

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Watt*, 2008 NSCA 25

Date: 20080328

Docket: CAC 278013

Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Roderick Samuel Watt

Respondent

Revised judgment: The original judgment has been corrected according to the erratum dated July 10, 2008.

Judge(s): Roscoe, Saunders and Oland, JJ.A.

Appeal Heard: February 7, 2008, in Halifax, Nova Scotia

Held: Appeal allowed per reasons for judgment of Oland, J.A.; Roscoe and Saunders, JJ.A. concurring.

Counsel: Mark A. Scott, for the appellant
Philip J. Star, Q.C., for the respondent

Reasons for judgment:

[1] Pursuant to s. 676(1)(c) of the *Criminal Code*, the Crown appeals the stay of proceedings ordered by Justice Felix A. Cacchione in his decision dated January 22, 2007. He was satisfied that the Crown's failure to make timely disclosure impaired the right of the respondent to make full answer and defence and constituted an abuse of process. The judge determined that this was one of those "clearest of cases" which calls for a stay of proceedings. His decision is reported as 2007 NSSC 20. For the reasons which follow, I would allow the appeal against the stay.

Facts

[2] The judge set out the facts as follows:

4 The accused was charged on January 22nd, 2005, with two offences contrary to s. 348(1)(a) and 348(1)(b) of the *Criminal Code*.

5 The accused attended court on January 22nd, 2005, and was arraigned on these two charges and the matter was adjourned to March 8th, 2005, for election and/or plea and to allow the accused to consult with counsel. On March 8th, the matter was again adjourned to March 29th for election and/or plea. On March 29th the accused elected to be tried by a Supreme Court Judge sitting with a jury and his preliminary hearing was scheduled. At the conclusion of the preliminary hearing held on September 13th, 2005, the accused was committed to stand trial on one charge relating to the break and enter into a dwelling house and committing the indictable offence of assault causing bodily harm.

6 The accused was ordered to attend at the Supreme Court on September 29th, 2005, for the setting of a trial date. On that date the trial was scheduled for the period of April 18th, 2006, to April 25th, 2006.

7 On April 10th, 2006, eight days prior to the scheduled commencement of the trial, the defence received unexpected disclosure regarding this matter from Mr. Gorman, the per diem Crown assigned to the file. Included in this late disclosure was an RCMP continuation report with entries relating to events which occurred on November 25th, 2005. One of the entries dated November 25th, 2005, was in relation to the investigating officer, Constable Deveau, completing a request from the Great West Life Insurance Company in relation to a disability claim made by the complainant as a result of the alleged offence. A further entry dated December

5th, 2005, indicated that a memo to Great West Life had been completed and that the alleged victim had been notified that this memo was available for pick up.

8 As a result of this late disclosure, the defence wrote to the Crown on April 10th, 2006, and asked for a copy of the Great West Life request as well as a copy of the memo written to Great West Life and any and all other information relating to this Great West Life request.

9 On April 11th, 2006, the defence received correspondence from the Crown confirming that it would be pursuing some of this disclosure from the RCMP right away.

10 On April 13th, 2006, the defence received correspondence from the Crown which enclosed further disclosure consisting of an RCMP memo and page 2 of a two-page letter from Great West Life to the complainant Mr. Rafuse. The Crown advised the defence that it would be pursuing the missing disclosure with the RCMP, however the investigating officer was out of the office until April 14th and could not be made available until that time to explain where page 1 of the two-page letter might be located.

11 As a result of this late disclosure and the discovered non-disclosure a telephone conference was arranged with the Crown and Justice Goodfellow who was to preside at the trial commencing on April 18th, 2006. A series of telephone conferences involving the Crown, the defence and Justice Goodfellow took place.

12 The defence advised the Court by way of written correspondence and orally during the telephone conferences that the defence believed the disclosure of these documents was important because (a) the complainant had requested disability insurance payments as a result of the alleged incident which would provide him with a motive to fabricate; (b) the complainant had provided a statement to the insurance company or others regarding the incident which the defence did not have and; (c) the complainant indicated that the injuries sustained from the January 6th, 2005, incident were not serious and did not interfere with his original disability claim as referenced in page 2 of the Great West Life letter disclosed on April 13th, 2006.

13 During the series of weekend telephone conferences, the Crown agreed that the missing disclosure could be significant to the accused's defence. It also became apparent that the Crown would not be able to provide the missing disclosure in time for trial. The Crown advised it would make efforts to provide the requested disclosure fairly quickly in order to avoid any further delays.

14 On April 18th, 2006, the trial was adjourned to December 1st, 4th, 5th, 6th, 7th and 8th, 2006. Justice Goodfellow asked counsel if there was anything else they needed from him with respect to disclosure. The Crown's response was as follows:

MR. GORMAN: I can advise the Court, My Lord, that the issue that was before the Court related to Great West Life and some applications for disability insurance. With the assistance of Cst. Deveau, the investigating officer, there has been contact made with Mr. Rafuse, one of the alleged victims, and he has consented to have the information released from Great West Life, so I think that will obviate the necessity of a third party records application. So it should resolve itself fairly - fairly ...

15 Following the adjournment of the trial the defence wrote to Mr. Gorman, the per diem Crown, on May 1st, May 24th and to Mr. MacDonald of the Public Prosecution Service on July 19th, 2006, requesting the disclosure which has been referred to in Court on April 18th. The Crown replied on May 4th, August 16th and October 25th, 2006.

16 In his correspondence dated May 4th, 2006, Mr. Gorman wrote:

The file has been returned to the Antigonish Crown office and I am awaiting further instruction in terms of what is to take place. In that regard I have given instructions to office staff to have a Consent to Release of Information from Great West Life forwarded to Cst. Deveau and for Clinton Rafuse to sign. I will make further inquiries of the Antigonish office to determine the status of the matter.

17 In correspondence dated August 16th and October 25th, 2006, Mr. MacDonald referred to having been in touch with the RCMP on a few occasions regarding the requested disclosure but that he had not received any information from them as of the date of those letters.

18 On November 9th, 2006, the defence filed a brief of law requesting that the charge against the accused be stayed in accordance with s. 24(1) of the *Canadian Charter of Rights and Freedoms*. The defence referred to the passage of seven months from the time the Crown undertook to provide the requested information to the defence and the fact that the requested disclosure had still not been provided.

19 During a pretrial conference on November 14th, 2006, it was agreed that the trial scheduled to start on December 1st would have to be adjourned because disclosure of the Great West Life disability claim file had yet to be made. It was

agreed that some of the originally scheduled trial dates would be used for the hearing of this application to stay the proceedings. The defence agreed to file a formal Notice of Application setting out the basis of its application. This notice dated November 23rd, 2006, was filed on November 24th, 2006.

20 On November 23rd, 2006, seven days before the second scheduled commencement of the accused's trial the Great West Life file, together with other disclosure items, was finally disclosed to the defence.

[3] It is apparent that the first adjournment of the trial was granted to address the initial failure to disclose. What remained to be disclosed consisted of the first page of a two-page letter from Great West Life to the complainant and the Great West Life file disability claim file. The second page of that letter advised the insurer would review its decision if the respondent provided additional medical information, including a copy of all police records regarding the assault. In his decision, the judge recounted the reasons the Crown gave as to why, during the seven month interval between April and November 2006, it had not obtained the remaining documents. These were (a) Constable Deveau's transfer from that detachment; (b) the Crown's office in Antigonish being a busy two-person office; and (c) serious family health issues affecting one of the two Crown Attorneys there. The judge observed that the Crown never advised the respondent that it could not obtain the requested information. It was only on November 23, 2006, seven days before the commencement of the second trial, that the Great West Life disability file, along with other items, was delivered to the respondent. The release signed by the complainant which authorized access was dated November 10, 2006, less than a fortnight earlier.

The Decision to Grant a Stay

[4] Justice Cacchione heard submissions on the stay of proceedings application on December 4, 2006, after which he reserved. The respondent's position was that the only remedy for late disclosure was a stay of proceedings. The trial had been adjourned twice due to the Crown's failure to disclose. According to the respondent, the credibility of the complainant was a critical issue and, in April 2006, both the judge and Crown counsel had agreed that the Great West Life file was potentially relevant and should be disclosed. The respondent argued that he

had relied on the Crown's undertaking to provide the third party records; otherwise, he would have applied for their disclosure.

[5] According to the Crown, what it told the court on April 18, 2006 was not an undertaking. Rather, it was a "commitment" to assist the defence in obtaining those materials. The Crown conceded that not enough had been done in the period between the two scheduled trials, and acknowledged that "the ball was dropped." However, in its view, this was not a failure to disclose situation. It pointed out that the Crown was never in possession or control of the material sought after the first adjournment, until less than two weeks before its delivery to the respondent. The Crown submitted that the respondent had had the option of making a third party application during the seven month interval, and failed to do so.

[6] In his decision dated January 22, 2007, the judge framed the issues thus:

[41] The issues raised in this application can be made into the following questions. (1) Did the RCMP's knowledge and possession of information pertaining to the complainant's application for disability benefits arising from the alleged offence require that this information be disclosed to the accused? (2) Was there a duty or obligation on the RCMP to protect the complainant's privacy interests? (3) Was there a duty on the RCMP to disclose continuation reports in its file pertaining to this case? (4) Has the accused been prejudiced by the non-disclosure and late disclosure? (5) Was the Crown statement made to Goodfellow, J. that the complainant had consented to the release of information from Great West Life thus obviating the need for a third party records application an undertaking or something less?

[7] The critical portions of his judgment read:

57 Whether the Crown's words and actions are viewed as a commitment or an undertaking is of little consequence. The fact remains that the Crown, and in particular the RCMP, did little to fulfil an assurance given to the defence and the Court that materials acknowledged as being relevant to the defence would be disclosed in a timely fashion so as to allow the accused's trial to proceed on the adjourned date. The Crown breached the agreement it made with the defence by not making the disclosure in a timely fashion. The result of this breach was a further adjournment of the accused's trial and further prejudice to the accused.

58 The accused has suffered prejudice in a number of ways by the late and non-disclosure of certain materials. The defence has had to prepare twice for a trial which has yet to commence. This has led to an extra expense for the defence.

As well the accused has been under release conditions since January 2005. The passage of time is well known to affect not only a witness' memory but also the location of potential witnesses. Awaiting trial has been recognized as being stressful to an accused person. In the present case the accused has been awaiting his trial since September 2005 when the committal to trial was made by the Provincial Court. Because of the inaction of the Crown the trial, of necessity, has been adjourned on two occasions. A new trial would not be heard until September 2008 some three years after the accused's committal to stand trial and nearly four years after the alleged commission of the offence. Such an inordinate delay, attributable to the Crown's inaction, violates the fundamental principles of justice underlying the community's sense of fair play and decency. A delay of this length, in the case of an uncomplicated and straightforward prosecution, offends the public interest in a fair and just trial process and in the proper administration of justice. A defendant should not have to wait in excess of three years for a trial where the case is not unusual or complicated.

59 A defendant should be entitled to rely on assurances, commitments or undertakings given by the Crown. In the present case the accused relied on the Crown to provide him with disclosure materials which the Crown agreed were relevant to his defence. The Crown did not comply with its commitment until the very last minute. This delay caused a further adjournment of the accused's trial. No justifiable reason was given for this late disclosure.

60 The Crown by its inaction in the face of repeated defence requests for the disclosure materials demonstrated a complete disregard for the rights of the accused. This disregard of the Crown's disclosure obligations is not only troublesome but also abusive. In my opinion it would be prejudicial to the public interests for the Crown to continue its proceedings against Mr. Watt. To do so would undermine the public's confidence in the criminal justice system because it would be perceived that the agreements and undertakings of the Crown are not to be relied upon. This would be intolerable and would bring the administration of justice into disrepute. As stated by Hall J.C.C., (as he was then) in *Aucoin v. Nova Scotia (Attorney General)* (1989), 94 N.S.R. (2d) 205 (Co.C.T.) at page 210:

... The public expects the highest standard of fair play and fair treatment from the Crown as represented by those officials who act in the name of the state ...

61 In *R. v. Bursey* (1991), 109 N.S.R. (2d) 402 (Co.C.T.) an accused had been charged with fraud. A police officer promised to drop the charge of fraud if the accused testified against his friends. The accused did testify but later was served with a summons respecting the charge of fraud. The accused brought an application for a stay of proceedings arguing that it was an abuse of process for

the Crown to proceed with charges against him. Hall J.C.C. (as he was then) acknowledged the police as being subject to Crown responsibilities and stated at p. 405:

... when an undertaking is given by a person engaged in the prosecutorial process, including a police officer who has the ostensible authority to give the undertaking, the recipient of the undertaking should be entitled to rely on it. For the Crown to proceed contrary to the undertaking, in my opinion, constitutes oppressive behaviour by the Crown. In the words quoted and adopted by Chief Justice Dickson it would "violate those fundamental principles of justice which underlie the community's sense of fair play and decency ...

In the case at bar the defence was given an assurance by the Crown that the RCMP would obtain the complainant's consent to release of information. The accused was entitled to rely on the assurance given. The outcome of this application could have been different if at some stage the Crown had advised the defence of difficulties it was having in complying with the assurances it had given and the defence then did nothing on its own to pursue a third party records application. This was not done. For the Crown to now argue that the accused could have brought his own third party records application and as a result because he did not do so he did not suffer any prejudice is abusive.

62 The abuse in the present case also lies in the Crown reneging on an agreement made and presented to the Court. To renege on such an agreement constitutes an abuse of process of the Court. The Crown is expected to honour the agreements it has made in relation to prosecutions. As was stated by Graburn Co. Ct. J. in *R. v. Betesh* (1975), 30 C.C.C. (2d) 233 (Ont. Co.C.T.) at page 250-51:

... the Crown is expected to honour the agreements it has made in relation to prosecutions.

63 There is ample authority for the proposition that the Crown's failure to honour an agreement with the accused can amount to an abuse of process: *Regina v. Crnec, Bradley and Shelly* (1980), 55 C.C.C. (2d) 1 (Ont. H.C.); *R. v. Goodwin* (1981), 43 N.S.R. (2d) 106 (N.S.C.A.); *R. v. Mandate Erector and Welding Ltd.*, [1999] N.B.J. No. 519 (N.B.C.A.)

64 The Crown's failure to make timely disclosure has impaired the accused's right to make full answer and defence and is in my opinion evidence of an abuse of process.

65 In *R. v. O'Connor* [1995] 4 S.C.R. 411 (S.C.C.) Justice L'Heureux-Dube stated at paragraph 63:

... that conducting a prosecution in a manner that contravenes the community's basic sense of decency and fair play and thereby calls into question the integrity of the system is also an affront of constitutional magnitude to the rights of the individual accused. It would violate the principles of fundamental justice to be deprived of one's liberty under circumstances which amount to an abuse of process, and in my view, the individual who is the subject of such treatment is entitled to present arguments under the Charter and to request a just and appropriate remedy from a court of competent jurisdiction.

66 In *O'Connor* the Court also held that a demonstration of mala fides on the part of the Crown is not a necessary precondition to a finding that a stay of prosecution is warranted.

67 I am not satisfied that an adjournment of the trial would be a proper remedy for an infringement of the accused's s. 7 Charter rights. This case has already been adjourned twice as a result of the delay by the Crown in providing disclosure to the accused. A new trial would not be heard until sometime in September 2008 nearly three years after the accused's committal to stand trial and almost four years after the offence was alleged to have been committed. I am satisfied that the accused's right to life, liberty and security of the person as guaranteed by s. 7 of the *Charter* has been infringed in the present case. The Crown's failure to make timely disclosure has impaired the accused's right to make full answer and defence and is in my opinion evidence of an abuse of process.

68 As stated by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Tobiass* (1997), 118 C.C.C. (3d) 443 (S.C.C.) at paragraph 90:

If it appears that the state has conducted a prosecution in a way that renders the proceedings unfair or is otherwise damaging to the integrity of the judicial system, two criteria must be satisfied before a stay will be appropriate. They are that:

(1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and

(2) no other remedy is reasonably capable of removing that prejudice.

The prejudice referred to in this quotation applies as well to prejudice to the integrity of the judicial system.

69 In the present case the conduct of the Crown has damaged the integrity of the judicial system. The prejudice caused to the accused would be perpetuated by allowing the matter to proceed. The accused's trial has already been adjourned twice because of the Crown's conduct. To allow this matter to proceed would subject the accused to further vexatious and vicissitudes of a criminal accusation. It would cause further stigmatization of the accused, further stress and anxiety and further expense to him. The uncertainty as to the outcome and sanction is another prejudice that would be caused to the accused by allowing this matter to proceed.

70 The integrity of the judicial system would also be prejudiced in that the community would be left with the impression that the Crown could disregard any commitment or undertaking given to the accused and the Court without concern for any possible repercussions.

71 I am satisfied that this case is one of those "clearest of cases" which calls for a stay of proceedings.

72 Accordingly a stay of proceedings is granted. [Emphasis added]

Preliminary Application

[8] Before considering the merits of the appeal against the granting of a stay of proceedings, I must address a preliminary matter. Approximately two weeks before the hearing of the appeal, the respondent filed an addendum to his factum. He argues that his right to be tried within a reasonable time pursuant to s. 11(b) of the *Charter* had been violated. The Crown filed a written response and both counsel were invited to make submissions at the hearing.

[9] The proposed addendum was the first time in these proceedings that s. 11(b) was raised. The respondent did not present any evidence or submissions in regard to this *Charter* argument before the judge who granted the stay. Accordingly, the Crown did not respond to it and the judge did not address that provision in his decision. I would refuse to accept the addendum and its submissions, for the reasons set out in *R. v. Phillips*, 2006 NSCA 135 at ¶ 32, as follows:

In *Nova Scotia (Minister of Health) v. V.S.*, 2006 NSCA 122, this court discussed whether a challenge to the validity of legislation should be considered for the first time in the Court of Appeal. The court stated:

[28] The Supreme Court of Canada and provincial courts of appeal often have said that a new issue on appeal, including a new constitutional issue, (1) should not be considered unless the record contains all the facts material to that issue, and further (2) should not be considered if the opposing party would be prejudiced in a manner not remediable by costs. The opposing party would be irretrievably prejudiced if, in the lower court, that party would have adduced additional evidence, not already on the record, that is relevant to the new issue. . . .

Issues

[10] In its notice of appeal the Crown set out two grounds, namely that (a) the judge erred in ordering a stay of proceedings on the ground this proceeding constituted one of the “clearest of cases” for doing so; and (b) that he erred in his application of the law on stays of proceedings to the particular facts of this case. Although, in its factum and argument before the court, the Crown broke those two grounds into nine discrete grounds, it is not necessary that I deal with each in order to dispose of this appeal. All the grounds reduce to a single issue: Whether, in the circumstances before him, the judge erred in ordering a stay of proceedings.

Standard of Review

[11] In *R. v. Hiscock*, [1999] N.S.J. No. 363 (C.A.), this court stated:

42 The standard of appellate review from the decision of a trial judge granting a stay of proceedings was considered by the Supreme Court in **Canada (Minister of Citizenship and Immigration) v. Tobiass** (1997), 118 C.C.C. (3d) 443. The judgment was delivered by a unanimous Court.

43 At page 470, the Court said:

A stay of proceedings is a discretionary remedy. Accordingly, an appellate court may not lightly interfere with a trial judge's decision to grant or not to grant a stay. The situation here is just as our colleague Gonthier J. described it in **Elsom v. Elsom**, [1989] 1 S.C.R. 1367 at p. 1375, 59 D.L.R. (4th) 591:

[An] appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice.

[12] While the discretionary granting of a stay will not lightly be interfered with, the Supreme Court of Canada stated in *R. v. Regan*, [2002] 1 S.C.R. 297 (“*Regan* (SCC)”):

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

Stay of Proceedings

[13] In *R. v. Regan* (1999), 179 N.S.R. (2d) 45 at ¶ 100, Cromwell, J.A. for the majority described a stay as “a drastic remedy because its effect is that the state is permanently prevented from prosecuting the alleged criminal act.” The Supreme Court of Canada affirmed this characterization in *Regan* (S.C.C.) at ¶2.

[14] That a stay of proceedings is an exceptional remedy reserved for exceptional circumstances is clear from *R. v. Taillefer*, [2003] 3 S.C.R. 307 where the Supreme Court of Canada stated:

117 This Court has frequently underlined the draconian nature of a stay of proceedings, which should be ordered only in exceptional circumstances. A stay of proceedings is appropriate only “in the clearest of cases”, that is, “where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued” (*O'Connor, supra*, at para. 82). It is a “last resort” remedy, “to be taken when all other acceptable avenues of protecting the accused's right to full answer and defence are exhausted” (*O'Connor, supra*, at para. 77; see also *Tobiass, supra*, at paras. 89-90; *Carosella, supra*, at paras. 52-53; *Regan, supra*, at paras. 53 et seq.).

[15] Before beginning my analysis of the judge's decision, it will be helpful to set out two concessions made by the respondent during the hearing of the appeal. The first concerns the characterization of the words spoken by the Crown Attorney on April 18, 2006, and the second, that of the Crown's actions relating to the material sought by the respondent.

[16] The judge did not decide whether what the Crown told the court on April 18, 2006, constituted an undertaking. While he did not determine that the Crown had given an explicit undertaking, all of the cases he cited in finding abuse of process involved Crown undertakings relating to matters within the control of the Crown. In each of those cases, after giving an undertaking, the Crown had exercised prosecutorial discretion and acted contrary to its undertaking with potentially very serious consequences for the accused. Such was the situation in *R. v. Bursey* (1991), 109 N.S.R. 402 (2d) (Co.C.T.) which the judge quoted and relied upon in ¶ 61 of his reasons. There the police had undertaken to drop a fraud charge against the accused if he testified against his friends, but after he did so, the Crown proceeded with the charge against him. Equivalent breaches of clear undertakings are found in the other cases the judge cited, namely *R. v. Betesh* (1975), 30 C.C.C. (2d) 233 (Ont. Co.C.T.); *Regina v. Crnec, Bradley and Shelly* (1980), 55 C.C.C. (2d) 1 (Ont. H.C.); *R. v. Goodwin* (1981), 43 N.S.R. (2d) 106 (N.S.C.A.) and *R. v. Mandate Erectors & Welding Ltd.*, [1999] N.B.J. No. 519 (N.B.C.A.). No equivalent undertaking nor breach of a similar magnitude is found in this case.

[17] On appeal, the Crown argued that the Crown Attorney's response to the court did not amount to an undertaking which would give rise to the doctrine of abuse of process. It emphasized that the Crown did not have the Great West Life file in its control or possession. In its view, the Crown had advised the court that the complainant had indicated to the RCMP his consent to release of the information given to Great West Life, but could not, and did not, give an undertaking. The respondent, properly, in my view, conceded on appeal that the Crown had not given any undertaking to provide the remaining material. The parties agreed that what the Crown did, was to give a commitment to help the respondent receive it.

[18] The second concession made by the respondent on appeal is that the Crown had not acted with *mala fides*. As will be seen later, the intention of the Crown can be a significant factor where a stay is sought.

[19] I turn then to my analysis of the decision granting a stay of proceedings. The judge held that the respondent's s. 7 *Charter* rights not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice, had been infringed. Moreover, the conduct of the Crown had damaged the integrity of the judicial system. In ¶ 68 of his decision, he quoted the criteria that must be satisfied before a stay of proceedings will be granted, as set out in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391. With respect, he misdirected himself by failing to consider all aspects of the analysis essential in determining whether a stay should be granted. Had he done so, it would have been apparent that this was not the sort of case which called for the drastic remedy of a stay of proceedings.

[20] For convenience, I repeat the test set out in ¶ 90 of *Tobiass*, supra:

If it appears that the state has conducted a prosecution in a way that renders the proceedings unfair or is otherwise damaging to the integrity of the judicial system, two criteria must be satisfied before a stay will be appropriate. They are that:

- (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
- (2) no other remedy is reasonably capable of removing that prejudice.

[21] I will begin by considering the elements of the first criterion, commencing with abuse. A court has the power to stay proceedings to prevent the abuse of a court's process through oppressive or vexatious proceedings where compelling an accused to stand trial would violate those principles of fundamental justice which underlie the community sense of fair play and decency: *R. v. Jewitt*, [1985] 2 S.C.R. 128.

[22] According to the judge, the actions of the Crown constituted an abuse of process in several ways:

- (a) by completely disregarding its disclosure obligations to the respondent;
- (b) by not having advised him of its difficulties in obtaining the materials, and yet arguing that because the respondent had not brought his own third party records application, he did not suffer any prejudice;
- (c) by reneging on an agreement made and presented to the court; and
- (d) by failing to make timely disclosure and so impairing the respondent's right to make full answer and defence.

[23] In *R. v. Dixon*, [1998] 1 S.C.R. 244, the Supreme Court of Canada considered the Crown's duty to disclose and stated:

20 In *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, it was held that the Crown has an obligation to disclose all relevant material in its possession, so long as the material is not privileged. Material is relevant if it could reasonably be used by the defence in meeting the case for the Crown. . . .

22 The obligation resting upon the Crown to disclose material gives rise to a corresponding constitutional right of the accused to the disclosure of all material which meets the *Stinchcombe* threshold. As Sopinka J. recently wrote for the majority of this Court in *R. v. Carosella*, [1997] 1 S.C.R. 80, at p. 106:

The right to disclosure of material which meets the *Stinchcombe* threshold is one of the components of the right to make full answer and defence which in turn is a principle of fundamental justice embraced by s. 7 of the *Charter*. Breach of that obligation is a breach of the accused's constitutional rights without the requirement of an additional showing of prejudice.

Thus, where an accused demonstrates a reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence, he has also established the impairment of his *Charter* right to disclosure.

[24] Here, the obligation on the Crown to disclose consisted of an obligation on the part of the RCMP and on the part of the Crown Attorneys to disclose relevant

material in their possession. It is undisputed that late disclosure resulted in the adjournment of the initial trial scheduled for April 18, 2006. The respondent did not receive the first page of the Great West Life letter to the complainant, nor the Great West Life disability claim file, until a week before the second trial was to begin.

[25] As noted earlier, the parties agreed that what the Crown gave when the first trial was adjourned was a commitment to help the respondent obtain that remaining Great West Life material. However, there is no evidentiary basis for the judge's statement that the Crown reneged on an agreement made and presented to the court, which resulted in an abuse of process. Instead, although those efforts may have been erratic and, for a lengthy period, impotent, the correspondence demonstrates continuing efforts by the Crown Attorney to obtain the material through the RCMP. He had a consent to release information from Great West Life prepared and forwarded to the RCMP for the complainant to sign. It is the delay in having the consent signed that caused the delay in disclosure. There is no evidence that the RCMP already had the first page of the Great West Life letter, or the disability claim file, in its possession before that consent was signed and returned. Nor is there evidence of any refusal by the RCMP or the Crown Attorney to deliver this material once it came into its or his possession.

[26] The judge also faulted the Crown Attorney for not advising the respondent of its difficulties with the RCMP. In doing so, he referred to counsels' submissions concerning the bringing of a third party records application by the respondent, but did not deal with those arguments. In my respectful view, he erred by failing to take into consideration the obligation on an accused to be duly diligent in seeking disclosure, when determining whether or not to grant the exceptional remedy of a stay.

[27] In *R. v. Dixon, supra*, the Supreme Court of Canada stated:

37 In considering the overall fairness of the trial process, defence counsel's diligence in pursuing disclosure from the Crown must be taken into account. A lack of due diligence is a significant factor in determining whether the Crown's non-disclosure affected the fairness of the trial process. In *Stinchcombe, supra*, at p. 341, defence counsel's duty to be duly diligent was described in this way:

Counsel for the accused must bring to the attention of the trial judge at the earliest opportunity any failure of the Crown to comply with its duty to disclose of which counsel becomes aware. Observance of this rule will enable the trial judge to remedy any prejudice to the accused if possible and thus avoid a new trial. See *Caccamo v. The Queen*, [1976] 1 S.C.R. 786. Failure to do so by counsel for the defence will be an important factor in determining on appeal whether a new trial should be ordered.

The fair and efficient functioning of the criminal justice system requires that defence counsel exercise due diligence in actively seeking and pursuing Crown disclosure. The very nature of the disclosure process makes it prone to human error and vulnerable to attack. As officers of the court, defence counsel have an obligation to pursue disclosure diligently. When counsel becomes or ought to become aware, from other relevant material produced by the Crown, of a failure to disclose further material, counsel must not remain passive. Rather, they must diligently pursue disclosure. . . .

38 Whether a new trial should be ordered on the basis that the Crown's non-disclosure rendered the trial process unfair involves a process of weighing and balancing. If defence counsel knew or ought to have known on the basis of other disclosures that the Crown through inadvertence had failed to disclose information yet remained passive as a result of a tactical decision or lack of due diligence it would be difficult to accept a submission that the failure to disclose affected the fairness of the trial. See *R. v. McAnespie*, [1993] 4 S.C.R. 501, at pp. 502-3.

. . .

55 It must be remembered that defence counsel is not entitled to assume at any point that all relevant information has been disclosed to the defence. Just as the Crown's disclosure obligations are ongoing, and persist throughout the trial process, so too does defence counsel's obligation to be duly diligent in pursuing disclosure. To do nothing in the face of knowledge that relevant information has not been disclosed will, at a minimum, often justify a finding of lack of due diligence, and may, in certain circumstances, support an inference that counsel made a strategic decision not to pursue disclosure. In this case, the summary in the occurrence report indicates that Daye's statement would very likely meet the test for relevance set out in *Stinchcombe*. When defence counsel reviewed the occurrence report, he knew or should have known that the Crown had failed in its disclosure obligations. When this became apparent, defence counsel should have brought this matter to the attention of the trial judge at the earliest opportunity. In the circumstances of this case, the Court of Appeal was right to conclude that at

this point, defence counsel was faced with a choice: “call for the statements or live without them”. [Emphasis added]

[28] In summary, it is my view that the judge’s statement that the Crown reneged on an agreement was factually inaccurate. Moreover, he erred by failing to include any consideration of defence counsel’s obligation of due diligence in pursuing disclosure.

[29] In my opinion, the judge also misdirected himself by failing to consider a further requirement in the first *Tobiass*, supra criterion: before a stay will be appropriate, the abuse will be “manifested, perpetrated or aggravated through the conduct of the trial, or by its outcome.” In that case, the Supreme Court of Canada described this aspect as follows:

91 The first criterion is critically important. It reflects the fact that a stay of proceedings is a prospective remedy. A stay of proceedings does not redress a wrong that has already been done. It aims to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole in the future. See *O'Connor*, at para. 82. For this reason, the first criterion must be satisfied even in cases involving conduct that falls into the residual category. See *O'Connor*, at para. 75. The mere fact that the state has treated an individual shabbily in the past is not enough to warrant a stay of proceedings. For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. Ordinarily, the latter condition will not be met unless the former is as well -- society will not take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare. [Emphasis added]

[30] The judge’s reasons are directed to the Crown’s past conduct. They do not contain any suggestion as to how the delay in disclosure would manifest, perpetrate or aggravate damage by any future proceeding.

[31] Furthermore, the prejudice described by the judge which persuaded him to issue a stay does not impair the respondent’s ability to make full answer and defence to the extent required for a stay. His decision referred to several types of prejudice:

- (a) The extra preparation and related expense preparing for two trials;
- (b) The respondent continuing to be under release conditions;
- (c) The effect of the passage of time on the memory of witnesses and the locations of potential witnesses;
- (d) The stress of awaiting trial; and
- (e) The adjournment of two trials and the delay before the hearing of a third.

[32] However, showing some prejudice is not enough to support a determination that s. 7 of the *Charter* has been breached. In addition, the granting of a stay before trial is generally premature. The Ontario Court of Appeal explained in *R. v. François* (1995), 15 O.R. (3d) 627, 65 O.A.C. 306:

10 Where, as here, the respondent contended that the delay so adversely impacted upon the fairness of the trial as to constitute a breach of his s. 7 **Charter** rights, it is not apparent to me how this complaint can be evaluated without a trial. In my view, the appropriate course for the trial judge in this case would have been to reserve on the motion for a stay until after the trial, or at least until the Crown had closed its case. The trial judge would then have been in a position to assess the cogency of the witnesses and assess the damage to the defence said to be caused by the delay. He would also have had the opportunity of assessing the explanations for the delay in the light of the conduct of the trial. As was said by this court in **R. v. Blake**, unreported, dated July 15, 1993:

In our view, the showing of some prejudice is not a sufficient basis for a decision that an accused person's **Charter** rights under s. 7 and s. 11(d) would be infringed if the accused were required to stand trial. What must be demonstrated on a balance of probabilities is that the missing evidence creates a prejudice of such magnitude and importance that it can be fairly said to amount to a deprivation of the opportunity to make full answer and defence. The measurement of the extent of the prejudice in the circumstances of this case could not be done without hearing all the relevant evidence, the nature of which would make it clear whether the prejudice was real or minimal. The Crown's submission was, in our view, right. The motion was premature and

the stay should not have been granted when it was. [Emphasis added]

[33] The Supreme Court of Canada in *R. v. Taillefer*, supra also stated that a trial judge is often be in a stronger position to assess the prejudice claimed and the appropriate remedy:

122 In the case of the appellant Taillefer, I believe that it would be premature to order a stay of proceedings, in the case of such a serious crime, where the charge is still first degree murder. The transcripts of all of the testimony given at the preliminary inquiry and the first trial are still available. As well, at this stage in the case, we can only speculate as to the prejudice that the accused would suffer by reason of the impeachment of the witnesses' credibility and the loss of opportunities for investigation. The trial judge will be in a better position to observe and assess the hurdles that the accused will have to surmount and to determine whether his right to make full answer and defence and to a fair trial is jeopardized by holding a new trial. It will be up to that judge to monitor the conduct of the new trial closely, and if necessary to assess the consequences of the passage of time and of the prosecution's conduct on the overall fairness of the proceeding being held before him or her. As this Court held in *R. v. La*, [1997] 2 S.C.R. 680, at para. 27:

The appropriateness of a stay of proceedings depends upon the effect of the conduct amounting to an abuse of process or other prejudice on the fairness of the trial. This is often best assessed in the context of the trial as it unfolds. Accordingly, the trial judge has a discretion as to whether to rule on the application for a stay immediately or after hearing some or all of the evidence. Unless it is clear that no other course of action will cure the prejudice that is occasioned by the conduct giving rise to the abuse, it will usually be preferable to reserve on the application. This will enable the judge to assess the degree of prejudice and as well to determine whether measures to minimize the prejudice have borne fruit. [Emphasis added]

[34] As to what constitutes prejudice sufficient to constitute a breach of the right to a fair trial, the Ontario Court of Appeal stated in *R. v. Bradford*, [2001] O.J. No. 107 (C.A.), a lost evidence case:

7. In a similar vein, Justices McLachlin and Iacobucci commented in *R. v. Mills*, [1999] 3 S.C.R. 668 at 718 that fundamental justice embraces more than the

rights of the accused and that the assessment concerning a fair trial must not only be made from the point of view of the accused but the community and the complainant. The fact that an accused is deprived of relevant information does not mean that the accused's right to make full answer and defence is automatically breached. Actual prejudice must be established: *Mills*, supra, 719-720, citing *R. v. La*, [1997] 2 S.C.R. 680 at 693.

8 The fact that a piece of evidence is missing that might or might not affect the defence will not be sufficient to establish that irreparable harm has occurred to the right to make full answer and defence. Actual prejudice occurs when the accused is unable to put forward his or her defence due to the lost evidence and not simply that the loss of the evidence makes putting forward the position more difficult. To determine whether actual prejudice has occurred, consideration of the other evidence that does exist and whether that evidence contains essentially the same information as the lost evidence is an essential consideration. For example, in *B. (F.C.)*, supra, the court held that where the complainant's signed statement was lost, but a typed transcription that was probably accurate existed, the trial judge erred in entering a stay of proceedings. In *R. v. J.D.*, a judgment of the Ontario Court of Appeal, delivered May 30, 1996, [1996] O.J. No. 1907, although the complainant's statement was lost, the officer's notes were available and the court held that it was speculative whether there were any inconsistencies between the complainant's statement and the officer's notes. [Emphasis added]

[35] In this case, as in *Taillefer*, supra the transcript of the preliminary inquiry remained available. As a result, some of the potential prejudice described by the judge which could result from the passage of time might have been reduced, or even eliminated. Any delay in proceeding to trial is regrettable, but the types of prejudice referred to in the decision are not unusual in regular criminal proceedings. I am not persuaded that that prejudice recounted by the judge is of "such magnitude and importance that it can be fairly said to amount to a deprivation of the opportunity to make full answer and defence". Furthermore, having the extent of the alleged prejudice considered at trial would have allowed fuller consideration of the effect on the respondent's position.

[36] As explained above, the circumstances of this case did not satisfy several elements of the first criterion of the *Tobiass*, supra test for the appropriateness of a stay. The second criterion requires that no other remedy is reasonably capable of removing that prejudice. The judge was not satisfied that an adjournment of the trial would be a proper remedy, reiterating the two adjournments and delay. However, there was no substantial inquiry as to whether there were other remedies

lesser than a stay that were appropriate. In that regard, I observe that when the stay application was heard, the respondent had received all the material that it had sought through the Crown, other than RCMP continuation reports which could not have gone to the issue of the complainant's credibility. An adjournment would have allowed the respondent time to prepare for trial.

[37] To justify a stay, the abuses must reach the "oppressive and vexatious" level set out in *Jewitt*, supra. They must shock the conscience of the community. While bad faith is always a consideration, the respondent conceded that *mala fides* did not exist here. In *R. v. Power*, [1994] 1 S.C.R. 601, the Supreme Court of Canada stated that:

11 I, therefore, conclude that, in criminal cases, courts have a residual discretion to remedy an abuse of the court's process but only in the "clearest of cases", which, in my view, amounts to conduct which shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention.

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

[38] Finally, while the judge quoted ¶ 90 of *Tobiass*, supra which set out a two part test for the granting of a stay, he erred by failing to refer to the third criterion set out in that case and thereby misdirected himself. The Supreme Court continued:

92 After considering these two requirements, the court may still find it necessary to consider a third factor. As L'Heureux-Dubé J. has written, "where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings": *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667. We take this statement to mean that there may be instances in which it will be appropriate to balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits. This is not to say, of course, that something akin to an egregious act of misconduct could ever be overtaken by some passing public concern. Rather, it merely recognizes that in certain cases, where it is unclear whether the abuse is sufficient to warrant a stay, a compelling societal interest in having a full hearing could tip the scales in favour of proceeding.

[39] Here the respondent is charged with break and enter into a dwelling house, and there committing the indictable offence of assault causing bodily harm (s. 348(1)(b)). This is a serious charge. If he were found guilty, the maximum sentence is life imprisonment (s. 348(1)(d)). Yet nowhere in his decision did the judge refer to the seriousness of the charge. Nor did he conduct any weighing of the granting of a stay against the societal interests of having the matter decided at trial. In these circumstances, the judge erred by failing to take this third criterion into account when deciding whether to grant a stay.

[40] In conclusion, the judge misdirected himself on the requirements for granting the extraordinary remedy of a stay of proceedings. The circumstances here did not amount to one of the "clearest of cases" which demands a stay. I would allow the appeal. It would appear that no formal order was ever taken out staying this proceeding. The effect of our decision will be to set aside the stay as

if it had been formalized by order of the court of first instance.

Oland, J.A.

Concurred in:

Roscoe, J.A.

Saunders, J.A.