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Our File No. : 3482179

March 14, 2017

BY COURIER

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Attention Lilina Lysenko, Counsel for Ugo Lapointe

Dear Madam:

Re: Lapointe v. Mount Polley Mining Corporation and HMTQ BC
Williams Lake Provincial Court File 34472-1

Please find enclosed my submissions and cases on this matter, as Whonnock J. noted that written submissions would be useful. Although I'm the respondent on this issue, here are my submissions in advance of the hearing.

Regarding your previous correspondence on delay, respectfully, your analysis is inconsistent with the cases on the matter. In any case, it is the Crown that has taken all actions it can to stop the delay clock in this matter and, by staying the matter prior to process, seeking to eliminate the delay altogether. I do agree with you that the private informant in this case ought to be considered an "exceptional circumstance".

Yours Truly,

Alexander R. Clarkson
Crown Counsel

ARC/ab

Encl.

File No. 34472-1
Williams Lake Registry

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN:

UGO LAPOINTE

AND:

MOUNT POLLEY MINING CORPORATION
HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA

ATTORNEY GENERAL OF CANADA
SUBMISSIONS ON JURISDICTION TO STAY PROCEEDINGS

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Overview

1. On October 18, 2016, Ugo Lapointe swore private information 34472-1 charging Mount Polley Mining Corporation and Her Majesty the Queen in Right of the Province of British Columbia with destruction of fish habitat and the deposit of a deleterious substance under ss. 35(1) and 36(3) of the *Fisheries* Act respectively. The *in camera* pre-enquete hearing was scheduled for January 13, 2017.

2. On January 13, 2017, at the outset of the pre-enquete hearing, counsel for the Attorney General of Canada intervened in the prosecution and directed a stay of proceedings pursuant to s. 579(1) of the *Criminal Code*.

3. The hearing judge raised the issue of whether the Crown had jurisdiction to enter the stay of proceedings prior to the issuance of process. The matter was adjourned for argument on the issue.

4. The Crown respectfully submits that the jurisdiction to stay proceedings prior to the issuance of process is found explicitly in s. 579(1) of the *Criminal Code* allowing the Crown to stay proceedings at "any time". In addition, our Court of Appeal has ruled directly on the issue, holding that the Crown can stay proceedings prior to the issuance of process.

5. The proper remedy is to record the stay of proceedings entered January 13, 2017.

FACTS

6. On October 18, 2016, Ugo Lapointe swore private information 34472-1 charging Mount Polley Mining Corporation and Her Majesty the Queen in Right of the Province of British Columbia with destruction of fish habitat and the deposit of a deleterious substance under ss. 35(1) and 36(3) of the *Fisheries* Act respectively. The *in camera* pre-enquete hearing was scheduled for January 13, 2017.

7. On January 13, 2017, Ugo Lapointe and the Attorney General of Canada appeared for the *in camera* pre-enquete hearing before Whonnock J. Counsel for Ugo Lapointe also introduced herself as counsel for "MiningWatch Canada". At the outset of the hearing, the Attorney General of Canada intervened in the prosecution and entered a stay of proceedings. Counsel for Attorney General of Canada provided the following reasons:

> We are intervening to stay the private prosecution proceedings as a result of the application of the PPSC Deskbook charge approval test. Our review has determined that there is no reasonable prospect of conviction against either accused (Her Majesty the Queen in right of British Columbia or Mount Polley Mining Corporation) on the basis of the case prepared by the private informant. In addition, it is not in the public interest to allow the private prosecution to continue as there is an ongoing comprehensive investigation being conducted by the BC Conservation Officer Service, Environment Canada and Fisheries & Oceans Canada that should be allowed to complete and be considered for charge approval.

8. After providing these reasons, counsel for Mr. Lapointe stated that the stay of proceedings should be entered outside of the *in camera* pre-enquete hearing. Whonnock J. stood the matter down for counsel for Mr. Lapointe to provide case law on this point.

9. Upon returning from the break counsel for the Attorney General of Canada advised the Court that the stay of proceedings would be a matter of public record in any case and that the words could be repeated again in a non-*in camera* setting, obviating the need for argument on this issue.

10. At this time, Whonnock J. raised a separate issue, not raised by either party. Reading from the annotations in the *Martin's Criminal Code* under s. 507.1, she read that a Crown

does not have the jurisdiction to "withdraw" an information prior to the issuance of process.[1] Counsel for the Attorney General of Canada informed Whonnock J. that it had not "withdrawn" the information but rather directed a stay of proceedings, the authority for which is found in s. 579(1) allowing the Attorney General to, "at any time after any proceeding in relation to an accused or a defendant are commenced and before judgement, direct the clerk or other proper officer of the court to make an entry onto the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter".

11. Whonnock J. then asked counsel for Mr. Lapointe if the stay of proceedings was "by consent". Counsel for Mr. Lapointe advised that she was also joining in the issue raised by Whonnock J. and would like to argue the issue.

12. Whonnock J. noted that, since the stay of proceedings was not "by consent", she was adjourning the issue to the Court Scheduler for one hour of argument. She noted written submissions would be useful. March 27, 2017 was fixed for this argument.

[1] Martin's *Criminal Code*, s. 507.1. The annotation was a summary of *R. v. McHale*, 2010 ONCA 316.

ISSUES

I. Whether the Crown has Jurisdiction to Stay Proceedings Prior to the Issuance of Process?

13. The Crown's jurisdiction to stay proceedings prior to the issuance of process is found in s. 579(1) of the *Criminal Code*. Our Court of Appeal has also ruled that s. 579(1) gives the Crown jurisdiction to direct a stay of proceedings at any time after the laying of the private information, including prior to the decision on whether process should issue.[2] The Quebec and Ontario Courts of Appeal have ruled in the same way.[3] The private informant has provided no authority in support of its position.

In addition to this first issue, the following further issue is necessarily implicated.

II. What is the Proper Remedy?

14. In adjourning the matter for a one hour argument, Whonnock J. assumed that directions to stay proceedings require the "consent" of the private informant. As such, it appears that, despite the Crown's direction staying proceedings, the stay of proceedings was not recorded in the record of proceedings.

15. Respectfully, it was incorrect for the Court to require the "consent" of the private informant before recording the stay of proceedings. Once the Attorney General intervenes in a prosecution, then he or she assumes control of the prosecution and has the right to stay those proceedings despite the wishes of the informant.[4] In addition, once a stay is entered, the court hearing the matter becomes *functus* and lacks jurisdiction to proceed further.[5]

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[2] *R. v. Wren*, [1987] B.C.J. No. 1336 (BCCA); *Davidson v. British Columbia (Attorney General)*, 2006 BCCA 447 at paras. 30-38.
[3] *Hebert c. Marx*, [1991] R.J.Q. 293 (Que CA); *R. v. McHale*, 2010 ONCA 361 at para. 90.
[4] *Hamilton v. British Columbia (Attorney General)*, [1986] B.C.J. No. 756 at para. 6, 30 C.C.C. (3d) 65 (BCSC). See also *Baker v. British Columbia (Attorney General)*, [1986] B.C.J. No. 3280, 26 C.C.C. (3d) 123 (BCSC); *Ahmadoun v. Ontario (Attorney General)*, 2012 ONSC 955; *Kostuch v. Alberta (Attorney General)*, [1995] A.J. No. 866, 101 C.C.C. (3d) 321 (Alta CA), leave to the SCC dismissed [1995] S.C.C.A. No. 512.
[5] *R. v. Smith* (1992), 79 C.C.C. (3d) 70 (BCCA).

Judicial reviews of stays of proceedings are not held in Provincial Court.[6] They are conducted through writs of *mandamus*, *prohibition* or *certiorari* in Supreme Court.[7]

16. The proper procedure should have been for the Court to record the stay of proceedings on January 13, 2017. Challenges to the Crown's jurisdiction to direct the stay of proceedings should have been brought in Supreme Court, not scheduled for argument in Provincial Court. Therefore, the proper remedy at this point is for the Clerk of the Court to record the stay of proceedings directed January 13, 2017.

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[6] *R. v. Smith* (1992), 79 C.C.C. (3d) 70 (BCCA).
[7] *R. v. Smith* (1992), 79 C.C.C. (3d) 70 (BCCA). See also e.g. *R. v. Wren*, [1987] B.C.J. No. 1336 (BCCA); *Ahmadoun v. Ontario (Attorney General)*, 2012 ONSC 955.

ARGUMENT

I. Whether the Crown has Jurisdiction to Stay Proceedings Prior to the Issuance of Process?

17. The Crown's jurisdiction to stay proceedings is found in s. 579(1) of the *Criminal Code*, which explicitly gives the Crown the jurisdiction to stay proceedings "at any time":

> The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated.[8]

18. In addition, our Court of Appeal has also ruled directly on this issue, holding that s. 579(1) of the *Criminal Code* gives the Crown jurisdiction to direct a stay of proceedings at any time after the laying of the private information, including prior to the decision on whether process should issue. In *R. v. Wren*, a private individual swore a private information against a police officer alleging that the officer had assaulted the private informant. The Crown determined that there was no reasonable prospect of conviction. Prior to the pre-enquete hearing, the Crown directed the Clerk of Court to enter a stay of proceedings.[9] The private individual brought a petition in B.C. Supreme Court seeking an order that the Crown withdraw the stay of proceedings on the basis that the Crown could not stay proceedings prior to the issuance of process. The private individual relied on *R. v. Dowson*,[10] wherein Lamer J. held that the Crown could not enter a stay of proceedings prior to the issuance because the wording of s. 508 of the *Criminal Code*, at that time, did not provide for it.

19. MacDonald J. of the B.C. Supreme Court dismissed the private individual's petition on the basis that s. 508(1) (now s. 579(1)) had been amended subsequent to *R. v. Dowson* to explicitly provide that the Attorney General may enter a stay "at any time after proceedings are commenced". Hinkson J.A., for the Court of Appeal, dismissed the private individual's

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[8] *Criminal Code*, s. 579(1) [emphasis added].
[9] *R. v. Wren*, [1987] B.C.J. No. 1336 (BCCA); *Davidson v. British Columbia (Attorney General)*, 2006 BCCA 447 at paras. 30-38.
[10] *R. v. Dowson*, [1983] 2 S.C.R. 144.

appeal for the same reason. This reasoning was followed by the Quebec Court of Appeal,[11] and also employed by the Ontario High Court of Justice and Ontario Court of Appeal.[12] Indeed, in *McHale* (the case referenced by Whonnock J. during her query of the Crown's jurisdiction), the Ontario Court of Appeal held that, while the Crown could not withdraw an information prior to the issuance of process, it could enter a stay of proceedings prior to the issuance of process.[13]

20. Our Court of Appeal relied on *Wren* more recently in *Davidson v. British Columbia (Attorney General)*, stating that

> In *R. v. Wren*, [1987] B.C.J. No. 1336 (C.A.) (a decision binding on this Court), the Court considered a stay of proceedings entered after a private information had been laid, before process had issued. In reasons for the Court, Hinkson J.A. stated (referring to Lamer J.'s comment about the anomaly of the disparity between stays for summary convictions and indictable offences):
>
> > Subsequent to that comment in the Supreme Court of Canada the Criminal Code was amended. S. 732(1) was repealed and at the same time s. 508(1) was amended. Previously s. 508 provided that a stay could be entered "at any time after an indictment has been found". That phrase was deleted in the amendment and now with respect to both summary conviction offences and indictable offences the Attorney General may enter a stay at any time after proceedings are commenced.[14]

21. In summary, the Crown's jurisdiction to stay proceedings prior to the issuance of process is found in the explicit wording of the *Criminal Code* and supported by two cases from our Court of Appeal.

II. What is the Proper Remedy?

22. Although the Crown directed the stay of proceedings to the Clerk of the Court on January 13, 2017, it appears that the stay was not recorded. Whonnock J. queried whether

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[11] *Hebert c. Marx*, [1991] R.J.Q. 293 (Que CA).
[12] *Campbell v. Attorney-General of Ontario*, [1987] O.J. No. 68, 31 C.C.C. (3d) 289, appeal dismissed, [1987] O.J. No. 338, leave to appeal to the SCC dismissed [1987] S.C.C.A. No. 202; *R. v. McHale*, 2010 ONCA 361. See also *R. v. Olumide*, 2014 ONCA 712.
[13] *R. v. McHale*, 2010 ONCA 361 at para. 90.
[14] *Davidson v. British Columbia (Attorney General)*, 2006 BCCA 447 at paras. 30-38 [emphasis added]. See similarly *Parchment v. British Columbia*, 2015 BCSC 1006 at para. 46.

the Crown had jurisdiction to enter the stay prior to the issuance of process. Since this issue was raised for the first time by the Court during the hearing, neither party was equipped with all the jurisprudence on the issue. Whonnock J. stated that, since the stay of proceedings was not "by consent", she was adjourning the matter for argument on the jurisdictional issue. As such, it appears that, despite the Crown's direction to stay proceedings, the stay of proceedings was not recorded in the record of proceedings.

23. Respectfully, it was incorrect for the Court to require the "consent" of the private informant before recording the stay of proceedings. Once the Attorney General intervenes in a prosecution and directs a stay, s. 579(1) explicitly requires "such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly". No consent is required from the private informant.[15] In addition, once a stay is entered, the court hearing the matter becomes *functus* and lacks jurisdiction to proceed further.[16] Judicial reviews of stays of proceedings are not held in Provincial Court.[17] They are conducted through writs of *mandamus*, *prohibition* or *certiorari* in Supreme Court.[18]

24. The proper procedure should have been for the Court to record the stay of proceedings on January 13, 2017. Challenges to the Crown's jurisdiction to direct the stay of proceedings should have been brought in Supreme Court, not scheduled for argument in Provincial Court. Therefore, the proper remedy at this point is for the Clerk of the Court to record the stay of proceedings directed January 13, 2017.

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[15] *Hamilton v. British Columbia (Attorney General)*, [1986] B.C.J. No. 756 at para. 6, 30 C.C.C. (3d) 65 (BCSC). See also *Baker v. British Columbia (Attorney General)*, [1986] B.C.J. No. 3280, 26 C.C.C. (3d) 123 (BCSC); *Ahmadoun v. Ontario (Attorney General)*, 2012 ONSC 955; *Kostuch v. Alberta (Attorney General)*, [1995] A.J. No. 866, 101 C.C.C. (3d) 321 (Alta CA), leave to the SCC dismissed [1995] S.C.C.A. No. 512.
[16] *R. v. Smith* (1992), 79 C.C.C. (3d) 70 (BCCA).
[17] *R. v. Smith* (1992), 79 C.C.C. (3d) 70 (BCCA).
[18] *R. v. Smith* (1992), 79 C.C.C. (3d) 70 (BCCA). See also e.g. *R. v. Wren*, [1987] B.C.J. No. 1336 (BCCA); *Ahmadoun v. Ontario (Attorney General)*, 2012 ONSC 955; *R. v. Olumide*, 2014 ONCA 712.

REMEDY SOUGHT

25. That the stay of proceedings directed January 13, 2017 be recorded.

Respectfully submitted at Vancouver, British Columbia, on March 14, 2017.

Alexander R. Clarkson
Crown Counsel

File No. 34472-1
Williams Lake Registry

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN:

UGO LAPOINTE

AND:

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HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA

ATTORNEY GENERAL OF CANADA
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Case Name:

Ahmadoun v. Ontario (Attorney General)

Between
Med Ahmadoun, Applicant, and
Attorney General for Ontario, Respondent

[2012] O.J. No. 639

2012 ONSC 955

281 C.C.C. (3d) 270

100 W.C.B. (2d) 180

2012 CarswellOnt 1544

Court File No. SC M48/11

Ontario Superior Court of Justice

M.A. Code J.

Heard: January 31, 2012.
Judgment: February 13, 2012.

(38 paras.)

Criminal law -- Prosecution -- Prosecutorial discretion -- Role of the Crown -- Application by Ahmadoun for certiorari to quash Crown's decision staying criminal proceedings commenced on basis of information sworn by applicant dismissed -- Applicant alleged that main witness at his criminal harassment trial, resulting in his acquittal, committed perjury -- Crown's decision to enter a stay of proceedings was one of the core prosecutorial powers generally immune from judicial review, subject only to abuse of process doctrine -- Applicant had not proved flagrant misconduct and abuse of process with respect to Crown's conduct in the criminal harassment trial or in staying the perjury proceedings.

Application by Ahmadoun for certiorari to quash a decision made by Crown counsel staying criminal proceedings commenced on the basis of an information sworn by the applicant. The applicant had been acquitted of criminal harassment. The applicant alleged that the alleged victim had com-

mitted perjury at the criminal proceedings against the applicant. The court stayed the proceedings on the basis that there was no reasonable prospect of conviction and that it would not be in the public interest to prosecute despite the decision of a Justice of the Peace at a pre-enquete hearing to issue process.

HELD: Application dismissed. The Crown's decision to enter a stay of proceedings was one of the core prosecutorial powers that were generally immune from judicial review, subject only to the abuse of process doctrine. The applicant had not proved flagrant misconduct and abuse of process with respect to the Crown's conduct in the criminal harassment trial. The Crown succeeded in proving much of its case and almost obtained either a conviction or a peace bond. In these circumstances, there was no possible misconduct in proceeding with the prosecution and seeking either a conviction or a peace bond on the criminal harassment count. None of the Crown misconduct in entering the stay alleged by the applicant had been made out.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, s. 2, s. 507.1, s. 579, s. 785

Crown Attorneys Act, R.S.O. 1990 Ch. C-49, s. 11(d)

Counsel:

Med Ahmadoun, the Applicant representing himself.

Brad Demone, for the Respondent.

REASONS FOR JUDGMENT

M.A. CODE J.:--

A. INTRODUCTION

1 This is an originating Application, in the nature of *certiorari,* seeking to quash a decision made by Crown counsel in the course of criminal proceedings. The Applicant Med Ahmadoun (hereinafter, Ahmadoun) had been prosecuted for various offences, in particular, criminal harassment. At the end of his trial in the Ontario Court of Justice, on November 10, 2010, he was acquitted by Greene J. The main Crown witness in the proceedings, who alleged that Ahmadoun had harassed her, was one Laila Tibari (hereinafter, Tibari).

2 Ahmadoun responded to his acquittal by swearing an Information alleging that Tibari had committed various criminal offences against him, in particular, perjury at the proceedings before Greene J. The Crown was given notice of the pre-enquête before Justice of the Peace McNish, pursuant to s. 507.1 of the *Criminal Code*, and a hearing was held on March 4, 2011 to determine whether process should issue. Ahmadoun was represented by counsel at the hearing and successfully persuaded the Justice of the Peace to issue process. The Crown had submitted, unsuccessfully, that there was insufficient evidence to justify issuing process.

3 At this point, with process having issued, the Crown entered a stay of proceedings pursuant to s. 579 of the *Criminal Code*. The Crown stated, on the record, that there was "no reasonable prospect of conviction" and that "it would not be in the public interest to prosecute."

4 It can be seen that the Crown applied both aspects of the modern charge screening standard that emerged in this province from *The Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions*, Queen's Printer for Ontario 1993, at pp. 113-120 (hereinafter "*The Martin Committee Report*"). It is this decision by the Crown that the Applicant seeks to quash. He alleges that the Crown acted with a "flagrant impropriety" and committed an "abuse of process" when entering the stay.

5 In Ahmadoun's submission, this narrow "abuse of process" basis for attacking a "core" exercise of Crown discretion is what allows him to seek judicial review of the Crown's decision. See: *Krieger v. Law Society of Alberta* (2002), 168 C.C.C. (3d) 97 (S.C.C.); *R. v. Nixon* (2011), 271 C.C.C. (3d) 36 (S.C.C.); *Campbell v. Ontario (Attorney General)* (1987), 31 C.C.C. (3d) 289 (Ont. H.C.J.), affirmed 35 C.C.C. (3d) 480 (Ont. C.A.).

6 I have grave doubts whether Ahmadoun has standing to seek to quash the Crown's decision entering a stay in criminal proceedings against Tibari. Once process issued and the Crown intervened in the private prosecution, pursuant to s. 11(d) of the *Crown Attorneys Act*, R.S.O. 1990 Ch. C-49, as amended, the only parties to the criminal proceedings were the Crown and Tibari. The Applicant Ahmadoun was no longer a "prosecutor" in the proceedings, as defined in s. 2 and s. 785 of the *Criminal Code.* He was now a "victim" or witness and was not a party to the proceedings. Tibari was a party and she has not been joined in these proceedings. A further difficulty is that the meaning of "abuse of process" in criminal law refers to an extraordinary judicial power to stay proceedings in order to protect the accused from serious misconduct by the executive branch of government. The root case in Canada remains *R. v. Young* (1984), 13 C.C.C. (3d) 1 at 31 (Ont. C.A.) where Dubin J. A., as he then was (Howland C. J. O. and Martin J. A. concurring) stated:

> I am satisfied on the basis of the authorities that I have set forth above that there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings. It is a power, however, of special application which can only be exercised in the clearest of cases. [Emphasis added].

7 The Supreme Court of Canada unanimously adopted this narrow formulation of the "abuse of process" power in *R. v. Jewitt* (1985), 21 C.C.C. (3d) 7 at 13-14 (S.C.C.). Dickson J., as he then was, gave the Judgment of the court and described the power as:

> ... a judicial discretion to enter a stay of proceedings to control prosecutorial behaviour prejudicial to accused persons ... [Emphasis added].

8 Not only is the Applicant Ahmadoun no longer a party to the proceedings between the Crown and Tibari but he seeks to turn the "abuse of process" doctrine on its head. Instead of using it to stay abusive proceedings against the accused, he is trying to revive proceedings that the Crown has already stayed. He seeks to do all this without joining the accused Tibari as a party. None of these issues, relating to the Applicant's apparent lack of standing and the apparent inapplicability of "abuse

of process" as a tool to revive proceedings, was raised before me. Instead, the Crown addressed the Applicant Ahmadoun's submissions on their merits and simply argued that there was no evidence to support the claim of "flagrant misconduct". Accordingly, I will proceed on the same basis. Indeed, this may well be the best course to take. Otherwise, the Applicant might simply re-frame his Application as a civil action or application seeking declaratory relief, in which case the same issues would be re-litigated but in a different form. See, for example: *Campbell v. Ontario (Attorney General)*, *supra*; *Bedford et al v. Canada (Attorney General) et al* (2010), 262 C.C.C. (3d) 129 at 164-9 (Ont. S.C.J.).

B. THE CROWN STAY POWER IS A "CORE" EXERCISE OF DISCRETION THAT IS GENERALLY IMMUNE FROM JUDICIAL REVIEW.

9 The parties agree that the Crown's decision to enter a stay of proceedings in this case is one of those so-called "core" prosecutorial powers that are generally immune from judicial review. Iacobucci and Major J.J. gave the unanimous Judgment of the full court in *Krieger, supra* at para. 32, and described the Attorney-General's independence from the courts, when making prosecutorial decisions, as a constitutional principle:

> The court's acknowledgment of the Attorney General's independence from judicial review in the sphere of prosecutorial discretion has its strongest source in the fundamental principle of the rule of law under our Constitution. Subject to the abuse of process doctrine, supervising one litigant's decision-making process - rather than the conduct of litigants before the court - is beyond the legitimate reach of the court. In *Re Hoem and Law Society of British Columbia* (1985), 20 C.C.C. (3d) 239 (B.C.C.A.), Esson J.A. for the court observed, at p. 254, that:
>
> > The independence of the Attorney-General, in deciding fairly who should be prosecuted, is also a hallmark of a free society. Just as the independence of the bar within its proper sphere must be respected, so must the independence of the Attorney-General.
>
> We agree with these comments. The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution. Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict. [Emphasis added].

10 However, the Court in *Krieger* went on to define the scope of this independence from judicial review fairly narrowly by placing two important limits on it. First, Iacobucci and Major J. J. held, *supra* at paras 42-3 and 46-7, that the independence principle applied only to a narrow "core" of decisions relating to "whether" to prosecute and "what" to prosecute:

> In making independent decisions on prosecutions, the Attorney General and his agents exercise what is known as prosecutorial discretion. This discretion is generally exercised directly by agents, the Crown attorneys, as it is uncommon for a single prosecution to attract the Attorney General's personal attention.

> "Prosecutorial discretion" is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor. Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence.
>
> ...
>
> Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 579 and 579.1; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether: *R. v. Osborne* (1975), 25 C.C.C. (2d) 405 (N.B.C.A.); and (e) the discretion to take control of a private prosecution: *R. v. Osiowy* (1989), 50 C.C.C. (3d) 189 (Sask. C.A.). While there are other discretionary decisions, these are the core of the delegated sovereign authority peculiar to the office of the Attorney General.
>
> Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum. [Emphasis added].

11 The second limitation on the Attorney-General's immunity, set out in *Krieger*, *supra* at paras. 49 and 51, is that even those "core" decisions that are protected by the independence principle can be reviewed on a highly deferential standard of "flagrant impropriety", drawn from the abuse of process and malicious prosecution case law:

> In *Campbell v. Attorney-General of Ontario* (1987), 35 C.C.C. (3d) 480 (Ont. C.A.), it was held that an Attorney General's decision to stay proceedings would not be reviewed save in cases of "flagrant impropriety". See also *Power*, [1994] 1 S.C.R. 601, *supra*; *Chartrand v. Quebec (Minister of Justice)* (1987), 59 C.R. (3d) 388 (Que. C.A.). Within the core of prosecutorial discretion, the courts cannot interfere except in such circumstances of flagrant impropriety or in actions for "malicious prosecution": *Nelles*, [1989] 2 S.C.R. 170, *supra*. In all such cases, the actions of the Attorney General will be beyond the scope of his office as protected by constitutional principle, and the justification for such deference will have evaporated.

...

> Review by the Law Society for bad faith or improper purpose by a prosecutor does not constitute a review of the exercise of prosecutorial discretion *per se*, since an official action which is undertaken in bad faith or for improper motives is not within the scope of the powers of the Attorney General. As stated by McIntyre J. in his concurrence in *Nelles*, *supra*, at p. 211: "public officers are entitled to no special immunities or privileges when they act beyond the powers which are accorded to them by law in their official capacities". We agree with the observation of MacKenzie J. that "conduct amounting to bad faith or dishonesty is beyond the pale of prosecutorial discretion" (para. 55).

12 The approach to this issue set out in *Krieger,* ten years ago, was recently re-affirmed in *R. v. Nixon, supra* at paras. 52 and 64. Charron J. gave the unanimous Judgment of the full court and stated:

> The application judge's assessment of a decision made in the exercise of prosecutorial discretion for "reasonableness" runs contrary to the principles set out in *Krieger*. Paperny J.A. reiterated these principles, and explained that it is not the role of the court to look behind a prosecutor's discretionary decision to see if it is justified or reasonable in itself (paras. 46-49). By straying into the arena and second-guessing the decision, the reviewing court effectively becomes a supervising prosecutor and risks losing its independence and impartiality. Due regard to the constitutionally separate role of the Attorney General in the initiation and pursuit of criminal prosecutions puts such decisions "beyond the legitimate reach of the court" (*Krieger*, at para. 32). Thus, the court does not assess the reasonableness or correctness of the decision itself; it only looks behind the decision for "proof of the requisite prosecutorial misconduct, improper motive or bad faith in the approach, circumstances or ultimate decision to repudiate" (Court of Appeal decision, at para. 49).
>
> ...
>
> This approach is consistent with the principles set out in *Krieger*. Acts of prosecutorial discretion are not immune from judicial review. Rather, they are subject to judicial review for abuse of process.

13 Prior to *Krieger* and *Nixon*, a considerable body of case law had developed wherein private prosecutors challenged decisions by Crown counsel to intervene in a case and to either proceed with it or stay it. None of these challenges were successful. The Courts consistently upheld the power of the Crown to take over a private prosecution and generally held that the Crown's decision to prosecute or stay the privately laid charges could only be reviewed on a standard of "flagrant impropriety" and not on a standard of "reasonableness". *Krieger* and *Nixon*, of course, have now confirmed this approach to the issue. See: *Re Bradley and the Queen* (1975), 24 C.C.C. (2d) 482 (Ont. C.A.); *Campbell v. Ontario (Attorney General), supra; Re Osiowy and the Queen* (1989), 50 C.C.C. (3d) 189 (Sask. C.A.); *Re Chartrand and Quebec (Attorney General)* (1987), 40 C.C.C. (3d) 270 (Que. C.A.); *Kostuch v. Alberta (Attorney General)* (1995), 101 C.C.C. (3d) 321 (Alta. C.A.); *Re Baker*

and The Queen (1986), 26 C.C.C. (3d) 123 (B.C.S.C.); *Re Hamilton and The Queen* (1986), 30 C.C.C. (3d) 65 (B.C.S.C.).

14 It is clear from the above authorities that Crown counsel's decisions in this case, to intervene and take control of a private prosecution and to enter a stay of proceedings, were both decisions within the "core" discretion that are generally immune from judicial review, subject only to the abuse of process doctrine. The Applicant Ahmadoun conceded this and seeks to take on the difficult burden of establishing "abuse of process".

C. THE APPLICANT'S ATTEMPT TO PROVE "ABUSE OF PROCESS" ON THE FACTS OF THIS CASE.

15 Ahmadoun's theory of "abuse of process" on the facts of this particular case, is far-reaching. He did not confine his analysis to anything that happened at the pre-enquête on March 4, 2011. Rather, he reached back into the trial proceedings before Greene J. in 2010, culminating in his own acquittal on November 10, 2010, and submitted that it is the entire course of the Crown's conduct throughout both of these proceedings that infers "flagrant misconduct" in the ultimate decision to enter a stay of the charges against Tibari. Each step that the Crown took over a year long period, from April 2010 to March 2011, is said to be related and cumulative. Ahmadoun asked the court to draw the inference of "flagrant misconduct" from a long series of allegedly inter-connected events and decisions.

16 Unfortunately, the Applicant's analysis of the facts and the law is misconceived at numerous steps in his lengthy chain of reasoning. I will set out a number of examples of the Applicant's flawed process of analysis, without exhaustively reviewing the merits of his allegations against Tibari. As noted above, the scope of judicial review in this case does not include considerations such as the reasonableness or correctness of the Crown's decision not to prosecute but focuses on whether the Applicant has proved "flagrant misconduct" and "abuse of process".

17 In very brief summary, the factual background leading to the initial charges against the Applicant Ahmadoun involved a relationship between him and Tibari that had ended in December, 2008. Towards the end of the relationship, Ahmadoun had received a speeding ticket. Tibari was not with him in the car at the time he received the speeding ticket but, nevertheless, Ahmadoun felt that she had relevant evidence to give about the alleged speeding infraction. He had been with her earlier in the evening and he believed that her evidence as to the timing of certain events earlier that evening would infer that the officer who issued the speeding ticket had made a mistake as to the correct time of the alleged infraction. Ahmadoun still wanted Tibari to testify at his speeding trial, even after their relationship had ended in December 2008. Disputes about whether Tibari had any relevant evidence to give, whether Ahmadoun was or was not asking her to lie in court, and whether he was simply using the speeding ticket as a device to justify ongoing unwanted contact with Tibari became the backdrop to communications between the parties in early 2009. Tibari twice called the police who twice told Ahmadoun not to contact Tibari. He continued to contact her and the police eventually laid three charges against Ahmadoun in April 2009: first, personating a peace officer, relating to Ahmadoun's service of a summons to Tibari requiring that she attend and testify at the speeding trial; second, attempt to obstruct justice, relating to whether Ahmadoun was trying to get Tibari to lie at the speeding trial; and third, criminal harassment, relating to the ongoing unwanted contact with Tibari.

18 The first step in Ahmadoun's "abuse of process" analysis relates to events a year after the charges were laid, on April 12, 2010. The matter was set to proceed to trial and the Crown began by withdrawing the charge of personating a police officer. The Crown had obviously reviewed the brief and had concluded that there was no reasonable prospect of conviction on this one charge. The trial had to be adjourned, on the other two charges, due to the need to translate some e-mails between Ahmadoun and Tibari that were written in the French language and that were important evidence in the case. After the adjournment, Crown counsel entered into resolution discussions with defence counsel. I have real concerns about the Applicant's disclosure of these resolution discussions as they are privileged. See: *Sopinka et al, The Law of Evidence in Canada*, 2nd Ed. 1999, Butterworths Canada Ltd., at 985-9; *R. v. L. (N.)* (1998), 124 C.C.C. (3d) 564 (Ont. S.C.J.); *R. v. Pabani* (1994), 89 C.C.C. (3d) 437 (Ont. C.A.); *R. v. Legato* (2002), 172 C.C.C. (3d) 415 (Que. C.A.). Nevertheless, the Crown has not raised this issue and has chosen to deal with the particular Crown misconduct alleged by Ahmadoun on its merits. Accordingly, I will take the same approach. The resolution offered by the Crown was withdrawal of the two remaining criminal charges if Ahmadoun would undertake not to summons Tibari to the speeding ticket trial, which had still not taken place. This proposed resolution was based on discussions between the Crown and Tibari in which she acknowledged that Ahmadoun had not contacted her in the year since charges were laid, while he was on bail, and that they had both "moved on".

19 Ahmadoun refused the offer of resolution, feeling that he would only be vindicated by an unconditional withdrawal of all charges. The trial of the two remaining charges was adjourned to August 2010. Ahmadoun now alleges that the resolution offered by the Crown in April 2010 was tantamount to obstructing justice. As he put it in his Factum:

> The Crown attempted to prevent the Applicant from exercising his legal rights (i.e. summonsing a witness to court) and offered to withdraw the remaining two charges if the Applicant undertakes to forego his defence in the traffic matter by not summonsing the complainant to testify in court. The Crown was attempting to pressure the Applicant into dropping a summons ... The Crown is saying that the Applicant will be prosecuted unless he drops the summons.

20 The flaw in Ahmadoun's argument on this point is that he had served Tibari with a summons in February 2009 and had then sent her an e-mail in April 2009 relieving her from the summons. This e-mail formed part of the Crown's case on the criminal harassment charge and was alleged to be part of the ongoing unwanted contact with Tibari. The speeding ticket trial date in 2009, to which Tibari had originally been summonsed, was adjourned and Ahmadoun did not renew or continue the summons. He conceded that he had obtained disclosure of the police officer's notes, relating to the timing of the speeding infraction, and that he no longer needed Tibari to testify in relation to the technical issue of the exact time of the speeding ticket. Defence counsel, who acted for Ahmadoun at the criminal trial, conceded that his client had already agreed not to summons Tibari to the new speeding ticket trial date that was now set in 2010. As a result, when Crown counsel made the resolution offer in April 2010, more than a year after the original speeding ticket summons had been served, the parties were agreed that Tibari was not needed as a witness at the speeding ticket trial and she was no longer subject to a summons.

21 In these circumstances, these could be no possible impropriety in the Crown's resolution offer. Ahmadoun's experienced defence counsel never raised any suggestion of impropriety, let alone "abuse of process", when the criminal trial resumed before Greene J. in August 2010. Tibari had

always been a doubtful or peripheral witness, at best, in the speeding ticket proceedings. Ahmadoun had now conceded that he did not need her as a witness and had relieved her of the summons. There was no misconduct when Crown counsel asked for Ahmadoun's undertaking not to renew the summons. It must be remembered that the Crown's theory was that Ahmadoun had used the speeding ticket trial as a device to justify ongoing unwanted contact with Tibari and the Crown was simply trying to prevent any repetition of this conduct.

22 The second step in Ahmadoun's "abuse of process" analysis relates to the obstruct justice charge. By the end of the trial, on October 12, 2010, Crown counsel was satisfied that the count alleging obstruct justice should be dismissed. At the outset of closing submissions, the Crown invited the trial judge to dismiss this particular charge and Greene J. agreed. Crown counsel referred to having heard "evidence on the part of Mr. Ahmadoun" at trial as the basis for the Crown's position that the obstruct charge should be dismissed.

23 Ahmadoun now alleges that the Crown's earlier offer to withdraw all charges, in the resolution discussions prior to trial, combined with the Crown's eventual realization after trial that the obstruct justice charge should be dismissed, infers that there was misconduct in the Crown's decision to proceed to trial on this charge. Ahmadoun submits that the obstruct justice charge was patently without merit. It depended on the theory that he was asking Tibari to lie at the speeding ticket trial when his own e-mails to Tibari, on which the Crown was relying to prove the criminal harassment charge, made it clear that he was not asking Tibari to lie.

24 The flaws in Ahmadoun's argument on this point are two-fold. First, an offer to withdraw a charge as part of resolution discussions does not indicate that there is no proper case to prosecute. It usually means that withdrawal would be in the public interest in light of all the circumstances surrounding the proposed resolution. Second, the e-mails that Ahmadoun sent Tibari, insisting that he was not asking her to lie, were entirely self-serving. Tibari took a different view of the matter. The Crown was entitled to proceed to trial and wait until after Ahmadoun had given sworn evidence on this point, and had been cross-examined on it, before deciding that there was at least a reasonable doubt on the obstruct justice count. In short, there was no misconduct when Crown counsel proceeded to trial and then properly asked Greene J. to dismiss the obstruct charge at the end of the trial.

25 The third step in Ahmadoun's "abuse of process" analysis relates to the criminal harassment count on which the Crown did seek a conviction in closing submissions. The Crown conceded, at an early stage of its submissions, that the case was "not at the high end of a criminal harassment". Furthermore, at the conclusion of these submissions Crown counsel sought a peace bond in the alternative, stating "If your honour is not satisfied beyond a reasonable doubt, I would respectfully request that you exercise your common law jurisdiction and ask that he enter into a ... peace bond." The Crown agreed to carve out an exception to the peace bond, should Ahmadoun subsequently decide that he needed to summons Tibari to the speeding ticket trial, allowing for service of a summons by the officer-in-charge.

26 Ahmadoun submits that the above course of conduct at trial, combined with the Crown's earlier offer to resolve the case prior to trial, all tends to indicate that the Crown knew they did not have a proper case of criminal harassment to prosecute. Again, the flaws in this analysis relate to Ahmadoun's misconceptions about resolution discussions and about realistic submissions to the court by counsel to the effect that a given set of facts may not be the most serious example of a particular offence and that alternative lesser remedies may be available. Crown counsel have always

been encouraged to take reasonable positions and to be flexible, both in resolution discussions and at trial. It is well established that the gravity of the particular case and the availability of alternative remedies are appropriate "public interest" considerations for the Crown to weigh, even though there is "a case" that could be made out. See: *The Martin Committee Report, supra* at 74-80 and 96-9. None of this reasonable flexibility has ever been taken to amount to an acknowledgement that the Crown has no case to prosecute.

27 I have reviewed Crown counsel's submissions on the criminal harassment count and she accurately set out the elements of the offence and explained how the evidence satisfied each element. In her Reasons for Judgment, Greene J. eventually acquitted Ahmadoun but never suggested that the Crown did not have a proper case to prosecute. Indeed, Greene J. found that the Crown had proved both elements of the *actus reus* of the offence, stating "I do accept [Tibari's] evidence that she did feel harassed." However, Greene J. had a reasonable doubt on the *mens rea* elements. It was a close case on this point as Greene J. flatly rejected some of Ahmadoun's evidence, found that there was "some evidence that [Ahmadoun] should have known that [Tibari] was harassed", and found that one of Ahmadoun's e-mails to Tibari was particularly "troubling" on the critical issue of his alleged intention to harass. During submissions, Greene J. had agreed with Crown counsel that this one e-mail was "very bizarre" and agreed that Ahmadoun had likely misinterpreted one of the two phone calls from the police warning him against further contact with Tibari. As to the Crown's proposed alternative of a peace bond, Greene J. made one relevant finding when she stated, "I do accept Ms. Tibari, that she in fact was fearful. I have no reason to reject her evidence on this point." However, Greene J. went on to note "that Mr. Ahmadoun has had no contact with Ms. Tibari while he has been on bail for this matter" and there was considerable "evidence about his good conduct that was put forward before the Court." In all these circumstances, Greene J. denied the request for a peace bond but concluded with this clear warning or injunction to Ahmadoun:

> Having said that, Mr. Ahmadoun, she [Tibari] does not want contact. If you contact her again it will amount to criminal harassment most likely. All right, sir? Do not contact her. [Emphasis added].

28 As I read the trial judge's Reasons, the Crown succeeded in proving much of its case and almost obtained either a conviction or a peace bond. Indeed, the Crown arguably did obtain something close to a peace bond, given the trial judge's concluding warning to the accused. In these circumstances, there was no possible misconduct in proceeding with the prosecution and seeking either a conviction or a peace bond on the one count of criminal harassment.

29 The fourth step in Ahmadoun's "abuse of process" analysis relates to the Crown's conduct at the pre-enquête. After his acquittal, Ahmadoun swore an Information alleging three offences against Tibari: first, that she committed perjury when testifying at Ahmadoun's criminal trial; second, that she committed public mischief in making allegedly false accusations to the police against Ahmadoun; and third, that she attempted to obstruct justice in allegedly lying to the police and then to the court. After a significant amount of evidence was tendered at the pre-enquête, Justice of the Peace McNish was satisfied that the Applicant had made out a *prima facie* case on all three counts and issued process. As already noted, the Crown then intervened in the prosecution and entered a stay, based on both of the charge screening standards found in the Crown Policy Manual.

30 In summary, Ahmadoun alleges at least five distinct kinds of Crown misconduct at the pre-enquête: first, that the Crown's charge screening standard in relation to Tibari was more rigor-

ous than the standard applied in Ahmadoun's own case; second, that the Crown departed from its proper role and advanced "defences" in favour of Tibari at the pre-enquête; third, that the Crown delayed entering a stay until after the Justice of the Peace had already ruled and issued process, indicating a lack of respect for the judicial process and an intent to circumvent the Court's ruling; fourth, that the Crown applied the charge screening standard to the body of evidence called at the pre-enquête, without first investigating any further evidence that might have been available, which effectively elevated the *prima facie* case standard for issuing process to the higher charge screening standard; and fifth, that the Crown exhibited bias in protecting its own Crown witness from prosecution.

31 None of these allegations of Crown misconduct at the pre-enquête has any merit. The first form of misconduct, alleging a double standard in charge screening, depends on the submission that the Crown's earlier case against Ahmadoun was weak and should not have been prosecuted. I have already rejected this submission.

32 The second submission is factually and legally incorrect. I have reviewed the Crown's submissions at the pre-enquête. She was not advancing "defences" on behalf of Tibari. Instead her focus was on the essential elements or evidentiary requirements of the offences, in particular, whether there was an intent to mislead, whether there was corroboration on the perjury count, and whether Tibari knowingly made false accusations against Ahmadoun. Greene J. had already made findings at trial that Ahmadoun and Tibari had both misinterpreted what was happening at various points. She also rejected some parts of what each side testified to, because it was contradicted by the e-mails, and accepted other parts of what each side testified to. In short, the factual record in the case was one where the Crown could quite properly question whether there was sufficient evidence of certain essential elements. There was also room for reasonable legal debate as to whether Ahmadoun's e-mails and telephone records amounted to "independent" corroboration in law, given that they depended on Ahmadoun's testimony for much of their probative worth. See: *Sopinka et al, The Law of Evidence in Canada, supra* at 985-9. In short, I found nothing improper in the Crown's submissions at the pre-enquête. I also wish to be clear that at the charge screening stage, when the Crown entered a stay, it is perfectly appropriate to take available "defences" into consideration. See: *The Martin Committee Report, supra* at 55-65 and 136-7.

33 The third form of misconduct alleged at the pre-enquête is complicated and hard to understand. It is submitted that the evidence never changed, before or after the pre-enquête, and that the Crown should have entered a stay prior to the pre-enquête if the Crown's genuine view was that the case was not a proper one to prosecute. By waiting until after process issued, the Crown is said to have showed disrespect for the judicial process and to have used the stay as a tool to circumvent a judicial ruling. Ahmadoun relies, in this regard, on the *Scott* line of authority concerning improper use of the stay power in order to circumvent an unfavourable judicial ruling. See: *R. v. Scott* (1990), 61 C.C.C. (3d) 300 (S.C.C.). The law used to be that the Crown could only enter a stay after process had issued. See: *R. v. Dowson* (1983), 7 C.C.C. (3d) 527 (S.C.C.). The law has changed and there is now authority to the effect that the Crown can enter a stay as soon as an Information is sworn. See: *McHale v. Ontario (Attorney General)* (2010), 256 C.C.C. (3d) 26 (Ont. C.A.); *R. v. Pardo* (1990), 62 C.C.C. (3d) 371 (Que. C.A.). As I read the record, Crown counsel was aware of *Dowson*, *supra* and was following the procedure set out in that case. She did not seem to be aware of *McHale, supra,* which had only been decided about eight months before the pre-enquête commenced. In any event, the procedure in *Dowson* is far more generous and fair to a private informant, allowing Ahmadoun to call his evidence and make out a case before the Justice of the Peace for issuing process.

In this way, Crown counsel could take the evidence called at the pre-enquête into account, as well as the Justice of the Peace's decision, before deciding whether to proceed or whether to stay the prosecution. There was nothing unfair about proceeding in this way. Furthermore, the Crown did not use the stay in order to circumvent an unfavourable ruling, for example, after the denial of an adjournment or after an adverse evidentiary ruling at trial, as in the *Scott* line of cases. The Justice of the Peace found that a *prima facie* case existed. The Crown then decided that there was no "reasonable prospect of conviction" and that a prosecution was "not in the public interest". The Justice of the Peace never decided the matters that the Crown decided. They were both exercising completely distinct and separate powers of decision in which neither could encroach. Accordingly, there is no merit to Ahmadoun's third submission.

34 The fourth submission, concerning failure to investigate any further evidence that might have been available was not raised at the pre-enquête. No mention was made of the list of potential additional evidence that the Applicant Ahmadoun has now set out at the end of his Reply Factum, filed with the Court on January 30, 2012, the day before the hearing of this Application. The Crown is not obliged to ask the police to carry out further factual investigations in every case where a charge is laid and where process issues. The very late mention of this list of potential further evidence tends to indicate its peripheral significance. The Applicant does not dispute that the Crown already had a very full file in relation to this case as it had proceeded through one trial and counsel for Ahmadoun had then called a substantial body of evidence at the pre-enquête, with the Crown present throughout. In these circumstances, it was entirely proper to make a charge screening decision on the record that was already in the Crown's hands. See: *The Martin Committee Report, supra* at 130-5. This did not somehow change or elevate the standard for issuing process. As already noted, the Crown's charge screening decision was separate and different from the Justice of the Peace's decision concerning process. There is no merit to Ahmadoun's fourth submission.

35 The fifth and last form of misconduct alleged is that the Crown's motive, in entering a stay, was to protect its former witness Tibari. There is no direct evidence of this biased motive. It depends on circumstantial inferences drawn from the entire course of alleged misconduct that had preceded the stay. In particular, it depends on the first submission to the effect that the Crown utilized a double standard in its charge screening decision in order to protect its own witness Tibari. As I have rejected that first submission and have also rejected the entire alleged course of misconduct, there is simply no factual basis from which to infer bias. I note that new Crown counsel was assigned to the pre-enquête. There is no evidence that she had any connection to, or any communication with, Crown counsel who conducted the prior prosecution of Ahmadoun. I have carefully reviewed her submissions at the pre-enquête and there is no hint of a biased motive. Her submissions were consistently principled and were tenable, on the facts and law applicable to this case. There is no merit to Ahmadoun's fifth submission concerning an allegedly biased motive.

36 I should note that Ahmadoun attempted to frame this bias argument as a s.15 *Charter of Rights* issue, for the first time, in his Reply Factum. Leaving aside the late notice of this *Charter* issue, Ahmadoun concedes that it depends on the same factual basis as his rejected common law bias argument. The s. 15 *Charter* argument lacks any factual foundation, in the same manner as the bias argument.

D. CONCLUSION:

37 None of the Crown misconduct alleged by Ahmadoun has been made out. Whether the various steps in his chain of reasoning are viewed individually, or cumulatively, there is nothing in this

case that even approaches the standard of "flagrant misconduct" and "abuse of process" that the Applicant must meet in order to succeed in his Application.

38 For all these reasons, the Application is dismissed.

M.A. CODE J.

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Case Name:

Baker v. British Columbia (Attorney General)

IN THE MATTER OF the Information of Murray Baker sworn the 19th day of July, 1985 and numbered 35774, in the Provincial Court of British Columbia, Prince George Registry, County of Caribou, alleging that Grant Perry Brown did drive a motor vehicle on a highway, to wit, a highway in the City of Prince George, in a manner dangerous to the public peace, contrary to section 233(4) of the Criminal Code and did commit criminal negligence contrary to section 203 of the Criminal Code
AND IN THE MATTER OF sections 508(1) of the Criminal Code and sections 1, 15(1) and 24(1) of Part I, Schedule B, Canadian Charter of Rights and Freedoms
Between
Murray Baker, Petitioner, and
Attorney General of the Province of British Columbia, Attorney General of Canada, and Grant Perry Brown, Respondents

[1986] B.C.J. No. 3280

26 C.C.C. (3d) 123

1986 CLB 289

16 W.C.B. 71

21 C.R.R. 365

Prince George Registry No. 6690/85

British Columbia Supreme Court
Prince George, British Columbia

Toy J.

Heard: January 7, 1986.
Decision: January 22, 1986.

(21 paras.)

Counsel:

P.M. Packenham, Esq., Counsel for the Petitioner.

O. Kuzma, Esq., Counsel for the Attorney General of British Columbia.

W. Firman, Esq., Counsel for Grant Perry Brown.

REASONS FOR JUDGMENT

1 **TOY J.**:-- The petitioner's six year old daughter, Charlene Lisa, and her younger brother were hit by a motor vehicle driven by Grant Perry Brown on the 6th of April 1985 while they were playing about two feet from the curb on Ford Street, in Prince George. Regrettably Charlene died in hospital four hours later - the immediate cause of death being a fractured skull. There were five independent witnesses to the accident not including the driver, Mr. Brown, and his passenger. Neither Mr. Brown nor his passenger saw the children playing on Ford Street at approximately 5:50 p.m., as at that time Mr. Brown was driving west on Ford Street facing the setting sun.

2 The police conducted an investigation and reported to Regional Crown Counsel at Prince George.

3 A Coroner's Inquest was held on the 10th of June 1985.

4 The petitioner and his wife attended on Regional Crown Counsel anxious to discuss the case and to know what proceedings the Crown intended to take against Mr. Brown.

5 Based on witnesses statements, police and reports of other Crown Counsel in his office, the Regional Crown Counsel decided that there was insufficient evidence to warrant a criminal prosecution, but that it would be appropriate to charge Mr. Brown under sec. 149(a) of the *Motor Vehicle Act* - driving without due care and attention. A traffic violation report for that offence was issued on the 19th of June 1985.

6 The petitioner was not satisfied with Regional Crown Counsel's decision and obtained signatures of some 905 citizens who recommended more serious charges be laid against Mr. Brown.

7 Then on the 19th of July 1985, as was his right, the petitioner attended before a Justice of the Peace and swore an information alleging against Mr. Brown two indictable offences under the *Criminal Code of Canada*:

(1) Driving in a manner dangerous to the public peace - sec. 233(4); and
(2) Causing death by criminal negligence - sec. 203,

the maximum penalties for which are 2 and 5 years respectively.

8 The Justice of the Peace conducted an ex parte hearing pursuant to sec. 455.3(1) of the *Criminal Code* and decided to issue process against Mr. Brown which was made returnable on the 12th of August 1985.

9 On the 12th of August 1985 Regional Crown Counsel directed a clerk of the Provincial Court to enter a stay of proceedings on the information sworn by the petitioner on the 19th of July 1985. It is that act by Regional Crown Counsel that is attacked in these proceedings. The substance of the petitioner's claim is that since the 17th of April 1985 when sec. 15(1) of the *Canadian Charter of Rights and Freedoms* came into effect that the power to stay envisaged in sec. 508(1) is ultra vires only in so far as it relates to "private informations or indictments". If that be so, the petitioner claims that Regional Crown Counsel should be compelled to give notice and recommence the proceedings on the petitioner's information.

10 To have some appreciation of the issue raised in this petition, as a starting point I recommend the reading of the judgment of the late Chief Justice Wilson in a prohibition matter: *Regina v. Schwerdt* (1957), 119 C.C.C. 81, where he analyzed the rights that a private person had under the 1953-4 revision of the *Criminal Cade* to prosecute indictable offences where the Attorney General or counsel on his behalf did not intervene. It is apparent from that judgment that a private person - as opposed to a peace officer or some governmental official - has an unfettered right to seek to have criminal process issued by a Justice of the Peace by swearing an information. If process does issue, the private citizen has additional rights that Chief Justice Wilson examined in detail that are personal to the private citizen or are rights that accrue to counsel representing the private citizen to carry forward the prosecution, i.e. to act as the prosecutor, whether it be at a preliminary inquiry, a summary trial before a Provincial Court judge, a speedy trial before a judge or a trial by judge and jury. In my brief comparison of the present *Criminal Code* with the 1953-4 revision Chief Justice Wilson was considering, I do not observe any substantial changes in those rights that all citizens of this country possess to privately prosecute indictable offences.

11 However, those rights, unlike the right to swear an information, are not absolute or completely unfettered. I do not propose to comment on any of the qualifications to the private person's rights save one and that is once the Attorney General or counsel of his behalf intervenes, or for that matter causes informations to be sworn, then the counsel appointed on behalf of the Attorney General assumes control of the prosecution and that counsel's rights are paramount to the private person's or his counsel's rights. The first case I am aware of that so held in Canada is *Regina v. Gilmore* (1903), 7 Can. C.C. 219. As recently as 1975 the issue of a conflict between private prosecutors and representatives of the Ontario Attorney General arose in *Re Bradley* (1975), 24 C.C.C. (2d) 482. After referring to Schwerdt and other cases, Mr. Justice Arnup, speaking for the Ontario Court of Appeal, said in part at pp. 489 and 490:

> "... None of them deals with the specific question raised on this appeal, but none is inconsistent with the conclusion I have reached, and there runs through them a common thread of the underlying philosophy of criminal law, namely, that crimes are offences against the State. The Sovereign is the protector of the King's peace.
>
> In Anglo-Saxon times, crimes were regarded as committed not against the State but against a particular person or his family. The victim or injured party or some directly interested party brought the offence to justice, and personally conducted the prosecution. In Norman times, a change in the concept of the nature of a criminal offence began. A public crime was no longer a wrong against an individual; it was wrong against the State. By the familiar device of legal fiction,

more and more crimes were regarded as a breach of the King's peace. Thus, by the 19th century Blackstone was able to state categorically that "(the Sovereign] is therefore the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law" (*Blackstone's Commentaries*, vol. 1, c. 7, p. 268). See also *R. v. Strong* (1915), 24 C.C.C. 430 at p. 435, 26 D.L.R. 122, 43 N.B.R. 190; *R. v. Whiteford, supra*, at p. 77.

The Attorney-General, and his agent the Crown Attorney, represent the Sovereign in the prosecution of crimes. The role of the private prosecutor, permitted by statute in this country, is parallel to but not in substitution for the role of the Attorney-General, and where the two roles come into conflict, the role of the Crown's prosecutor is paramount, where in his opinion the interests of justice require that he intervene and take over the private prosecution.

12 Counsel for the petitioner, in his carefully worded argument to me conceded that prior to the coming into force of sec. 15(1) of the *Canadian Charter of Rights and Freedoms* that it could not be doubted that the Attorney General had an unqualified right to stay proceedings. Sec. 508 reads in these words:

"ATTORNEY GENERAL MAY DIRECT STAY--Recommencement of proceedings.

508.(1) The Attorney General or counsel instructed by him for the purpose may, at any time after an indictment has been found and before judgment, direct the clerk of the court to make an entry on the record that the proceedings are stayed by his direction, and when the entry is made all proceedings on the indictment shall be stayed accordingly and any recognizance relating to the proceedings is vacated, 1953-54, c. 51, s. 490.

(2) Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new charge or preferring a new indictment as the case may be, by the Attorney General or counsel instructed by him for the purpose giving notice of the recommencement to the clerk of the court in which the stay of proceedings was entered, but where no such notice is given within one year after the entry of the stay of proceedings, the proceedings shall be deemed never to have been commenced. 1972, c. 13, s. 43(1)."

13 In considering whether a change has occurred since April 17th, 1985 two sections of the Charter may have to be interpreted.

"RIGHTS AND FREEDOMS IN CANADA.

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

14 The petitioner's counsel's submission is that when Regional Crown Counsel directed that a stay of proceedings be entered, the petitioner was deprived of his right to equality before the law. The inequality he points to is the inequality between the petitioner, who swore the information, and the counsel acting on behalf of the Attorney General, i.e. Regional Crown Counsel.

15 There are no decided cases on this novel point. Nor do any of the cases under the *Canadian Charter of Rights* R.S.C. 1970, c. 44 shed any light on this problem as all of the cases decided under that statute that were referred to me were attacks being made by accused persons against what was perceived to be unfair or unequal treatment by the prosecuting authority directed toward the accused. Here the competition is between an individual, the petitioner informant, and counsel acting on behalf of the Attorney General.

16 In my view, what sec. 15(1) deals with is equality under the law without justifiable discrimination between individuals. Here there is nothing in sec. 508(1) indicating an unevenness of application to individuals or groups. One would hope not, but it may very well be that cases do arise where in the application of sec. 508(1) that some individuals' rights may be discriminated against, but that is clearly not the case here; nor was there any suggestion thereof.

17 What the petitioner is complaining about is that the holder, for the time being, of the office of Regional Crown Counsel has a paramount right to his, the petitioner's, right as a private person to stop the criminal proceedings that were initiated when he swore the information. To digress for a moment it must, of course, be observed that it is not the swearing of the information that initiates the criminal proceedings - it is only after the Justice of the Peace has made a determination and has decided that a summons or warrant should issue that the accused becomes involved and in jeopardy in a criminal proceeding against him.

18 Although Regional Crown Counsel is a live and well human being, I do not categorize his right, duty or function in deciding whether to authorize the initiation of criminal proceedings or the staying thereof as acts or deeds of an individual such that when compared to the petitioner as the informant it can be argued that the latter has been discriminated against and therefore entitled to a constitutional remedy under sec. 24.

19 The policy consideration that I consider of significance here is whether a private prosecutor's right to prosecute should be an unfettered one. In the recent past counsel acting on behalf of the Attorney General in our criminal courts have been discharging their responsibilities with firmness and practical objectivity that has generally served our communities satisfactorily. The prospect of the loss of that attribute of objectivity convinces me that no such change is necessary at this time.

20 It is therefore my first conclusion that sec. 15(1) of the *Charter of Rights and Freedoms* is not applicable to read down or declare in part sec. 508(1) ultra vires. But even if that were not so and the petitioner's rights have been infringed I would find that sec. 1 of the *Canadian Charter of Rights and Freedoms* comes into play. In both England and the United States of America, the two closest democracies I know of to our Canadian way of life, seem to be surviving under systems where the state rather than the individual is in the paramount position when it comes to the prosecution of criminal proceedings.

21 The petition is accordingly dismissed.

qp/s/qlmss/qlrdp

Indexed as:

Campbell v. Attorney-General of Ontario

[1987] O.J. No. 68

58 O.R. (2d) 209

38 D.L.R. (4th) 64

31 C.C.C. (3d) 289

Ontario
High Court of Justice

Craig J.

January 30, 1987

Counsel:

Michael Bader, Q.C., and James K. Stuart, for applicant.

Angela M. Costigan and Karla K. Gower, for respondent.

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1 **CRAIG J.**:-- This is a motion on behalf of the Attorney- General for an order pursuant to rule 21.01(1)(a) for the determination before trial of a question of law as to whether the plaintiff has a cause of action against the defendant in the circumstances set forth in the statement of claim, and for leave to file the affidavit to be mentioned.

2 In this action the plaintiff claims a declaration that the stay of proceedings directed by the Attorney-General for the Province of Ontario on September 24, 1986, in respect to seven counts of procuring a miscarriage contrary to s. 251 of the Criminal Code laid against Drs. Henry Morgentaler, Robert Scott and Nikki Colodny is void and of no force and effect.

3 Also the plaintiff claims orders of mandamus requiring the Attorney-General to continue the proceedings in respect to the above seven counts and requiring a justice of the peace to issue either a summons or a warrant for the arrest of the above-mentioned doctors.

4 Counsel for the Attorney-General submits that the court has no jurisdiction to review or otherwise make a declaration with respect to the direction of the Attorney-General to stay prosecutions

pursuant to s. 508 of the Criminal Code, nor to direct (by mandamus) the Attorney-General to continue with prosecutions where he has directed a stay. He therefore seeks an order dismissing the action.

5 For the purpose of this motion the facts alleged in the statement of claim must be deemed to have been proved. Also, before dismissing the action at this stage, I must be satisfied that it is "plain and obvious that the action cannot succeed": Operation Dismantle Inc. et al. v. The Queen et al. (1985), 18 D.L.R. (4th) 481, [1985] 1 S.C.R. 441, 13 C.R.R. 287. Upon consent of counsel for the plaintiff and pursuant to rule 21.01(2)(a), I permitted counsel for the Attorney-General to file the affidavit mentioned above to show the reasons given by the Attorney-General for directing a stay of these prosecutions.

Issues

(1) Does the direction of the Attorney-General to stay the prosecutions give rise to a constitutional issue that ought to be reviewed or considered at a trial?

(2) Whether the statement of claim discloses a cause of action is closely related to the issue of standing. Does the plaintiff have a sufficient personal interest in the prosecutions of the doctors to bring him within the requirement for standing to challenge the exercise of the discretionary statutory power of the Attorney-General under s. 508 of the Criminal Code. In the Minister of Finance of Canada et al. v. Finlay (unreported, released December 18, 1986 [since reported 33 D.L.R. (4th) 321, [1987] 1 W.W.R. 603]) Le Dain J., speaking for the court, stated at p. 43 [p. 343 D.L.R.]:

> The issues of standing and reasonable cause of action are obviously closely related, and ... tend in a case such as this to merge. Indeed, I question whether there is a true issue of reasonable cause of action distinguishable, as an alternative issue, from that of standing.

(3) Whether the exercise of discretionary power reposed in the Attorney-General under s. 508 of the Criminal Code is justiciable (i.e., whether the court is an appropriate forum to resolve the issues raised in this case).

6 Relevant allegations contained in the statement of claim are as follows:

1. The plaintiff carries on business at the premises municipally known as 87 Harbord Street, in the City of Toronto.

. . . . .

3. Since in or about June, 1983 Dr. Henry Morgentaler has operated an abortion clinic at the premises municipally known as 85 Harbord Street, in the City of Toronto, (hereinafter referred to as the Morgentaler Clinic).
4. The premises known municipally as 85 and 87 Harbord Street are located in one building. They are semi-detached and share a common stairway.
5. Since in or about May, 1986, Dr. Robert Scott has operated an abortion clinic at 157 Gerrard Street in the City of Toronto (hereinafter referred to as the Scott Clinic).

6. Dr. Scott performed abortions at the Morgentaler Clinic from in or about June, 1983 until in or about February, 1986.
7. From in or about June to in or about July, 1983, Dr. Leslie Smoling performed abortions at the Morgentaler Clinic.
8. Since in or about February, 1986 Dr. Nikki Colodny has performed abortions at the Morgentaler Clinic.
9. The Morgentaler and Scott Clinics do not meet the requirements of Section 251 of the Criminal Code. They are not accredited or approved hospitals and the decision to perform an abortion therein is not reviewed by a therapeutic abortion committee which is to certify in writing that in its opinion the continuation of the pregnancy of the woman desiring an abortion would or would be likely to endanger the woman's life or health.
10. In or about July 5, 1983 Drs. Henry Morgentaler, Robert Scott and Leslie Smoling were charged that they did conspire with each other with intent to procure the miscarriage of female persons contrary to Section 251 of the Criminal Code. Their trial led to an acquittal.

7 The statement of claim further alleges that on October 25, 1985, the Ontario Court of Appeal ordered a new trial, and that the accused then appealed that decision to the Supreme Court of Canada.

8 On September 24, 1986, under the instructions of Chief of Police Marks, the three doctors were further charged with seven counts of procuring a miscarriage contrary to s. 251 of the Criminal Code; five counts related to Drs. Morgentaler and Colodny and two counts related to Dr. Scott.

9 On that same day the doctors appeared at a bail hearing before Her Honour Judge Bernhard. At this time the Attorney- General directed a stay of proceedings. Reasons were given for so doing; the reasons may be relevant. A transcript of the proceedings before Judge Bernhard is attached to the affidavit that I admitted upon consent. At this time counsel for the Attorney-General addressed the court, in part, as follows:

> The Attorney General asks me to convey his respects to the Court. I have been instructed by him to direct the clerk of this Court to enter on the record that these proceedings are stayed by his direction, pursuant to Section 508(1) of the Criminal Code of Canada.
>
> The Attorney General has asked me to communicate to the Court his reasons for this decision.
>
> Constitutional authority in this country, and the United Kingdom, makes it plain that the decision to investigate alleged offences and to lay charges is the constitutional responsibility of the police. The Crown Law Office must determine how and when to proceed with charges once they are laid. In 1925 Sir John Simon made it plain that there was no obligation to prosecute merely because there is what the lawyers call "a case".

The discretion of the Attorney General to proceed with a charge at any given time, now or later, is a quasi-judicial one in which the effect of the prosecution upon the administration of law and of government in the abstract must be considered.

The facts are that on July 5th, 1983, Drs. Morgentaler, Scott and another were charged with offences contrary to s. 251 of the Criminal Code. Their trials led to an acquittal by a jury before the Associate Chief Justice of the High Court of Justice on November 8th, 1984.

The Crown appealed against these acquittals. The Court of Appeal for Ontario did not convict the accused, but ordered a new trial on October 1st, 1985.

Immediately the Crown Law Office indicated its intention to proceed with that new trial at the earliest possible date.

On October 8th, 1985, the accused appealed to the Supreme Court of Canada. The Supreme Court of Canada will commence hearing argument of their appeal within two weeks, namely, on October 8th of 1986.

Meanwhile, on December 19th, 1984, a second charge of alleged offences under s. 251 of the Criminal Code were laid against Drs. Morgentaler and Scott. Various judges of the Supreme Court of Ontario have adjourned the trial of these charges pending a determination in the matter in the Supreme Court of Canada in Regina v. Morgentaler, Scott et al. (No. 1). Indeed, on January 16th, 1986, when the Crown indicated that it was prepared to proceed to trial, the Associate Chief Justice of the High Court of Justice said in adjourning the matter further: "It is foolish to proceed until the Supreme Court of Canada rules".

The Attorney General believes that the following conclusions cannot, at this stage, be doubted.

1. In argument commencing on October 8th, 1986, the Supreme Court of Canada will give consideration to the question of whether the defence of Dr. Morgentaler and Dr. Scott to this and all other charges, namely, the defence of necessity, is available to them. The determination of the Supreme Court of Canada on this issue will decide whether Drs. Morgentaler and Scott were properly acquitted by a jury on November 8th, 1984. There is every probability that the legality of conduct such as that evidenced by Drs. Morgentaler and Scott and others will be for once and for all conclusively determined.
2. It is clear that whatever charges are laid today, and any other day, there can be no trial of those charges until the Supreme Court of Canada makes its determination. The Associate Chief Justice of the High Court of this province has said so. It thus

follows that any charge laid today cannot be tried until after the Supreme Court of Canada decision is given.

3. Whatever may be said about charges laid at an earlier date, these charges are laid on the very eve of commencement of the Supreme Court of Canada argument in which the charge and proposed defence will be authoritatively determined.

The Attorney General has given long and anxious consideration to the circumstances that prevail as these charges are laid and come before this Court. The Supreme Court of Canada will shortly commence its deliberation in Regina v. Morgentaler, Scott et al. (No. 1). The courts have made it clear that no trial of any outstanding charges will occur until the Supreme Court of Canada's determination is given.

Accordingly, it is the view of the Attorney General that these charges should not be proceeded with until the Supreme Court of Canada has spoken on the legal issues in the case. The Attorney General has the right to recommence these proceedings. Once the Supreme Court of Canada renders its decision, the Attorney General will review the matter, and take the appropriate action.

At bottom, these proceedings raise fundamental questions about the integrity of the legal process and the rule of law. There is already a process underway in which the law of Canada, and its meaning in this situation, will be conclusively determined. This process, which leads to the Supreme Court of Canada, is both lengthy and somewhat cumbersome, but this process, no matter how time consuming or inconvenient, must be maintained and respected.

For these reasons, Your Honour, I am asking that the Court enter a stay of proceedings on all seven informations against these accused.

. . . . .

THE COURT: I send my deepest respects to the Attorney General. I couldn't agree with him more. Your request will be followed, and proceedings will be stayed.

. . . . .

MR. CULVER [Counsel for the Attorney-General]: Section 508(1) of the Criminal Code -- as Your Honour, and Mr. Manning, and other counsel are aware -- allows the Attorney General to recommence proceedings at any time within a year of this date. It's not tantamount to a withdrawal of charges, or it's not tantamount to a dismissal of charges, not is it tantamount to a dropping of charges. It's a stay of proceedings.

10 The arguments on appeal to the Supreme Court of Canada commenced October 8, 1986; judgment is still reserved.

11 Section 508(1) and (2) of the Criminal Code provides as follows:

> 508(1) The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated.
>
> (2) Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new information or preferring a new indictment, as the case may be, by the Attorney General or counsel instructed by him for that purpose giving notice of the recommencement to the clerk of the court in which the stay of the proceedings was entered, but where no such notice is given within one year after the entry of the stay of proceedings, or before the expiration of the time within which the proceedings could have been commenced, whichever is the earlier, the proceedings shall be deemed never to have been commenced.

The alleged constitutional issue herein

12 In Finlay, supra, Le Dain J. particularly considered the scope of three cases, namely: Thorson v. A.-G. Can. et al. (No. 2) (1974), 43 D.L.R. (3d) 1, [1975] 1 S.C.R. 138, 1 N.R. 225; Nova Scotia Board of Censors v. McNeil (1975), 55 D.L.R. (3d) 632, [1976] 2 S.C.R. 265, 12 N.S.R. (2d) 85, and Minister of Justice of Canada et al. v. Borowski (1981), 130 D.L.R. (3d) 588, 64 C.C.C. (2d) 97, [1981] 2 S.C.R. 575. He indicated that "opinion has differed as to the scope and implication of what was held in Thorson, McNeil and Borowski". In all of those cases there was a challenge to the constitutional validity of legislation. For example in Borowski the substantive question raised by the action for a declaration was whether the abortion provisions of the Criminal Code were rendered inoperative by the Canadian Bill of Rights. In delivering the judgment in Finlay, Le Dain J. stated at p. 27 [p. 336 D.L.R.]:

> In Borowski, Martland J., delivering the judgment of the majority, summed up what Thorson and McNeil stood for as follows at p. 606 D.L.R., p. 598 S.C.R.:
>
> "I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court."
>
> I take that to be an indication that the court was not purporting in Thorson, McNeil and Borowski to lay down a rule or principle respecting public interest standing that extended beyond a challenge to the constitutionality of legislation.

13 In the instant case the constitutional validity of s. 508 is not in doubt; it is not challenged by the plaintiff. Rather it is a case whether, as alleged by the plaintiff, the stay of the prosecutions pursuant to s. 508 has resulted in a breach or denial of the Charter rights of the plaintiff or anyone he can claim to represent. On this issue, counsel for the plaintiff relies on Operation Dismantle, supra; of course that case held that Cabinet decisions are reviewable by the courts under s. 32(1)(a) of the Canadian Charter of Rights and Freedoms and that the executive branch of the Canadian Government bears a general duty to act in accordance with the dictates of the Charter.

14 The plaintiff herein alleges that the Attorney-General's decision to stay has resulted in activities that are inconsistent with his Charter rights (ss. 7 and 15(1)). The statement of claim alleges that in addition to the criminal charges laid against Drs. Morgentaler, Scott, Smoling and Colodny, criminal and quasi-criminal charges (from time to time) have been laid against a large number of persons who have attended at, in or about the Morgentaler Clinic and the plaintiff's premises to express their support or opposition to that clinic. Also that there have been many convictions in respect to the charges. These included trespass charges, assaults, watching and besetting, causing a disturbance, mischief, and failing to leave the premises. The statement of claim alleges:

> 29. The Plaintiff pleads that his right to life, and security of the person and his right not to be deprived thereof except in accordance with the principles of fundamental justice as guaranteed by Section 7 of the Canadian Charter of Rights and Freedoms is violated in that:
> (i) The premises of the Plaintiff are the scene of frequent criminal and quasi-criminal activity which constitutes a threat to the life and security of the Plaintiff and his staff.
> 30. The Plaintiff pleads that his right to equal protection and equal benefit of the law without discrimination as guaranteed by Section 15 of the Canadian Charter of Rights and Freedoms is violated in that:
> (i) the premises of the Plaintiff are the scene of criminal and quasi-criminal activity which places the Plaintiff's premises at a risk to which the premises of other taxpayers of the City of Toronto are not exposed.

15 It is alleged that the demonstrations in the area of the clinic (giving rise to the criminal charges) resulted from the decision of the Attorney-General to stay the proceedings against the doctors. Assuming, as I do, that they are proved, they result from the actions of third parties (some opposed to and some in favour of abortion); they are speculative and too remote. Also, there could be no assurance that these demonstrations would not have continued had the stay not been directed. If there is any interference with the plaintiff's rights in relation to trespass, mischief or the like, he is entitled to call upon the police for protection or to commence actions for damages against any offenders. As to alleged discrimination in relation to his premises, the same comments apply. In my opinion the allegations in the statement of claim do not support any reasonable cause of action that the plaintiff has been deprived of his personal Charter rights under ss. 7 and 15.

16 The statement of claim further alleges:

> 31. The Plaintiff pleads that the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice as guaranteed by Section 7 of the Canadian Charter of Rights

and Freedoms to the unborn children aborted or about to be aborted at the Morgentaler and Scott Clinics is violated in that:

(i) they are denied a right to the balancing of the interest in protecting their lives as against the interest of their mothers who desire an abortion when that balancing of interests is guaranteed by Section 251 of the Criminal Code.

32. The Plaintiff pleads that the right to equality before and under the law and the right to equal protection and equal benefit of the law without discrimination as guaranteed by Section 15 of the Canadian Charter of Rights and Freedoms to unborn children aborted or about to be aborted at the Morgentaler and Scott Clinics is violated in that:

(i) their lives are destroyed contrary to the law as provided in Section 251 of the Criminal Code while other unborn children have the benefit of that law.

17 The Criminal Code provides:

> 206(1) A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother whether or not
>
> (a) it has breathed,
> (b) it has an independent circulation, or
> (c) the navel string is severed.

18 I am bound by Dehler v. Ottawa Civic Hospital et al. (1984), 25 O.R. (2d) 748, 101 D.L.R. (3d) 686, 14 C.P.C. 4; affirmed 29 O.R. (2d) 677n, 117 D.L.R. (3d) 512n (Ont. C.A.); leave to appeal to the Supreme Court of Canada refused D.L.R. loc. cit., [1981] 1 S.C.R. viii, 36 N.R. 180n. In that case Robins J. stated at p. 757 O.R., p. 695 D.L.R.:

> Since the law does not regard an unborn child as an independent, legal entity prior to birth, it is not recognized as having the rights the plaintiff asserts on its behalf or the status to maintain an action. A foetus, whatever its stage of development, is recognized as a person in the full sense only after birth ... In short, the law has set birth as the line of demarcation at which personhood is realized, at which full and independent legal rights attach, and until a child en ventre sa mere sees the light of day it does not have the rights of those already born.

19 Robins J. went on to hold that a plaintiff who claims to represent unborn children and seeks declaratory and injunctive relief against a hospital to prohibit further therapeutic abortions lacks standing to bring such an action.

20 Assuming that the plaintiff might have a sufficiently direct interest to represent unborn children, it is my opinion (for the above reasons) that the unborn children do not enjoy any Charter rights.

21 For the above reasons the allegations in the statement of claim do not support a conclusion that the decision of the Attorney-General was inconsistent with any alleged Charter rights. There is no constitutional issue to be reviewed by the court; or that would give rise to a cause of action.

Has the plaintiff the status or standing to maintain this action?

22 In Minister of Finance of Canada et al. v. Finlay (1986), 33 D.L.R. (4th) 321, [1987] 1 W.W.R. 603, the plaintiff was a resident of Manitoba and a person in need within the meaning of the Canada Assistance Plan seeking a declaration that cost- sharing payments by Canada to Manitoba pursuant to the plan are illegal, and also an injunction to stop the payments because of provincial non-compliance with the conditions and undertakings imposed by the plan. The plaintiff claimed to be prejudiced by the provincial non-compliance. The issue in Finlay was whether the plaintiff had standing to seek the declaration and injunctive relief and whether the statement of claim disclosed a reasonable cause of action. It was a non-constitutional challenge by an action for a declaration of statutory authority for public expenditure. The court held that Thorson, McNeil and Borowski, while not providing "clear and direct authority for the recognition of public interest standing, as a matter of judicial discretion, to bring a non-constitutional challenge ... did not exclude such recognition" (p. 34 [p. 339 D.L.R.]). The court did recognize and grant public interest standing to the plaintiff in Finlay, holding that such recognition was subject to the following requirements: (1) that the action is justiciable; (2) that a serious issue is raised and that a citizen has a genuine interest in the case, and (3) that there be no other reasonable and effective manner in which the issue might be brought before the court. The court indicated that all three requirements were satisfied. First, that the issues of provincial non-compliance raised questions of law that merited the consideration of a court and were clearly justiciable; second, that there was a serious issue raised and the plaintiff himself was a person in need and he had a direct and genuine interest in the issues "and not a mere busybody"; and third, it was clear that the Attorney-General would not have consented to the institution of proceedings.

23 In the instant case, the gist of the plaintiff's argument is that all citizens have, or ought to have, an interest in seeing the criminal laws of the land upheld and enforced; and that the Attorney-General has a duty to uphold and enforce the law and that by granting the stay he breached that duty in that Drs. Morgentaler, Scott and Colodny have been left free to continue breaking the law, as the law now stands: Attorney-General v. Great E astern R. Co. (1879), 11 Ch. D. 449, and Attorney- General ex rel. McWhirter v. Independent Broadcasting Authority, [1973] Q.B. 629.

24 In the case at Bar, what "genuine interest" does the plaintiff have? He is a stranger to the criminal prosecutions against the doctors. The allegations in the statement of claim do not support any claim that his rights have been denied or infringed. The comments of Robins J. in Dehler at p. 762 O.R., p. 700 D.L.R., apply to this issue:

> Accepting the plaintiff's ability to prove his allegations, in my opinion, he manifestly lacks standing to prosecute these claims or obtain the relief sought. No dispute or controversy exists between him and the defendants. He has no individual rights in law or equity which have been denied or infringed. No personal, proprietary or parental interests of his are at stake or in issue. The plaintiff's position is identical to that of any private citizen and as such he has no status to enforce the criminal law or seek redress of public wrongs by his own private action.

25 This case differs from Medhurst v. Medhurst et al., 46 O.R. (2d) 263, 9 D.L.R. (4th) 252, 38 R.F.L. (2d) 225, per Reid J., where the plaintiff husband commenced an action to enjoin his wife undergoing an abortion procedure. He had a direct interest in the matter and was granted standing

by Reid J. for the purpose of applying to the court to enforce compliance with s. 251 of the Criminal Code.

26 In my opinion the plaintiff does not have the status or standing to seek a review of the prosecutorial discretion of the Attorney-General.

Justiciability and reviewability of the Attorney-General's discretion

27 The Attorney-General, and his agent, the Crown Attorney, represent the Queen in the prosecution of crimes, and the role of the Attorney-General and the Crown Attorney is paramount to that of a private prosecutor: Criminal Code, ss. 2 and 72(1); Re Bradley et al. and The Queen (1975), 9 O.R. (2d) 161 at p. 169, 24 C.C.C. (2d) 482 at pp. 489-90, 35 C.R.N.S. 192 (Ont. C.A.).

28 At common law, the Attorney-General's exercise of discretion in directing a stay of proceedings was a prerogative power not subject to judicial review. His power to stay proceedings is a fundamental part of the Canadian criminal justice system. It has long and historic roots. The decision is not reviewable by the courts but is one for which the Attorney-General is accountable to the Legislature or to Parliament: Dowson v. The Queen (1983), 2 D.L.R. (4th) 507, 7 C.C.C. (3d) 527, [1983] 2 S.C.R. 144 (S.C.C.): see also Ewaschuk, Criminal Pleadings and Practice in Canada (1983), at p. 295; and Sun, "The Discretionary Power to Stay Criminal Proceedings", 1 Dalhousie L. Rev. 483 (1974); R. v. Dube et al. (unreported, November 28, 1986, Judge Vannini, Ont. Dist. Ct. [summarized 17 W.C.B. 457]). It was decided in Dowson that a summons or warrant must first be issued before the power to stay may be exercised. Subsequent amendments to the Code permit the Attorney-General to direct a stay any time after an information is laid.

29 Another relevant feature of the role of the Attorney-General in criminal prosecutions, and one which has received considerable judicial attention, both before and since the enactment of the Charter, is the power to prefer a direct indictment under s. 507 of the Criminal Code. Before the enactment of the Charter, the exercise by the Attorney-General of his accusatorial function in preferring a direct indictment was considered to be beyond judicial review: Re Saikaly and The Queen (1979), 48 C.C.C. (2d) 192 (Ont. C.A.). In delivering the judgment of the court, MacKinnon A.C.J.O. touched upon the powers of the Attorney-General including his powers to stop prosecutions and the exercise of his discretion. He stated at pp. 195-6:

> The principles which we feel are applicable were enunciated most recently by Viscount Dilhorne in Gouriet v. Union of Post Office Workers et al., [1977] 3 W.L.R. 300 at pp. 319-20. Viscount Dilhorne (a former Attorney-General) said the following:
>
> "The Attorney-General has many powers and duties. He may stop any prosecution on indictment by entering a nolle prosequi. He merely has to sign a piece of paper saying that he does not wish the prosecution to continue. He need not give any reasons. He can direct the institution of a prosecution and direct the Director of Public Prosecutions to take over the conduct of any criminal proceedings and he may tell him to offer no evidence. In the exercise of these powers he is not subject to direction by his ministerial colleagues or to control and supervision by the courts."

> A somewhat similar view, on of course different facts, was taken by the Supreme Court of Canada in R. v. Smythe (1971), 3 C.C.C. (2d) 366 at p. 370, 19 D.L.R. (3d) 480, [1971] S.C.R. 680 at p. 686, where Chief Justice Fauteux, speaking for the Court, said the following:
>
> "Obviously, the manner in which the Attorney-General of the day exercises his statutory discretion may be questioned or censured by the legislative body to which he is answerable, but that again is foreign to the determination of the question now under consideration. Enforcement of the law and especially of the criminal law would be impossible unless someone in authority be vested with some measure of discretionary power."

30 I am aware of only one Canadian case (to be mentioned later) where a court has interfered with the discretion of the Attorney-General to stay criminal proceedings. However, the Manitoba Court of Appeal has indicated in two recent decisions that where there is "flagrant impropriety" on the part of the Attorney-General in exercising his discretion to prefer a direct indictment where the accused has been discharged at a preliminary inquiry, a court may interfere. Re Balderstone et al. and The Queen (1983), 4 D.L.R. (4th) 162, 8 C.C.C. (3d) 532, [1983] 6 W.W.R. 438 (Man. C.A.); leave to appeal to the Supreme Court of Canada refused D.L.R. and C.C.C. loc. cit., 27 Man. R. (2d) 240n, was one of those cases. In upholding the decision of Scollin J. refusing to quash the indictment, Monnin C.J.M. expressed the principle as follows at p. 169 D.L.R., p. 539 C.C.C.:

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

(Emphasis added.)

31 In R. v. Moore et al. (1986), 26 C.C.C. (3d) 474, 50 C.R. (3d) 243, 19 C.R.R. 32, the Manitoba Court of Appeal dealt with the same issue as was before the court in Re Balderstone. It was argued that the law had changed since Re Balderstone because of the decision in Operation Dismantle Inc. et al. v. The Queen et al. (1985), 18 D.L.R. (4th) 481, [1985] 1 S.C.R. 441, 13 C.R.R. 287. In delivering the judgment of the court, Huband J.A. disagreed. In so doing he stated at p. 476:

> If the courts have the power to inquire into the exercise of that discretionary authority by the Attorney-General, then I do not see on what basis every exercise of his discretionary powers would not also be reviewable. There would have to be hearings and representations presented and heard before deciding what criminal charges should be laid against whom. The criminal law system would be in a shambles.

(Emphasis added.)

32 Since the Charter the provisions of s. 507 of the Code have been held to be constitutionally valid: Re Regina and Arviv (1985), 51 O.R. (2d) 551, 20 D.L.R. (4th) 422, 19 C.C.C. (3d) 395 (Ont. C.A.), per Martin J.A.; leave to appeal to the Supreme Court of Canada refused D.L.R. and C.C.C. loc. cit., [1985] 1 S.C.R. v.

33 Based on the above authorities, absent a constitutional issue to be reviewed, the action is not justiciable with the possible exception where it can be said that there was "flagrant impropriety" on the part of the Attorney-General in directing the stay. Here there can be no suggestion that the Attorney- General is failing to uphold the law or that he is acting out of improper motives or for an improper purpose. As indicated earlier, he had given long and anxious consideration to the circumstances. The reasons for directing the stay were quoted earlier herein; there was uncertainty in the law and any charge against the doctors would not be tried until after the decision of the Supreme Court of Canada. It seems to me that the order directing the stay was quite logical, particularly where the order directing the stay is not a dismissal, and where the Attorney-General indicates that he will review the matter once the Supreme Court of Canada renders its decision.

34 I turn now to the one case mentioned earlier where a court did interfere with the prosecutorial discretion of the Attorney-General under s. 508 of the Criminal Code. In Chartrand v. Attorney-General of Quebec et al., unreported, released December 12, 1986, Bergeron J. dealt with a situation where the applicant, a private complainant, laid an information pursuant to s. 455 of the Criminal Code alleging that a Dr. Machabee was procuring miscarriages contrary to s. 251 of the Code. At the conclusion of the preliminary hearing he was committed for trial before a judge and jury. At this point the Attorney-General of Quebec intervened and entered a stay of the prosecution. As I interpret his reasons, Bergeron J. quashed the decision of the Attorney-General to stay the criminal proceedings on the basis that the reasons for directing a stay were based on two "false premises" referred to at p. 14 as follows:

> ... first that it was impossible to obtain a guilty verdict in the matter of illegal abortion, and second that in the case of Dr. Machabee he had had examined the evidence submitted at the preliminary hearing, and that on the basis of the evidence examined and in view of the state of the law, it was advisable to order the adjournment of the proceedings.

35 He invoked s. 15 of the Charter. At p. 15 he indicated that s. 15 gives a citizen "the right to complain if in the relationship between State and citizen an interference develops which could cause him to be deprived of a right".

36 And at p. 16:

> ... the article [s. 508] assumes that both the State and the citizen are equal before the law; this law being the same for both, the latter may institute criminal proceedings and the former may interrupt them. The inequality of the citizen will not materialize unless it originates from an arbitrary exercise of the powers which the legislation grants.

37 He concluded, at pp. 44-5:

> I therefore do not believe that a decision to adjourn proceedings, based on premises of possible unconstitutionality of the law and on difficulties arising from ac-

> quittals in the circumstances outlined above, may be considered as a justifiable reason for not applying the law as required by the duties of the Attorney-General.
>
> In the present instance the law has to be applied, there is no possibility of uncertainty: it has not been applied. The evidence adduced supports right away the conclusions requested.

38 With respect I disagree with the decision in Chartrand. Assuming that the applicant was entitled to standing, it is my view that on the facts as disclosed in the English translation given to me, the Attorney-General's reasons for stay could not be characterized as a "flagrant impropriety"; particularly when, as in the case at Bar, the decision of the Ontario Court of Appeal had been appealed to the Supreme Court of Canada. If it is assumed that the reasons of the Attorney-General in Chartrand resulted in a "flagrant impropriety", that conclusion is not applicable to the reasons of the Attorney-General in the case at Bar.

39 For all of the above reasons the action cannot succeed because the plaintiff lacks standing and the issues are not justiciable; the action is therefore dismissed. The question of costs was not argued. Counsel may speak to me as to costs or make very short written submissions.

Action dismissed.

Case Name:

Davidson v. British Columbia (Attorney General)

IN THE MATTER OF a Private Information Charging George W. Bush Under Section 269.1 of the Criminal Code
Between
Gail Davidson and Lawyers Against the War, Appellants (Applicants), and
Attorney General of British Columbia, Respondent

[2006] B.C.J. No. 2630

2006 BCCA 447

[2006] 12 W.W.R. 591

231 B.C.A.C. 136

58 B.C.L.R. (4th) 13

214 C.C.C. (3d) 373

71 W.C.B. (2d) 303

2006 CarswellBC 2453

Vancouver Registry No. CA033710

British Columbia Court of Appeal
Vancouver, British Columbia

Newbury, Levine and Kirkpatrick JJ.A.

Heard: August 17, 2006.
Judgment: October 11, 2006.

(40 paras.)

Criminal law -- Offences -- Offences against public order -- War crimes or crimes against humanity -- Preliminary application by the Crown for an order dismissing the appeal for want of jurisdiction -- Appellants sought to appeal decisions dismissing proceedings brought against the President of the United States alleging that he counseled, aided and abetted torture in Abu Ghraib and Guantanamo Bay -- Application allowed and appeal dismissed -- Appellants failed to obtain the consent of the Attorney General of Canada not later than eight days after the information was laid -- Criminal Code, s. 7(7).

Criminal law -- Jurisdiction -- Over accused -- Preliminary application by the Crown for an order dismissing the appeal for want of jurisdiction -- Appellants sought to appeal decisions dismissing proceedings brought against the President of the United States alleging that he counseled, aided and abetted torture in Abu Ghraib and Guantanamo Bay -- Application allowed and appeal dismissed -- Appellants failed to obtain the consent of the Attorney General of Canada not later than eight days after the information was laid -- Requirement recognized the importance of Canada's relationships with other states, and the role of the federal government in managing those relationships.

International law and conflict of laws -- Criminal law -- Preliminary application by the Crown for an order dismissing the appeal for want of jurisdiction -- Appellants sought to appeal decisions dismissing proceedings brought against the President of the United States alleging that he counseled, aided and abetted torture in Abu Ghraib and Guantanamo Bay -- Application allowed and appeal dismissed -- Appellants failed to obtain the consent of the Attorney General of Canada not later than eight days after the information was laid -- Requirement recognized the importance of Canada's relationships with other states, and the role of the federal government in managing those relationships.

Preliminary application by the Crown for an order dismissing the appeal for want of jurisdiction. Davidson and Lawyers Against War attempted to bring a prosecution under the Criminal Code against George W. Bush, the President of the United States, for counselling, aiding and abetting torture in the Abu Ghraib prison in Baghdad, Iraq, and at the US Naval Base at Guantanamo Bay, Cuba. The appellants appealed from decisions of a Provincial Court judge and a Supreme Court justice dismissing the proceedings. The Crown brought its preliminary application to dismiss the appeal for want of jurisdiction.

HELD: Application allowed and appeal dismissed. The proceedings could not continue because the appellant failed to obtain the consent of the Attorney General of Canada not later than eight days after the information was laid. Section 7(7) of the Code required consent of the Attorney General to the prosecution of offences with international implications. The requirement recognized the importance of Canada's relationships with other states, and the role of the federal government in managing those relationships.

Statutes, Regulations and Rules Cited:

Court of Appeal Criminal Appeal Rules, Rule 17(1)

Criminal Code, s. 6(2), s. 7(3.7)(e), s. 7(5), s. 7(7), s. 269.1, s. 504, s. 507.1, s. 730, s. 784(1)

United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), Can. T.S. 1987 No. 36, Article 4, Article 5

Counsel:

G. Davidson: Counsel for the Appellants

K. Madsen: Counsel for the Respondent

The judgment of the Court was delivered by

LEVINE J.A.:--

Introduction

1 The appellants, Gail Davidson and Lawyers Against the War, attempted to bring a prosecution under the ***Criminal Code*** against George W. Bush, the President of the United States, for counselling, aiding and abetting torture in the Abu Ghraib prison in Baghdad, Iraq, and at the U.S. Naval Base at Guantanamo Bay, Cuba.

2 The appellants appealed from decisions of a Provincial Court judge and a Supreme Court justice dismissing the proceedings. The Crown brought a preliminary application to dismiss the appeal for want of jurisdiction.

3 The issues raised by the preliminary application concern the procedural requirements that must be followed to bring criminal charges against a person who is neither a citizen nor a resident of Canada, for alleged acts of torture committed outside of Canada.

4 In my opinion, the Crown's application should be granted, and the appeal dismissed. The Court does not have jurisdiction to hear the appeal, because the consent of the Attorney General of Canada has not been obtained to continue the proceedings, as required by the ***Code***.

Statutory and Factual Background

5 Section 6(2) of the ***Code*** sets out the general rule of jurisdiction in criminal matters: "Subject to this Act and any other act of Parliament, no person shall be convicted or discharged under section 730 of an offence committed outside Canada."

6 Section 7 of the ***Code*** extends Canadian criminal jurisdiction to persons who commit certain crimes outside of Canada. Under s. 7(3.7)(e) of the ***Code***, anyone who commits an act outside Canada that, if committed in Canada, would constitute torture or counselling torture contrary to s. 269.1 of the ***Code***, is deemed to commit that offence in Canada, if that person is present in Canada after the commission of the offence.

7 Section 7(5) provides that proceedings in respect of any offence set out in s. 7 may be commenced in any territorial division in Canada.

8 Ms. Davidson attended before a Justice of the Peace in Vancouver on November 30, 2004 and swore an information, under s. 504 of the ***Code***, alleging that President Bush had committed crimes of torture contrary to s. 269.1 of the ***Code*** between February 2002 and November 2004. Section 504(1)(a) provides that such an information may be laid:

> ... where it is alleged
>
> (a) that the person has committed, anywhere, an indictable offence that may be tried in the province in which the justice resides, and that the person
>
> (i) is or is believed to be, or
> (ii) resides or is believed to reside,
>
> within the territorial jurisdiction of the justice;

9 President Bush was present in Ottawa on November 30, 2004, at the invitation of the Government of Canada.

10 Section 7(7) of the ***Code*** requires that the Attorney General of Canada consent to proceedings under s. 7:

> (7) If the accused is not a Canadian citizen, no proceedings in respect of which courts have jurisdiction by virtue of this section shall be continued unless the consent of the Attorney General of Canada is obtained not later than eight days after the proceedings are commenced.

11 When an information is laid under s. 504 by a person who is not a peace officer, a public officer, the Attorney General or the Attorney General's agent, the justice who receives the information must refer it to a provincial court judge to consider whether to compel the appearance of the accused (ss. 507.1(1), 507(1)).

12 On November 30, 2004, Ms. Davidson sent a copy of the information to the Department of Justice. On December 2, 2004, she applied to the Provincial Court for a hearing under s. 507.1. December 6, 2004 was assigned as the date on which to present the application and fix a date for the hearing. On December 2, 2004, Ms. Davidson wrote to the Attorney General of Canada seeking his consent to continue the proceedings for the limited purpose of the hearing under s. 507.1. She had not received a reply from the Attorney General of Canada by December 6, 2004, and has not received his consent to the prosecution of President Bush.

13 At the hearing on December 6, 2004, Crown counsel on behalf of the Attorney General of British Columbia applied to the Provincial Court judge for a declaration that the information was a nullity on the ground that President Bush enjoyed head of state immunity from criminal prosecution in Canada. Although Ms. Davidson was not given notice of the Crown's application, she made oral submissions to the Provincial Court judge in opposition. The Provincial Court judge accepted the Crown's position, and declared the information a nullity, directing that no further proceedings be taken on it.

14 Sections 507.1(5) and (6) of the ***Code*** provide:

(5) If the judge ... does not issue a summons or warrant under subsection (2), he or she shall endorse the information with a statement to that effect. Unless the informant, not later than six months after the endorsement, commences proceedings to compel the judge ... to issue a summons or warrant, the information is deemed never to have been laid.

(6) If proceedings are commenced under subsection (5) and a summons or warrant is not issued as a result of those proceedings, the information is deemed never to have been laid.

15 On June 1, 2005, Ms. Davidson filed an application in the Supreme Court of British Columbia seeking, among other orders, an order in the nature of *certiorari* quashing the ruling of the Provincial Court judge that the information was a nullity. The application did not include an application in the nature of *mandamus*, compelling the Provincial Court judge to issue a summons or warrant to compel the attendance of President Bush.

16 Crown counsel on behalf of the Attorney General of British Columbia raised a preliminary objection to Ms. Davidson's application for judicial review, claiming the proceedings were moot, and the court did not have jurisdiction because the consent of the Attorney General of Canada to continue the proceedings had not been obtained. After receiving written and oral submissions on the issues raised by the Crown's application, the Supreme Court justice dismissed the proceedings as an abuse of process, [2005] B.C.J. No. 2760, 2005 BCSC 1765. The chambers judge determined that Ms. Davidson intended to use the criminal process to express her political views, which the chambers judge found (at para. 11) to be an attempt to use the process of the court "for some ulterior or improper purpose or in an improper way".

17 Ms. Davidson filed an appeal in this Court on January 17, 2006. The appeal is brought under s. 784(1) of the ***Code***: an appeal "from a decision granting or refusing the relief sought in proceedings by way of *mandamus, certiorari*, or prohibition."

18 Ms. Davidson alleges various errors by both the Provincial Court judge and the Supreme Court justice in their decisions. She claims that the Provincial Court judge erred in law in finding that President Bush has head of state immunity from the charges alleged against him, and erred in deciding that matter when no notice had been given of the Crown's application to have the information declared a nullity. The primary alleged error of the Supreme Court justice is that she decided the information was an abuse of process, when that issue had not been raised by the Crown or addressed in submissions by either the Crown or Ms. Davidson.

Preliminary Application to Dismiss

19 The Attorney General of British Columbia raised a preliminary objection to the appeal in this Court, under R. 17(1) of the Court of Appeal Criminal Appeal Rules. He claimed that the Court has no jurisdiction to hear the appeal, on three bases:

(1) the appellant has not obtained the consent of the Attorney General of Canada to continue the proceedings, as required by s. 7(7) of the ***Code***;

(2) the appellant did not apply to compel the provincial court judge to issue a summons or warrant within six months of the provincial court judge failing to do so, or at any time, as required by s. 507.1(5) of the ***Code***, and the information is therefore deemed never to have been laid;

(3) section 784(1) of the ***Code*** does not provide a right of appeal from the order of the Supreme Court justice dismissing the application on the ground that the proceedings are an abuse of process.

20 During the hearing of the Crown's application, Crown counsel abandoned the second ground for claiming the Court has no jurisdiction to hear the appeal.

21 In my opinion, the Crown's application must succeed on the first ground: the proceedings cannot continue because the appellant failed to obtain the consent of the Attorney General of Canada not later than eight days after the information was laid. That makes it unnecessary to deal with the third ground.

Section 7(3.7) - Prosecution for Torture

22 Section 7(3.7) of the ***Code***, which provides for the prosecution of any person for torture, wherever committed, was Canada's response to its international commitments under Articles 4 and 5 of the United Nations *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. 39/46, Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), Can. T.S. 1987 No. 36, (entered into force June 26, 1987):

> Article 4
>
> 1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
> 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.
>
> Article 5
>
> . . .
>
> 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him ...

23 On introduction of Bill C-28, to amend the ***Code*** to implement the *Convention*, the Government recognized that extraterritorial jurisdiction was required in order to effectively implement the *Convention*. Mr. François Gérin (Parliamentary Secretary to Minister of Justice and Attorney General of Canada) said (*House of Commons Debates*, 33rd Parliament, 2nd Session, 1987, vol. IV, March 26 (Ottawa: Canadian Government Publishing, 1997) at 4601):

> In order to enforce the convention, a system of extraterritorial jurisdiction is created to prevent safe havens for torturers or for their accomplices. States are obligated to investigate allegations of torture and to prosecute alleged torturers.

> With respect to a foreign torturer found on its territories, each state is obligated to either extradite or prosecute the alleged torturer.

Section 7(7) - Consent of the Attorney General of Canada

24 The expanded jurisdiction provided in s. 7 is qualified by the requirement in s. 7(7) that the consent of the Attorney General of Canada be obtained. This requirement is not specific to the offence of torture. It also applies to other offences that extend Canadian criminal jurisdiction beyond its borders and thus have an international aspect, such as air piracy, offences against diplomats, terrorist offences, and protection of nuclear material.

Purpose of s. 7(7)

25 The consent of the Attorney General to the prosecution of offences with international implications recognizes the importance of Canada's relationships with other states, and the role of the federal government in managing those relationships.

26 In ***Regina v. Ford; Regina v. Gilkey*** (1956), 115 C.C.C. 113 at 114 (B.C.C.A.), Sidney Smith J.A. articulated the purpose behind s. 420(2) of the ***Code***, which provided that no proceedings could be taken against an "accused who is not a Canadian citizen" with respect to an offence committed within the "three mile limit" of Canadian territorial waters except with the consent of the Attorney General:

> Obviously the intention was that international friction should not be provoked unknown to the central Government.

27 Similar comments were made by the Minister of Justice, Hon. E.D. Fulton, in 1959, when he introduced a Bill to deal with crimes committed on aircrafts, which also extended the jurisdiction of Canadian courts. In response to concerns raised by one member about the "consequences to Canadian citizens from this effort to invade the confines of foreign countries with our criminal legislation", the Minister said (*House of Commons Debates*, 24th Parliament, 2nd Session, 1959, vol. V, July 1 (Ottawa: Canadian Government Publishing, 1997) at 5341):

> I would point out that we have taken steps to minimize the danger of difficulties by the provision made in clause 5a(3), which says:
>
> > No proceeding shall be instituted under this section where the accused is not a Canadian citizen without the consent of the Attorney General of Canada.
>
> Thus if a situation arises where a foreign country wishes to exercise jurisdiction over an offence, and has a law under which the person can be tried, and the person concerned is a citizen of that country, then we can take steps to return him to his own country for the purpose of having his case disposed of there.

He noted further (at 5339): "...we have put in as a precaution that the consent of the Attorney General of Canada must be obtained ... so questions of dual jurisdiction can be resolved. We are not abandoning jurisdiction."

28 In his article, *"Torture in Canadian Criminal Law"*, (2005) 24 C.R. (6th) 74, Donald V. MacDougall notes that the prosecution of international offences such as torture involve the added dimension of state-to-state relations, stating (at 90): "The political nature of this offence and its extraterritorial reach will undoubtedly affect the situations for which this crime is charged."

29 David Matas provides a slightly different perspective on the purpose of obtaining the consent of the Attorney General in the context of the prosecution of war crimes, in his article "*From Nuremburg to Rome: Tracing the Legacy of the Nuremburg Trials*", (2006) 10 Gonzaga Journal of International Law 17. He notes (at 30):

> The law requires that the Attorney-General of Canada both consent to and conduct the prosecution of war crimes and crimes against humanity. However, that requirement is there to stop politicized private prosecutions, not to allow the Attorney-General to refrain from prosecuting sound cases for political reasons.

Application of s. 7(7)

30 The issue between the parties with respect to the application of s. 7(7) is the proper interpretation of when "the proceedings are commenced". The Crown argues that the laying of the information is the commencement of proceedings for the purpose of s. 7(7). Thus, Crown counsel says that the consent of the Attorney General of Canada must be obtained not later than eight days after the information is sworn. The appellant contends that the proceedings do not commence until after process (a summons or warrant) is issued, relying on the authority of ***R. v. Dowson***, [1983] 2 S.C.R. 144.

31 In ***Dowson***, the Supreme Court of Canada considered when the Attorney General could enter a stay of proceedings on an indictment. The Attorney General had entered a stay of proceedings on a private information which alleged that an R.C.M.P. officer had committed forgery and other offences. The Supreme Court concluded that a stay could not be entered until after process had issued.

32 Section 508(1) of the ***Code***, as it then read, provided that a stay could be entered "at any time after an indictment has been found". Under then s. 732.1 of the ***Code***, it was clear that a stay could be entered in summary conviction proceedings any time after the information was laid. As explained by Lamer J. (as he then was), writing for the Court, (at 155), the Court preferred, in the case of an indictment, an interpretation that increased the accountability of the Attorney General. Justice Lamer acknowledged (at 158) that the disparity between stays for indictments and summary conviction proceedings was an anomaly, but preferred for policy reasons to limit the Attorney General's "necessary but no less dangerous discretion to circumvent the courts and deny a citizen his right to bring another to court ...".

33 Section 508 (now s. 579(1)) of the ***Code*** was subsequently amended to provide that the Attorney General could enter a stay of proceedings in both indictable and summary proceedings after "proceedings ... are commenced".

34 In ***R. v. Wren***, [1987] B.C.J. No. 1336 (C.A.) (a decision binding on this Court), the Court considered a stay of proceedings entered after a private information had been laid, before process had issued. In reasons for the Court, Hinkson J.A. stated (referring to Lamer J.'s comment about the anomaly of the disparity between stays for summary convictions and indictable offences):

> Subsequent to that comment in the Supreme Court of Canada the Criminal Code was amended. S. 732(1) was repealed and at the same time s. 508(1) was amended. Previously s. 508 provided that a stay could be entered "at any time after an indictment has been found". That phrase was deleted in the amendment and now with respect to both summary conviction offences and indictable offences the Attorney General may enter a stay at any time after proceedings are commenced.

35 It is worth noting that other provincial courts of appeal interpreted the amendments to the ***Code*** in the same way. In ***R. v. Campbell*** (1987), 35 C.C.C. (3d) 480, the Ontario Court of Appeal dismissed an appeal, adopting the reasons of Craig J. of the Ontario High Court (1987), 31 C.C.C. (3d) 289 at 299 where he said:

> It was decided in *Dowson* that a summons or warrant must first be issued before the power to stay may be exercised. Subsequent amendments to the *Code* permit the Attorney-General to direct a stay any time after an information is laid.

36 The Quebec Court of Appeal came to the same opinion in ***R. v. Pardo*** (1990), 62 C.C.C. (3d) 371 at 373, where Gendreau J.A. for the Court, after quoting s. 579(1) of the ***Code***, said:

> I completely share the opinion of the Superior Court judge when he stated that a person is an accused as of the laying of the information, which constitutes the beginning of the proceedings. He concluded, with reason, that this new disposition is the legislative response to the case of *R. v. Dowson* [citations omitted] ...

37 Thus, if the principles in ***Dowson*** may have applied to interpret when "proceedings are commenced" for the purpose of s. 7(7), it is clearly not applicable since the ***Code*** was amended, and this Court decided in ***Wren*** that proceedings commence when an information is laid.

38 That is the complete answer to the appellants' argument that they were not required to obtain the consent of the Attorney General of Canada to continue the proceedings against President Bush until after the hearing under s. 507.1(1) of the ***Code***. The proceedings commenced when Ms. Davidson laid the private information on November 30, 2006. In the absence of the Attorney General of Canada's consent having been obtained not later than December 8, 2006, the proceedings cannot continue, and no court has jurisdiction to consider them.

Conclusion

39 The appellants failed to obtain the consent of the Attorney General of Canada to continue the proceedings as required by s. 7(7) of the ***Code***, with the result that this Court does not have jurisdiction to hear the appeal.

40 I would grant the application of the Crown to dismiss the appeal for want of jurisdiction, and order that the appeal be dismissed.

LEVINE J.A.
NEWBURY J.A.:-- I agree.
KIRKPATRICK J.A.:-- I agree.

Indexed as:

Hamilton v. British Columbia (Attorney General) (B.C.S.C.)

In the matter of an application for remedies under Section 24(1) of the Canadian Charter of Rights and Freedoms, Part I, Schedule B, of the Constitution Act, 1982; and In the matter of an application for relief pursuant to The Inherent Jurisdiction of the Court; and In the matter of an application for judicial review under The Judicial Review Procedures Act, R.S.B.C. 1979, Ch. 209 and Amendments thereto
Between
Peter Hamilton, Petitioner, and
Attorney General for the Province of British Columbia, Respondent

[1986] B.C.J. No. 756

30 C.C.C. (3d) 65

26 C.R.R. 241

17 W.C.B. 229

Vancouver Registry No. A861384

British Columbia Supreme Court
Vancouver, British Columbia

McKenzie J.

Heard: Sept. 24, 1986
Judgment: Oct. 1, 1986

(8 pp.)

Summary conviction offence -- Private prosecution -- Attorney General intervening and staying proceedings -- No infringement of guarantee of liberty -- Canadian Charter of Rights and Freedoms, s. 7 -- Criminal Code, ss. 455, 508.

This was an application for a remedy under s. 24(1) of the Canadian Charter of Rights and Freedoms, and for judicial review. The petitioner maintained that his right to liberty under s. 7 of the Charter was violated because he was denied the opportunity to carry through a private prosecution which he had initiated by swearing an information, alleging that summary conviction offences under s. 402 of the of the Criminal Code had been committed. These offences related to the wilful infliction of unnecessary pain upon a dog by the failure to provide proper care following experimental surgery performed in the animal laboratory at the U.B.C. Faculty of Medicine. After the summonses were issued but before the accused people appeared, counsel instructed by the Attorney General of British Columbia had the matter stayed by the clerk of the Provincial Court pursuant to Criminal Code s. 508(1).

HELD: The application was dismissed. A private prosecutor does not have a legal right or liberty to continue a prosecution in the face of Crown intervention. The Attorney General and his agent, the Crown Attorney, represent the Sovereign in the prosecution of crimes: when the role of the private prosecutor comes into conflict with that of the Crown's prosecutor, the role of the latter is paramount where in his opinion the interests of justice require that he intervene and take over a private prosecution. Section 7 of the Charter does not provide support strong enough to overcome the specific provision of the Criminal Code of the underlying reason which justifies its existence. An individual's liberty does not free him to continue a prosecution when he is met by the Attorney General's direction to enter a stay of proceedings. An exception could arise were there was clear evidence to support some flagrant impropriety on the part of Crown officers but no such suggestion was made here.

P. Michael Bolton, counsel for the Petitioner.
John Chelle, counsel for the Crown.

MCKENZIE J.:--

CANADIAN CHARTER OF RIGHTS
AND FREEDOMS

LIFE, LIBERTY AND SECURITY OF PERSON

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

1 The petitioner maintains that his right to liberty there given was violated because he was denied the opportunity to carry through a private prosecution which he had privately initiated by swearing an Information following a show cause hearing before a Justice of the Peace wherein the Informant alleged that three Summary Conviction offenses under S. 402 of the Criminal Code had been committed relating to the wilful infliction of unnecessary pain upon a dog by the failure to provide it proper care following experimental surgery performed in the animal laboratory at the University of British Columbia Faculty of Medicine by two researchers and the supervisor of the laboratory.

2 The petitioner heads an organization called Life Force dedicated to the investigation of cruelty to animals and to the laying of charges under S. 402.

3 After issuance of summonses, but before appearance of the three accused, counsel instructed by the Attorney General of British Columbia had the matter called forward in Provincial Court where he directed the Clerk of the Court to enter a stay of proceedings pursuant to S. 508(1) of the Criminal Code.

> 508.(1) The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated.

4 The stay was entered over the protests of counsel retained by the Informant to prosecute the charges.

5 The issues are:

A. Whether the Crown has the power to stay Summary Conviction proceedings commenced and prosecuted by a private prosecutor?

B. Whether the Crown's right to stay Summary Conviction proceedings is unfettered or must be exercised in accordance with the "principles of fundamental justice" within the meaning of those words in s. 7 of the Charter of Rights and Freedoms?

6 My conclusion is that the Crown does have the discretionary right to intervene in criminal matters, and having done so, to stay a private prosecution. Stated conversely, a private prosecutor does not have a legal right or liberty to continue a prosecution in the face of Crown intervention. The traditional justification for this Crown prerogative is the presumed objectivity and impartiality of the Crown as contrasted to that possessed by individuals or special-interest groups.

7 For indictable offenses S. 455 of the Criminal Code recognizes the right of "any one" to lay an information so long as that person believes on reasonable and probable grounds that an indictable offense has been committed. For Summary Conviction offenses S. 723 is less specific in that it does not specify who can lay an information but only says: "Proceedings under this part shall be commenced by laying an information in Form 2." By its lack of specificity this section does not shut the door against a private informant.

8 Put shortly, while the law allows a private informant to initiate proceedings it does not give him liberty to continue the proceedings should the Crown invoke S. 508(1) and direct the entry of a stay of proceedings.

9 By Reasons for Judgment dated 22 January 1986 Toy, J. considered the position of a private prosecutor in Baker v. Attorney General of British Columbia S.C.B.C. 6690/85 (Prince George). There, the private prosecutor was the father of a child killed in a motor vehicle accident who swore an information alleging dangerous driving and criminal negligence upon which the Crown directed a stay, being of the belief that careless driving was the appropriate change.

10 Toy J. observed that the right of a private citizen to act as the prosecution (as opposed to his unfettered right to seek to have a criminal process issued by a Justice of the Peace by swearing an Information) is not absolute or completely unfettered. Once the Attorney General or counsel on his behalf intervenes then that counsel assumes control of the prosecution and that counsel's rights are paramount to the private person's or his counsel's rights. This is bound up with the underlying philosophy of criminal law that crimes are offenses against the State. The Sovereign is the protector of the King's Peace. The Attorney General, and his agent the Crown Attorney, represent the Sovereign in the prosecution of crimes. When the role of the private prosecutor comes into conflict with that of the Crown's Prosecutor, the role of the Crown's Prosecutor is paramount where in his opinion the interests of justice requires that he intervene and take over a private prosecution.

11 Toy, J. considered whether any changes have been effected by these sections of the Charter:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

He concluded his judgment this way:

> The petitioner's counsel's submission is that when Regional Crown Counsel directed that a stay of proceedings be entered, the petitioner was deprived of his right to equality before the law. The inequality he points to is the inequality between the petitioner, who swore the information, and the counsel acting on behalf of the Attorney General, i.e. Regional Crown Counsel.
>
> There are no decided cases on this point. Nor do any of the cases under the Canadian Bill of Rights R.S.C. 1970 c. 44 shed any light on this problem as all of the cases decided under that statute that were referred to me were attacks being made by accused persons against what was perceived to be unfair or unequal treatment by the prosecuting authority directed toward the accused. Here the competition is between an individual, the petitioner informant, and counsel acting on behalf of the Attorney General.
>
> In my view, what sec. 15(1) deals with is equality under the law without justifiable discrimination between individuals. Here there is nothing in sec. 508(1) indicating an unevenness of application to individuals or groups. One would hope not, but it may very well be that cases do arise where in the application of sec. 508(1) that some individuals' rights may be discriminated against, but that is clearly not the case here; nor was there any suggestion thereof.

> What the petitioner is complaining about is that the holder, for the time being, of the office of Regional Crown Counsel has a paramount right to his, the petitioner's, right as a private person to stop the criminal proceedings that were initiated when he swore the information. To digress for a moment it must, of course, be observed that it is not the swearing of the information that initiates the criminal proceedings - it is only after the Justice of the Peace has made a determination and has decided that a summons or warrant should issue that the accused becomes involved and in jeopardy in a criminal proceeding against him.
>
> Although Regional Crown Counsel is a live and well human being, I do not categorize his right, duty or function in deciding whether to authorize the initiation of criminal proceedings or the staying thereof as acts or deeds of an individual such that when compared to the petitioner as the informant it can be argued that the latter has been discriminated against and therefore entitled to a constitutional remedy under sec. 24.
>
> The policy consideration that I consider of significance here is whether a private prosecutor's right to prosecute should be an unfettered one. In the recent past counsel acting on behalf of the Attorney General in our criminal courts have been discharging their responsibilities with firmness and practical objectivity that has generally served our communities satisfactorily. The prospect of the loss of that attribute of objectivity convinces me that no such change is necessary at this time.
>
> It is therefore my first conclusion that sec. 15(1) of the Charter of Rights and Freedoms is not applicable to read down or declare in part sec. 508(1) ultra vires. But even if that were not so and the petitioner's rights have been infringed I would find that sec. 1 of the Canadian Charter of Rights and Freedoms comes into play. In both England and the United States of America, the two closest democracies I know of to our Canadian way of life, seem to be surviving under systems where the state rather than the individual is in the paramount position when it comes to the prosecution of criminal proceedings.

While Toy, J.'s reasons concerned S. 15 they provide a conclusive answer to the challenge under S. 7. I would go further and say that S. 15 of the Charter provides a stronger support to the cause of a private prosecutor than does S. 7 but neither support is strong enough to overcome the specific provision of the Criminal Code or the underlying reason which justifies its existence.

12 In reaching this conclusion I have been guided by the expanded definition of liberty adopted by Nemetz, C.J.B.C. in Regina v. Robson, 19 C.C.C. (3d) 137 at p. 140:

> How far, then, and to what extent are we to define the word "liberty" in our Charter? I preface these reasons by putting aside the American decisions such as Wall v. King (1953), 206 F. 2d 878, to the extent that, if adopted, they might be taken to import property rights into the definition of "liberty" under s. 7 of our Charter.

> I adopt, however, those American authorities which do not confine the definition of liberty to mere freedom from bodily restraint. In Bolling v. Sharpe (1954), 347 U.S. 497, Chief Justice Warren said, in part:"'Liberty' under law extends to the full range of conduct which the individual is free to pursue and it cannot be restrained except for proper governmental objective" (my emphasis). I am in respectful agreement with this general doctrine.

13 The fact is that this individual's liberty, given this broad definition, does not free him to continue a prosecution when he is met by the Attorney General's direction to enter a stay of proceedings. An exception could arise were there clear evidence to support some flagrant impropriety on the part of Crown officers but no such suggestion is made here.

14 That is the end of the matter and it is not necessary to consider the further arguments advanced and authorities cited.

15 The petition is dismissed with costs.

---- End of Request ----
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** Version textuelle **

Répertorié:

Hébert c. Marx (C.A.Q.)

Jean Hébert, Appelant (Requérant)
c. Herbert Marx, Intimé (Intimé), et
Le greffier de la Cour des sessions de la paix et Joseph Pardo,
Mis en cause (Mis en cause)

[1990] J.Q. no 2202

[1991] R.J.Q. 293

J.E. 91-199

62 C.C.C. (3d) 371

12 W.C.B. (2d) 90

No : 500-10-000326-882 (700-36-000013-887)

Cour d'appel du Québec
District de Montréal

Les juges Kaufman, Tyndale et Gendreau

Entendu: Le 16 octobre 1990
Rendu: Le 3 décembre 1990

Régent Laforest, pour l'Appelant.
Michel F. Denis et Claude Provost, pour l'Intimé.
Richard Masson, pour le Mis en cause.

LA COUR, statuant sur le pourvoi de l'appelant contre un jugement de la Cour supérieure du district de Terrebonne (Honorable Yves Mayrand), rendu le 13 juillet 1988, qui rejetait sa requête en certiorari;

Après étude du dossier, audition et délibéré;

Pour les motifs exposés dans l'opinion écrite de Monsieur le juge Paul-Arthur Gendreau, déposée avec le présent jugement, et à laquelle souscrivent Messieurs les juges Fred Kaufman et William S. Tyndale;

REJETTE l'appel.

LE JUGE KAUFMAN
LE JUGE TYNDALE
LE JUGE GENDREAU

OPINION DU JUGE GENDREAU:-- L'appelant se pourvoit contre un jugement de la Cour supérieure du district de Terrebonne (Honorable Yves Mayrand), prononcé le 13 juillet 1988, qui rejetait sa requête en certiorari.

Jean Hébert avait déposé, le 25 août 1987, une dénonciation contre le mis en cause Joseph Pardo: il l'accusait de parjure. Après pré-enquête, une sommation était émise. M. Pardo comparut et choisit un procès devant un juge seul; l'audience fut fixée au 27 avril 1988.

Entre-temps, le 22 décembre 1987, l'appelant déposait huit nouvelles dénonciations visant d'autres personnes. Elles furent toutes reçues par le juge de paix qui ordonna une pré-enquête: elle devait avoir lieu le 21 février 1988.

Toutefois, le 17 février 1988, le Procureur général ordonnait un nolle prosequi dans tous les dossiers; cette procédure empêchait la tenue du procès dans l'affaire Pardo et des pré-enquêtes dans les autres.

L'appelant s'est pourvu contre cette décision ministérielle par voie de certiorari au motif:

- que le Procureur général ne pouvait déposer un nolle prosequi avant l'émission des sommations ou mandats;

- qu'il a agi illégalement, injustement, démontrant discrimination et partialité à son endroit et brimant les droits garantis par la Charte.

Le juge, dans une décision particulièrement bien motivée, a rejeté tous ces arguments. Il a conclu que l'amendement apporté à l'article 508 du Code criminel en 1985 autorisait le Procureur général à ordonner l'arrêt des procédures dès après le dépôt de la dénonciation et que, dans le cas sous étude, l'appelant n'avait pas démontré qu'il avait agi arbitrairement, sans respecter l'équité procédurale et les principes de la justice fondamentale mais au contraire, que sa décision était "amplement justifiée" (m.a. 53). A ce propos, le juge écrit:

> Jean Hébert a été trouvé coupable par trois jury différents de fraude, de conspiration, d'agression sexuelle et de voies de faits.
>
> Il semble que le mis en cause Pardo aurait été son partenaire ou son complice dans certaines fraudes. Ce dernier a témoigné contre lui et n'aurait pas été accusé.

> Hébert prétend que Pardo s'est parjuré devant jury, de même que les autres personnes visées dans sa deuxième dénonciation.
>
> Il n'est pas satisfait des trois verdicts et les a portés tous les trois en appel.
>
> Hébert a témoigné devant nous et l'ensemble de son témoignage nous permet de conclure que le requérant Hébert poursuit un but très précis, par ses dénonciations, et ce n'est pas la répression des crimes allégués ni le châtiment des coupables.
>
> Il cherche à obtenir des preuves additionnelles pour étoffer son appel, soumettre des faits nouveaux et obtenir une ordonnance de nouveaux procès par la Cour d'appel du Québec.
>
> Porter des dénonciations fait partie de sa défense dans de futurs procès. Le requérant blâme tous les intervenants, soit les directives des Juges, la partialité des procureurs de la Couronne et l'incompétence des policiers.
>
> Il s'est, en plus de la Cour d'appel, adressé au ministre de la Justice, quant au comportement des avocats de la Couronne, et à la Commission de Police, quant au comportement des policiers.
>
> Toutes les personnes visées par ses dénonciations ont été des témoins à charge contre lui et ont été crues par les jurés. Aujourd'hui, il les accuse de s'être parjurées lors de ses procès.
>
> Nous estimons que c'est la Cour d'appel qui aura à décider s'il a subi des procès justes et équitables et si les verdicts sont bien fondés en faits et en droit.
>
> La finalité des jugements et la protection des témoins de la Couronne contre toute forme de harassement justifiaient l'interruption des procédures par le Procureur général.
>
> Le requérant n'a démontré d'aucune façon que le geste du Procureur général pouvait jeter un discrédit sur l'administration de la Justice, ou a été inspiré par corruption ou autre iniquité ou illégalité. (m.a. vol. 1, pp. 52 et 53)

L'appelant a soulevé à son mémoire les mêmes moyens que devant la Cour supérieure et a insisté sur la décision de cette Cour dans Procureur général de la province de Québec c. Guy Bertrand (1988) R.J.Q. 2617.

A l'audience, cependant, il ne s'en est tenu qu'à la seule question du droit du Procureur général d'ordonner l'arrêt des procédures avant l'émission d'une sommation ou d'un mandat. Il prend appui sur l'article 508 (579(1) nouvelle numérotation) qui se lit:

> Art. 579(1) (Le procureur général peut ordonner un arrêt des procédures) Le procureur général ou le procureur mandaté par lui à cette fin peut, à tout moment après le début des procédures à l'égard d'un prévenu ou d'un défendeur et avant jugement, ordonner au greffier ou à tout autre fonctionnaire compétent du tribunal de mentionner au dossier que les procédures sont arrêtées sur son ordre et cette mention doit être faite séance tenante; dès lors, les procédures sont suspendues en conséquence et tout engagement y relatif est annulé.

A mon avis, l'appelant a tort: je partage entièrement l'avis du juge de la Cour supérieure lorsqu'il affirme qu'une personne est un prévenu dès le dépôt de la dénonciation, ce qui constitue pour elle le début des procédures. Il a conclu, avec raison, que cette nouvelle disposition est la réponse législative à l'arrêt Dowson c. La Reine (1983) 2 R.C.S. 144 qui avait signalé une anomalie au Code criminel. En effet, le Code prévoyait alors que le Procureur général pouvait ordonner l'arrêt des procédures dès après le dépôt de la dénonciation d'une infraction punissable sur déclaration sommaire de culpabilité alors que dans le cas d'un acte criminel, cette initiative ne lui était permise qu'"à tout moment après une mise en accusation (...) et avant jugement", selon les termes mêmes de l'article 508 à l'époque. Or, le juge Lamer (il n'était pas encore Juge en chef), pour la Cour, après avoir constaté que "cette différence ne (pouvait) être l'expression de l'intention du Parlement", se refusait à donner une interprétation qui aurait reconnu l'uniformité de la procédure de nolle prosequi au motif de l'importance et de la gravité de ce pouvoir du Procureur général et de son exercice. "Ayant à choisir", écrivait-il, "entre l'uniformité de la procédure et une responsabilité politique plus grande face à l'exercice d'un pouvoir discrétionnaire, nécessaire mais néanmoins dangereux, qui permet de circonvenir les tribunaux et de nier à un citoyen le droit de poursuivre une autre personne, j'estime préférable, en attendant que le Parlement décide de moderniser la loi, de retenir cette dernière situation et de subir une anomalie de la loi qui, j'imagine, n'est que temporaire."

Depuis cet arrêt, le Parlement est intervenu pour clarifier son intention, se rendant ainsi à l'invitation lancée par la Cour Suprême du Canada. C'est pourquoi, je suis d'accord avec la démonstration du juge Mayrand.

Il convient de signaler, au surplus, que cette opinion est aussi partagée par la Cour d'appel de l'Ontario (Campbell c. A.G. of Ontario (1987) 35 C.C.C. (3d) 480) et celle de la Colombie-Britannique (R. c. Wren, 22 juillet 1987, No 087176037) qui ont toutes deux confirmé les motifs exprimés en ce sens par les juges de première instance. Ainsi, le juge Craig (de la High Court) écrivait-il dans l'affaire Wren ((1987) 31 C.C.C. (3d) 189):

It was decided in Dowson that a summons of warrant must first be issued before the power to stay may be exercised. Subsequent amendments to the Code permit the Attorney-General to direct a stay any time after an information is laid.
(p. 299)

Le juge Hinkson, pour la Cour d'appel de la Colombie-Britannique, affirmait de son côté:

> Subsequent to that comment [Voir Appendice Note] in the Supreme Court of Canada the Criminal Code was amended. s. 732(1) was repealed and at the same time s. 508(1) was amended. Previously s. 508 provided that a stay could be entered "at any time after an indictment has been found". That phrase was deleted in the amendment and now with respect to both summary conviction offences

> and indictable offences the Attorney General may enter a stay at any time after proceedings are commenced.
> (pp. 3 et 4)

Enfin, la Cour Suprême du Canada dans Kalani c. R. (1989) 1 R.C.S. 1594, a affirmé qu'une personne était un accusé dès le dépôt de la dénonciation. Il est vrai que cette affaire traitait de la définition d'"inculpé" au sens de l'article 11b) de la Charte canadienne des droits et libertés. Mais je ne doute pas qu'elle affirmait une règle qui devait trouver application à l'article 579 C. cr.

L'appelant voudrait, d'autre part, trouver dans l'arrêt de notre Cour Procureur général c. Bertrand un appui à sa prétention. Il a tort. Cette affaire traitait de la nature du billet d'infraction émis en application du Code de la sécurité routière pour définir si le délai de sept (7) mois entre l'émission de cette contravention par le policier patrouilleur et la réception de la dénonciation (suivant la Loi sur les poursuites sommaires du Québec) était déraisonnable au sens de l'article 11 de la Charte canadienne des droits et libertés. A mon avis, cet arrêt non seulement n'a aucune application en l'espèce mais ne supporte pas la proposition de l'appelant. En effet, outre que le Code criminel n'avait aucune application dans ce débat, le juge Paré, pour la Cour, écrivait:

> Pour ces motifs, je crois que l'intimé n'était pas un inculpé ou un accusé avant le 6 juin 1984, date à laquelle le juge de paix recevait la plainte du procureur général du Québec (m.a. p. 37).
> (1988 R.J.Q. p. 2621)
> (J'ai souligné)

Ce premier moyen d'appel est donc mal fondé.

Quant à la conduite abusive du Procureur général, l'avocat ne l'a pas soulevée devant nous et je m'en tiendrais aux remarques du juge Mayrand que j'ai déjà cité.

Pour ces motifs, je proposerais le REJET du pourvoi.

* * * * *

Appendice

Note

Le juge Hinkson faisait ici écho au commentaire suivant du juge Lamer:

> The disparity between stays for summary convictions and those for indictable offences is undesirable and could not have been intended by Parliament. Such an anomaly is not, unfortunately, so infrequent in the field of criminal procedure.

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Indexed as:

Kostuch v. Alberta (Attorney General)

IN THE MATTER of Regina ex rel. Kostuch v. The Queen in Right of Alberta et al., being information number 21075833P1 ("the information") sworn by Martha Kostuch in the Provincial Court of Alberta in the Judicial District of Calgary ("the Court") on the 28th day of July, 1992, alleging inter alia that The Queen in Right of Alberta, UMA Engineering Ltd., W.A. Stephenson Construction (Western) Limited, and SCI Engineering & Constructors Inc. ("the Accused") did contravene section 35(1) and 40(1)(b) of the Fisheries Act, R.S.C. 1985, C. F-14, and upon which summonses have been issued to the Accused by the Court to appear in Courtroom number GR1 in the Court of Queen's Bench Courthouse in the City of Calgary on Monday, March 22, 1993 to answer to the information.

Between

Martha Kostuch, appellant, and

The Attorney General of Alberta, respondent

[1995] A.J. No. 866

128 D.L.R. (4th) 440

[1996] 1 W.W.R. 292

33 Alta. L.R. (3d) 225

174 A.R. 109

101 C.C.C. (3d) 321

43 C.R. (4th) 81

32 C.R.R. (2d) 84

28 W.C.B. (2d) 398

58 A.C.W.S. (3d) 586

1995 CanLII 6244

Appeal No. 14672

Alberta Court of Appeal
Calgary Civil Sittings

Hetherington, McFadyen and Russell JJ.A.

Heard: May 8, 1995.
Judgment: filed September 26, 1995.

(20 pp.)

On appeal from Power J.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 7.
Fisheries Act, R.S.C. 1985, c. F-14, ss. 35(1), 35(2), 40(1) (b).

Crown -- Attorney General -- Criminal proceedings, power to enter stay -- Judicial review of exercise of prosecutorial discretion -- Civil rights -- Security of the person -- Law enforcement -- Conduct of private prosecution.

Appeal from the dismissal of the appellant's application for an order setting aside the entry of a stay of proceedings by the Attorney General of Alberta on an information sworn by the appellant. By that information, the appellant had alleged that the provincial Crown and others involved in the construction of a dam had breached the provisions of sections 35(1) and 40(b) of the Fisheries Act by carrying a work or undertaking which was harmful to fish habitat. The appellant contended that section 7 of the Canadian Charter of Rights and Freedoms protected her right to carry on a private prosecution and that the Attorney General's intervention and stay of proceedings breached her rights under that section of the Charter. She further submitted that the power of the court to review the exercise of prosecutorial discretion by the Attorney General was not limited to cases of flagrant impropriety. The main issues were whether the said intervention and entering of a stay breached the appellant's Charter rights and whether this was an appropriate case for the court to review the Attorney General's exercise of prosecutorial discretion.

HELD: Appeal dismissed. However broadly the right to liberty and security of the person in section 7 of the Charter may come to be interpreted, it would not and could not include the unrestricted right on the part of a private prosecutor to continue a criminal prosecution in the face of an intervention by the Attorney General. The test for judicial review of prosecutorial discretion remained that of "flagrant impropriety", not "unreasonableness" as was suggested by the applicant. In the circumstances and on the evidence, the chambers judge did not err in his finding that the trial judge acted appropriately in this case and that the appellant failed to establish flagrant impropriety.

Counsel:

I. Cartwright, J. Klimek and B. Tingle, for the appellant. T. Beattie, for the respondent.

MEMORANDUM OF JUDGMENT

The following judgment was delivered by

1 THE COURT:-- Dr. Martha Kostuch appeals from the dismissal of her application for an order setting aside the intervention and the entry of a stay of proceedings, on March 23, 1993, by the Attorney General of Alberta, on an information sworn by Dr. Kostuch, on July 28, 1992 alleging that Her Majesty the Queen in Right of Alberta and others involved in the construction of the Oldman River Dam had breached the provisions of ss. 35(1) and 40(1)(b) of the Fisheries Act, R.S.C.1 985, c. F-14, by carrying on a work or undertaking which was harmful to fish habitat.

ISSUES:

2 Several issues arise in this matter:

1. Whether the intervention and the entering of a stay of proceedings by the Attorney General in a prosecution commenced by the appellant breach the appellant's rights under s. 7 of the Canadian Charter of Rights and Freedoms.
2. The circumstances in which a court will review the discretion exercised by the Attorney-General to intervene and stay a prosecution commenced by a private informant.
3. Whether the learned chambers judge erred in finding that the appellant had failed to establish flagrant impropriety on the part of the Attorney General of Alberta in intervening in and/or staying the prosecution.

POSITION OF THE APPELLANT

3 The appellant claims that s. 7 of the Charter protects her right to carry on a private prosecution and that the Attorney General's intervention and stay of proceedings breached her rights under s. 7 of the Charter. The appellant further submits that the power of the Court to review the exercise of the prosecutorial discretion by the Attorney General is not limited to cases of flagrant impropriety. She submits that the Court can consider the reasonableness of the decision. The Appellant also says that the learned Chambers Judge erred in not finding flagrant impropriety on the part of the Attorney General of Alberta.

FACTS:

4 It is not necessary to review the facts in detail. They are fully and accurately set out in the judgment of the learned Chambers Judge. (Kostuch v. Alberta (A.G.) [1993] 8 W.W.R. 693, 12 Alta L.R. (3d) 257, 143 A.R. 161, 12 C.E.L.R. (NS) 123.)

5 This matter involves the construction of the Oldman River Dam by the Province of Alberta. The information in question was the last in a series of eight informations sworn by Dr. Martha Kostuch against those involved in the construction of this dam. With some minor differences, each

of the informations alleged that either the Government of Alberta, its ministers, or the Crown in Right of Alberta and various construction companies breached the Fisheries Act by constructing and operating river diversion channels at the dam site which interfered with fish habitat, without the required authorization of the Federal Minister of Fisheries and Oceans. The first of these informations had been sworn by the appellant on August 2, 1988. The first seven informations were stayed by the Attorney General or were otherwise disposed of by the Courts for a variety of reasons, none of which have any relevance here.

6 Following the laying of the first information, the Attorney General intervened. On his instructions, the R.C.M.P. commenced an investigation. Inspector Duncan was responsible for this investigation. In referring the matter to the R.C.M.P., the Attorney General's department, being concerned about conflicts of interest, advised the R.C.M.P. to seek instructions regarding the investigation and prosecution from the Federal Department of Justice.

7 In the course of the investigation, Inspector Duncan interviewed the appellant on at least two occasions, and obtained from her a statement of facts, as well as a summary of her position on the matter. Dr. Kostuch advised Duncan that she believed that the dam construction interfered with fish habitat, that the construction had never been approved by the Minister of Fisheries, and that any delegation of administrative authority under the Fisheries Act to the Province of Alberta was unconstitutional. The prosecution was one of many legal avenues being pursued by the group called the Friends of the Oldman River Society in its efforts to stop the construction of the Oldman River Dam.

8 Following an initial investigation, Duncan concluded that while it appeared that the construction of the dam had interfered or would interfere with fish habitat, serious questions of the availability of a defence under s. 35(2) of the Fisheries Act also had to be addressed.

9 In December, 1988, Duncan forwarded a brief to the Federal Department of Justice requesting a legal opinion on various issues, including the effect and validity of arrangements between the Government of Alberta and the Government of Canada transferring the administrative responsibility for fisheries to the Province of Alberta. In the course of his investigation, Duncan obtained documents from the Deputy Minister of the Environment setting out the understanding of the parties.

10 Duncan submitted his final report on April 24, 1990. He had interviewed officials of the Alberta Fish and Wildlife Department, who informed him of the investigations undertaken by them, of the approval of the project by the appropriate Alberta government departments, and of the projects planned upstream from the dam to enhance fish population with objectives of ensuring that there would be no net loss of fish. While formal permission had not been obtained from the Federal Minister of Fisheries, the evidence (accepted by the learned Chambers Judge) disclosed that Federal authorities had been consulted in the planning of the project, and were aware of the construction of the dam, and of its effect on fish. The then Minister of Fisheries, Tom Siddons, indicated that he was satisfied with the investigations of provincial officials and their consultations with his department in a letter dated, August 25, 1987.

> In view of the long standing administrative arrangements that are in place for the management of fisheries in Alberta, and the fact that the potential problems associated with the dam are being addressed, I do not intend to intervene.

11 Earlier correspondence from Federal Ministers of Fisheries and Environment Canada, as well as publications of that department, disclosed the understanding of federal government officials that administrative responsibility for the provisions of the Fisheries Act related to the protection of fish habitat had been transferred to the Province of Alberta. Alberta Fisheries officials consulted with their federal counterparts, but did not seek authorization.

12 Following the laying of the information in question, the Attorney General of Alberta decided to intervene in the prosecution, and asked the Manitoba Attorney General to review the file and the Alberta prosecution guidelines. He authorized agents of the Attorney General of Manitoba to decide whether prosecution was warranted. The Federal Department of Justice had earlier declined to prosecute. The matter was again referred to the Federal Department of Justice, Edmonton Regional Office, in the event they now wished to intervene. The Federal Department of Justice again refused to do so.

13 The prosecution policy established by the Attorney General of Alberta contains a two-fold test: (1) the evidence must be such that there is a reasonable likelihood of conviction when the evidence as a whole is considered; (2) whether the public interest requires prosecution.

14 Matthew Britton and Jeremy Dangerfield, senior agents of the Attorney General of Manitoba, reviewed the file and concluded that prosecution was not warranted because there was no real chance of a successful prosecution. On March 22, 1993, Dangerfield, who was also appointed by the Attorney General of Alberta as his agent, appeared before the Provincial Court of Alberta. After giving a detailed outline of his reasons, Dangerfield advised the Court that, in his opinion, there was no real chance of a successful prosecution and directed that a stay of proceedings be entered.

15 By Notice of Motion dated March 22, 1993, the appellant brought an application for an order setting aside the intervention and the stay of proceedings of the Attorney General and prohibiting the Attorney General from again intervening in the prosecution. The application was dismissed and the appellant appeals to this court.

DECISION OF THE CHAMBERS JUDGE

16 The learned Chambers Judge reviewed the agreements between federal and provincial departments, correspondence between departments responsible for fisheries and the environment, and statements by federal ministers in correspondence with others regarding the transfer of jurisdiction to the Province of Alberta. He concluded:

> From the statement contained in the letter of the Minister, one could conclude that the Minister authorized the project under s. 35(2) of the Fisheries Act.

17 The learned Chambers Judge found that the Provincial officials had carried out a complete investigation of the effect of the dam on fish habitat, and they were satisfied that adequate plans had been put in place to protect fish. Therefore no net loss of fish would result from the project. In 1977/78, the Federal Minister of Fisheries and Oceans and the Minister of the Environment confirmed their understanding that Alberta had authority to deal with matters involving fish habitat in Alberta. The Province of Alberta and the Government of Canada entered into another agreement in 1987, confirming Alberta's assumption of responsibility for enforcement of the Fisheries Act. Alberta did not thereafter seek permission from the Federal Minister with respect to projects located in this province. Federal officials were aware of the plans for the Oldman River Dam, the investigations by the Provincial authorities and the plans which had been put into place to protect fish and

the environment, and voiced no objections to the construction of the dam. Federal Ministers of Fisheries and Oceans, had expressly declined to intervene, and the Agents of the Federal Department of Justice refused to prosecute.

18 The learned Chambers Judge found that the Alberta Government had acted in good faith in approving the construction of the dam. On this ground, the Crown in the Right of Alberta and the corporate defendants who acted on the authorization had a complete defence to any prosecution. These findings were supported by the evidence.

FISHERIES ACT PROVISIONS AND THE FEDERAL PROVINCIAL AGREEMENT

19 Section 35 of the Fisheries Act provides:

> (1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.
> (2) No person contravenes subsection (1) by causing the alteration, disruption, or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this act.

20 On January 9, 1987, Her Majesty the Queen in Right of Canada, represented by the Minister of Fisheries and Oceans, and her Majesty the Queen in Right of Alberta, represented by the Minister of Forestry, Lands and Wildlife, entered into the Canada Fisheries Agreement whereby "subject to constitutional and statutory constraints", certain administrative responsibilities under the Fisheries Act were transferred to the Province of Alberta. The effect of the agreement, as understood by the parties, is conveniently set out in a press release issued by them as follows:

> The Canada/Alberta Fisheries Agreement reaffirms assignment of fisheries administrative responsibilities from Canada to Alberta and establishes a framework to address issues related to fish habitat management, aquaculture, and fish health, sport fisheries development, commercial fisheries development, fish inspection and small craft harbours.

(A.B. Vol. 2, p. 398)

21 The jurisdiction of Alberta to deal with fish dates back to the Natural Resources Transfer Act, S.A. 1930, c. 21.

SECTION 7 OF THE CHARTER

22 The appellant claims that her rights under s. 7 of the Charter have been breached in that "she has not been able to have a court adjudicate on a matter of concern to her" thus causing her emotional stress.

23 In other words, the appellant claims that she has a right to prosecute another person, that s. 7 of the Charter protects that right, and that the Attorney General cannot interfere with a private prosecution without according the informant an opportunity of examining the reports on the investigation conducted, and giving her an opportunity to address those facts before an impartial person.

24 Section 7 of the Charter provides:

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

25 In Reference re s. 94(2) of Motor Vehicle Act [1985] 2 S.C.R. 486, 23 C.C.C. (3d) 289 the Supreme Court of Canada established a two-stage test for the application of s. 7. First, the appellant must demonstrate a deprivation of her right to life, liberty and security of the person; and secondly, she must demonstrate this deprivation occurred in a manner not consistent with principles of fundamental justice. (See also R. v. Beare, [1988] 2 S.C.R. 387, at 401, 45 C.C.C. (3d) 57).

26 In my view, the appellant has failed. Counsel for the appellant cites the decision of the Supreme Court of Canada in Reference re s. 193 and 195.1(1)(c) of the Criminal Code, [1990] 1 S.C.R. 1123, 56 C.C.C. (3d) 65, in support of her submission that "security of the person" includes the right to protection from state imposed psychological stress. Counsel for the appellant submits that the interference by the Attorney General in the prosecution she has commenced causes her stress by interfering with her right to have a wrong redressed.

27 However broadly the right to "liberty and security of the person" in s. 7 of the Charter may come to be interpreted, it is my view that it will not and cannot include the unrestricted right on the part of a private prosecutor to continue a criminal prosecution in the face of an intervention by the Attorney General. The criminal process is not the preserve of the private individual. The fundamental consideration in any decision regarding prosecutions must be the public interest. The function of protecting the public interest in prosecution matters has been granted by Parliament to the Attorney General of a province, and in some cases to the Federal Minister of Justice.

28 In deciding whether to prosecute, the Attorney General must have regard not only to the interests of the person laying the charges, but also to the rights of the person charged with an offence, and to the public interest. By the provisions of the Criminal Code, the Attorney General is given a discretionary power to intervene in private prosecutions. The Attorney General of a province is a member of the Executive who is charged with responsibility for the administration of justice in the province. He or she is answerable to the Legislature and finally to the electorate, for decisions made. The courts have understandably been very hesitant to intervene in the exercise of that discretion.

29 In R. v. Power [1994] 1 S.C.R. 601, 89 C.C.C. (3d) 1, Madam Justice L'Heureux-Dubé discussed the nature of the prosecutorial discretion and the possibility of the review of such discretion by the courts. She stated at p. 15:

> That courts have been extremely reluctant to interfere with prosecutorial discretion is clear from the case-law. They have been so as a matter of principle based on the doctrine of separation of powers as well as a matter of policy founded on the efficiency of the system of criminal justice and the fact that prosecutorial discretion is especially ill-suited to judicial review.

30 The right, if any, of a private prosecutor to prosecute another person is very limited and is clearly restricted by the provisions of the Criminal Code to cases where the Attorney General opts not to intervene.

31 In R. v. Osiowy, (1989) 50 C.C.C. (3d) 189 at 191 (Sask. C.A.), Vancise J.A. described that right as follows:

> It is settled that an individual has the right to initiate a private prosecution. It is also settled that the Attorney General has the right to intervene and take control of a private prosecution. Included in the right to intervene and take control is the power to direct a stay pursuant to s. 508. It follows, then, that a private informant has the right to initiate proceedings, but that right does not give him the liberty to continue the proceedings should the Attorney General decide to intervene and invoke s. 508(1) and direct the entry of a stay of proceedings. Once the Attorney General or counsel on his behalf intervenes and assumes control of the prosecution, that counsel's rights are paramount to the private person's or his counsel's rights. The discretion of the Attorney General to enter a stay is not reviewable in the absence of some flagrant impropriety on the part of the Crown officers. No such impropriety has been suggested here.

32 In any event, it appears to us that the appellant was afforded ample opportunity to state her position in the interviews conducted by Inspector Duncan. The various concerns were included in his report, and undoubtedly considered by Britton and Dangerfield, whose conclusions supported the opinion of Inspector Duncan that a prosecution would not be successful because a strong defence had been disclosed to him. There is no obligation on the part of the Attorney General or the Agent of the Attorney General who makes the decision, to discuss the evidence and the issues with the informant.

THE EXTENT OF THE POWER OF REVIEW

33 Assuming that the court has power to review prosecutorial discretion, that power will be exercised only in cases where there has been flagrant impropriety in the exercise of the prosecutorial discretion. This rule has been clearly established by the Courts, and we accept it as correct. In R. v. Balderstone et al (1983) 8 C.C.C (3d) 532 at 539 (Man. C.A.), (leave to appeal refused, [1983] 2 S.C.R. v) Monnin C.J.M. stated as follows:

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

See also R. v. Moore (1986) 26 C.C.C. (3d) 474 (Man. C.A.); Campbell v. Attorney General of Ontario (1987) 31 C.C.C. (3d) 289, (Ont. H.C.J.) (1988) 35 C.C.C. (3d) 480 (Ont. C.A.) (leave to appeal refused, 35 C.C.C. (3d) 480 (S.C.C.).)

34 We agree with the statement of Miller A.C.J. in Re W.A. Stephenson Construction (Western) Ltd. (1991) 81 Alta L.R. (2) 214, 121 A.R. 219 (Q.B.), 66 C.C.C. 201 that flagrant impropriety can only be established by proof of misconduct bordering on corruption, violation of the law, bias against or for a particular individual or offence.

35 The appellant relies on the decision of the Quebec Court of Appeal in Chartrand v. Quebec (Attorney General), (1987) 40 C.C.C. (3d) 270, 59 C.R. (3d) 388, leave to appeal refused (1988) 41 C.C.C. (3d) vi (S.S.S.) and submits that this decision has altered the test.

36 Beauregarde J.A., giving one of the judgments of the Court, stated at p. 389-390:

> Malgré la séparation étanche entre les tâches du tribunal et celles du-Procureur général (celui-là seul statue sur les procès que le Procureur général seul décide de faire), j'accepte que le tribunal a le pouvoir d'annuler un nolle prosequi si on démontre qu'en le déposant le Procureur général a enfreint la loi ou a abusé, par corruption en faveur de l'accusé, par préjugé défavorable contre la victime ou contre la disposition de la Loi qui a crée l'infraction, ou enfin par une décision carrément déraisonnable.

37 Having given careful consideration to this passage, I am of the view that Beauregarde J.A. did not set forth any different test for review of prosecutorial discretion, but merely detailed some instances where flagrant impropriety might be found. However, we doubt whether a patently or obviously unreasonable decision would constitute flagrant impropriety.

38 Vallerand J.A. (Nichols J.A. concurring) adopted the flagrant impropriety test set forth by the Manitoba Court of Appeal in Balderstone.

39 The test for review of prosecutorial discretion remains that of flagrant impropriety, and is not unreasonableness as suggested by counsel for the appellant.

FLAGRANT IMPROPRIETY

40 The appellant in paragraph 18 of her factum alleges improper interference in the investigation by the Federal Department of Justice. She asks this Court to infer that the Department so directed the investigation as to predetermine the result, referring to such action as an abuse of power. There is no evidence to support any such suggestion. The appellant asks that an inference of impropriety be drawn from the fact that after the submission of the initial report, the investigation changed direction and focused on issues of mitigation and due diligence. The appellant appears to suggest that the police investigation and the prosecutors' concerns must be limited to evidence supporting the charge, and the possibilities of valid defences ought not to be explored by the investigator or the prosecutors in arriving at their decision. Needless to say, this argument is rejected as completely unfounded in law and on the evidence.

41 The appellant also suggests that the Attorney General was guilty of flagrant impropriety in deciding to intervene in a case in which the Province had an interest, prior to the receipt of the opinion from the independent prosecutors. For reasons more fully stated in the analysis of the argument on bias, we agree with the finding of the learned Chambers Judge that the Attorney General for Alberta acted appropriately in this case.

BIAS

42 Faced with possible allegations of conflict of interest, the Attorney General of Alberta instructed that the file be directed to the Federal Department of Justice, in the event that Department wished to exercise its discretion and take over the prosecution. He also directed that the file be referred to the Manitoba Attorney General's Department for decision. The Manitoba Attorney General's Department had authority to decide whether to prosecute or to stay proceedings. Counsel for

the appellant suggests that the Alberta Attorney General should have waited for the decision of the Manitoba Attorney General's Department before deciding to intervene in the prosecution, and alternatively that the decision by the Manitoba Department is tainted because of its association with the Attorney General of Alberta.

43 The Attorney General of Alberta acted appropriately in referring the decision on the prosecution to experienced prosecutors from another province. There is no suggestion that those prosecutors were influenced in any manner by the Attorney General of Alberta or by his agents in this province. In fact, such a suggestion would be contrary to the clear indication by Mr. Dangerfield, as an officer of the Court, that he and another prosecutor from Manitoba had reviewed the file and formed their own opinions.

44 Further, the appellant does not suggest that the authorization and approval by the Alberta Fish and Wildlife officials was granted otherwise than in good faith. The appellant merely suggests that the delegation of authority to the province is unconstitutional. The overwhelming evidence presented which establishes that over a period of time commencing with the agreement in 1930, correspondence in 1977-78 and ending with the agreement in 1987, the Federal Minister of Fisheries and Oceans and the Minister of the Environment were consistent in the position that jurisdiction for enforcement of the Fisheries Act had been transferred to the province. It is difficult to see how one could conclude otherwise than that Alberta acted in good faith in authorizing the construction in question.

45 Flagrant impropriety has not been established.

46 The appeal is dismissed.

HETHERINGTON J.A.
McFADYEN J.A.
RUSSELL J.A.

Case Name:

Parchment v. British Columbia

Between
Oneil Parchment, Plaintiff, and
Her Majesty the Queen in the Right of
the Province of British Columbia,
Defendant
And between
Attorney General of British Columbia, Petitioner, and
Oneil Parchment, Respondent

[2015] B.C.J. No. 1236

2015 BCSC 1006

Dockets: 133175, 148126

Registry: Victoria

British Columbia Supreme Court
Vancouver, British Columbia

J.C. Grauer J.

Heard: March 19-20, 2015.
Judgment: June 12, 2015.

(59 paras.)

Civil litigation -- Civil procedure -- Parties -- Vexatious litigants -- Pleadings -- Striking out pleadings or allegations -- Grounds -- Failure to disclose a cause of action or defence -- False, frivolous, vexatious or abuse of process -- Res judicata -- Applications by Crown for order dismissing predicate action with vexatious litigant declaration and related relief allowed -- Plaintiff was inmate who commenced several actions, human rights complaints and laid private informations alleging individuals involved in investigation that led to conviction for drug offences fabricated evidence and engaged in racist and defamatory behaviour -- Proceedings were repeatedly dismissed -- Plaintiff met criteria for vexatious litigant -- 14 extant proceedings were stayed -- Predicate action summarily dismissed -- Order did not extend to private informations due to jurisdictional and constitutional issues -- Criminal Code, ss. 504, 507.1 -- Supreme Court Act, s. 18.

Applications by the Crown for an order to strike or summarily dismiss the civil claim of the plaintiff, Parchment, and for an order prohibiting the plaintiff from instituting or continuing legal proceedings, including the swearing of private informations under the Criminal Code. The plaintiff was a self-represented inmate at the Vancouver Island Regional Corrections Centre. He was convicted of drug offences on the basis of evidence seized in breach of his rights, but admitted pursuant to s. 24(2). The plaintiff subsequently swore ten private informations against individuals involved with the investigation and his prosecution, alleging fabrication of evidence, racism and defamation. The plaintiff swore an additional 15 informations against various correctional officers and institutions. His complaints formed the basis of several human rights complaints and civil claims filed in Provincial and Supreme Court. The Crown sought a vexatious litigant declaration with related relief and an order striking or dismissing the current proceeding.

HELD: Applications allowed. The plaintiff's proceedings repeatedly raised particular themes notwithstanding prior rulings against him finding that his claims were devoid of merit. The criteria for a vexatious litigant declaration were met. The plaintiff was barred from instituting further Provincial or Supreme Court proceedings without prior leave. The Crown was granted an order staying 14 other proceedings already initiated by the plaintiff, save for an appeal to the extent it remained in good standing. The order did not extend to the swearing of private informations due to jurisdictional concerns regarding the doctrine of paramountcy. The Crown was at liberty to apply to extend the order to private informations via a notice of constitutional question. The predicate action was bound to fail as no bona fide triable issue existed and the claims offended the principle of res judicata. The action was dismissed via summary judgment.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Civil Rules, Rule 9-5(1)(a), Rule 9-5(1)(d), Rule 9-6(4), Rule 9-6(5)

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 8, s. 24(2)

Constitutional Question Act, RSBC 1996, c 68,

Courts of Justice Act, RSO 1990, c C43, s. 140(1)(d)

Criminal Code, RSC 1985, c C-46, s. 504, s. 507.1

Supreme Court Act, RSBC 1996, c 443, s. 18

Counsel:

The Plaintiff/Respondent on his own Behalf: Oneil Parchment.

Counsel for the Defendant/Petitioner: Peter Ameerali.

Reasons for Judgment

J.C. GRAUER J.

I. INTRODUCTION

1 Before me are applications in two proceedings arising out of civil claims and private informations filed by Mr. Oneil Parchment, who at the time of the hearing was incarcerated at the Vancouver Island Regional Corrections Centre ("VIRCC") and is self-represented.

2 The first, in the matter of *Parchment v Her Majesty the Queen in Right of the Province of British Columbia*, Victoria Registry No. 133175, is an application to strike all or portions of Mr. Parchment's notice of civil claim, and to dismiss his action summarily pursuant to Rule 9-6(4) and (5) of the *Supreme Court Civil Rules*. I will refer to this as the "Victoria action".

3 The second, in the matter of *British Columbia (Attorney General) v Parchment*, Vancouver Registry No. S148126, is an application pursuant to section 18 of the *Supreme Court Act*, RSBC 1996, c 443, and the court's inherent jurisdiction, for an order prohibiting Mr. Parchment from instituting or continuing legal proceedings in the Supreme Court or the Provincial Court, including the swearing of private informations under sections 504 and 507.1 of the *Criminal Code* RSC 1985, c C-46. I will refer to this as the "Vancouver petition".

4 To keep things simple, I will refer to both the Attorney General, as petitioner in the Vancouver petition, and Her Majesty the Queen in Right of British Columbia, as defendant in the Victoria action, as "the Attorney General". They are, of course, represented by the same counsel from the British Columbia Ministry of Justice.

II. PROCEDURAL HISTORY

5 These applications first came on for hearing before Mr. Justice Bernard in New Westminster on December 12, 2014. Mr. Parchment sought, and was granted, an adjournment to January 29, 2015. Mr. Justice Bernard made that date peremptory upon Mr. Parchment, and ordered him to file his materials by January 6, 2015.

6 The applications then came on for hearing before me on January 29, 2015, and Mr. Parchment again sought an adjournment. He had been released on December 23, 2014, and re-incarcerated on January 6, 2015. He complained of difficulties in preparing his materials, though he filed no materials to support that position. In the end, I granted a further adjournment and seized myself of the applications. The hearing was reset for March 19 and 20, 2015, and was again made peremptory on Mr. Parchment.

7 At the outset of this hearing, Mr. Parchment sought a third adjournment, and further sought leave to cross-examine certain persons, and to call various witnesses.

8 One of the difficulties he raised was an inability to have his affidavits sworn. With the consent of counsel for the Attorney General, I accepted his affidavits in the form in which they were presented, on Mr. Parchment's assurance that they were true to the best of his information and belief. I also accepted as part of the materials properly before me Mr. Parchment's proposed amended notice of civil claim in the Victoria action notwithstanding the objection of counsel for the Attorney General.

9 I denied Mr. Parchment's request for an adjournment, and declined to permit him to cross-examine witnesses or call his own witnesses. I observed that these applications did not call for findings of fact, and I reasoned that if it appeared from Mr. Parchment's affidavits and submissions

that I could not properly and fairly decide the issues before me without hearing from these witnesses, then the proper course would be to dismiss the applications. As matters proceeded, it became abundantly clear that the evidence Mr. Parchment sought to elicit either through cross-examination or through his own witnesses would add nothing of relevance to the issues I had to determine.

10 As will shortly become apparent, Mr. Parchment has commenced a number of civil proceedings in both the Provincial Court and this Court, and has sworn a number of private informations. These proceedings are all pertinent to the vexatious litigant application in the Vancouver petition. As the Victoria action is one of these proceedings, I propose to consider the Vancouver petition first, before turning to the specific relief requested in relation to the Victoria action.

III. THE VANCOUVER PETITION

A. Background

11 On January 8, 2010, Mr. Parchment was convicted by a jury of one count of possession of cocaine for the purpose of trafficking, and one count of possession of heroin for the purpose of trafficking (the "PPT charges"). An earlier trial on the same charges had concluded in a mistrial.

12 The drugs in question had been found on Mr. Parchment's person by one Constable Gelderblom. In the course of his trials, Mr. Parchment applied for the exclusion of the drugs from evidence under s. 24(2) of the *Canadian Charter of Rights and Freedoms* on the ground that his section 8 *Charter* rights had been breached. In *voir dires* conducted in each of Mr. Parchment's two trials, two different Justices of this Court concluded that his section 8 rights had been breached, but that the evidence was nevertheless admissible. Mr. Parchment was represented by counsel throughout these proceedings, while the federal Crown was represented by Mr. Brian Jones.

13 Acting in person, Mr. Parchment appealed his convictions. He took the position that the Crown had improperly withheld evidence, compromising his ability to defend himself, that the police officers who gave evidence at his trial, particularly Constable Gelderblom, had given contradictory evidence that misled the judge, and that employees of this Court, and the transcription service, participated in a cover-up by altering audio recordings of the trial proceedings and transcripts of those proceedings in order to conceal the efforts of Constable Gelderblom to fabricate evidence.

14 Mr. Parchment's appeal was dismissed: *R v Parchment*, 2013 BCCA 215.

15 In the years following his 2010 conviction, before his appeal, Mr. Parchment swore ten private informations pursuant to section 504 of the *Criminal Code* against persons involved with the investigation and prosecution of his PPT charges. He alleged a number of criminal offences involving the falsification or fabrication of evidence, similar to those he raised on his appeal.

16 In addition, during his time in custody, Mr. Parchment has sworn, or attempted to swear, fifteen informations against the "Corrections Branch" and various correctional officers regarding his treatment.

17 Mr. Parchment's same complaints about his treatment while in custody have also been the subject of seven complaints filed before the Human Rights Tribunal ("HRT"), a number of civil claims filed in the Provincial Court (Small Claims Division), and in this Court (in addition to the Victoria action).

B. Issues

18 The following issues arise in relation to the Attorney General's application:

(a) Has Mr. Parchment habitually commenced vexatious legal proceedings so as to trigger section 18 of the *Supreme Court Act*, and the court's inherent jurisdiction to control its own process?

(b) If so, then In addition to prohibiting the commencement of further civil proceedings without leave of the court, would it be a proper exercise of the court's inherent jurisdiction to order what would be, in effect, a stay of all existing civil proceedings?

(c) Does the court have jurisdiction under section 18 of the *Supreme Court Act* to prohibit Mr. Parchment from swearing private informations under the *Criminal Code* without the leave of the court, and if so, should it do so?

1. Habitual Commencement of Vexatious Proceedings?

19 By section 18 of the *Supreme Court Act:*

> 18. If, on application by any person, the court is satisfied that a person has habitually, persistently and without reasonable grounds, instituted vexatious legal proceedings in the Supreme Court or in the Provincial Court against the same or different persons, the court may, after hearing that person or giving him or her an opportunity to be heard, order that a legal proceeding must not, without leave of the court, be instituted by that person in any court.

20 In *S(M) v S(PI)* (1998), 60 BCLR (3d) 232 (CA), Hall J.A. reviewed the purpose of section 18 of the *Supreme Court Act*:

> [13] Section 18 of the *Supreme Court Act* has been in the *Act* for a great many years. The section gives the court the needed ability to control its own process. It enables the court to put in place an order to prevent a citizen or citizens from being subjected to an endless blizzard of litigation. A great number of court applications have been filed by this appellant over a course of several years. In my judgment, the history disclosed here afforded an ample foundation for the conclusions reached and the order made by the learned judge of first instance. It is obviously of the utmost importance that there be unfettered access to the courts by citizens but I should think that a corollary of that is that continuing abuse of this most valuable and deeply enshrined democratic right should be dealt with decisively to preserve the rights of all. There is a right to invoke the jurisdiction of the Supreme Court but it is not a right that is without limit. In my opinion, s. 18 of the *Supreme Court Act* affords to judges of the Supreme Court the authority to order in proper cases that a persistent litigant must seek leave before being able to launch court proceedings. It is a necessary power to ensure the proper administration of justice.

21 In *The Law Society of BC v Dempsey*, 2005 BCSC 1277 at paras 160-161, Williams J. listed some of the principles that guide the exercise of the Court's discretion on an application such as this:

> [160] The principles that guide the exercise of the Court's discretion on such an application were discussed in *Lang Michener Lash Johnston v. Fabian* (1987), 59 O.R. (2d) 353 at para. 20 (Ont. H.C):
>
> a. the bringing of one or more actions to determine an issue which has already been determined by a Court of competent jurisdiction constitutes a vexatious proceeding;
>
> b. where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
>
> c. vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
>
> d. it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
>
> e. in determining whether proceedings are vexatious, the Court must look at the whole history of the matter and not just whether there was originally a good cause of action;
>
> f. the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;
>
> g. the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.

22 These principles have been regularly cited with approval in this province in both this Court and in the Court of Appeal: see *Dempsey v. Peart*, 2004 BCCA 395.

23 That these principles are applicable to the proceedings pursued by Mr. Parchment cannot be denied. There are particular themes repeatedly raised by Mr. Parchment, and which he continues to raise notwithstanding rulings against him. These include:

* his original allegations of wrongdoing, including perjury and fabrication of evidence, on the part of the police officer, prosecutor and court officials

involved in his original conviction, dismissed by the Court of Appeal, but repeated (and dismissed) in other complaints, claims and informations;

* allegations of racism and cover up against the Corrections Branch, particularly in terms of failure to stop racist activities by a chapter of the Ku Klux Klan. These allegations have been the subject of unsuccessful complaints before the HRT, a number of private informations, small claims actions and the Victoria action. These began with an assault of Mr. Parchment in prison that he alleges was carried out by two inmates (one aboriginal and one Arabic) at the behest of the KKK, although the assault, curiously, has not itself been part of his claims;

* allegations framed in different ways, including defamation, but which consist of an alleged breach of duty by Corrections officers in failing to correct false rumours spread about Mr. Parchment by other inmates, to his detriment; and

* allegations that amount to medical malpractice or misfeasance in relation to dietary matters, botched procedures and the denial of access to skin cream, raised in complaints before the HRT, claims brought in Provincial Court, and the Victoria action.

24 The Victoria action is in many ways illustrative. The notice of civil claim sets out, in essence, three claims. The first alleges that Mr. Parchment was assaulted by persons directed by a chapter of the KKK, and claims that the province failed in its duty to do something about the presence of a KKK chapter and its promotion of racism at VIRCC. The second alleges that the province filed affidavits in response to Mr. Parchment's complaints before the HRT that defamed him. The third claims that the province refused to 'set the record straight' about Mr. Parchment's criminal history, about which untrue rumours were being spread. This, he alleged, exposed him to risk from the general prison population.

25 Later in the document, a sum in the amount of $100,000 is claimed as damages for medical negligence, although no material facts are pleaded to support such a claim.

26 All of these are also the subject of private informations that Mr. Parchment has laid under the *Criminal Code*, and were the subject of claims before the HRT, and in small claims proceedings. They have not met with success. Some of these claims do not raise any cause of action known to law (an alleged tort of discrimination; and a duty to correct rumours started by others), while others are doomed to fail (the contents of affidavits filed before the HRT would be subject to absolute privilege), or lack any factual foundation (negligence, medical and other).

27 Neither the stay of an information nor the dismissal of a human rights complaint or small claims action has deterred Mr. Parchment from laying new informations or starting new actions based upon the same allegations. The claim for damages from the withholding of skin cream, for instance, was dismissed in Provincial Court: see the decision of the Honourable Judge Bayliff in *Parchment v British Columbia*, 2014 BCPC 377.

28 In these circumstances, I am satisfied that the requirements of section 18 of the *Supreme Court Act* have been met. I order that Mr. Parchment is barred from instituting any further legal proceedings in this Court or in the Provincial Court without first obtaining leave of the court.

2. Stay of Existing Civil Proceedings?

29 Section 18 of the *Supreme Court Act* refers only to barring a litigant from instituting proceedings. It does not provide for an order staying existing proceedings. This is because the Court's inherent jurisdiction does not encompass the power to prohibit litigants from starting actions. It has, however, always extended to controlling litigation that already exists, and to preventing the abuse of the court's process. Does it extend to imposing stays in cases that are not directly before the court so that their merits cannot be fully reviewed?

30 In Ontario, the vexatious litigant provision of the *Courts of Justice Act,* RSO 1990, c C43, section 140(1)(d), specifically authorizes a judge to order that where a person has been found to be a vexatious litigant, "a proceeding previously instituted by the person in any court not be continued".

31 There is no such provision in our *Supreme Court Act*. A similar order, preventing a litigant not only from instituting proceedings without leave, but also from filing applications in any existing legal proceedings without leave, has nevertheless been made and upheld on appeal: *Attorney General of B.C. v Lindsay*, 2007 BCCA 165.

32 What is clear is that such an order must be express: *Pearlman v Vancouver Police Department and Constable Ben Stevens #2177*, 2012 BCSC 1179, and ought not to be made where the other claims appear to be unrelated: *Rose v Canada (Royal Canadian Mounted Police)*, 2009 BCSC 1750 at para 34.

33 As far as I am able to determine from the record put before me, three Provincial Court claims commenced by Mr. Parchment have been dismissed, as has a Supreme Court action commenced in the Nanaimo Registry. This leaves, as active files, the Victoria action and Action No. 050562 commenced in the Kamloops Registry of the Supreme Court on August 29, 2014, with the style of cause of *Parchment v Her Majesty the Queen in Right of the Province of British Columbia, Monika Niklasin the class and Sentry Health Services Corporation* (the "Kamloops action").

34 In addition, I am advised that Mr. Parchment has purported to commence a number of actions in both the Provincial Court and the Supreme Court in which he has yet to effect proper service on the named defendants. The files for some of these claims contain nothing other than applications for indigent status, suggesting that they have yet to be properly commenced. Where affidavits in support are contained in the file, those affidavits demonstrate that the matters to be raised are duplicative of claims previously raised and dismissed.

35 The Victoria action and the Kamloops action are among those proceedings I have considered in concluding that it is appropriate to declare Mr. Parchment a vexatious litigant and pronounce an order under section 18 of the *Supreme Court Act*. I will consider the Victoria action separately below.

36 In the circumstances, I am satisfied that these additional civil claims are born of the same vexatious conduct and should be stayed. I order that Mr. Parchment take no further steps in the following actions without first obtaining the leave of the court:

(a) BCSC Action No. 050562 (Kamloops);

(b) BCSC Action No. 111545 (Victoria);

(c) BCSC Action No. 143195 (New Westminster);

(d) BCSC Action No. 143196 (New Westminster);

(e) BCSC Action No. 132404 (Victoria);

(f) BCSC Action No. 71129 (Nanaimo);

(g) BCSC Action No. 142335 (Victoria);

(h) BCSC Action No. 28035 (Chilliwack);

(i) BCSC Action No. 72952 (Nanaimo);

(j) BCSC Action No. 28286 (Chilliwack);

(k) BCSC Action No. 50557 (Kamloops);

(l) BCSC Action No. 28308 (Chilliwack);

(m) BCSC Action No. 1445712 (Prince George); and

(n) BCPC File No. 39224 (Kamloops).

37 I do not extend this order to Mr. Parchment's appeal filed in the Chilliwack Registry of the Supreme Court under file number 62303-1, to the extent it remains in good standing.

3. Jurisdiction to Prohibit the Swearing of Private Informations?

38 It is in this area that Mr. Parchment has proven himself to be most vexatious. He has sworn innumerable private informations, many against police officers and Crown counsel relating to the alleged falsification or fabrication of evidence in relation to the investigation and prosecution of the original charges against him, others against corrections officers alleging fabrication of evidence in connection with his human rights complaints, and still others against various other corrections personnel, justices of the peace and court administration staff. Often they follow the dismissal of proceedings such as his civil actions, and human rights complaints, and relate to the conduct of those matters. Most of them have been dismissed; others have been stayed.

39 I find it abundantly clear on the record that in swearing these informations, Mr. Parchment has engaged in the habitual commencement of vexatious proceedings. The question is whether section 18 of the *Supreme Court Act* gives me the jurisdiction to order that Mr. Parchment must not swear any further private informations without leave of the court. This raises a number of issues.

40 Counsel for the Attorney General argues that the term "legal proceeding" used in section 18 is wide enough to encompass the process of laying of an information pursuant to section 504 of the *Criminal Code*:

> **504.** Any one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information, where it is alleged
>
> (a) that the person has committed, anywhere, an indictable offence that may be tried in the province in which the justice resides, and that the person
>
> (i) is or is believed to be, or
>
> (ii) resides or is believed to reside, within the territorial jurisdiction of the justice;
>
> (b) that the person, wherever he may be, has committed an indictable offence within the territorial jurisdiction of the justice;
>
> ...

41 Despite earlier, and arguably distinguishable, authority to the effect that a vexatious litigant order under the *Supreme Court Act* cannot prevent a litigant from laying in information before a justice (see, for instance, *Mortimer v Barrisove*, [1977] 6 WWR 383 (BCSC)), modern authority supports the proposition that it is the laying of an information that constitutes the commencement of criminal proceedings (*Ambrosi v British Columbia (Attorney General)*, 2014 BCCA 123 at para 19; *R v McHale*, 2010 ONCA 361 at para 43); see also *Attorney General of B.C. v Lindsay*.

42 Nevertheless, whether a vexatious litigant order can apply to the commencement of criminal proceedings remains in doubt: compare, for instance, *Stanny v Alberta*, 2009 ABQB 161 and *R v Thorburn*, 2010 ABQB 390.

43 For my part, I have two difficulties with resolving this issue in favour of the Attorney General.

44 First, there is a constitutional issue. Criminal law is within the exclusive jurisdiction of Parliament. The *Criminal Code* provides for the laying of an information by any person, subject only to the requirement of a reasonable belief concerning the commitment of an indictable offence. In such circumstances, the justice "shall" receive the information. The *Supreme Court Act* is a provincial statute, and arguably, an interpretation of section 18 that would extend to prohibiting the laying of an information under the *Criminal Code* would offend the doctrine of paramountcy by intruding into the realm of criminal procedure.

45 The Attorney General submits that I need not trouble myself with such concerns as Mr. Parchment had given no Notice of Constitutional Question pursuant to the *Constitutional Question Act*, RSBC 1996, c 68, a submission that I found remarkable given that Mr. Parchment was hardly in a position to raise the matter. Given my conclusion on this issue, I need not take the constitutional question any further. If I felt it necessary, however, I would give notice myself and require the matter to be fully argued with the assistance of *amicus curiae*.

46 Second, there is the process issue. Although it may be said that it is the laying of an information that constitutes the commencement of criminal proceedings, the fact remains that the court's process is not thereby engaged the same way as it is with the commencement of civil proceedings. On the contrary, section 507.1 of the *Criminal Code* sets out its own gatekeeping process. A judge or designated justice to whom the private information must be referred shall consider whether to compel the appearance of the accused on the information. That judge may issue a summons or warrant only after hearing and considering the allegations of the informant and the evidence of witnesses, with notice to the Attorney General. There is also the power of the Attorney General to stay proceedings. The question then becomes, how many keepers must guard the gate? On what basis should the court interpose itself at the front, as well as at the back, of this preliminary process?

47 That Mr. Parchment has laid many private informations of dubious merit cannot be doubted. His actions in this regard are clearly vexatious. That he will continue act in this manner seems probable. But at this point, I see little to be gained by requiring him to go before a judge of this court to get leave to go before a justice to lay an information, when any information he lays is in any event subject to the scrutiny of a judge or designated justice. As the Court of Appeal put it in *Ambrosi*:

> [23] Section 507.1 requires that the referral be heard by a judge or a designated justice; that the informant lead evidence of his or her allegations on each essential element of the offence (see also, *McHale* at para. 74); and that notice be given to the Attorney General, and that the Attorney General be permitted to participate, cross-examine and call witnesses, and present evidence.
>
> [24] These additional safeguards ensure that "spurious allegations, vexatious claims, and frivolous complaints barren of evidentiary support or legal validity will not carry forward into a prosecution" (*McHale* at para. 74).

See also *Lindsay v British Columbia (Attorney General)*, 2005 BCSC 1494 at para 11, and *Thorburn* at para 72.

48 In these circumstances, given the exceptional nature of the relief sought, the fact that this jurisdiction is to be exercised with great caution, the existence of procedural safeguards in the *Criminal Code,* and taking into account Mr. Parchment's inability to mount a proper argument on the constitutional and procedural issues, I am not persuaded that it would be appropriate to impose an additional layer of gatekeeping even assuming I have the jurisdiction to do so.

49 Accordingly, I decline to extend the order I have made, requiring Mr. Parchment to obtain the leave of the court before instituting further legal proceedings in any court, to the laying of private informations under section 504 of the *Criminal Code.*

IV. THE VICTORIA ACTION

50 The Attorney General applies for an order striking all or part of Mr. Parchment's notice of civil claim pursuant to Rule 9-5 (1)(a) and (d), and further for an order dismissing the claim by way of summary judgment pursuant to Rule 9--6(4) and (5).

51 The law applicable to such applications is well-settled. See, for instance, *Bajwa v British Columbia Veterinary Medical Association*, 2012 BCSC 878, and the cases cited therein.

52 I have already described above the nature of the claims Mr. Parchment has pleaded in this action. As discussed there, I am satisfied that all of them are bound to fail, and that no *bona fide* triable issue exists. They offend the principle of *res judicata*, put forward causes of action unknown to law, are unsupported by material facts, or are by their nature subject to valid defences in law such as absolute privilege and the effluxion of time. Accordingly, the Attorney General is entitled to succeed in its application for summary judgment dismissing the claim, and it is accordingly dismissed.

V. CONCLUSION AND SUMMARY

53 Pursuant to section 18 of the *Supreme Court Act*, Mr. Parchment must not, without leave of the court, institute a legal proceeding in this Court or in the Provincial Court of British Columbia. This does not extend to the laying of private informations under section 504 of the *Criminal Code*.

54 The Attorney General is at liberty to reapply to extend the application of this order to the laying of private informations under section 504 of the *Criminal Code* in the event of continued abuse of that provision by Mr. Parchment, provided that the matter proceeds as though appropriate Notice had been given under the *Constitutional Question Act* as discussed in these reasons, and an *amicus curiae* is appointed to assist the Court, given Mr. Parchment's limited ability to argue his position on this important issue fully.

55 Further, nothing in this order precludes Mr. Parchment from appealing this order, or from responding to a proceeding commenced by another litigant.

56 In addition, Mr. Parchment is prohibited from taking any further steps in the following actions without first obtaining the leave of the court:

(a) BCSC Action No. 050562 (Kamloops);

(b) BCSC Action No. 111545 (Victoria);

(c) BCSC Action No. 143195 (New Westminster);

(d) BCSC Action No. 143196 (New Westminster);

(e) BCSC Action No.132404 (Victoria);

(f) BCSC Action No. 71129 (Nanaimo);

(g) BCSC Action No. 142335 (Victoria);

(h) BCSC Action No. 28035 (Chilliwack);

(i) BCSC Action No. 72952 (Nanaimo);

(j) BCSC Action No. 28286 (Chilliwack);

(k) BCSC Action No. 50557 (Kamloops);

(l) BCSC Action No. 28308 (Chilliwack);

(m) BCSC Action No. 1445712 (Prince George); and

(n) BCPC File No. 39224 (Kamloops).

57 This stay does not prevent Mr. Parchment from proceeding with his appeal filed in the Chilliwack Registry of the Supreme Court under file number 62303-1, to the extent it remains in good standing.

58 The Victoria action, BCSC No. 133175, is dismissed.

59 The Attorney General may forward its form of order to the appropriate registries to be brought to my attention before entry, without the need for obtaining Mr. Parchment's signature.

J.C. GRAUER J.

Indexed as:

R. v. Dowson

Ross Dowson, appellant;
and
Her Majesty The Queen, respondent;
and
Canadian Civil Liberties Association, intervener.

[1983] 2 S.C.R. 144

[1983] 2 R.C.S. 144

[1983] S.C.J. No. 68

[1983] A.C.S. no 68

File No.: 16818.

Supreme Court of Canada

1983: June 9 / 1983: October 13.

Present: Laskin C.J. and Dickson, Estey, McIntyre, Chouinard, Lamer and Wilson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law -- Procedure -- Private prosecution -- Stay of proceedings -- Mandamus to compel hearing on informations - - Whether Attorney General has power to stay proceedings any time after laying of information -- Criminal Code, R.S.C. 1970, c. C-34 as amended, ss.2, 455, 455.3, 503, 508.

Appellant laid informations before a Justice of the Peace alleging the commission of indictable offenses. Prior to the commencement of the hearing by the Justice of the Peace to determine whether process should issue, the Attorney General stayed the proceedings pursuant to his authority under s. 508 of the Criminal Code. The Supreme Court of Ontario denied appellant's application for an order for mandamus directing the Justice of the Peace to proceed with a hearing under s. 455.3 of the Code and the Court of Appeal upheld the decision. This appeal is to determine whether the Attorney

General is empowered by s. 508(1) to direct a stay of proceedings after an information has been received but before the Justice of the Peace has completed an inquiry under s. 455.3.

Held: The appeal should be allowed.

Section 508 of the Criminal Code did not empower the Attorney General to stay proceedings at any time after an information was laid. The power to stay starts only after a summons or warrant is issued. The laying of an information does not amount to the "finding of an information"; an information is found only after the Justice of the Peace has made a decision to issue process. The power to stay, while necessary, encroaches upon a citizen's fundamental and historical right to inform under oath a Justice of the Peace of the commission of a crime. Parliament has seen fit to impose upon the justice an obligation to "hear and consider" the allegation and make a determination. In the absence of a clear and unambiguous text taking away that right, and considering a text of law that is open to an interpretation that favours the exercise of that right while amply accommodating the policy consideration that supports the power to stay, the right should be protected.

Cases Cited

R. v. Leonard, ex parte Graham (1962), 133 C.C.C. 262; R. v. Wilson (1878), 43 U.C.Q.B. 583; R. v. Mitchel (1848), 3 Cox C.C. 93; R. v. Rosser (1971), 16 C.R.N.S. 321; R. v. Chabot, [1980] 2 S.C.R. 985, referred to.

APPEAL from a judgment of the Ontario Court of Appeal (1981), 62 C.C.C. (2d) 286, 24 C.R. (3d) 139, affirming a judgment of Montgomery J. (1980), 57 C.C.C. (2d) 140, 19 C.R. (3d) 384, dismissing an application for an order of mandamus. Appeal allowed.

Harry Kopyto and Harvey Berkal, for the appellant. Howard F. Morton, for the respondent. Ian Scott, Q.C., and Ross Wells, for the intervener.

Solicitor for the appellant: Harry Kopyto, Toronto. Solicitor for the respondent: The Attorney General for the Province of Ontario, Toronto. Solicitors for the intervener: Cameron, Brewin & Scott, Toronto.

The judgment of the Court was delivered by

LAMER J.:-- Appellant Dowson applied to a Justice of the Supreme Court of Ontario for an order of mandamus directed to a Justice of the Peace to proceed with a hearing pursuant to s. 455.3 of the Criminal Code on nine charges: three of forgery, three of uttering forged documents, and three of conveying false messages. The application was dismissed as was also his appeal from that decision to the Court of Appeal. Dowson now appeals to this Court.

On April 25, 1980, the appellant laid an information before a Justice of the Peace concerning allegedly forged letters. Under s. 455.3 of the Criminal Code a justice who receives an information

(other than an information laid under s. 455.1) shall hold a hearing to determine whether process should issue against the accused. At the request of the Attorney General of Ontario, this hearing was adjourned to permit the Attorney General to complete his investigation into the matter.

On June 26, 1980, a new information was laid and received. It charged an officer of the R.C.M.P. with forgery, uttering false documents and conveying false messages contrary to ss. 326(1), 330 and 324 of the Criminal Code. The hearing under s. 455.3 was again adjourned and eventually resumed on October 30, 1980. At this time, counsel for the Attorney General of Ontario, pursuant to s. 508 of the Code, directed the clerk of the court to make an entry on the record that the proceedings were stayed by direction of the Attorney General. His Worship Justice of the Peace Allen refused the appellant's application for an adjournment and discontinued the proceedings.

The appellant then applied for the order of mandamus.

STATUTORY PROVISIONS

455. Any one who, on reasonable and probable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information, where it is alleged

(a) that the person has committed, anywhere, an indictable offence that may be tried in the province in which the justice resides, and that the person

  (i) is or is believed to be, or
  (ii) resides or is believed to reside, within the territorial jurisdiction of the justice;

(b) that the person, wherever he may be, has committed an indictable offence within the territorial jurisdiction of the justice;
(c) that the person has, anywhere, unlawfully received property that was unlawfully obtained within the territorial jurisdiction of the justice; or
(d) that the person has in his possession stolen property within the territorial jurisdiction of the justice.

455.3 (1) A justice who receives an information, other than an information laid before him under section 455.1, shall

(a) hear and consider, ex parte,

  (i) the allegations of the informant, and
  (ii) the evidence of witnesses, where he considers it desirable or necessary to do so; and

(b) where he considers that a case for so doing is made out, issue, in accordance with this section, either a summons or a warrant for the arrest of the

accused to compel the accused to attend before him to answer to a charge of an offence.

508. (1) The Attorney General or counsel instructed by him for the purpose may, at any time after an indictment has been found and before judgment, direct the clerk of the court to make an entry on the record that the proceedings are stayed by his direction, and when the entry is made all proceedings on the indictment shall be stayed accordingly and any recognizance relating to the proceedings is vacated.

(2) Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new charge or preferring a new indictment, as the case may be, by the Attorney General or counsel instructed by him for the purpose giving notice of the recommencement to the clerk of the court in which the stay of proceedings was entered, but where no such notice is given within one year after the entry of the stay of proceedings, the proceedings shall be deemed never to have been commenced.

(Emphasis added.)

The appellant raised two issues:

1. Is the Attorney General of Ontario empowered by s. 508(1) of the Criminal Code to direct a stay of proceedings after an information has been received but before the Justice of the Peace has completed an inquiry under s. 455.3 to determine whether process should issue against the accused?
2. Are The Ministry of the Attorney General Act and The Crown Attorneys Act ultra vires in so far as they authorize the Attorney General of Ontario to direct a stay of proceedings after an information has been laid but before the Justice of the Peace has completed an inquiry under s. 455.3?

At the hearing before this Court, the Crown took the position that it did not rely on provincial legislation to support its position. This being so, we are left with only the first issue.

THE JUDGMENTS

Supreme Court of Ontario

Montgomery J. concluded that "All criminal proceedings are commenced by the laying of an information. Once proceedings are commenced, the Attorney General may intervene and conduct or stay proceedings." He relied on The Department of Justice Act, R.S.O. 1970, c. 116, The Crown Attorneys Act, R.S.O. 1970, c. 101, the historical origins of the expression "finding an indictment" in 1886, R.S.C. 1886, c. 174, s. 2, paras. (c.) and (d.), and, amongst others, R. v. Leonard, ex parte Graham (1962), 133 C.C.C. 262, a decision of the Court of Appeal of Alberta, and the fact that the Attorney General was the "chief law officer for the Crown and the duly constituted public authority charged with the responsibility for the administration of justice in the province".

The Court of Appeal

The Court of Appeal, per Howland C.J.O. adopted the reasons of Montgomery J. and added three observations of its own. They are essentially as follows:

(1) Any ambiguity in the expression "an indictment has been found" is resolved by the definition of "indictment" in s. 2 and by the context in which the expression occurs, especially s. 508(2). This section provides that proceedings stayed in accordance with s. 508(1) "may be recommenced, without laying a new charge or preferring a new indictment". It thus assimilates laying a charge with finding an indictment.

(2) Under s. 732.1 the Attorney General has the power to stay proceedings any time after the laying of an information which charges a summary conviction offence. It would be anomalous to deny him this power with respect to indictable offenses, especially since he is charged by statute with the ultimate responsibility for the conduct of prosecutions: see The Crown Attorneys Act, ss. 11 and 12.

(3) As Chief law officer of the Crown, the Attorney General has always had the power to control the issue of process in the name of the Crown. His decision is not reviewable by the courts.

Section 2 of the Criminal Code defines "indictment" and "count":

> "indictment" includes
>
> (a) information, presentment and a count therein
>
> (b) a plea, replication or other pleading, and
>
> (c) any record;
>
> "count" means a charge in an information or indictment;

Section 503 defines the expression "Finding an indictment"

> 503. For the purposes of this Part, finding an indictment includes
>
> (a) preferring an indictment, and
> (b) presentment of an indictment by a grand jury.

As the Attorney General can stay under s. 508 "at any time after an indictment has been found and before judgment", when substituting the word "information" for the word "indictment" the question to be answered in order to address the issue is whether an information is "found" upon the mere "laying" of the information or only when the Justice of the Peace has decided to issue a process, warrant or summons, following a hearing under s. 455.3.

Appellant takes issue with the Alberta Court of Appeal's decision in R. v. Leonard, ex parte Graham, supra, and takes the primary position that the Attorney General cannot enter a stay of proceedings while the matter is in Provincial Court. In that case the issue before the Court was whether the Attorney General could intervene to withdraw an information for an indictable offence that had been laid by a private prosecutor. In obiter Smith C.J.A., rendering judgment for the Court said, at p. 266:

Justices of the Peace at a preliminary inquiry. (See Stroud, Judicial Dictionary, vol. 3, 4th ed., London, Sweet & Maxwell Ltd., 1973, at p. 1362. See also Blackstone, Commentaries on The Laws of England, vol. IV, 18th ed., 1829, where commenting on criminal informations he says, at p. 308: "The informations that are exhibited in the name of the king alone, are... .")

Exhibiting informations also had in the last century a secondary meaning. Jowitt, The Dictionary of English Law, London, Sweet & Maxwell Ltd., 1959, at p. 968, refers to the matters as follows:

> Proceedings before justices of the peace in matters of a criminal nature are commenced by an information, which is a statement of the facts of the case made by informant or prosecutor, sometimes verbally, sometimes in writing, and either with or without an oath; when not upon oath, the information is said to be exhibited.
>
> (Emphasis added.)

In my view, this latter meaning could not have been the one intended in s. 5 of the Code of 1927 defining "Finding of the indictment" as including "the exhibiting of an information". Indeed, there is no reason to preclude informations that are sworn and consider only those that were not as amounting to indictments "found". That would not make any sense. In fact, were it not for the 1953-54 amendments to the Criminal Code it could be seriously questioned whether the word "information" in the Code definition of indictment even before 1953 meant anything other than a "criminal information". In any event, even assuming that information did include those before justices, reference to these old sections derived as they are from ancient practice would still leave us facing the original question of if and when an information may be found. The fact that Parliament, when abolishing criminal informations in 1953, deleted the words "exhibiting an information" but left the word "information" in the definition of indictment, clearly indicates that information, whatever the word may have included in the predecessor sections, as of then referred to those informations before Justices and those only, as there existed as of then none else.

For these reasons I do not, with respect, think that anything turns upon the predecessor sections. However, reference to the historical evolution of the powers enjoyed by the Attorney General in the charging process to which I shall allude shortly is of prime importance.

Now to consider the views of the Court of Appeal.

With respect, I do not find compelling the first and third reasons upon which they predicated their conclusion. As regards the first of those reasons, all that s. 508(2) says is that you need not start all over to recommence the proceedings. It does not follow that laying a new information would amount to the "finding of an information". If the Attorney General does choose to start all over, he will of necessity have to lay an information. Prior to the addition in 1972 of s. 508(2) to what is now s. 508(1), there was uncertainty as to whether you had to prefer a new charge or whether you could start the proceedings again by carrying on at the point the proceedings were stayed. (See R. v. Mitchel (1848), 3 Cox C.C. 93; see also R. v. Rosser (1971), 16 C.R.N.S. 321, at p. 326, for a review of the authorities.)

The Court of Appeal's third reason was expressed as follows:

> Since the decision of the Justice of the Peace to proceed with the charges involves the issue of process in the name of the Sovereign, it would seem appropriate that the Attorney-General as the chief law officer of the Crown should have the power to prevent the use of such process where he considers that the proceedings should be stayed. This involves an executive decision which historically, and now by statute, has been vested in the Attorney-General. This decision is not reviewable by the Courts and is one for which he is in turn accountable to the Legislature or to Parliament, as the case may be.
>
> The right of a private citizen to lay an information, and the right and duty of the Attorney-General to supervise criminal prosecutions are both fundamental parts of our criminal justice system.

There is nothing there said with which I take issue. However, with respect, I fail to see why the conclusion dictated by these remarks would of necessity be that the law should be interpreted as did the Court of Appeal. Indeed, prior to that determination by the Justices of the Peace, there being no summons or warrant issued, one could say that the process is not yet put into operation. Furthermore, when the Attorney General in the exercise of his supervisory power over criminal prosecutions chooses to prevent the use of the criminal process, as is his right, his accountability to the Legislature would be much greater if he acted after the Justice of the Peace has determined that there is cause to issue process.

The power to stay is a necessary one but one which encroaches upon the citizen's fundamental and historical right to inform under oath a Justice of the Peace of the commission of a crime. Parliament has seen fit to impose upon the justice an obligation to "hear and consider" the allegation and make a determination. In the absence of a clear and unambiguous text taking away the right, it should be protected. This is particularly true when considering a text of law that is open to an interpretation that favours the exercise of that right whilst amply accommodating the policy consideration that supports the power to stay. When one adds to these considerations the fact that, apart from the court's control, the only one left is that of the legislative branch of government, given a choice, any interpretation of the law, which would have the added advantage of better ensuring the Attorney General's accountability by enhancing the legislative capacity to superintend the exercise of his power, should be preferred.

An historical review of the evolution of the Crown's power to avoid the preliminary inquiry or the grand jury indicates an intent on the part of Parliament to increase the Attorney General's accountability. The most recent manifestation of this evolution is found in the amendments brought to the Crown's power to by-pass a preliminary inquiry and to prefer indictments directly before a grand or petit jury. Prior to 1969, not only the Attorney General but his agent, and the Deputy Attorney General, and any one with the written consent of the Attorney General could prefer an indictment directly.

The 1969 amendments first took out of the list of those who could indict, even following a preliminary inquiry, the Deputy Attorney General because he was not considered as being an agent of the Attorney General. As for by-passing a preliminary inquiry or a discharge, his agents or others, even with his written consent, can no longer do so. The Attorney General himself or a person

authorized by the court are the only ones that can now prefer directly. I can see no reason why we should not when possible interpret the law in compliance with this clear attitudinal trend on the part of Parliament. Furthermore, to say that an information is found only once a determination to issue a process is made is not inconsistent with the procedure by indictment. We are here unfortunately dealing with legal expressions which were developed in the grand jury system and as a result a certain degree of transposition is required. Under the grand jury system (which still exists in Nova Scotia) a bill was preferred before the grand jury. If it found a true bill it presented the indictment to the court. Prior to a true bill the Attorney General could not under the common law stay the proceedings by entering a nolle prosequi. The power to stay and limitation thereto were codified in this country in 1892 by s. 732:

> 732. The Attorney General may, at any time after an indictment has been found against any person for any offence and before judgment is given thereon, direct the officer of the court to make on the record an entry that the proceedings are stayed by his direction, and on such entry being made all such proceedings shall be stayed accordingly.
>
> 2. The Attorney-General may delegate such power in any particular court to any counsel nominated by him.

The procedure by indictment where there is no grand jury in fact does away, though we still speak of preferring an indictment, with the two stages of preferral and presentment. "There is but one act, that act being the placing by the appropriate authority of 'an indictment in writing setting forth the offence' before the trial court. This act constitutes the commencement of the trial and is a combination of the steps of preferral and presentment." (Dickson J. for the Court in R. v. Chabot, [1980] 2 S.C.R. 985, at p. 992.)

Under this procedure the Attorney General makes the determination in the stead of the grand jury, and the next step is for the court to issue the process to bring the accused before the court to answer the charge. When the proceedings are commenced by an information the informant in a sense "prefers" the information and the Justice of the Peace decides whether or not to "find" the information and then the next step is to issue the process to bring the accused before him. The Justice of the Peace then plays the same role as the grand jury, as regards the finding of grounds to issue a process following a preferment or presentment.

The Attorney General's power to stay starts as of the moment a summons or warrant is issued.

Though this approach is not without logic, I must admit that were it the only reason for adopting this course I should have to adopt the second reason advanced by the Court of Appeal and dismiss this appeal. Indeed the second observation made by the Court of Appeal cannot be discarded easily, and accordingly I have felt great hesitation in concluding that this appeal should be allowed. In fact, it is when addressing the third observation made by the Court of Appeal, (the Attorney General's historical control of the process), that I have preferred a policy consideration, desirable accountability, to the advantage of avoiding different approaches, one for indictable offenses and the other for summary conviction offenses. The disparity between stays for summary convictions and those for indictable offenses is undesirable and could not have been intended by Parliament. Such an anomaly is not, unfortunately so infrequent in the field of criminal procedure. Our

lexicon is archaic and no longer corresponds to current institutions. Our changing sections are unfortunately often the result of patchwork on the part of draughtsmen. Furthermore, it is difficult for the courts to inject some logic and cohesion in a system where, as regards the charging process, the exception has become over the years the rule, where the exceptional procedures of direct indictment without a grand jury for the Northwest Territories is now, save in Nova Scotia, the system for the whole country. When faced with the choice between uniformity of procedure and greater political accountability for the exercise of a necessary but no less dangerous discretion to circumvent the courts and deny a citizen his right to bring another to court, I think I should, pending Parliament's decision to speak out in modern terms, prefer the latter and suffer some anomaly in the law which I imagine is temporary.

For these reasons I would allow the appeal, and order that a mandamus issue and be directed to his Worship Justice of the Peace Allen to proceed with a hearing pursuant to s. 455.3 of the Criminal Code on the nine charges contained in the information of the appellant Dowson.

Appeal allowed.

Case Name:

McHale v. Ontario (Attorney General)

Between
Her Majesty the Queen, Appellant, and
Gary William McHale, Respondent

[2010] O.J. No. 2030

2010 ONCA 361

261 O.A.C. 354

76 C.R. (6th) 371

2010 CarswellOnt 3280

256 C.C.C. (3d) 26

88 W.C.B. (2d) 547

Docket: C50822

Ontario Court of Appeal
Toronto, Ontario

W.K. Winkler C.J.O., S.T. Goudge and D. Watt JJ.A.

Heard: January 14, 2010.
Judgment: May 17, 2010.

(91 paras.)

Criminal law -- Prosecution -- Private prosecutors and prosecutions -- Role of the Crown -- Appeal by Crown from an order directing a pre-enquete regarding a private informant's allegations against three individuals dismissed -- The judge properly held that Crown counsel had acted prematurely in withdrawing the information prior to the pre-enquete -- The private informant was entitled to have a judge hear his allegations and evidence, and consider whether the elements of the offences alleged were made out -- As the pre-enquete was conducted in camera, there was no risk of prejudice to the interests of the named individuals -- Criminal Code, ss. 2, 8, 504, 507.1, 579, 785.

Appeal by the Crown from an order directing that a pre-enquete be held with respect to an information sworn by McHale, a private citizen, against three named individuals. McHale appeared before a justice of the peace on August 19, 2008, alleging the three named individuals committed a common nuisance on a specific date one year earlier. The justice was satisfied of the facial sufficiency of the information. McHale appeared at the pre-enquete on October 7, 2008. He objected to the participation of the Crown counsel present, because of his participation in earlier proceedings involving McHale. Crown counsel withdrew the charges against the three named individuals on the basis that the prosecutions were an abuse of process and not in the interests of justice. The justice did not hear or consider any evidence from McHale or the Crown. McHale successfully applied for an order of mandamus. The judge decided the case should be returned to a justice of the peace for a pre-enquete to determine whether process should issue to compel the named individuals to appear on the charges Crown counsel had withdrawn. The judge held that the Crown was not entitled to withdraw the information prior to the pre-enquete. He rejected Crown counsel's reliance on the Crown Attorneys Act, provincial legislation, because interpreting the Act to permit Crown counsel to withdraw the information would have created a conflict with the federal Criminal Code.

HELD: Appeal dismissed. The judge was correct in finding the withdrawal of the information sworn by McHale prior to the pre-enquete was premature. This was not because the Crown lacked the authority to withdraw an information generally, or because of any constitutional conflict between the Act and the Code. It was because McHale, as a private informant, had the right to have a judge listen to his allegations and evidence and to decide whether there was evidence of the essential elements of the offence charged. Because the pre-enquete was conducted in camera, there was no risk of prejudice to the interests of the named individuals.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, s. 2, s. 2, s. 8(2), s. 455.3, s. 455.3(1)(a), s. 504, s. 507, s. 507.1, s. 507.1(1)(a)(ii), s. 507.1(3), s. 507.1(3)(a), s. 507.1(3)(b), s. 507.1(3)(c), s. 507.1(3)(d), s. 507.1(4), s. 507.1(11), s. 508(1), s. 579, s. 579(1), s. 785(1)

Crown Attorneys Act, R.S.O. 1990. c. C.49, s. 11, s. 11(b), s. 11(d)

Appeal From:

On appeal from the decision of the Honourable Justice T. David Marshall of the Superior Court of Justice dated July 2, 2009, directing that a justice of the peace conduct a hearing under s. 507.1 of the Criminal Code on several charges contained in informations sworn by Gary McHale, with reasons reported at (2009), 251 C.C.C. (3d) 283.

Counsel:

Gary McHale, acting in person.[1]

John Patton, for the appellant.

The judgment of the Court was delivered by

1 D. WATT J.A.:-- Gary McHale alleged that three named persons committed a crime. A justice of the peace concluded that the allegations met the *Criminal Code* requirements and received the sworn information. A Crown Attorney decided that it was not in the interests of justice to require those persons alleged to have committed the offences to appear in court to answer to the charges. The Crown Attorney withdrew the charges before any inquiry into the issuance of process began.

2 This appeal requires us to examine the scope of the Attorney General's authority to intercede in proceedings initiated by a private informant. In particular, our task is to decide whether the withdrawal here was timely or premature.

3 In my view, for the reasons I will develop, the withdrawal here was premature. I would dismiss the appeal.

THE STATUTORY SCHEME

Introduction

4 A helpful foundation for the discussion that follows is an overview of the statutory scheme for the initiation and conduct of private prosecutions of indictable offences under the *Criminal Code*. The relevant provisions have been included as Appendix "A" to these reasons.

The First Step: Receipt of the Information

5 Anyone who has reasonable grounds to believe that another person has committed an indictable offence may lay an information in writing and under oath before a justice of the peace under s. 504 of the *Criminal Code*. By its use of the expansive term "any one", s. 504 applies to everyone who lays an information ("informant"), including private citizens ("private informant"), peace and public officers, the Attorney General and the Attorney General's agents (collectively "law enforcement informants").

6 A private informant who wants to lay an information before a justice of the peace must complete a standard form for submission to the justice. The private informant must provide sufficient details of the alleged offence to permit an information to be drafted, and list the names, addresses and telephone numbers of the witnesses whose evidence will be relied upon to establish the truth of the informant's allegations. The private informant must also indicate whether the police have investigated the offence alleged and describe any prior attempts the informant has made to lay an information or have process issued as a result.

7 The justice reviews the portion of the form that the private informant has completed to determine whether the allegations made satisfy the *Criminal Code* requirements and oblige the justice to receive the information. Where the justice is satisfied that the *Criminal Code* requirements have been met, she or he will direct the preparation of an information and have the private informant swear an oath or affirm the truth of its contents. Where the allegations of the private informant do not meet the demands of s. 504, the justice is not entitled to receive the information.

8 A justice who receives an information laid by a private informant, and determines its compliance with s. 504, selects a date upon which a hearing will be conducted to determine whether the

process of the court, either a summons or a warrant, will issue to compel the appearance of the persons named in the information to answer to the charge ("the pre-enquete").

The Second Step: Notice

9 In order for process to be issued, s. 507.1, which governs the pre-enquete (*i.e.* the procedure to decide that question), requires that the Attorney General receive a copy of the private information and reasonable notice of the hearing: see ss. 507.1(3)(b) and (c). Further, the Attorney General must have an opportunity to attend the hearing itself: see s. 507.1(3)(d). The *Criminal Code* does not provide a specific form of notice.

The Third Step: The Pre-enquete

10 The function of the pre-enquete is to determine whether the process of the court, a summons or warrant, should issue to compel the persons named in the information to attend before a justice to answer to the offence charged in the private information. At the pre-enquete, the presiding justice or provincial court judge must hear and consider the allegations of the private informant, as well as the evidence of the informant's witnesses: see s. 507.1(3)(a). The justice must give the Attorney General an opportunity to attend the hearing, to cross-examine the informant's witnesses, to call witnesses her or himself and to present any relevant evidence at the hearing: see s. 507.1(3)(d). The Attorney General's appearance at the hearing does not mean that the Attorney General has intervened in the proceeding: see s. 507.1(4).

11 At the end of the hearing, the judicial officer must determine whether a case for issuing a summons or warrant to compel the appearance of the accused to answer to the charge has been made out.

12 Section 507.1 does not contain or incorporate by reference any provision that authorizes the Attorney General, a term defined in s. 507.1(11), to terminate or truncate the pre-enquete prior to adjudication.

THE PROCEEDINGS IN THIS CASE

Laying the Information

13 Gary McHale appeared before a justice of the peace on August 19, 2008. He alleged that three named individuals committed a common nuisance about one year earlier, on a specific date and at a particular place. The justice was satisfied of the facial sufficiency of the information and its compliance with the statutory requirements.

14 Each information, in written form, was sworn before the justice.

The Pre-enquete

15 Gary McHale appeared at the pre-enquete on October 7, 2008. Crown counsel also appeared as the lawful deputy of the Attorney General.

16 After a brief skirmish, during which Mr. McHale asked that Crown counsel be removed because of his participation in earlier proceedings involving Mr. McHale, Crown counsel indicated his intention to intervene in several matters scheduled for a pre-enquete, including those matters that are the subject of this appeal.

17 Crown counsel invoked s. 11(d) of the *Crown Attorneys Act*, R.S.O. 1990, c. C.49, which requires the Crown Attorney to:

> [W]atch over cases conducted by private prosecutors and, without unnecessarily interfering with private individuals who wish in such cases to prosecute, assume wholly the conduct of the case where justice towards the accused seems to demand his or her interposition;

Crown counsel withdrew the charges that are the subject of this appeal, on the basis that the prosecution was an abuse of process and not in the interests of justice.

18 The justice did not hear, or consider, the allegations of the private informant, Gary McHale, or any evidence adduced by the informant or Crown counsel.

The Application for *Mandamus*

19 Gary McHale sought *mandamus* from a judge of the Superior Court of Justice. His application was successful. The judge decided that the case should be returned to a justice of the peace, so that a pre-enquete could be conducted to determine whether process should issue to compel the appearance of the persons named in the informations withdrawn by Crown counsel.

The Reasons of the Application Judge

20 The application judge held that s. 507.1 did not contemplate the authority of the Attorney General to withdraw an information prior to the pre-enquete. To countenance such an authority would render the procedure put in place by s. 507.1, for all intents and purposes, meaningless.

21 The application judge also rejected Crown counsel's reliance on s. 11(d) of the *Crown Attorneys Act* to furnish authority for the right to withdraw a private information at the outset of the pre-enquete. Such a "broad and generous interpretation" of s. 11(d), the application judge noted, would engender a conflict between provincial and federal legislation, and improperly expand the provincial authority beyond the clear language in s. 507.1.

22 Crown counsel contended that the discretionary nature of the extraordinary remedies, like *mandamus*, should result in refusal of the order sought. After all, if process were to be issued at the conclusion of the pre-enquete, the Attorney General would stay the proceedings under s. 579 of the *Criminal Code*. The application judge rejected the submission as "entirely contrary to the reasoning of the Supreme Court of Canada in *Dowson*."

THE GROUNDS OF APPEAL

23 The appellant advances two grounds of appeal. The first is that the application judge erred in holding that the Attorney General had no discretion to *withdraw* the privately laid information at the pre-enquete prior to the issuance of process. The second ground of appeal contests the correctness of the trial judge's conclusion that the Attorney General had no discretion to *stay* the private information in the same circumstances.

ANALYSIS

Ground One: The Crown's Authority to Withdraw a Private Information Prior to the Issuance of Process

24 The first ground of appeal requires an examination of the scope of the Crown's common law authority to withdraw an information. What is different here than in the great run of cases in which informations are withdrawn by the Crown is that the information in this case is that of a private informant, not a law enforcement informant and the timing of the withdrawal occurred at the outset of the pre-enquete.

The Position of the Parties

25 For the appellant, Mr. Patton submits that the purpose of the pre-enquete is to determine whether process should issue to compel persons named in the private information to attend court to answer to the charge. To ensure that only *bona fide* criminal proceedings are undertaken at the instance of a private informant, Parliament enacted s. 507.1. The provision recognizes the long-standing supervisory authority of the Crown to guard against frivolous and vexatious prosecutions going forward.

26 Mr. Patton invokes the well-established authority of the Attorney General, as the Chief Law Officer of the Crown, to supervise the initiation, management and determination of criminal proceedings, both indictable and summary, privately begun or publicly commenced. An essential feature of this authority, he submits, is the right and duty to withdraw charges where the circumstances warrant. This authority originates in the common law, is carried forward by s. 8(2) of the *Criminal Code*, and is not limited by failure of express reference to it in s. 507.1(3), a provision inserted to circumscribe the authority of a justice at the pre-enquete.

27 Further, Mr. Patton continues, the *Crown Attorneys Act*, valid legislation in relation to the administration of justice in the province, provides agents of the Attorney General with the same authority as the common law, and imposes upon them the same duty to terminate prosecutions that have no reasonable prospect of success or are an abuse of process. Far from creating a constitutional conflict or expanding the scope of s. 507.1, the provincial legislation complements s. 507.1(3) and supports the authority advanced here.

28 In the end, Mr. Patton submits that the application judge erred in cutting down the Crown's plenary authority to withdraw charges at any time after an information has been laid. To require that a decision be made to issue process before the authority to withdraw becomes engaged is neither supported by authority nor in the best interests of the administration of justice.

29 Mr. McHale disagrees. The authority of the Attorney General to participate in the pre-enquete comes exclusively from s. 507.1. The section makes no mention of the authority of the Attorney General to withdraw an information laid by a private informant. Not before the pre-enquete. Not during the pre-enquete. Not at the conclusion of the pre-enquete when the justice orders process to issue. Mr. McHale emphasizes that the pre-enquete is usually an *ex parte* and *in camera* proceeding, attended only by the informant, some witnesses and the justice. The intervention of the Attorney General is an exception, and so the need to constrain the Attorney General's authority to what is expressly given.

30 Mr. McHale denies that the *Crown Attorneys Act* has any influence in determining whether the authority asserted by the appellant exists. The language of that Act, in particular ss. 11(b) and 11(d), makes it clear that the authority conferred applies only to existing *prosecutions*, in other words, proceedings taken *after* process has issued. In the event of any conflict between s. 507.1 and

provincial legislation, Mr. McHale says, the specific federal authority trumps that of the province and supports the conclusion of the application judge.

The Governing Principles

31 The issue raised by this appeal is of importance to the relationship between private informants or, more expansively, private prosecutors, and the public prosecutor exercising the prerogatives of the Chief Law Officer of the Crown. In the absence of binding precedent, the issue must be decided in accordance with basic principle informed by policy considerations.

The Authority of the Attorney General to Withdraw an Information

32 Despite the absence of express or necessarily implied authority in the *Criminal Code*, it is well-established that the Attorney General has the authority to withdraw an information prior to plea: *R. v. Dick*, [1968] 2 O.R. 351 (H.C.J.), at p. 359; *R. v. Osborne* (1975), 11 N.B.R. (2d) 48 (S.C.(A.D.)), at paras. 17 and 30; *R. v. Blasko*, [1975] O.J. No. 1239 (H.C.J.), at paras. 5 and 6; *Re Forrester and The Queen* (1976), 33 C.C.C. (2d) 221 (Alta. S.C.(T.D.)), at pp. 223-5. While leave of the presiding judge may be required to withdraw an information or charge after plea, the authority of the Attorney General to do so in advance of plea is unfettered.

33 The overwhelming majority of criminal proceedings are commenced when a peace or public officer lays an information before a justice who conducts the pre-enquete required under s. 507, and issues process to compel the attendance of persons named in the information to answer to the charge. Since most prosecutions originate in this way, it is scarcely remarkable that most informations withdrawn by agents of the Attorney General were laid by agents of the state, not private informants. Yet no authority limits the right of an agent of the Attorney General to withdraw an information to only those informations laid by law enforcement officials.

34 The simple fact that most withdrawals of informations by agents of the Attorney General occur *after* process has issued, and when the accused appears before a court, does not assist in determining the point at which the authority to withdraw may first be exercised. Frequency of occurrence does not equate with a condition precedent to exercise the right to withdraw.

35 Pre-charge screening, or pre-charge approval, is the exception and not the rule in this province. An agent of the Attorney General is unlikely to have sufficient knowledge of the prosecution's case to make an informed decision about the prosecution until she or he has received and reviewed disclosure from investigators. Knowledge of this kind is critical to informed decisions about withdrawal, yet unavailable earlier.

36 The precise contours of the common law power of the Attorney General to withdraw an information are not expressly defined, or for that matter fully developed. This is scarcely novel. See, for example, *R. v. Clement*, [1981] 2 S.C.R. 468, at p. 477; *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 670. While the precise moment at which the authority to withdraw an information crystallizes is unclear from the existing authorities, it does seem clear that the business of withdrawals is strictly that of the Attorney General and his or her agents, and is subject to very limited review by the courts.

The Attorney General and the Private Prosecutor

37 The *Criminal Code* makes room for both private and public prosecutors in indictable and summary conviction proceedings. Section 2 of the *Criminal Code* exhaustibly defines "prosecutor"

as "the Attorney General" or, where the Attorney General has not intervened, as "the person who institutes proceedings to which this *Act* applies, and includes counsel acting on behalf of either of them". For summary conviction proceedings, s. 785(1) defines "prosecutor" as "the Attorney General or, where the Attorney General does not intervene, the informant, and includes counsel or an agent acting on behalf of either of them".

38 A Crown Attorney is an agent of the Attorney General of Ontario. Section 11 of the *Crown Attorneys Act* requires a Crown Attorney to "to aid in the local administration of justice and perform the duties that are assigned to Crown Attorneys under the laws in force in Ontario". Among the specific duties assigned to Crown Attorneys under s. 11(b) of the Act is the conduct, on the part of the Crown, of "prosecutions for indictable offences". Under s. 11(d) of the Act, Crown Attorneys are assigned the duty to:

> [W]atch over cases conducted by private prosecutors and, without unnecessarily interfering with private individuals who wish in such cases to prosecute, assume wholly the conduct of the case where justice towards the accused seems to demand his or her interposition;

39 The interplay between a private prosecutor and a Crown Attorney who intervened in a private summary conviction prosecution was the focus of this Court's decision in *Re Bradley et al. and The Queen* (1975), 9 O.R. (2d) 161.

40 In *Bradley*, private complainants had laid informations charging three persons with the summary conviction offence of intimidation arising out of a labour dispute. At a court appearance after the strike had settled, an "agent" for the complainants sought to have the informations withdrawn. An Assistant Crown Attorney intervened, and asked for an opportunity to speak to the complainants before deciding whether to proceed with or withdraw the charges. The accused unsuccessfully sought prohibition. When the case returned to the trial court, the Assistant Crown Attorney made it clear that the charges would not be withdrawn. The accused again sought prohibition. The application was dismissed on the basis that, once the Attorney General had assumed responsibility for the prosecution, the Crown had the exclusive right to determine whether the charges would be withdrawn or prosecuted, whether the informant was a state agent or private complainant.

41 The accused appealed to this Court. In giving the judgment of the Court dismissing the appeal, Arnup J.A. said at p. 169:

> The Attorney-General, and his agent the Crown Attorney, represent the Sovereign in the prosecution of crimes. The role of the private prosecutor, permitted by statute in this country, is parallel to but not in substitution for the role of the Attorney-General, and where the two roles come into conflict, the role of the Crown's prosecutor is paramount, where in his opinion the interests of justice require that he intervene and take over the private prosecution.

42 Although the circumstances in *Bradley* depict the obverse of the coin displayed here, this Court's decision confirms the untrammeled right of the Attorney General to intervene in a private prosecution and to determine its future course - prosecution or withdrawal. The intervention there occurred *after* process had issued, but the plenary authority of the Attorney General was *not* made contingent upon the issuance of process.

The Commencement of Criminal Proceedings

43 In the usual course, criminal proceedings are commenced or instituted by laying an information before a justice alleging the commission of an offence. Receipt of the information is a ministerial act. Provided the information alleges an offence known to law and is facially compliant with the requirements of the *Criminal Code*, the justice must receive the information. The justice takes the information under oath and affixes his or her signature to the *jurat* on the written Form 2.

44 An information is a sworn allegation of crime. But it does not compel the person named as the accused to attend court to answer to the charge. Although the person named in the information is "charged with an offence" for the purposes of s. 11 of the *Canadian Charter of Rights and Freedoms*, we distinguish between the commencement of criminal proceedings and the commencement of a criminal prosecution. This distinction coincides with the dual functions of the justice. The ministerial act of receiving the information coincides with the institution of proceedings, and the judicial act of issuing process signals the commencement of the prosecution: *R. v. Dowson*, [1983] 2 S.C.R. 144, at pp. 150, 155 and 157; *Southam Inc. v. Coulter* (1990), 75 O.R. (2d) 1 (C.A.), at pp. 6-7.

The Pre-enquete

45 To determine whether process should issue to compel the attendance of the person named in the information to answer to the charge, thus to determine whether a criminal prosecution will be commenced, the justice conducts a pre-enquete. Section 507.1 governs the pre-enquete when the proceedings have been commenced by a private informant.

46 Under s. 507.1, Parliament has enacted a variety of provisions that regulate the conduct of the pre-enquete and describe the consequences that follow when process is not issued. The provisions of influence here are subsections (3) and (4):

> (3) The judge or designated justice may issue a summons or warrant only if he or she
>
> (a) has heard and considered the allegations of the informant and the evidence of witnesses;
> (b) is satisfied that the Attorney General has received a copy of the information;
> (c) is satisfied that the Attorney General has received reasonable notice of the hearing under paragraph (a); and
> (d) has given the Attorney General an opportunity to attend the hearing under paragraph (a) and to cross-examine and call witnesses and to present any relevant evidence at the hearing.
>
> (4) The Attorney General may appear at the hearing held under paragraph (3)(a) without being deemed to intervene in the proceeding.

47 The enactment of s. 507.1(3) maintains the vitality of private prosecutions but, at the same time, takes steps to ensure that only those with legitimacy continue. The pre-enquete must be conducted by a designated justice or provincial court judge. The presiding justice must hear and consider not only the allegations of the private informant, but also the evidence of witnesses. The *obligation* to hear witnesses under s. 507.1(3)(a) may be contrasted with the language in s. 507(1)(a)(ii),

applicable when the informant is a law enforcement officer or official, where the evidence of witnesses is only taken where the justice "considers it desirable or necessary to do so". Under s. 507.1(3) the Attorney General is entitled, without being deemed to intervene in the proceedings, to:

* a copy of the information
* reasonable notice of the pre-enquete hearing
* the opportunity to attend the pre-enquete
* the opportunity to cross-examine witnesses
* the opportunity to call witnesses and present evidence at the hearing

48 A pre-enquete is usually an *ex parte* proceeding held *in camera*. It affords the informant the opportunity to persuade the justice that she or he should issue process to compel the persons named in the information to appear in court to respond to the allegations in the information. But unlike s. 507, the regime of s. 507.1 makes provision for the attendance and participation in the pre-enquete of the Attorney General, as defined in s. 507.1(11), otherwise a stranger to the process.

49 Section 507.1 makes no reference to the withdrawal of an information at the per-enquete, at any stage after the private information has been laid. In its silence on this issue, s. 507.1 is in harmony with the balance of the *Criminal Code* that says nothing about the authority of the Attorney General to withdraw the charge, or when that authority may be exercised. That said, neither does s. 507.1 prohibit withdrawal of an information in accordance with any common law authority.

The Principles Applied

50 The application judge concluded that the Crown Attorney's withdrawal of the private information before the pre-enquete had begun amounted to jurisdictional error. His conclusion as to jurisdictional excess appears linked to a combination of factors:

i. that s. 507.1 makes no reference to the authority to withdraw an information prior to the issuance of process, thus the authority does not exist;
ii. that s. 11(d) of the *Crown Attorneys Act*, on its face, confers no such authority and to combine it with s. 507.1 would expand from the latter beyond its clear and express terms in a constitutionally impermissible way;
iii. that to permit exercise of the Attorney General's authority to withdraw an information prior to the pre-enquete would render the pre-enquete, thus private prosecutions, of little or no value; and
iv. that the authority of the Attorney General to withdraw an information is limited to informations laid by law enforcement officials and does not extend to private informations.

It is unclear whether the application judge would require the actual issuance of process, or simply the determination to do so as a condition precedent to the exercise by the Attorney General of the withdrawal authority.

51 I agree with the application judge that the withdrawal of the information prior to the conclusion of the pre-enquete, indeed before it began, was premature. But I reach my conclusion for substantially different reasons than did the application judge. In my view, his reasons are at once unsupported by authority and inconsistent with governing principles.

52 The application judge attached significance to the absence from s. 507.1 of any reference to the authority of the Attorney General to withdraw a private information before, during, or at the conclusion of the pre-enquete. I disagree with this assessment.

53 The *Criminal Code* contains no reference to the authority of the Attorney General or his or her agents to withdraw an information, whether laid by a private informant or a member of law enforcement. The authority, which is beyond argument, originates in the common law and is preserved by s. 8(2) of the *Criminal Code*. No *Criminal Code* provision alters, varies, modifies or affects this prerogative of the Crown. In the absence of any general provision about withdrawals, it is difficult to attach any significance to the lack of specific reference to this authority in s. 507.1, let alone to conclude that silence about it negates its availability.

54 The application judge also considered that any invocation of s. 11(d) of the *Crown Attorneys Act*, to support the exercise of the authority to withdraw at the outset of the pre-enquete, would not only expand s. 507.1 beyond its plain wording, but also create a constitutional confrontation between provincial and federal legislation. Again, I disagree.

55 In *Bradley*, this Court held that what is now s. 11(d) of the *Crown Attorneys Act* is not legislation in relation to criminal procedure, which could only be enacted by Parliament, but rather is legislation in relation to the administration of justice in a province, which lies properly within the provincial head of constitutional authority: see *Bradley* at p. 168. The directive contained in s. 11(d) does not clash with the provisions of s. 507.1, nor otherwise alter its operation or effect.

56 The application judge seems also to have been of the mind that the Attorney General's authority to withdraw an information could only be exercised when the information had been laid by a public, that is to say, a law enforcement informant. Yet again, I disagree.

57 The Attorney General, and his or her agent the Crown Attorney, represents the Sovereign in the prosecution of crimes. The *Criminal Code* makes provision for private prosecutors. The role of the private prosecutor is parallel to, but does not serve as a substitute for, the role of the Attorney General. And where the two roles conflict, the role of the Attorney General prevails. Where the Attorney General considers that the interest of justice require his or her intervention, the Attorney General is entitled to interfere, to take over the prosecution and to terminate or continue it as she or he considers appropriate: see *Bradley*, at p. 169.

58 In express terms, s. 507.1 authorizes the participation of the Attorney General in what is usually an *ex parte* and *in camera* proceeding involving only the informant and his or her witnesses. Nothing in the section curtails the authority of the Attorney General once she or he decides to participate in the pre-enquete.

59 When all the cards are counted, the issue to be resolved reduces to whether the Attorney General may intervene to withdraw a private information prior to the commencement of the pre-enquete or must await the conclusion of:

i. the allegations of the informant and any evidence adduced at the inquiry; or
ii. the submissions of the informant and Attorney General about the issuance of process; or
iii. the decision of the justice or judge about the issuance of process.

60 The resolution of the issue involves the intersection of a common law authority, the power of the Attorney General to withdraw an information, and a statutory enactment that governs a hearing, the pre-enquete, that precedes but may result in the issuance of process.

61 The time period under consideration is the time between the commencement of criminal proceedings (by laying of a private information) and the commencement of a criminal prosecution (by the issuance of process to compel the attendance of the accused to answer to the charge).

62 What is not at issue is either the general authority of the Attorney General to intervene in a private prosecution, or the specific authority of the Attorney General to intervene and withdraw a private information *after* process has issued. Each of these principles is firmly rooted in our jurisprudence.

The Purpose of s. 507.1

63 Critical to a decision on this issue is an understanding of the purpose underlying the enactment of s. 507.1 and its application.

64 Section 507.1 preserves the right of a private informant to seek the issuance of process to compel the appearance of persons named as prospective accused in an information laid by a private informant under s. 504. The issuance of process on the basis of a private information signals the commencement of a private prosecution.

65 Section 507.1 also puts in place several measures to assure scrutiny of prospective private prosecutions to stifle the procession of frivolous or vexatious prosecutions before the courts. The presiding judicial officer must be either a designated justice or a provincial court judge. The Attorney General, the Chief Law Officer of the Crown, is entitled to notice of the pre-enquete, a copy of the information and the right to participate in the evidentiary hearing.

66 In *Dowson*, the Supreme Court of Canada agreed with the conclusion of this Court that, as Chief Law Officer of the Crown, the Attorney General had the power to prevent the use of the criminal process where the Attorney General considered the proceedings should be stayed: *Dowson*, at pp. 154-5. The Supreme Court differed with this Court regarding the time at which a stay of proceedings could be entered. The difference arose because the Supreme Court considered that the clause "at any time after an indictment has been found", in the context of an information before a justice for a pre-enquete, required that process issue before a stay could be entered under former s. 508(1) of the *Criminal Code*.

67 To reach its conclusion, the *Dowson* court relied on several factors:

i. the fundamental right of a private citizen to lay an information and to seek the issuance of process;
ii. the right and duty of the Attorney General to supervise the conduct of criminal prosecutions;
iii. the duty of the justice under then, s. 455.3(1)(a) to "hear and consider" the allegations of the informant and make a decision about the issuance of process;
iv. the absence from the *Criminal Code* of any clear and unambiguous text taking away the right of private information; and
v. policy considerations ensuring accountability for decisions made in connection with the termination of private prosecutions.

68 The factors considered by the Supreme Court of Canada in *Dowson* inform the decision in this case despite the differences in the governing statute and in the method of termination used here (withdrawal of the information) and in *Dowson* (entry of a stay of proceedings).

69 The structure and language of s. 507.1(3)(a) differs from the former s. 455.3 applicable in *Dowson*. Under the former provision, the justice was required to hear and consider *ex parte*, the allegations of the informant. The justice was only required to hear and consider, *ex parte*, the evidence of witnesses, where the justice considered it desirable or necessary to do so. Section 507.1(3) is of a different construction. It eschews the direct statement of a duty in favour of a list of prerequisites that must be met before the justice may exercise his or her discretion to issue process. The prerequisites include the requirement that the justice hear and consider the allegations of the informant and the evidence of witnesses. The effect of s. 507.1(3)(a) is to impose a duty on the justice to hear and consider the allegations of the informant and the evidence of witnesses at the pre-enquete.

70 It is well-settled that criminal proceedings are instituted or commenced by the laying or receipt of an information in writing and under oath. Anyone named as a person who committed the offence described in the information is a person "charged" with an offence for the purposes of s. 11(b) of the *Charter*: *R. v. Kalanj*, [1989] 1 S.C.R. 1594, at p. 1607.

71 A criminal prosecution only commences after a justice has made a decision to issue process: *Dowson*, at p. 150. As Chief Law Officer of the Crown, the Attorney General has supervisory control over criminal prosecutions. It seems reasonable to conclude that this supervisory authority begins contemporaneously with the commencement of a criminal prosecution. And that moment, at least in the absence of some statutory provision to the contrary, is after a justice has decided to issue process at the conclusion of a pre-enquete.

72 Policy considerations also favour the conclusion that the withdrawal authority of the Attorney General crystallizes and may be exercised as of the moment the justice determines to issue process at the conclusion of the pre-enquete.

73 The *Criminal Code* permits private prosecutions. A private informant may lay an information in conformity with s. 504. Receipt of the information commences criminal proceedings. Parliament enacted, more accurately continued, a procedure aimed at the determination by a judicial officer of whether the informant has made out a case for prosecution. This procedure is the pre-enquete, a hearing that provides the private informant the opportunity to present her or his case for prosecution.

74 Conduct of the pre-enquete vindicates the interest of the private informant who seeks prosecution of another for an alleged crime. The pre-enquete assures the private informant that an independent judicial officer will hear the informant's allegations, listen to the evidence of the informant's witnesses, and decide whether there this is evidence of each essential element of the offence charged in the information. The pre-enquete also ensures that spurious allegations, vexatious claims, and frivolous complaints barren of evidentiary support or legal validity will not carry forward into a prosecution. To insist that the withdrawal power await the determination about issuance of process also reduces the risk that the *Criminal Code's* provisions for private prosecution will to begin and end with the right to lay a private information.

75 To hold that the authority to withdraw arises immediately upon the decision to issue process does not prejudice the interest of the persons named as responsible for the crimes alleged in the pri-

vate information. The pre-enquete is conducted *in camera*. A decision by the Attorney General to withdraw the information once the decision to issue process has been made requires no public appearance, nor any response by those named in the information.

76 The nexus between the decision to issue process and the withdrawal authority of the Attorney General also ensures that the decision to withdraw is informed by knowledge of the substance of the case the private prosecutor proposes to pursue. The fuller evidentiary record also establishes the basis upon which the withdrawal decision is grounded should accountability concerns later surface.

77 It is for those reasons that I agree in the result with the application judge that the purported withdrawal of the informations here, before the pre-enquete had begun, was premature. The withdrawal authority requires the commencement of a prosecution, a point that coincides temporally with the determination by the justice that process shall issue. Withdrawal then is permissible while the *in camera* proceedings remain extant. Those named in the original information need not appear.

Ground Two: The Crown's Authority to Stay Proceedings Prior to Pre-enquete

78 At first sight, it seems unnecessary to determine whether an agent of the Attorney General is entitled to stay proceedings taken on a private information before the pre-enquete has begun under s. 507.1(3). After all, the Crown Attorney who appeared as the pre-enquete was about to begin in this case did not invoke s. 579(1) to enter a stay of proceedings. That said, it may well be that, as the pre-enquete is scheduled to begin, or at some time before the decision about the issuance of process is made, the Crown Attorney may invoke s. 579(1) to stay the proceedings. Thus the need to determine when this authority may be exercised.

The Position of the Parties

79 For the appellant, Mr. Patton begins with the text of s. 579(1) of the *Criminal Code*, the enabling statutory authority. The subsection permits the Attorney General or an instructed agent to direct the clerk of the court to enter a stay of proceedings at any time after any proceedings in relation to an accused are commenced. Proceedings in relation to an accused are commenced by laying or receipt of an information. It is of no moment whether the informant is a private individual or a law enforcement official. It follows, Mr. Patton submits, that the Attorney General could direct entry of a stay at the time of the purported withdrawal here: at the outset of the pre-enquete and before the hearing under s. 507.1(3) begins.

80 The appellant advances an alternative argument. A pre-enquete is a "proceeding in relation to an accused." As soon as the pre-enquete formerly commences with the allegations of the informant, the Crown Attorney is entitled to direct entry of a stay.

81 Mr. McHale is of a different mind. He submits that the Attorney General or instructed agent cannot direct entry of a stay until there is an "accused", and that there is no "accused" until the designated justice or provincial court judge determines that process shall issue. Only then does the prosecution commence and can the person named in the information be properly described as an "accused". And only then, when process has issued to compel attendance, can the Attorney General or instructed agent direct entry of a stay. For Mr. McHale, the right of the private citizen to pursue

the issuance of process prevails over the authority of the Attorney General to supervise prosecutions and enter stays.

The Governing Principles

82 The matter in which the authority to stay proceedings makes its way into this case renders an expansive discussion of the subject neither essential nor advisable. That said, brief reference to the authority to direct entry of a stay, the time at which a stay may be directed, and the availability of a stay as a basis upon which to refuse to issue *mandamus* may be of some assistance at the pre-enquete.

The Authority to Direct Entry of a Stay

83 Unlike the authority to withdraw charges, the authority of the Attorney General or an instructed agent to direct entry of a stay of proceedings is statutory. Section 579 of the *Criminal Code* defines *who* may direct entry of a stay of proceedings, *when* and *how* the direction may be given, and what *effect* entry of a stay has on future proceedings.

84 The only persons entitled to invoke the authority to direct entry of a stay are the Attorney General and counsel instructed by the Attorney General for the purpose of directing entry of the stay. Under the definition of "Attorney General" in s. 2 of the *Criminal Code*, the term includes the "lawful deputy" of the Attorney General. To implement the stay authority, the Attorney General or instructed agent must direct the clerk or other proper officer of the court to make an entry on the court record, for example, the information or indictment, that proceedings are stayed by the direction of the Attorney General or instructed agent. The entry is to be made on the record forthwith. The entry has the effect of staying proceedings and vacating any recognizances.

The Issue of Timing

85 Section 579(1) permits the direction to enter a stay to be given "at any time after any proceedings in relation to an accused ... are commenced". The predecessor of s. 579(1) was s. 508(1) in the 1970 statutory revision. The comparable wording in former s. 508(1) was "at any time after an indictment has been found", which the *Dowson* court interpreted to mean "as of the moment a summons or warrant is issued" or "once a determination to issue a process is made": see *Dowson*, at p. 157.

86 The *Criminal Code* provides no definition of the term "proceedings" as it is used in s. 579(1) or elsewhere in the *Criminal Code*. Courts have interpreted "at any time after any proceedings in relation to an accused ... are commenced" in present s. 579(1) as "any time after an information is laid": see *Campbell v. Attorney-General of Ontario* (1987), 58 O.R. (2d) 209 (H.C.J.), at p. 220, aff'd (1987), 60 O.R. (2d) 617 (C.A.); *R. v. Wren*, [1987] B.C.J. No. 1336 (C.A.), at p. 2; *R. v. Pardo* (1990), 62 C.C.C. (3d) 371 (Que. C.A.), at pp. 373-4. Laying or receipt of an information commences criminal proceedings. It seems to logically follow from the decisions mentioned that laying an information falls within "proceedings in relation to an accused". The same could be said of a pre-enquete, a proceeding to determine whether process should issue.

Extraordinary and Other Remedies

87 As respondent before the application judge, the appellant urged the judge to refuse to issue *mandamus* because the prosecutor could simply direct entry of a stay in advance of the conduct of the pre-enquete. In doing so, the Attorney General summoned the well-known principle that the extraordinary remedies, like *mandamus*, do not issue as of right, rather are discretionary in their grant and may be refused where another adequate remedy exists: see *Cheyenne Realty v. Thompson*, [1975] 1 S.C.R. 87, at p. 90.

88 The appellant's reliance on this principle seems misplaced. The availability of an alternative remedy to an applicant for *mandamus*, for example a right of appeal from the decision that is the subject of the application for *mandamus*, may result in refusal of the extraordinary remedy. But that is not this case. The alternative remedy here, entry of a stay rather than withdrawal of the information, was available not to the applicant but rather to the respondent on the application. The Attorney General or an instructed agent chose to withdraw the information rather than to stay it. The withdrawal was premature, made before the authority to do so existed. That the Attorney General or instructed agent could have directed entry of a stay did not disentitle the respondent here to an order of *mandamus* setting aside the purported withdrawal and directing conduct of the pre-enquete.

The Principles Applied

89 The application of the principles governing the entry of stays of proceedings under s. 579(1) permit the Attorney General or an instructed agent to direct entry of a stay at any time after an information has been laid. Laying an information commences criminal proceedings and is itself a "proceeding in relation to an accused" within the meaning of those terms in s. 579(1) of the *Criminal Code*. What occurred here, attendance before a justice to conduct a pre-enquete also amounts to "proceedings in relation to an accused" under s. 579(1).

90 It may seem anomalous to some that of two available steps to terminate proceedings initiated by a private information one is available at any time after the information is laid, but the other not until a determination has been made that process shall issue. The difference resides in the source of the authority. The common law, infused by policy considerations, compels one conclusion, the plain language of the statute, another.

CONCLUSION

91 For these reasons I would dismiss the appeal, and confirm the order of the application judge directing that the matter return to the justice of the peace to conduct the pre-enquete.

D. WATT J.A.
W.K. WINKLER C.J.O.:-- I agree.
S.T. GOUDGE J.A.:-- I agree.

* * * * *

APPENDIX "A"

Sections 504 and 507.1 of the *Criminal Code*, R.S.C. 1985, c. C-46.

In what cases justice may receive information

504. Any one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information, where it is alleged

(*a*) that the person has committed, anywhere, an indictable offence that may be tried in the province in which the justice resides, and that the person

(i) is or is believed to be, or

(ii) resides or is believed to reside,

within the territorial jurisdiction of the justice;

(*b*) that the person, wherever he may be, has committed an indictable offence within the territorial jurisdiction of the justice;

(*c*) that the person has, anywhere, unlawfully received property that was unlawfully obtained within the territorial jurisdiction of the justice; or

(*d*) that the person has in his possession stolen property within the territorial jurisdiction of the justice.

Referral when private prosecution

507.1(1) A justice who receives an information laid under section 504, other than an information referred to in subsection 507(1), shall refer it to a provincial court judge or, in Quebec, a judge of the Court of Quebec, or to a designated justice, to consider whether to compel the appearance of the accused on the information.

Summons or warrant

(2) A judge or designated justice to whom an information is referred under subsection (1) and who considers that a case for doing so is made out shall issue either a summons or warrant for the arrest of the accused to compel him or her to attend before a justice to answer to a charge of the offence charged in the information.

Conditions for issuance

(3) The judge or designated justice may issue a summons or warrant only if he or she

(*a*) has heard and considered the allegations of the informant and the evidence of witnesses;

(*b*) is satisfied that the Attorney General has received a copy of the information;

(*c*) is satisfied that the Attorney General has received reasonable notice of the hearing under paragraph (*a*); and

(*d*) has given the Attorney General an opportunity to attend the hearing under paragraph (*a*) and to cross-examine and call witnesses and to present any relevant evidence at the hearing.

Appearance of Attorney General

(4) The Attorney General may appear at the hearing held under paragraph (3)(*a*) without being deemed to intervene in the proceeding.

Information deemed not to have been laid

(5) If the judge or designated justice does not issue a summons or warrant under subsection (2), he or she shall endorse the information with a statement to that effect. Unless the informant, not later than six months after the endorsement, commences proceedings to compel the judge or designated justice to issue a summons or warrant, the information is deemed never to have been laid.

Information deemed not to have been laid -- proceedings commenced

(6) If proceedings are commenced under subsection (5) and a summons or warrant is not issued as a result of those proceedings, the information is deemed never to have been laid.

New evidence required for new hearing

(7) If a hearing in respect of an offence has been held under paragraph (3)(*a*) and the judge or designated justice has not issued a summons or a warrant, no other hearings may be held under that paragraph with respect to the offence or an included offence unless there is new evidence in support of the allegation in respect of which the hearing is sought to be held.

Subsections 507(2) to (8) to apply

(8) Subsections 507(2) to (8) apply to proceedings under this section.

Non-application -- informations laid under sections 810 and 810.1

(9) Subsections (1) to (8) do not apply in respect of an information laid under section 810 or 810.1.

Definition of "designated justice"

(10) In this section, "designated justice" means a justice designated for the purpose by the chief judge of the provincial court having jurisdiction in the matter or, in Quebec, a justice designated by the chief judge of the Court of Quebec.

Meaning of "Attorney General"

(11) In this section, "Attorney General" includes the Attorney General of Canada and his or her lawful deputy in respect of proceedings that could have been commenced at the instance of the Government of Canada and conducted by or on behalf of that Government.

1 The style of cause duplicates the style of cause in the Superior Court of Justice, but leaves the impression that Mr. McHale is the accused. He is not. A more appropriate style of cause would be *Re Ontario (Attorney General) v. Gary William McHale.*

Case Name:

R. v. Olumide

Between
Her Majesty the Queen, Respondent, and
Ade Olumide, Appellant

[2014] O.J. No. 4891

2014 CarswellOnt 14442

117 W.C.B. (2d) 503

2014 ONCA 712

Docket: C59279

Ontario Court of Appeal

K.N. Feldman, G.J. Epstein and M.L. Benotto JJ.A.

Heard: October 6, 2014.
Judgment: October 20, 2014.

(5 paras.)

Criminal law -- Prosecution -- Private prosecutors and prosecutions -- Appeal by accused from summary dismissal of his mandamus application seeking to overturn Crown's decision to stay his private prosecution dismissed -- Attorney General had the authority to direct a stay of proceedings at any time -- The discretion to do so was reviewable only in the event of abuse of process -- There was no evidence to point to an abuse of process.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, s. 579

Appeal From:

On appeal from the judgment of Justice Julianne A. Parfett of the Superior Court of Justice, dated August 18, 2014, dismissing the appellant's application for *mandamus*.

Counsel:

Ade Olumide, appearing in person.

Jennifer Woollcombe, for the respondent.

ENDORSEMENT

The following judgment was delivered by

1 THE COURT:-- Mr. Olumide appeals the summary dismissal of his *mandamus* application in the Superior Court. He had sought to overturn the Crown's decision to stay his private prosecution of Kathleen Wynne.

2 Section 579 of the *Criminal Code* gives the Attorney General the authority to direct a stay of proceedings at any time. The discretion to do so is reviewable only in the event of abuse of process. There is a presumption of prosecutorial good faith: see *Krieger v. Law Society (Alberta)* 2002 SCC 65 and *R. v. Nixon* 2011 SCC 34. The appellant has the onus of proving an abuse of process in the exercise of prosecutorial discretion.

3 Mr. Olumide alleged that the Attorney General is in an inherent conflict of interest and this constitutes an abuse of process. The motion judge found that there was no evidence of abuse of process. Absent proof of an abuse, the discretion is not subject to review by the court: *Campbell v. Ontario* (A.G.) (1987), 35 C.C.C. (3d) 480 (Ont. C.A.), leave to appeal refused, [1987] S.C.C.A. No. 202. There is no evidence to point to an abuse of process.

4 We therefore see no basis to allow this appeal.

5 The appeal is dismissed.

K.N. FELDMAN J.A.
G.J. EPSTEIN J.A.
M.L. BENOTTO J.A.

Indexed as:

R. v. Smith (B.C.C.A.)

IN THE MATTER OF an application for relief in the nature of prohibition
AND IN THE MATTER OF Regina v. Kenneth Benjamin Smith
Between
Attorney General of Canada, Appellant, and
His Honour Judge A.E. Filmer, Respondent, and
Kenneth Benjamin Smith, Respondent

[1992] B.C.J. No. 2730

21 B.C.A.C. 141

78 B.C.L.R. (2d) 95

79 C.C.C. (3d) 70

18 W.C.B. (2d) 231

Vancouver Registry: CA015287

British Columbia Court of Appeal
Vancouver, British Columbia

Carrothers, Gibbs and Hollinrake JJ.A.

Heard: November 25, 1992
Filed: December 21, 1992

(19 pp.)

Counsel for the Appellant, Attorney General of Canada: S. David Frankel, Q.C. Counsel for the Respondent, Kenneth Benjamin Smith: David J. Martin.

1 **HOLLINRAKE J.A.** (for the Court, allowing the appeal):- - This is an appeal by the Crown from a judgment dismissing the petition of the Crown for an order that His Honour Judge Filmer of the Provincial Court of British Columbia be prohibited from commencing or continuing with the trial of Regina v. Kenneth Benjamin Smith.

2 The facts are found in part in the affidavit of Mr. Westlake, counsel for the respondent, Smith, at trial. Those facts, along with other material facts, and the position of the parties at the hearing in the Supreme Court, are set out by the trial judge as follows:

> 2. That on May 2nd, 1991, Mr. Smith was charged with a two count Information Numbered 58962.
> 3. That Mr. Smith was arrested on the 2nd of May, 1991 and held in custody without bail until May 3rd, 1991, when at that time he was released by His Honour Judge Filmer, in the Provincial Court of British Columbia, upon certain terms and conditions.
> 5. That the matter was further remanded to May 31st, 1991. At that time, a three week period was set aside for trial, commencing December 4 through to December 27, 1991. The matter was further adjourned to June 28th for election and plea.
> 7. The matter was called forward to June 24th, 1991 when I appeared as counsel for Smith and the previous trial dates were re-fixed for December 4th to 13th, and thereafter recommencing on January 6th through to the 17th. On that date Mr. Smith elected trial by provincial court judge and entered pleas of not guilty to both counts contained in the Information.
> 9. That on the 7th of October, 1991 a new Information was sworn, Number 589262C, [sic] alleging two counts.
> 11. That on October 18, 1991 Mr. Macdonald, on behalf of the Crown, appeared in provincial court and stayed Information Number 58962, leaving the previously fixed trial dates on the trial list.
> 12. That counsel appeared at a pretrial conference, together with Mr. Macdonald on November 14, 1991 in Victoria before His Honour Chief Justice Metzger. During the course of this pretrial conference a number of issues were discussed including the proposed length of trial, defense admissions as to witnesses, the order of witnesses, the potentiality of admissions to wiretap hookups, voice identification and other issues related to the trial process.
> 13. That following the pretrial conference I appeared before the trial judge, His Honour Judge Filmer, in Provincial Court. The new Information was presented and Mr. Smith elected trial by Provincial Court judge and reiterated his pleas of not guilty to both counts.
> 16. That Mr. Macdonald called me on November 27th, 1991 with a view to securing admissions from me. That I spoke to him on November 28th, 1991 in the a.m. and confirmed to him that I would be making the admissions that he sought, including the order of witnesses, the admissions related to telephone-line hookups, voice identification, et

cetera. In addition I requested additional disclosure respecting intercepted conversations.

18. That during the month of November, I caused my trial schedule and commitments to be adjusted and to make room for preparation for trial and for my appearances on trial at the aforementioned trial dates. Accordingly, I sent a letter to the court coordinator advising I would be seeking an adjournment of one of the trial dates, i.e., December 5th.

20. That on the morning of December 4 I appeared with Mr. Smith and Mr. Martin, cocounsel, to engage in the defense of Mr. Smith before His Honour Judge Filmer, and on that occasion the Crown, in the person of Ms. McNeely, indicated she would be staying proceedings.

22. That in accordance with my indication that we would be filing a Constitutional Questions Act respecting the constitutional validity of the stay, a Constitutional Questions Act Notice was drawn and served December 4th, 1991.

At the hearing on December 4th, 1991 the following exchange took place (Page 1 of the transcript):

> MR. WESTLAKE: Mr. Smith -- excuse for a minute. Mr. Smith is in court as well, Your Honour, seated at the back.
>
> As you know, this matter was fixed for trial this morning, and I received a letter on Wednesday -- and I'm sorry I didn't bring my copy unfortunately, but maybe my friend has one -- that indicated that the Crown would be staying proceedings today. I would like to indicate to the court, before my friend addresses the court, that I take issue with the ability and right of the Crown to stay proceedings postplea especially in view of the fact that there have been pretrial conferences related to the trial that was to commence today, and especially in view of the Crown relying on Section, I believe, 579 subsection (2) in particular, as giving them an unfettered right to enter a stay at any time in the proceedings. I would like to challenge the constitutional validity of that section post-plea, and I would like the court to decline to record the stay that I think my friend is probably going to indicate to the court and set the matter down for hearing at any time that's convenient for the Crown.
>
> I have offered next week, but my friend says she has since filled in her time. However, I'm at her disposal to argue the matter, and Mr Martin is with me in particular for that reason.
>
> THE COURT: Miss McNeely, what's the Crown's view?

> MS. McNEELY: The Crown's view is that they have the right to direct the clerk of the court to enter a stay of proceedings, and indeed, that's what I do at this time, I direct the clerk of the court to enter a stay of proceedings on Information 58962 and 58962-C. My friend has not filed any notice with respect to the issue he is speaking of.

Further submissions were made and discussions ensued involving the court, Mr. Westlake, Mr. Martin and Ms. McNeely.

The following occurred at Page 4 of the transcript:

> MS. McNEELY: The Crown's view is that the stay has already been entered -- directed, and that as this is a statutory court, provisions of 579 require that the entry on the record be made forthwith, and in my submission, the matter will be then concluded and the court -- the Crown, pardon me, having directed the stay of proceedings, there is no jurisdiction for the court to entertain this application.
>
> THE COURT: I think what I'll do is ensure that there's enough time to deal with an application, if it's brought, to deal with the constitutionality of this section. I have some concerns with regard to whether as a trial judge, a stay having been entered, that I have any jurisdiction. It may be that the Crown, on the face of an application to have me deal with this particular issue, may choose to proceed in the court above to prohibit me from proceeding with the matter further, but I think it would be necessary, first of all, for the question to be posed appropriately and the times that are stipulated for the the [sic] giving of notice given, and then I'll be prepared to deal with the matter, if it comes back into my court to be dealt with.

The matter was adjourned to January the 6th, 1992. I will quote from portions of the proceedings on that date at Page 2. Mr. Macdonald appeared for the Crown at that time and addressed the court (Page 2):

> Now, the matter was before the court on the 4th of December of 1991. Ms. McNeely appeared before the court on behalf of the Crown and a stay of proceedings was directed and the court record of proceedings, as I understand it, show that the proceedings were stayed on the 4th of December, 1991. Consequently, in my submission, Your Honour, the court has no further jurisdiction to deal with the matter at all, the court is functus.
>
> Now, the argument may be that the court has the jurisdiction to rule whether or not Section 579 is constitutional by a court of competent jurisdiction, but here, in my submission and with the greatest of re-

> spect, this court is no longer a court of competent jurisdiction, the stay having been entered.

At page 7 the court stated after further submissions:

> Well, with respect, I don't see 579(1) as being the same as a trial court judge being functus. And the reason I say that is just because of the way the Code is set. Up a stay has (sic), in the past, always been referred to as putting the Information into limbo. That limbo can be reinstituted without the laying of a fresh Information, without the laying of a fresh Indictment, under Subsection (2).
>
> In my view, it is not an issue of functus in the same sense as a trial judge might be functus after having declared guilt or innocence. So I think it must be looked at from at least a different point of view: that the trial judge has a right to review that exercise of discretion. I will also go as far as to say that a trial judge probably also has the right to consider the constitutionality of the section that's operating.

It is those last few words that Mr. Macdonald takes exception to. It is his position, and has been the Crown's position from the start as indicated from the quotation of the proceedings in December, that the trial judge cannot review the Crown's discretion; that the Crown, as part of its function, has the right to enter a stay, and that in this case, since a stay has been entered, the court is without jurisdiction to consider the constitutionality of the section under which the stay was entered.

The grounds of the petition are as follows:

1. That the learned Provincial Court judge exceeded his jurisdiction permitting the trial to commence after the proceedings had been stayed pursuant to Section 579 of the Criminal Code.
2. The learned Provincial Court judge heard (sic) a ruling that he had jurisdiction to consider the constitutional validity after the proceedings had been stayed pursuant to Section 579 of the Criminal Code.
3. The learned Provincial Court judge exceeded his provincial jurisdiction to determine the constitutional validity of Section 579 of the Criminal Code after the proceedings had been stayed pursuant to Section 579 of the Criminal Code.

Mr. Martin, on behalf of the accused, does not launch a wholesale challenge against Section 579. He does not say it is unconstitutional in all respects. It is his position that where proceedings have proceeded to election, plea and the matter is set for trial, and indeed on the trial date, that the Crown cannot just terminate proceedings and start them later at its discretion.

3 In finding in favour of the position of the respondent before us the trial judge below said:

> The application before me is to prohibit the Provincial Court judge to hear an application basically challenging the constitutionality of Section 579 of the Criminal Code.
>
> It may be that on the basis of the decisions referred to me by Mr. Macdonald that issue has already been resolved, particularly in the decision I have just referred to, Regina v. Fortin, and perhaps to a certain extent in the The Queen v. Scott. However, that is a matter that should be determined by the trial judge, and thereafter, any of the parties dissatisfied with the decision may take the matter to an appeal, or may proceed by way of a prerogative writ to bring the matter before an appellate court which can then determine the issue, and which court will have before it for its benefit the reasoning of the trial judge.
>
> I consider in this case that having indicated to the court and to Crown counsel that the accused intended to challenge the constitutional validly of Section 579, at best the stay entered by the Crown constitutes a suspension only of the proceedings until such time as that issue has been determined.

4 The respondent Smith filed a notice of motion in which he seeks an order quashing the notice of appeal. His position on the motion is that this is an interlocutory appeal in a criminal matter and, consequently, is subject to the general rule that such appeals are prohibited as a matter of law and policy. He relies upon Re Anson and the Queen (1983), 4 C.C.C. (3d) 119 (B.C.C.A.) where Macfarlane, J.A. said (at p. 130):

> But if every case is to be interrupted each time a constitutional point arises while prerogative relief is sought, while appeals are taken to this court and to the Supreme Court of Canada then the administration of justice would be chaotic, the cost to accused persons would be oppressive and the cost to the public unjustified -- particularly when many such points would prove to have been academic.

5 His counsel also referred us to Re Ritter et al., and The Queen (1984), 11 C.C.C. (3d) 123 (B.C.C.A.); Regina v. Morgentaler, Smoling & Scott (1985), 16 C.C.C. (3d) 1 (Ont. C.A.); and Regina v. Seaboyer (1991), 66 C.C.C. (3d) 321 at 412, 413-14 (S.C.C.).

6 I agree that just because this matter comes before the court by way of prohibition does not necessarily take it out of the general rule that the court will not hear interlocutory appeals in criminal matters. However, this is not an interlocutory case. The Crown seeks to prohibit the Provincial Court Judge from commencing the trial on the ground that he is without jurisdiction.

7 Counsel for the Crown says that s. 784(1) of the Criminal Code provides a statutory basis for this appeal and that that distinguishes this case from those where the appeal is clearly interlocutory

and has no statutory foundation. His position is that the Crown having directed that a stay be entered the Provincial Court Judge has no jurisdiction thereafter to embark on an enquiry.

8 In my opinion this is not the type of case that falls within the general rule as to interlocutory appeals in criminal matters. This is not a matter or challenge that has arisen during the course of the trial. It is not a case where if the trial is permitted to proceed, the reviewing court will be in a better position to decide the issues because it will have the benefit of a more complete picture of the evidence and the case (see McLachlin, J. in Seaboyer (at pp. 413-414).

9 I would dismiss the respondent's motion to quash the notice of appeal.

10 I turn now to the appeal itself. Section 579 of the Criminal Code reads:

> 579.[508] (1) The Attorney General or counsel instructed by him for that purpose may at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated.
>
> (2) Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new information or preferring a new indictment, as the case may be, by the Attorney General or counsel instructed by him for that purpose giving notice of the recommencement to the clerk of the court in which the stay of the proceedings was entered, but where no such notice is given within one year after the entry of the stay of proceedings, or before the expiration of the time within which the proceedings could have been commenced, whichever is the earlier, the proceedings shall be deemed never to have been commenced.

11 I note here that the stay was entered December 4th, 1991. Crown counsel advised us at the hearing that the Crown did not intend to recommence the proceeding and by now the one year referred to in s. 579(2) has expired. However, it remains open to the Crown to prefer a new indictment.

12 The appellant Crown says that the decision of this court in Regina v. Beaudry, [1967] 1 C.C.C 272 remains the law and has not been affected by the Charter. In Beaudry, the accused challenged the right of Crown counsel, as agent of the Attorney General, to direct the clerk of the court to make an entry on the record that the proceedings are stayed. This was done just before the jury returned with a verdict directed by the trial judge. In the face of this stay the judge took a verdict of acquittal from the jury. Speaking for the court, Bull, J. said (at p. 274-5):

> The official Court record of the
> proceedings of the trial on the murder
> indictment was brought before us, and it is
> clear from the sequence of the entries
> therein and the exact times thereof noted
> by the Clerk of the Court that the Crown

> counsel directed the said Clerk to make the entry of the stay on the record before the jury "returned the verdict". The notation on the record made by the Clerk of the Court, which reads, "Mr. Craig, Agent for the A.G. directs the Clerk of the Court to make an entry on the Record that the Proceedings are Stayed", is in my respectful opinion a sufficient making of "an entry on the record" to comply with the section in question, so that all proceedings became stayed when so made. The next entries on the record are with respect to the Judge's decision to take the verdict nevertheless, the return of the jury and the delivering of the verdict of acquittal. It follows that the said decision of the learned trial Judge to take the verdict notwithstanding the stay was beyond his power so to do, as he had no jurisdiction, authority or discretion with respect to whether or not a stay should be entered or, if entered, when it should become effective or what effect it should have. The entry of a stay is a statutory administrative discretion given to the Attorney-General, and, if exercised, his direction is to the Clerk of the Court as such and is outside any control of the Judge. It follows that the verdict of acquittal was a nullity, the proceedings on the murder indictment having been previously stayed prior to its delivery. The appellant has never been acquitted of the murder charge and was never in double jeopardy.

13 In Regina v. Fortin (1989), 47 C.R.R. 348, the Ontario Court of Appeal had before it a challenge to what is now s. 579 on the ground that it violated the rights guaranteed by the s. 7 of the Charter. At p. 349, the court said:

> 1. The first submission is that s. 508 [am. 1972, c. 13, s. 43; rep. & sub. 1985, c. 19, s. 117] of the Criminal Code, R.S.C. 1970, c. C-34, is unconstitutional and violates s. 7 of the Canadian Charter of Rights and Freedoms because of the complete absence in the legislation of any controlling standard to limit the use of the power to stay. It was conceded that the power of the Attorney General to stay proceedings is itself constitutionally

> valid. It is submitted that s. 508 is not in accord with the principles of justice because it is an arbitrary grant of power which permits the unilateral interference with the accused's liberty by one party to the litigation without judicial control and without objective standards. We are not persuaded that, in its present form, s. 508 violates the rights guaranteed by s. 7 of the Charter. The section is an adequate expression of the power which has always rested in the Attorney General and which is essential to the proper enforcement of criminal law. Safeguards of the individual against the improper use of the power to stay which existed before the Charter still exist; those safeguards have been enhanced by the rights and guarantees in the Charter together with the power of the court to give a remedy if necessary. We did not call on the Crown with respect to this issue.

14 In Scott v. The Queen (1990), 61 C.C.C. (3d) 300, the Supreme Court of Canada had before it a challenge to the Crown directing a stay on a charge of possession of cocaine for the purpose of trafficking and then recommencing the proceeding under what is now s. 579(2). The stay was entered to protect the identity of an informer. The accused asserted that recommencement of proceedings was an abuse of process and sought a stay of proceedings. The majority held that the actions of the Crown were "not abusive". The validity of what is now s. 579 was not in issue in the case.

15 Before dealing with submissions of the respondent, I think it important to keep in mind that the only issue before the this court is whether the Provincial Court Judge has any jurisdiction to embark on a hearing in which the constitutionality of s. 579 is challenged after the Crown has directed a stay of proceedings be entered.

16 Counsel for the respondent says that Regina v. Big M. Drug Mart Ltd. (1985), 18 C.C.C. (3d) 385 (S.C.C.) is the authority for Filmer, P.C.J. to hear the argument as to the constitutionality of s. 579 as part of the trial proceedings in Regina v. Kenneth Benjamin Smith even after entry of the stay. He refers to the judgment of Dickson, J. (at pp. 399-400) where he said:

> Standing and jurisdiction to challenge the validity of a law pursuant to which one is being prosecuted is the same regardless of whether that challenge is with respect to ss. 91 and 92 of the Constitution Act, 1867 or with respect to the limits imposed on the Legislatures by the Constitution Act, 1982.
>
> Section 24(1) sets out a remedy for individuals (whether real persons or artificial ones such as corporations) whose rights under the Charter have been infringed. It is not, however, the only recourse in the face of unconstitutional legislation. Where, as here, the challenge is based on the unconstitutionality of the legislation, recourse to s. 24 is unnecessary and the particular effect on the challenging party is irrelevant.
>
> Section 52 sets out the fundamental principle of constitutional law that the Constitution is supreme. The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law. (Emphasis mine)

17 However, in the case before us the argument being advanced does not deal with "a law pursuant to which one is being prosecuted". It deals solely with the jurisdiction of the Provincial Court Judge to continue the trial after the stay so as to hear argument on the constitutionality of s. 579 of the Criminal Code.

18 The respondent does not challenge the right of the Crown to direct that a stay be entered before plea. He asserts that after plea the case is different. With respect, I confess to being unable to see any difference between the right of the Crown to direct a stay be it before or after plea.

19 The respondent asserts that it is arguable that there are Charter violations of both the respondent's s. 7 and s. 11(h) Charter rights. He says that having been charged and a plea entered, he is entitled to continue with the trial in the hope of an acquittal. He says such an acquittal could be significant to him if extradition proceedings are taken by the State of Washington for the same offence. I should note here that no reason is found in the record before us as to why the Crown directed that a stay be entered. At most there is speculation arising from the material that extradition proceedings might possibly be commenced. The respondent goes on to say that s. 579 must be dealt with, not as it is applied, but rather on the basis that it could be unfair.

20 Without a Charter consideration, it is clear that once the Crown exercises its s. 579 right to direct a stay be entered, the judge hearing the prosecution is functus and without jurisdiction to proceed further. Does the Charter change that? With respect, I think not.

21 The purpose of the Charter has been said "to regulate the relationship of an individual with the government by invalidating laws and governmental activity which infringe the rights guaranteed" (see Retail Wholesale and Department Store Union, Local 580, Al Peterson and Donna Alexander v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 at 596).

22 Here, the direction to the clerk of the court to enter a stay is a statutory administrative discretion given to the Attorney General which is outside the direction or control of the judge. That is what Beaudry tells us. When the stay has been entered there is no contest between the individual and the state. The prosecution has come to an end. The position of the accused as against the state is the same as if he had never been charged. The individual is not put at jeopardy by the stay. On the contrary, the jeopardy he faced as an accused in an ongoing prosecution has come to an end. It may be that if in this case a new indictment is preferred, an argument could be made that the action of the Crown in staying and then preferring a new indictment, gives rise to Charter violations. However, at the moment a stay is entered, and assuming the matter stops there, I can see no possible violation of the accused's Charter rights. In my opinion, Beaudry is still the law when the Crown directs a stay of proceedings be entered.

23 Lastly, the respondent submits that if the Provincial Court Judge has no jurisdiction to hear argument as to the constitutionality of s. 579 then that section is immune from Charter challenge. In my opinion, that consequence does not necessarily follow. In the view I take of this case, s. 579 is immune from Charter challenge before a Provincial Court Judge if the state activity ceases with respect to that charge on the entry of the stay. However, if the Crown recommences the proceeding under s. 579(2) or prefers a new indictment, the accused may well have a challenge (such as in Scott) that would involve the purpose of the stay and the effect of it on the accused's Charter or common law rights.

24 Further, had the Provincial Court Judge declined to entertain the Charter argument it would have been open to the accused to seek a writ of mandamus before a Supreme Court Judge to compel

him to do so. At that time the Charter challenge to entry of the stay would be an issue before that court.

25 In my opinion, when the stay was entered, the Provincial Court Judge became functus with respect to this charge and he has no jurisdiction to proceed further in the matter of Regina v. Kenneth Benjamin Smith.

26 I would allow the appeal and direct that His Honour Judge A.E. Filmer of the Provincial Court of British Columbia be prohibited from continuing in the matter of Regina v. Kenneth Benjamin Smith.

HOLLINRAKE J.A.
CARROTHERS J.A.:-- I agree.
GIBBS J.A.:-- I agree.

Indexed as:

R. v. Wren (B.C.C.A.)

Between
Regina, Respondent, and
Randall Wren, Appellant

Vancouver Registry: CA006186

[1987] B.C.J. No. 1336

British Columbia Court of Appeal

Hinkson, Macfarlane and McLachlin JJ.A.

June 1, 1987

(On appeal from the judgment of Macdonald, J., pronounced June 6, 1986).

C.M. Norris, Esq., appearing for the (Crown), Respondent. The Appellant appearing in Person.

HINKSON J.A. (for the Court, orally, dismissing the appeal):-- This is an appeal from the decision of Mr. Justice Macdonald, in the Supreme Court, in chambers, in which he dismissed the petitioner's application for an order in the nature of prohibition directing the withdrawal of a stay of proceedings on the private information sworn by the petitioner against Constable Larson, a member of the Royal Canadian Mounted Police.

In March, 1986, the Regional Crown counsel for the Fraser Region of British Columbia received a report concerning an investigation conducted by the Surrey Detatchment of the R.C.M.P. into an allegation made by the petitioner.

The petitioner alleged that he had been assaulted on December 30, 1985, at 12:30 a.m. on Highway 1 at the Douglas Border crossing by Constable Larson.

After reviewing the report, the Regional Crown counsel met with the petitioner on April 28th, 1986, and informed him that in his view there was insufficient evidence to support the laying of a criminal charge against Constable Larson.

That decision not to lay a charge was confirmed on May 12, 1986 after the complaint had been referred to independent legal counsel, Mr. Richard Peck.

On May 28, 1986, the petitioner appeared before a justice of the peace and swore a private information against Constable Larson.

On May 29th the Regional Crown counsel directed the Clerk of the Court to enter a stay of proceedings on the Information, pursuant to s. 508(1) of the Code.

The petitioner then brought an application in the Supreme Court seeking an order that the Regional Crown counsel and the Attorney General of British Columbia withdraw the stay of proceedings.

Mr. Justice Macdonald,in the course of his reasons made reference to the decision of the Supreme Court of Canada in Dowson v. The Queen (1983) 7 C.C.C. (3d) 527. In that case, Laskin, J. (as he then was) said at p. 538 with reference to the existing provisions of the Code at that time, namely, 732(1) and 508 in its form at that time:

> "The disparity between stays for summary convictions and those for indictable offences is undesirable and could not have been intended by Parliament. Such an anomaly is not, unfortunately, so infrequent in the field of criminal procedure."

Subsequent to that comment in the Supreme Court of Canada the Criminal Code was amended. S. 732(1) was repealed and at the same time s. 508(1) was amended. Previously s. 508 provided that a stay could be entered "at any time after an indictment has been found". That phrase was deleted in the amendment and now with respect to both summary conviction offences and indictable offences the Attorney General may enter a stay at any time after proceedings are commenced.

On the basis of the comment of Mr. Justice Laskin in Dowson and the amendment to s. 508 of the Criminal Code, Mr. Justice Macdonald concluded as a matter of law that there was an absolute discretion in the Attorney General, or counsel instructed by him, to stay the proceedings in the present case. I am not persuaded that he erred.

For those reasons I would dismiss the appeal.

HINKSON J.A.
MACFARLANE J.A.:-- I agree.
McLACHLIN J.A.:-- I agree.
HINKSON J.A.:-- The appeal is dismissed.

---- End of Request ----
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