remedy. He said that his "initial reaction was to declare a mistrial and to make a substantial order of costs against the Crown" [para. 49]. He concluded, however, that the only appropriate remedy was a stay. In his view, "Jacques Leduc's right to a fair trial, within a reasonable period of time, has been irreparably prejudiced and the only remedy under s. 24(1) of the Charter is a stay of proceedings" [para. 58].

E. Analysis of the Issues on the Appeal

¶ 57 The Crown's principal position on appeal is that neither the finding of wilful non-disclosure, nor the order of the stay, is supportable ***[page340]*** on the evidence. The Crown also advances two other submissions: the application judge had no jurisdiction to hear the application for a stay and Ms. Hallett did not receive reasonable notice of the allegation of wilful non-disclosure made against her. Because, logically, these two submissions precede the Crown's main position, I shall deal with them first.

1. Did the Application Judge have Jurisdiction to Hear the Application?

¶ 58 When McKinnon J. perceived that his presiding over the stay application would give rise to a reasonable apprehension of bias, he arranged for Chadwick J. to hear the application. The Crown consented to this arrangement. Nonetheless, in this court the Crown submits that McKinnon J. should have simply declared a mistrial, either because he hadno jurisdiction to transfer the stay application to Chadwick J., or because, as a practical matter, once Dunlop became an issue in the trial he could no longer carry on as the trial judge even if the stay were refused. I shall deal with these points separately.

¶ 59 The Crown contends that McKinnon J. had no jurisdiction to bifurcate the proceedings by severing the stay application from the trial proper and appointing another judge to preside over the "severed off" proceeding. It points out, correctly, that consent cannot confer jurisdiction. It therefore submits that once McKinnon J. concluded that he could not continue to hear the stay application, his jurisdiction ended and he should have declared a mistrial. Equally, Chadwick J. ought to have declined jurisdiction.

¶ 60 The respondent argues that McKinnon J. had jurisdiction to transfer the stay application to Chadwick J. and that Chadwick J. had jurisdiction to hear it. He puts forward two bases for this jurisdiction: the jurisdiction of a superior court judge to grant relief under s. 24(1) of the Charter or s. 669.2(1) of the Criminal Code. I agree that either basis supported the transfer of jurisdiction over the stay fromthe trial judge to the application judge.

¶ 61 Ordinarily, once a reasonable apprehension of bias has been demonstrated, a trial judge has no jurisdiction to continue the proceedings. The only appropriate remedy is a new trial. See R. v. Curragh Inc., [1997] 1 S.C.R. 537, 113 C.C.C. (3d) 481.

¶ 62 But McKinnon J. was confronted with an unusual situation. The appearance of bias had not yet infected the trial. It arose only on ***[page341]*** the stay application. Thus, purely as a jurisdictional matter, I am not persuaded that McKinnon J. had to declare a mistrial before the stay application. He was entitled to ask another judge of his court to hear the stay application. His jurisdiction to do so rested on the principle first stated by the Supreme Court of Canada in Mills v. The Queen (1986), 26 C.C.C. (3d) 481 (S.C.C.) at p. 517, and reaffirmed in its subsequent decision in Rahey v. The Queen (1987), 33 C.C.C. (3d) 289 (S.C.C.) at 299: the "constant, complete, and concurrent jurisdiction" of the Superior Court to grant relief under s. 24(1) of the Charter.

¶ 63 In both Mills and Rahey the trial proceedings were in the provincial court. Still the Supreme Court held that the Superior Court could exercise jurisdiction over a Charter issue as long as it was more suited than the trial court to assess and grant the appropriate remedy. In Rahey at p. 299, Lamer J. discussed when this "discretionary jurisdiction" ought to be exercised:In Mills, it was also decided that the superior courts should have "constant, complete and concurrent jurisdiction" for s. 24(1) applications. But it was therein emphasized that the superior courts should decline to exercise this discretionary jurisdiction unless, in the opinion of the superior court and given the nature of the violation or any other circumstances, it is more suited than the trial court to assess and grant the remedy that is just and appropriate. The clearest, though not necessarily the only, instances where there is a need for the exercise of such jurisdiction are those where there is as yet no trial court within reach and the timeliness of the remedy or the need to prevent a continuing violation of rights is shown, and those where it is the process below itself which is alleged to be in violation of the Charter's guarantees. The burden should be upon the claimant, in this case Mr. Rahey, to establish that the application is an appropriate one for the superior court's consideration.

¶ 64 Here, the trial proceedings are in the Superior Court, not the provincial court. But it seems to me that the principle in Mills and Rahey still applies. The appearance of bias prevented the trial judge from hearing the stay application. He could not guarantee a fair process. To prevent any further delay in the proceedings, Chadwick J. had a discretionary jurisdiction to hear the stay application.

¶ 65 Alternatively, I think that Chadwick J. also had jurisdiction under s. 669.2(1) of the Criminal Code. That section -- with the applicable words underlined -- states: 669.2(1) Subject to this section, where an accused or a defendant is being tried by(a) a judge or provincial court judge, ***[page342]*** (b) a justice or other person who is, or is a member of, a summary conviction court, or(c) a court composed of a judge and jury,as the case may be, and the judge, provincial court judge, justice or other person dies or is for any reason unable to continue, the proceedings may be continued before another judge, provincial court judge, justice or other person, as the case may be, who has jurisdiction to try the accused or defendant. [Emphasis added.]

¶ 66 The case law does not establish an exhaustive list of circumstances where a judge would be "unable to continue". The list, however, has been held to include illness, absence and appointment to higher court. See Ramsey v. The Queen (1972), 8 C.C.C. (2d) 188 (N.B.C.A.); R. v. Beauchamp, [2002] J.Q. No. 3214 (QL) (S.C.) [reported 4 C.R. (6th) 318]; R. v. Shrubsall (2000), 148 C.C.C. (3d) 425 (N.S.S.C.). The section uses the open-ended phrase "for any

reason". In my view, the trial judge's disqualification for bias was a "reason" within this section of the Code. The trial judge's conclusion that a reasonable apprehension of bias arose on the stay application meant that he was unable to continue to hear that application. No apprehension of bias arose before the stay application, and thus the trial record remained untainted. Accordingly, the stay proceedings could be continued before another judge of the same court.

¶ 67 The Crown, however, also submits that transferring the hearingof the stay application to Chadwick J. served no useful purpose. It argues that once Dunlop's involvement became an issue in the respondent's case, McKinnon J. could not have continued the trial even if the stay application were dismissed. Therefore, the Crown contends, the trial judge should not have left open the possibility that he could continue with the trial. He should have declared a mistrial, ordered a new trial and left the respondent to pursue whatever Charter remedies he considered appropriate.

¶ 68 In hindsight, this submission appears to have considerable merit. Indeed, in his reasons, Chadwick J. commented, "Now that Dunlop is relevant to the Leduc's case the trial judge in all likelihood would have to recuse himself from the trial and declare a mistrial." In this court, both counsel concurred that McKinnon J. could not continue to preside over the respondent's trial.

¶ 69 In my view, however, the trial judge should not be faulted for the position that he took. On their face the telephone calls between ***[page343]*** Cory M.'s mother and Dunlop seemed innocuous, at most marginally relevant. The trial judge undoubtedly was concerned about the cost, the delay and the inconvenience of a new trial. He likely wanted to preserve the possibility, however slight, that Dunlop would not be an issue in the trial itself and that, therefore, he could carry on as the trial judge. Thus, he acted appropriately and within his jurisdiction in asking another judge of the Superior Court to hear the stay application. For these reasons I would not give effect to this ground of appeal.

2. The Notice Issues

¶ 70 The Crown submits that Ms. Hallett did not receive reasonable notice of the allegation of wilful non-disclosure made against her. It argues that, absent reasonable notice, the application judge should not have made a finding of misconduct.

¶ 71 The submissions of the interveners, the Ontario Crown Attorneys' Association ("OCAA") and the Criminal Lawyers' Association ("CLA"), raised the more general question whether this court should propound a special rule governing notice when a Crown counsel is alleged to have intentionally withheld information relevant to the defence.

(a) Did Crown counsel receive reasonable notice of the allegation against her?

¶ 72 An accused who applies for the stay of proceedings for a Charter violation is obliged to give the Crown reasonable notice of the application and the grounds for it. Therefore, if the application for a stay is based on prosecutorial misconduct, the defence is obliged to give the Crown fair notice of that allegation. The accused's obligation to give notice is codified in Rule 27 of the Criminal Proceedings Rules, SI/92-99. Rule 27.03 requires a written notice of application

and constitutional issue, which includes the relief sought and the grounds to be argued. Under rule 2.02, the court may dispense with requirements of Rule 27, "only where and as necessary in the interests of justice".

¶ 73 The obvious purpose of notice is to give the Crown a fair opportunity to respond to the application. In this court, the Crown submits that the respondent did not comply with his obligation to give reasonable notice. The Crown contends that the notice given to Ms. Hallett was inadequate, that only in closing submissions was she ***[page344]*** was told explicitly she was accused of prosecutorial misconduct and that, therefore, she did not have a fair opportunity to respond. Because of the lack of notice, the Crown submits that the stay and the finding of misconduct on which it was based cannot stand.

¶ 74 To put this submission in context I will briefly review the chronology of what occurred. February 7, 2001: Cory M.'s mother testifies about her telephone calls with Dunlop. February 12: Leduc writes the Crown asking for disclosure of Dunlop's materials and Dupuis' handwritten note. February 13 -- 14: Ms. Hallett gives Leduc copies of the materials requested. February 14: Leduc gives oral notice of his intent to apply for a stay based on police non- disclosure. February 15: Leduc serves a notice of application and constitutional issue, seeking a stay under s. 24(1) the Charter based on deliberate non-disclosure by the police. February 19: The stay application begins before McKinnon J. February 20: McKinnon J. recuses himself. Leduc obtains a copy of exhibit 22, Ms. Hallett's July 4, 2000 letter to Detective Constable Dupuis. Wednesday, February 21: The stay application begins before Chadwick J. Counsel for Leduc states orally that he will not seek a stay unless the non-disclosure was wilful. He contends, "this is not a matter simply of five lines buried in the notes of an investigating police officers. There are other materials in the hands of the police and Crown counsel and whichhave been in the hands of the police and Crown counsel for eight or nine months now". Thursday, February 22: The stay application continues for a second day and then is adjourned to Monday February 26. Monday, February 26: The stay application concludes. During closing argument, counsel for Leduc states expressly that he is seeking a stay because Ms. Hallett "wilfully withheld from the defence" the Dunlop materials and exhibit 22. March 1: Chadwick J. orders a stay based on intentional non-disclosure by Ms. Hallett.

¶ 75 As this chronology demonstrates, notice that the stay application was grounded on Ms. Hallett's misconduct was far from ***[page345]*** ideal. The written notice of application and constitutional issue makes no allegation of misconduct against her. Although counsel for Leduc gave some inkling of their client's position in opening submissions to the application judge on February 21, not until closing arguments did they clearly state that the application for a stay focused on the conduct of Ms. Hallett, not that of the police.

¶ 76 Counsel for Leduc did not amend the notice of application when they received a copy of exhibit 22 on February 20. They did not even amend the notice of application between the second and third days of the stay hearing, though they had four days to do so. They did not send Ms. Hallett a letter indicating the changed focus of the application. Even in opening submissions on February 21, they did not expressly tell the court and the Crown that Ms. Hallett's conduct was now the basis for the application. Had counsel for Leduc done any of these things, Ms. Hallett might have better appreciated the gravity of the allegation against the Crown. She might

have better appreciated that her credibility was being questioned. Instead, in the midst of a stressful and emotional trial, she had to respond, with little notice, to a most serious allegation of misconduct.

¶ 77 Still, Leduc's failure to take any of these steps does not answer the question whether the notice of prosecutorial misconduct was so inadequate that for this reason alone the stay should be set aside. I do not have to resolve this question because I have concluded that the finding of Crown misconduct on which the stay was based is not supported by the evidence. I do, however, lean to the view that though not ideal, the notice was adequate. I also lean to the view that the Crown should not be permitted to raise the adequacy of the notice on appeal. I do so for three main reasons.

¶ 78 First, from the beginning of the hearing of the stay application, Ms. Hallett seemed aware of the allegation against her and prepared to respond to it. She addressed the allegation not just in her closing submissions but in her questioning of the police officers called on the stay. In answer to questions from Ms. Hallett, Inspector Hall and Detective Constable Dupuis each said that to his knowledge Crown counsel had not intentionally withheld material prejudicial to the prosecution.

¶ 79 Second, and more important, Ms. Hallett did not object to the adequacy of the notice she was given. At no time during the stay, even during closing arguments when there could have been no doubt about Leduc's position, did Ms. Hallett ask for an adjournment, ask ***[page346]*** for the opportunity to get advice from another lawyer, or even say that the allegation had taken her by surprise. Although her failure to object may not be fatal to the Crown's position on appeal, I think it is an important consideration.

¶ 80 Appellate courts are always reluctant to permit one party to raise on appeal an issue that was not raised at trial. This reluctance is grounded in several valid concerns: possible prejudice to the other party, who may not have had a fair opportunity to respond to the issue; an incomplete trial record and the absence of factual findings on the issue; and society's interest in the finality of criminal litigation. See R. v. Brown, [1993] 2 S.C.R. 918 at 923, 83 C.C.C. (3d) 129. These concerns existed in this case.

¶ 81 Finally, whether notice is reasonable or adequate must be assessed in the context in which it is given. Here Ms. Hallett participated in the stay hearing without objection. She questioned police witnesses on her conduct. She made detailed closing submissions explaining what had happened. She never once raised the adequacy of the notice given to her. All these considerations weigh against setting aside the stay because the Crown did not get reasonable notice of the allegation of prosecutorial misconduct. I would not give effect to this ground of appeal.

(b) Should the court propound a special rule for notice to Crown Counsel of an allegation of wilful non-disclosure?

¶ 82 The OCAA and the CLA were given leave to intervene to make submissions on the appropriate notice to be given to a Crown counsel of an allegation of wilful non-disclosure.

¶ 83 The OCAA argues for a firm rule: where the defence alleges wilful non- disclosure, Crown counsel must be given timely written notice of the allegation, with enough particulars to permit the Crown to know the case to be met and a fair opportunity to respond to it. The OCAA submits that such a rule is required by the principles of natural justice and the duty of fairness.

¶ 84 In making this submission, the OCAA draws an analogy to administrative law proceedings, and especially to law society disciplinary proceedings. It argues that both the importance of the issue and the potential effect of an adverse finding warrant a high standard of natural justice. What is at stake is whether a Crown counsel intentionally breached her constitutional disclosure obligation under ***[page347]*** s. 7 of the Charter. A finding of intentional non-disclosure will adversely affect Crown counsel's reputation, and may have serious professional, criminal and employment consequences. The OCAA submits that these considerations impose a duty at the high end of the scales of natural justice. It says that its proposed rule is consistent with this duty.

¶ 85 Further the OCAA submits that the respondent failed to give Ms. Hallett the notice contemplated by its proposed rule. The notice to Ms. Hallett was not timely; it was not in writing; and it did not specify what particulars were being relied on to support the allegation of wilful non-disclosure.

¶ 86 Where an accused intends to rely on an allegation of prosecutorial misconduct, I think it highly desirable that Crown counsel receive the kind of notice argued for by the OCAA. If the accused is represented by a lawyer, where at all possible, this kind of notice is called for as a matter of simple professional decency and courtesy.

¶ 87 But, largely for the reasons given by the CLA, I do not consider it either wise or necessary to impose the firm notice requirement suggested by the OCAA. First, even in administrative law, the duty of procedural fairness, which includes the duty to give adequate notice, ordinarily applies to parties to a proceeding. In criminal proceedings, Crown counsel is not a party. A finding of prosecutorial misconduct may affect Crown counsel, but criminal proceedings are between the accused and the state. Only where Crown counsel's interests are directly affected -- for example, by a cost order against counsel personally -- would the duty of procedural fairness be applicable. See R. v. Richards (1999), 26 C.R. (5th) 286 (Ont. C.A.).

¶ 88 Viewed in this light, the analogy to law society discipline proceedings is not sound. In discipline proceedings the lawyer is a party, charged with professional misconduct or conduct unbecoming. An adverse finding can result in a reprimand, a suspension from practice, or even disbarment. Because of these potentially serious consequences of finding of professional misconduct, courts have consistently held that the lawyer is entitled to a high standard of natural justice, which would include the kind of notice proposed by the OCAA. The duty of procedural fairness, so clearly applicable to professional discipline proceedings, cannot automatically be transposed to an application for a stay of a criminal prosecution, even where the basis of the application is alleged Crown misconduct. ***[page348]***

¶ 89 Second, and most important, the Crown and its counsel are already adequately protected by the rules requiring noticeof an application for relief under s. 24 of the Charter and by the trial

judge's inherent jurisdiction to control the court's processes. Indeed the rules for notice for Charter applications are similar to the rule proposed by the OCAA.

¶ 90 An allegation of wilful non-disclosure by Crown counsel typically leads -- as it did in this case -- to an application for relief under s. 24(1) of the Charter. As I have already said where the defence brings this application, rule 27.03 of the Criminal Proceedings Rules requires a written notice of application and constitutional issue. This notice must specify the relief sought, the grounds to be argued and the documentary evidence to be used at the hearing. Moreover, the notice must be served 15 days before the hearing of the application, unless an order is obtained abridging the time. Rule 27.05 prescribes the materials that are to accompany the notice. Similar rules exist for Charter applications in the Ontario Court of Justice.

¶ 91 Thus, both the OCAA's proposed rule and the Criminal Proceedings Rules require notice in writing; both require timely notice; and both require that the relief and the grounds for it be specified.

¶ 92 However, I see two differences. The OCAA's rule calls for spelling out the particulars relied on; the Criminal Proceedings Rules do not require "particulars". The OCAA's rule would apply in all cases; the Criminal Proceedings Rules permit the court under rule 2.01 to shorten time periods on "terms as are just" or, under rule 2.02, to dispense altogether with the requirements of Rule 27 "where and as necessary in the interests of justice". In short the OCAA proposes a firm rule applicable in all cases; the Criminal Proceedings Rules allow for flexibility.

¶ 93 It seems to me that maintaining this flexibility is necessary to protect the accused's constitutional right to make full answer and defence. In some cases it may be unfair to require the accused to identify in advance the reasons for non-disclosure, whether the non-disclosure was intentional, and, if so, the party responsible. It may be unfair because ordinarily the Crown is in the best position to know the reasons why relevant information was withheld and who ***[page349]*** withheld it. The law is clear that the Crown, not the defence, has the burden of explaining non-disclosure. See R. v. Stinchcombe (1991), 68 C.C.C. (3d) 1 (S.C.C.) at p. 12, and R. v. Ahluwalia (2000), 149 C.C.C. (3d) 193 (Ont. C.A.) at 212-213.

¶ 94 Also, at any stage of a trial an accused has to be reasonably free to raise any legitimate defence, even though doing so may adversely affect another person. The accused's right is a constitutional one. The concerns of a Crown counsel targeted with an allegation of wilful non-disclosure, though entirely legitimate, are not constitutionally protected.

¶ 95 Moreover, any potential unfairness to Crown counsel from inadequate notice can be dealt with by the trial judge's inherent jurisdiction to control the court's processes. Or it can be dealt with under rule 2.01(a), which authorizes the court to grant relief "to secure the just determination of the real matters in dispute". For example, if an accused gives late notice of a claim of wilful non-disclosure, the trial judge can grant a reasonable adjournment to permit a Crown counsel to obtain advice, call evidence or even arrange for another Crown to take over the proceedings. Thus, on the respondent's stay application, had Ms. Hallett requested an adjournment, it undoubtedly would or should have been granted.

¶ 96 I would therefore reject the OCAA's call for a special rule to deal with an allegation that a Crown counsel has intentionally withheld relevant information. The existing rules coupled with the trial judge's inherent jurisdiction to control the processes of the court offer adequate protection. In support of my conclusion I can do no better than quote the observations of my former colleague Justice Finlayson in R. v. Kutynec (1992), 70 C.C.C. (3d) 289 (Ont. C.A.) at 300: (3) The requirements constitute an unnecessary interference with the inherent jurisdiction of the trial judge to control the conduct of the trial . . . The great majority of criminal cases in this province are disposed of by judges of the Provincial Division of the Ontario Court of Justice. Mandated pre-trial procedures will do nothing to assist them in carrying out their duties or to ease their case-loads. Rather than invent yet another procedural straitjacket to compound their problems, it is better to leave to these trial judges the discretion to determine the sufficiency of notice and the extent of the offer of proof. ***[page350]***

I would not give effect to the OCAA's submission.

3. Did the application judge err in finding that Crown Counsel wilfully failed to disclose Dunlop's materials and her July 4, 2000 letter?

¶ 97 This is the most important issue on the appeal. The Crown did not disclose Dunlop's materials to the defence before trial. Leduc sought a stay on the ground that the Crown's failure to disclose was wilful. Therefore, the question the application judge had to decide was whether Ms. Hallett saw the references to Cory M.'s mother in Dunlop's materials and wilfully withheld this information from Leduc, or whether she inadvertently overlooked these references. The application judge found that her failure to disclose was wilful and granted a stay on that ground. The Crown submits that there was no evidence to support a finding of wilful non-disclosure. I agree with the Crown's submission.

¶ 98 The Crown acknowledges that Dunlop's materials and Dupuis' note were relevant information that should have been disclosed to Leduc before the trial began. The right to disclosure of relevant information forms one component of the right to make full answer and defence. The right to make full answer and defence is a principle of fundamental justice under s. 7 of the Charter. Thus, the Crown's breach of its disclosure obligation amounted to a breach of Leduc's constitutional rights. See R. v. Stinchcombe, supra; R. v. Carosella (1997), 112 C.C.C. (3d) 289 (S.C.C.).

¶ 99 But the Crown's breach of its obligation to disclose does not automatically entitle an accused to a stay of proceedings under s. 24(1) of the Charter. A stay is a drastic remedy, a remedy of last resort, to be granted only in the "clearest of cases". It should be granted only in the rare cases where compelling an accused to stand trial would violate those fundamental principles of justice that underlie the community's sense of fair play and decency. Or, in the words of L'Heureux-Dube J. in R. v. O'Connor, [1995] 4 S.C.R. 411 at 468, 103 C.C.C. (3d) 1: a stay should be granted only "where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued".

¶ 100 In this case, Leduc does not contend that his right to make full answer and defence cannot be remedied. He contends that Ms. Hallett's failure to disclose has caused irreparable prejudice to the integrity of the judicial system. Therefore, both before the ***[page351]*** application judge and in this court Leduc acknowledged that he is not entitled to a stay if Ms. Hallett's failure to disclose was inadvertent or careless.

¶ 101 Before the application judge, Leduc argued that he was entitled to a stay only if Ms. Hallett's failure to disclose was wilful. His counsel made his position clear at the beginning of the application:At the outset, the foundation for the application for a stay of proceedings which we acknowledge is the most serious of Constitutional remedies, is founded on an allegation of wilful non-disclosure. If we fail to satisfy the court that non-disclosure in this instance was wilful, then we will not seek that most drastic of remedies, although, because of our position, that we have been severely prejudiced, to the preparation and execution of our defence, we will certainly seek and discuss with the court lesser remedies.

¶ 102 In this court, Leduc sought to support the stay on the ground that either Ms. Hallett's failure to disclose was wilful or grossly negligent. Accordingly, in his factum, Leduc recognized that "mere carelessness or civil negligence would not be sufficient to justify the stay of proceedings for non-disclosure".

¶ 103 In my opinion, the respondent cannot ask this court to find that Ms. Hallett's conduct was grossly negligent when he neither sought nor obtained that finding from the application judge. Moreover, as will be evident from my reasons, such a finding cannot be supported on the record.

¶ 104 The critical question is whether the application judge's finding that Ms. Hallett wilfully withheld Dunlop's materials and her July 4, 2000 letter can be supported on the evidence. If it cannot be supported, the order staying the prosecution of Leduc must be set aside.

¶ 105 The application judge's finding of wilful non-disclosure is a finding of fact. That finding is entitled to deference from this court. It can be set aside only if it was tainted by palpable and overriding error. See Housen v. Nikolaisen (2002), 211 D.L.R. (4th) 577 (S.C.C.).

¶ 106 In my view, the application judge made palpable and overriding errors that tainted his finding of wilful non-disclosure. His finding is entirely unsupported by the record, does not take account of several exculpatory considerations and flies in the face of the innocent explanation given by Ms. Hallett, an explanation the application judge had no reason to reject. ***[page352]***

¶ 107 The finding of wilful non-disclosure rests on three planks: exhibit 22, Ms. Hallett's July 4, 2000 letter; the evidence of Constable Genier; and the application judge's rejection of Ms. Hallett's explanation. The crucial plank appears to be exhibit 22 -- both its contents and the circumstances of its disclosure to the defence. According to the application judge, exhibit 22 showed Ms. Hallett had reviewed Dunlop's materials in depth, and Constable Genier's evidence confirmed that she had done so. Also, according to the application judge, Ms. Hallett suppressed exhibit 22 from the defence. In my view the application judge misinterpreted the contents of exhibit 22 and misapprehended the circumstances of its disclosure to the defence.

¶ 108 On July 4, 2000, Ms. Hallett had written to Detective Constable Dupuis about disclosure of Perry Dunlop's materials to defence counsel in the MacDonald case. Counsel for Leduc received a copy of the letterfrom Dupuis on February 20, 2001, the day before the stay application began before Chadwick J.

¶ 109 Ms. Hallett's letter is headed:R. v. MacDonald (Charles); Project Truth InvestigationDisclosure Items

¶ 110 The letter largely reflects what Ms. Hallett had already told the trial judge on February 14, 2001: that she had received a copy of Dunlop's material in April 2000, that on her return to the office on July 17th she would review these materials before making disclosure to the defence in the MacDonald case, and that she would return to Cornwall in late July to complete her review. Here is what Ms. Hallett wrote:Please find enclosed the notes of our clerk, Mr. Michael Chard, taken at my request upon the unexpected visit by P.C. Perry Dunlop to the Crown Law Office-Criminal on June 27, 2000. P.C. Dunlop brought with him a duplicate of his statement dated April 7, 2000 and its appendices in the form of four bound booklets, all of which were seized by D/Insp. Pat Hall on April 10, 2000. I received a copy of the same statement with appendices from Project Truth on April 17, 2000.I will review the statement and appendices brought in by P.C. Dunlop on June 27 to ensure that they are duplicates. I then propose to provide them to my co-counsel Christine Bartlett for use on the MacDonald trial. These items must still be reviewed by me prior to making disclosure to the defence, which I will do upon my return to the office on July 17. I believe that you have made a copy ***[page353]*** of these items for disclosure purposes, but are waiting to deliver them to defence counsel pending my review.Please also find enclosed a copy of P.C. Dunlop's letter delivered to the Attorney General the same day as his visit to me. This item should also be included in any new volume of the brief to be disclosed to the defence.I propose to return to Cornwall in the week of either July 24th or 31st for the purpose of completing my review of the Dunlop materials (Box 9) and meeting with M. to review his evidence in anticipation of the preliminary inquiry.

¶ 111 Constable Genier testified that Ms. Hallett began her review of the Dunlop materials on May 3 and 4, 2000. Ms. Hallett had told the trial judge that her review of the Dunlop materials had been "cursory". On the basis of exhibit 22 and Constable Genier's evidence the application judge concluded otherwise [para. 35]: The letter clearly shows that the Crown had reviewed the Dunlop file in more depth than a "cursory review". This is also confirmed by the evidence of Cst. Genier . . .

¶ 112 Although he did not expressly say so, for his finding of wilful non- disclosure to make sense, the application judge must have concluded that Ms. Hallett saw the information she says that she overlooked. He must have concluded that in her review of the Dunlop materials in 2000, Ms. Hallett had seen the reference to the telephone calls with Cory M.'s mother but had withheld this information to prevent Dunlop from contaminating the prosecution of the respondent.

¶ 113 The application judge then concluded that Ms. Hallett also withheld her letter (along with the Dunlop materials which she had "reviewed in depth"), "to avoid Dunlop becoming an issue in the Leduc case" [para. 41].

¶ 114 I see nothing in the contents of exhibit 22 or the evidence of Constable Genier from which one can infer or find that Ms. Hallett saw the brief references to Cory M.'s mother in Dunlop's materials and wilfully withheld this information from Leduc. Several considerations undermine the application judge's reliance on exhibit 22 to support his findings of wilful non-disclosure. Instead, these considerations point to the opposite inference or finding, that Ms. Hallett overlooked the references to the telephone calls between Dunlop and Cory M.'s mother.

¶ 115 First, the application judge misinterpreted the letter. He said that exhibit 22 "shows the Crown had reviewed the Dunlop file in more depth than a 'cursory review'". But the letter speaks of a future ***[page354]*** review of Dunlop's materials later in the month, not of a review that has already taken place. The letter is dated July 4, 2000. In it Ms. Hallett says she will review the Dunlop materials on July 17 and during the week of July 24 or July 31, not that she has already done so.

¶ 116 Second, the application judge failed to appreciate that in the spring and summer of 2000, Ms. Hallett was reviewing Dunlop's materials for a different case. As exhibit 22 shows, Ms. Hallett was reviewing Dunlop's materials to give disclosure to the defence in the MacDonald case, not in the Leduc case. Undoubtedly this coloured her review of the materials. Moreover, preparation for the MacDonald case was likely foremost in her mind. The MacDonald preliminary inquiry was set for that August. The Leduc trial was not scheduled to begin until the following January. When Ms. Hallett found that Dunlop's documents contained information relevant to the prosecution of MacDonald, she disclosed them to his counsel. That she would do so in that case and yet, at the same time, deliberately suppress evidence of two seemingly innocuous telephone calls between Dunlop and the mother of one of the complainants in the Leduc case seems implausible.

¶ 117 Third, the application judge failed to take into account that in reviewing the Dunlop materials, Ms. Hallett had no reason to be on the lookout for a connection to the Leduc case. The Crown's disclosure brief prepared by the police in 1999 contained no reference to Dunlop or his materials. Indeed, Dupuis' inadvertent failure to include his June 15, 1998 handwritten note in the Crown brief shows how easy it was to overlook these minor items. Even when the police gave Ms. Hallett a copy of the Dunlop materials in the spring of 2000, they did not flag the references to the Leduc case. No police officer made Ms. Hallett aware of the discussion on July 23, 1998, between the police and Perry Dunlop or about his telephone calls with Cory M.'s mother. Moreover, neither the evidence led at the preliminary inquiry nor Ms. Hallett's interviews of the complainants alerted her to any connection between Dunlop and the prosecution of Leduc.

¶ 118 Fourth, the application judge did not consider the evidence of the Project Truth investigators. The two lead OPP officers on the Leduc prosecution, Inspector Hall and Detective Constable Dupuis, each testified that he saw no indication Ms. Hallett intentionally withheld evidence prejudicial to the prosecution or relevant to the defence. Their evidence was not challenged by Leduc. ***[page355]***

¶ 119 Fifth, the application judge took no account of the massive number of documents generated by the Project Truth investigation. Dunlop's materials alone consisted of over 600

pages of notes, of which nearly 200 were in handwriting that was either illegible or hard to read. Neither Constable Genier's evidence nor exhibit 22 suggests that Ms. Hallett reviewed or was going to review those materials "in depth" in the spring and summer of 2000, much less that she actually saw the references to the telephone calls with Cory M.'s mother.

¶ 120 In my view, these considerations show that the conclusionthe application judge drew from the contents of exhibit 22 and Constable Genier's evidence is unsupportable. I believe these considerations lead to but one conclusion: Ms. Hallett made an honest mistake. Her failure to disclose was inadvertent.

¶ 121 The application judge also used the way in which the defence obtained a copy of exhibit 22 to support his finding of wilful non-disclosure. In doing so he misapprehended what occurred.

¶ 122 On February 8, 2001, the day after Cory M.'s mother testified about her telephone calls with Dunlop, Inspector Hall arranged for a copy of Ms. Hallett's July 4, 2000 letter to be delivered to her. In the top right hand corner, he wrote: "SHELLY for your information P.R. Hall". On the stay application, Hall testified that he expected Ms. Hallett to disclose the letter to the defence, though he had not asked her to do so. In fact, she had not done so.

¶ 123 On February 20, 2001, the day before the stay application was to begin before Chadwick J., Hall and Dupuis met with counsel for Leduc to discuss what questions they would be asked. During the meeting they were asked whether any document existed showing that Ms. Hallett had reviewed Perry Dunlop's will say statement. They volunteered Ms. Hallett's July 4 letter to Dupuis and offered to give a copy to Leduc's counsel. As Dupuis could not find the original of the letter, he obtained from Ms. Hallett the copy that Hall had given to her on February 8.

¶ 124 On the application, Leduc's counsel claimed that they only learned about the letter because a senior Project Truth investigator "had to bypass lead Crown counsel and make direct disclosure to the defence in order to circumvent her refusal to do so". The application judge seemed to accept this claim. He found that Ms. Hallett intentionally withheld the letter. ***[page356]***

¶ 125 The finding has no support in the evidence. Inspector Hall acknowledged that he never suggested Ms. Hallett should disclose the letter to the defence. Both Hall and Dupuis testified that Ms. Hallett did not try to suppress the letter, had no qualms about giving it to the defence and readily provided her copy. Moreover, the letter itself says little more than what Ms. Hallett had already told the trial judge in her oral submissions the previous week. Finally, disclosure of the letter was contrary to the Crown's usual practice concerning correspondence between Crown counsel and the police. The Disclosure Guidelines then in force for Ontario Crown Attorneys stipulated, "Crown counsel generally need not disclose any internal Crown counsel . . . correspondence". Thus, not only did Ms. Hallett not suppress the letter, she had no reason to disclose it.

¶ 126 I therefore conclude that the finding of wilful non-disclosure has no support in the record. It fails to take account of the several considerations showing that the non-disclosure was innocent and inadvertent. And it is based on a misapprehension of what occurred. In these ways the finding is tainted by "palpable and overriding errors". It must be set aside.

¶ 127 I would set aside the finding of wilful non-disclosure even without considering Ms. Hallett's innocent explanation for what occurred. But her innocent explanation provides an additional reason for setting aside the finding.

¶ 128 In her submissions to the application judge, Ms. Hallett maintained -- as she had before the trial judge -- that her failure to disclose was inadvertent. She again explained that she had Dunlop's notes and will say statement in the spring of 2000, and that she had reviewed the material in order to give disclosure in the MacDonald case.

¶ 129 Ms. Hallett acknowledged that since 1996 Dunlop had harboured a great deal of animus toward Leduc and had targeted him as a conspirator in the alleged cover-up of sexual abuse in the Cornwall area. But, she "had frankly compartmentalized Leduc as being a case that was more or less ready for trial and wasn't in any way involved -- did not engage in any way the Dunlop issue". Consequently she overlooked the references to Dunlop's telephone calls with Cory M.'s mother.

¶ 130 The application judge rejected Ms. Hallett's explanation. In doing so he observed that she did not testify on the application. And ***[page357]*** he concluded that her statement to the trial judge that she made only a "cursory review" of Dunlop's materials "appears to be contrary to the evidence". He said [para. 31]: Ms. Hallett, the Crown, did not give evidence on the stay. In her submissions, she explained how she compartmentalized each file. She did not find the Dunlop material relevant to the Leduc file. In her remarks to Justice McKinnon on February 14, 2001, she indicated that she had only made a "cursory review" of the Dunlop documents. This statement appears to be contrary to the evidence.

¶ 131 This part of the application judge's reasons may be viewed in two ways: either he drew an adverse inference from Ms. Hallett's failure to testify on the stay application or he simply rejected her innocent explanation. He should not have done either.

¶ 132 Ms. Hallett recognized that the Crown owed both the court and the respondent and explanation for the non-disclosure. See R. v. Ahluwalia, supra. She should, however, have given her explanation from the witness box instead of from the counsel table. She should have arranged for another Crown to take carriage of the stay application and lead her evidence. The reasons why she should have done so are grounded in the principle that ordinarily a lawyer cannot be both an advocate and a witness in the same case. See, for example, Imperial Oil Ltd. v. Grabarchuk (1974), 3 O.R. (2d) 783 (C.A.). If an advocate wishes to give evidence about material and contested facts, the advocate must take off his or her gown and testify under oath. Otherwise, the advocate's statements are shielded from cross-examination and the court has to make findings of credibilityon untested evidence.

¶ 133 Moreover, being an advocate and a witness in the same case raises professional conduct concerns. Giving evidence from the counsel table puts in question the advocate's personal credibility, compromises the advocate's objectivity and potentially puts the advocate in a conflict of interest.

¶ 134 Here, for example, some might perceive that Ms. Hallett was defending her own actions at the expense of her obligation as Crown counsel to the administration of justice. Thus for good reason, except in rare cases, both law society codes of professional conduct and courts advise against being advocate and witness in the same case. The following observations of the Manitoba Court of Appeal in R. v. Deslauriers (1992), 77 C.C.C. (3d) 329 at 337, have considerable merit: ***[page358]*** Counsel's objective role is also compromised in a case such as this where his own conduct or judgment has to be taken into account by the court in resolving an issue between parties. Counsel ends up in these circumstances justifying his own conduct and judgment and attacking those of opposing counsel. This is a situation which should be avoided. Whenever possible, other counsel should be retained.

¶ 135 That said, it seems to me that Ms. Hallett had no forewarning, either from the judge or from the opposing counsel that her explanation for the non- disclosure would not be accepted unless she testified. Both the trial judge and the application judge had adopted an informal approach to the giving of evidence. Each had permitted counsel on both sides to make assertions of fact during their submissions. Neither objected when Ms. Hallett explained her conduct from the counsel table. Given this context, if the application judge was not going to consider or was going to give less weight to Ms. Hallett's explanation because she did not give it under oath, he had an obligation to tell her. Simple fairness required that he do so: see M. Proulx and D. Layton, Ethics and Canadian Criminal Law (Toronto: Irwin Law, 2001) at 344-345. Thus, I do not think any adverse inference should have been drawn from Ms. Hallett's failure to testify, at least not without warning her of that possibility.

¶ 136 Having considered Ms. Hallett's innocent explanation, the application judge was, of course, entitled to reject it, provided he had grounds for doing so. In my view he had none. By rejecting Ms. Hallett's explanation he found not just that she was not credible but that she had misled the court. Yet he made that finding without any supporting evidence. Mainly for the reasons I have already discussed, the record shows that the non-disclosure in this case was not wilful. Here I emphasize three pieces of evidence that support Ms. Hallett's innocent account: The Crown disclosure brief prepared by the police contained no reference to Dunlop; The evidence at the preliminary inquiry revealed no connection to Dunlop; and On the stay application, each complainant testified that he had had no contact with Dunlop.

¶ 137 The finding of wilful non-disclosure cannot stand. I would set it aside and with it I would set aside the stay of proceedings. I will now consider whether the stay was justified even if the finding of wilful non-disclosure were permitted to stand. ***[page359]***

4. Did the application judge err in granting a stay of proceedings?

¶ 138 Because the application judge's finding of wilful non-disclosure cannot be supported, neither can his order for a stay. But I would go further. Even accepting the finding of wilful non-disclosure, the drasticremedy of a stay of proceedings cannot be justified.

¶ 139 The application judge's order granting a stay is a discretionary order. It is entitled to deference on appeal. This court should interfere with the application judge's exercise of discretion only if he misdirected himself or if his decision is "so clearly wrong as to amount to an

injustice". See Elsom v. Elsom, [1989] 1 S.C.R. 1367 at 1375; R. v. Regan (2002), 161 C.C.C. (3d) 97 (S.C.C.), at para. 117.

¶ 140 In my view the application judge did misdirect himself. And his order is so clearly wrong that it does amount to an injustice. The application judge made four related errors, each of which undermines his order for a stay. First, he did not apply the correct test for a stay for prosecutorial misconduct. Second, he justified the stay on a ground that Leduc has never asserted: a breach of his right to a fair trial within a reasonable time guaranteed by s. 11(b) of the Charter. Third, he did not apply the well-established guidelines for a s. 11(b) violation. Fourth, he relied on items of prejudice that were not supported in the record. I will deal with each of these errors.

¶ 141 The application judge ordered a stay because he concluded that Ms. Hallett's wilful non-disclosure irreparably prejudiced Leduc's right to a fair trial within a reasonable time. The application judge recognized that a stay should be granted only in the clearest of cases. He also referred to passages from the Supreme Court of Canada's judgments in R. v. O'Connor, supra, and R. v. Dixon (1998), 122 C.C.C. (3d) 1 (S.C.C.), which establish that to obtain a stay, the non-disclosure must have irreparably prejudiced either the accused's right to make full answer and defence or the integrity of the administration of justice contrary to s. 7 of the Charter. But the application judge failed to advert to the now recognized test for a stay for prosecutorial misconduct.

¶ 142 Prosecutorial misconduct, such as wilful non-disclosure, standing alone does not warrant a stay. To justify a stay, the misconduct must either prevent a fair trial or undermine the integrity of our justice system. Most cases where a stay is ordered fall into the former category. A small number of cases -- "exceptional" or "relatively very ***[page360]***

rare" cases -- fall into the latter or "residual" category, where trial fairness can be preserved by a remedy short of a stay, but the integrity of the justice system cannot. In either category of case,. . . 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 the prejudice . . .". . . . . where uncertainty persists about whether the abuse is sufficient to warrant the drastic remedy of the stay. . . a third criterion is considered. This is the stage where a traditional balancing of interests is done: "it will be appropriate to balance the interest that would be served by the granting of a stay of proceedings against the interest that society has in having the final decision on the merits". [See R. v. Regan, at 122-123, citing Canada (Minister of Citizenship and Immigration) v. Tobiass, [1997] 3 S.C.R. 391, 118 C.C.C. (3d) 443.]

¶ 143 The application judge not only failed to address these criteria, he seemed to focus on whether the wilful non-disclosure prejudiced Leduc's fair trial rights. Leduc, however, sought a stay on the ground that the wilful non-disclosure irreparably prejudiced the integrity of the justice system. Although Leduc maintained that the non-disclosure prejudiced his right to a fair trial, he acknowledged that this prejudice could be addressed by a remedy short of stay.

¶ 144 That was a fair acknowledgement. Leduc now has Dunlop's materials and Dupuis' notes. The innocuous telephone calls between Dunlop and Cory M.'s mother were at best marginally

relevant to the defence. The record disclosed that none of the three complainants had any contact with Dunlop. Most important, nothing in the evidence suggests that Ms. Hallett's untimely disclosure will impair Leduc's right to make full answer and defence or otherwise prevent him from having a fair trial.

¶ 145 Nor does this case fall into the residual category of cases where a stay must be ordered because to continue the prosecution would irreparably prejudice the integrity of our justice system. The remedy of a stay does not dwell on past misconduct but looks to the future. The critical first criterion is whether any prejudice caused by the wilful non-disclosure will be manifested or perpetuated or aggravated through the conduct of the trial or by its outcome. I am not persuaded that it will be. Even accepting that Ms. Hallett's ***[page361]*** non-disclosure was wilful, nothing suggests that this non- disclosure is likely to continue. Whatever prejudice may have been caused will not be perpetuated by continuing the trial.

¶ 146 The second criterion asks whether another remedy can reasonably remove any prejudice caused by the wilful non-disclosure. Here, even assuming wilful non-disclosure, a combination of remedies would have removed any prejudice: an order expediting a new trial, an order that Ms. Hallett not prosecute the new trial and an order that the Crown pay Leduc his costs of the first trial.

¶ 147 If uncertainty persists after the application of these first two criteria, the application of the third criterion removes any doubt that a stay is not justified. Several considerations -- none of which were referred to by the application judge -- point to the public interest in having a trial: each youthful complainant testified to several incidents of serious sexual abuse; victims of sexual abuse must be encouraged to trust the criminal justice system; and the community, which had been "riveted" by this and the other Project Truth cases, was entitled to a decision on the merits. See R. v. Regan. This is not that very rare case where the misconduct is "so egregious that the mere fact of going forward in the light of it will be offensive". See Canada v. Tobiass, supra, at para. 91. Indeed far more serious Crown misconduct in Tobiass, Regan and R. v. Latimer, [1997] 1 S.C.R. 217, 112 C.C.C. (3d) 193, did not warrant a stay. One should not have been granted in this case.

¶ 148 Moreover, the application judge ultimately seemed to justify a stay on a ground that Leduc never put forward: the wilful non-disclosure had resulted in a violation of his s. 11(b) Charter right to a trial within a reasonable time. Leduc did not contend that declaring a mistrial and ordering a new trial would violate his constitutional right under s. 11(b) of the Charter.

¶ 149 In addition, in finding that Leduc could no longer get a fair trial within a reasonable time, the application judge did not apply the framework established by the Supreme Court for determining whether a s. 11(b) violation has taken place. See, for example, R. v. Morin (1992), 71 C.C.C. (3d) 1 (S.C.C.). Section 11(b) determinations are fact driven. But the application judge was not aware of many of the relevant facts. These facts included the inherent time requirements of the case, Leduc's waiver of his s. 11(b) rights on ***[page362]*** March 31, 2000, in connection with the January 15, 2001 trial date, the limits on institutional resources, and the length of the delay that would be caused by a mistrial.

¶ 150 Finally, the items of prejudice on which the application judge relied to find that Leduc could no longer receive a fair trial within a reasonable time were not supported by the record. The application judge concluded that because Dunlop's materials were relevant, the trial judge would likely have had to recuse himself and declare a mistrial. He then pointed to five items of prejudice that would result from a new trial [see 84 C.R.R. (2d) paras. 52-54]: The continuous publicity for Leduc, which has caused him and his family a great deal of hardship. The "financial strain" on Leduc: "In order to defend a trial of this magnitude, you either have to be poor or rich. There is no in-between. I suspect the accused is neither." [See para. 53.] "A mistrial will require the complainants and other witnesses to testify again, a tremendous hardship on them." [See para. 54.] "Dunlop will be a necessary witness at a new trial. He will have to be properly subpoenaed and a warrant issued if he fails to attend . . . [and] his evidence will have to be the subject of a voir dire". "In view of all these issues and the scheduling of counsel and witnesses, a new trial would probably not be conducted for sometime."

¶ 151 Leduc did not testify on the stay application. He did not call any evidence about either the hardship to his family caused by the publicity surrounding his trial or the "financial strain" of the proceedings. Publicity and costs, however unpleasant or unpalatable, were two inevitable consequences of the charges against the respondent, regardless of the Crown's failure to disclose the Dunlop materials before trial. Hardship resulting from properly laid charges, as these were, does not amount to an abuse of process. Even accepting that the trial judge would have had to declare a mistrial, the application judge failed to assess separately the ongoing hardship that might be caused by the non-disclosure, and indeed he had no evidence to do so. He gave short shrift to making a cost order against the Crown even though he recognized that such an order could reimburse Leduc for the costs of the trial before McKinnon J. ***[page363]***

¶ 152 Undoubtedly the complainants and the Crown's witnesses would prefer not to have to testify again at a second trial, but none testified that he or she was unwilling to do so, or that to do so would cause a "tremendous hardship". If Dunlop's materials remain relevant, he likely will be a witness, but I fail to see why his proposed evidence must be subject to a voir dire and even if it is, why his testimony will unduly prolong the trial. Finally, a new trial can be expedited. Neither party suggested that it could not be held within a reasonable time.

¶ 153 Certainly a new trial could have been avoided had the Crown disclosed Dunlop's materials before the trial began. As the application judge pointed out, had McKinnon J. known before the trial began of Dunlop's connection to the prosecution of the respondent he would have declined to sit on the case. However, because of the late disclosure, he began the trial without this knowledge. Had the application judge dismissed the request for a stay and had Leduc maintained that he would raise Dunlop's conversations with Cory M.'s mother, the trial judge would have had to declare a mistrial and order a new trial.

¶ 154 New trials should be avoided where possible. The accused, the other participants in the trial, the criminal justice system and the community at large must all suffer the consequences -- financial, emotional and otherwise -- of going through the proceedings again. That the respondent will have to do so, however, does not by itself make out a violation of s. 11(b) of the Charter. Yet the items of prejudice on which the application judge relied to find a s. 11(b) violation were rooted in conjecture, not in the evidentiary record.

¶ 155 I therefore conclude that even if the finding of wilful non-disclosure were to stand, the order granting a stay was "so clearly wrong" that to maintain it would amount to an injustice. I would set the stay aside. In the light of the passage of time and the likelihood the respondent will rely on Dunlop's connection to this case, I would order a new trial. I would also order that the new trial be expedited.

5. Did the application judge err in awarding costs against the Crown?

¶ 156 The application judge ordered the Crown to pay Leduc his costs of the trial before McKinnon J. and of the stay application. His order was rooted in his finding that Ms. Hallett wilfully failed ***[page364]*** to disclose relevant information to the defence. As I would set aside that finding, it can no longer support a costs award against the Crown.

¶ 157 The question remains however, whether the costs award can be supported on any other basis. In R. v. 974649 Ontario Inc. (2001), 159 C.C.C. (3d) 321, the Supreme Court affirmed the court's jurisdiction to award costs in criminal trials for a violation of the Charter. A costs award may, under s. 24(1) of the Charter, be "appropriate and just in the circumstances". Moreover, the Supreme Court recognized that costs awards play a "vital role in enforcing the standards of disclosure" [para. 80], first established in Stinchcombe.

¶ 158 Nonetheless the Supreme Court and provincial appellate courts have stopped short of awarding costs against the Crown for an innocent or inadvertent breach of its obligation to disclose. Instead, the jurisprudence to date has restricted costs awards against the Crown to "circumstances of a marked and unacceptable departure from the reasonable standards expected of the prosecution". In the 974649 Ontario Inc. case at p. 356, McLachlin C.J.C. explained this restriction: Neither is there any indication that the Crown will be subjected to such awards unfairly or arbitrarily. Crown counsel is not held to a standard of perfection, and costs awards will not flow from every failure to disclose in a timely fashion. Rather, the developing jurisprudence uniformly restricts such awards, at a minimum, to circumstances of a marked and unacceptable departure from the reasonable standards expected of the prosecution. I fail to see how the provision of an expedient remedy in such cases, from a trial court that is not only competent but also ideally situated to make such an assessment, risks disrupting the existing system of justice.

¶ 159 Thus, although such costs awards have a compensatory element, they are "integrally connected to the court's control of its trial process, and intended as a means of disciplining and discouraging flagrant and unjustified incidents of non-disclosure" (at p. 354).

¶ 160 Restricting these awards to cases where the Crown's failure to disclose reflects a marked and unacceptable departure from the standards of a reasonable prosecutor is grounded in sound policy considerations. In R. v. Robinson (1999), 142 C.C.C. (3d) 303 (Alta. C.A.), McFadyen J.A. canvasses some of these considerations at p. 315 and again at p. 316:The reasons for limiting costs are that the Crown is not an ordinary litigant, does not win or lose criminal cases, and conducts prosecutions and makes decisions respecting prosecutions in the public interest. In the absence of proof ***[page365]*** of misconduct, an award of costs against the Crown would be a harsh penalty for a Crown officer carrying out such public duties.. . . . .Costs should not be

routinely awarded. Something more than a bona fide disagreement as to the applicable law, or a technical, unintended or innocent breach, whether clearly established or not, must be required. Otherwise, the criminal courts will be inundated with applications in this regard. We cannot ignore the fact that disclosure issues continue to occupy much of the Courts' time and attention in criminal trials, despite the existence of rules relating to disclosure, and often, good faith attempts on the part of police and Crown prosecutors to discharge their duties. Some degree of misconduct or an unacceptable degree of negligence must be present before costs are awarded against the Crown under s. 24(1) of the Charter.

¶ 161 Applying this case law to the present case, I do not think that a costs award against the Crown can be supported. Although Ms. Hallett's untimely disclosure amounted to a breach of Leduc's constitutional rights under s. 7 of the Charter, the failure to disclose was innocent and inadvertent. Ms. Hallett's conduct was not wilful. It did not amount to a "marked and unacceptable departure from the reasonable standards" expected of a prosecutor. It therefore does not justify a costs award against the Crown.

¶ 162 The Crown's untimely disclosure has led to a new trial, which would have been the likely result even had the stay application not been brought. Assuming the defence will rely on Dunlop's contact with Cory M.'s mother, the late disclosure disqualifies the trial judge from continuing the trial. Had he known of Dunlop's connection to the case at the outset, he would not have presided at all. Thus, the late disclosure unfortunately means that many days of trial have been wasted. The parties will have to start afresh. On the existing jurisprudence, however, whatever unfairness has been visited on Leduc cannot be remedied by a costs award against the Crown. Thus, I would set aside the application judge's order that the Crown pay Leduc his costs of the trial and of the stay application.

F. Disposition

¶ 163 For these reasons I would allow the appeal and make the following orders:(1) I would set aside the finding of wilful non-disclosure;(2) I would set aside the order staying the proceedings;(3) I would set aside the costs orders against the Crown; ***[page366]*** (4) I would order a new trial; and(5) I would order that the new trial be expedited.

¶ 164 I end these reasons by thanking all counsel for their assistance on the appeal.Crown appeal allowed; new trial ordered.