SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. G.S.*, 2020 NSSC 367

Date: 20201216
Docket: *Antigonish*, No. 485417
Registry: Antigonish

Between:

Her Majesty the Queen

v.

G.S.

DECISION

Restriction on Publication: Ss. 486 and 486.5 of the *Criminal Code* of Canada

Judge:	The Honourable Justice Christa M. Brothers
Corrected Decision:	The text of the original decision has been edited to remove information that could identify the complainant, including the name of the accused.
Heard:	October 26, 2020, in Antigonish, Nova Scotia
Oral Decision:	December 16, 2020, in Antigonish, Nova Scotia
Counsel:	Jonathan C. Gavel, for the Crown Raymond Kuszelewski, for the Defendant

By the Court:

[1] G.S. is charged in a two-count indictment with the following offences:

> Between the 1st day of January A.D. 2004 and the 20th day of August A.D. 2004 at, or near […], Nova Scotia, did for a sexual purpose touch R.A.M. a person under the age of sixteen years directly with a part of his body, to wit his hand contrary to Section 151 of the *Criminal Code*;
>
> AND FURTHMORE during the same date, time and place did for a sexual purpose touch R.A.M., a person under the age of sixteen years directly with a part of his body, to wit his groin area contrary to Section 151 of the *Criminal Code*.

[2] The indictment was filed on October 10, 2019. G.S. was to stand trial before me on Monday, October 26, 2020. At the beginning of trial, he moved to have his case dismissed based on the special plea of *autrefois acquit*. In the alternative, he sought a stay on the ground of abuse of process. The question before the Court is whether the plea of *autrefois acquit* is available to G.S. or whether the circumstances call for imposition of the drastic remedy of a stay of proceedings.

Issue

1. Is the plea of *autrefois acquit* available to the accused?
2. Is there a basis to find an abuse of process and impose a stay of proceedings?

Factual Background

[3] The factual underpinning of this motion is that the accused was originally charged by indictment dated July 7, 2006, with two counts contrary to section 151 of the *Criminal Code*. In handwriting on the indictment, dated April 23, 2007, is the following:

> charge withdrawn by Crown.

[4] On April 13, 2007, Crown counsel, Allen Murray, Q.C., wrote to Maurice Smith, Q.C., of Nova Scotia Legal Aid, who represented G. S., at the time. The substance of the letter is as follows:

> I am writing to confirm our telephone conversation of today's date with respect to the above noted matter. As I told you, the Crown has made a decision after considering the matter and after speaking once again to the victim of the alleged offence, that we will be offering no evidence at. [G.S.]'s trial. I understand that the matter of the Queen and Shawn Johnson is scheduled for back-up and will proceed to trial on that date. I trust you will find the foregoing satisfactory.

[5] On the same day, Ronald J. MacDonald, Q.C., Senior Crown Counsel, wrote to the Honourable Justice Douglas L. MacLellan in relation to G.S.'s matter and said the following:

> Please be advised that the Crown will not be proceeding with this matter and will be offering no evidence at. [G.S.]'s trial. The matter of The Queen and Shawn Johnson was scheduled to proceed as a back-up should the [S.] matter not proceed and I understand that both Crown and Defence are prepared to proceed with that trial on April 23, 2007. I trust you will the foregoing satisfactory. [sic]

[6] On April 23, 2007, the day set for trial, Mr. MacDonald and Mr. Smith (along with his client G.S) attended before Justice MacLellan. The following exchange occurred at that appearance:

> **MR. MACDONALD**: The Crown is giving indication that it intends to withdraw the Indictment against. [G.S.], My Lord.
>
> **THE COURT**: Okay.
>
> **MR. MACDONALD**: The Crown had determined there was no reasonable prospect of conviction in the matter.
>
> **THE COURT**: Okay. [G.S.] was committed to stand trial on a charge under Section 151 of the *Criminal Code*. [G.S.], if you would stand up, sir. In light of what the Crown had indicated, the charge for which you had been committed to stand trial after your preliminary inquiry is not going to be proceeding with the Crown and you are free to go, sir.
>
> **UNIDENTIFIED VOICE**:(Inaudible), sir.
>
> **MR. SMITH**: I … I understand, My Lord, that there was a … an undertaking or a recognizance in connection with this matter, I take it that that's now ended?
>
> **THE COURT:** Yes, any …any undertakings that you signed in regard to contact with parties or otherwise will also terminate as of today.

[7] Justice MacLellan had before him both Crown and Defence counsel. G.S. was present. Because the trial was scheduled before a judge and jury, G.S. had not yet entered his plea. As a result, G.S. was not called to do so, but instead, the Crown

withdrew the indictment. There was no objection taken on behalf of G.S. by his then counsel, Mr. Smith. The Crown simply withdrew the charge. The Crown has conceded that the current indictment and the allegations contained therein are the same as those that formed the indictment on July 7, 2007.

Law and Analysis

Autrefois Acquit

[8] Section 607(1) of the *Criminal Code* provides for a number of special pleas including the plea of *autrefois acquit*. Section 607(5) states:

> (5) Where an accused pleads *autrefois acquit* or *autrefois convict*, it is sufficient if he
>
> > (a) states that he has been lawfully acquitted, convicted or discharged under subsection 730(1), as the case may be, of the offence charged in the count to which the plea relates; and
> >
> > (b) indicates the time and place of the acquittal, conviction or discharge under subsection 730(1).

[9] Section 609 describes the conditions for making out the *autrefois* pleas:

> 609 (1) Where an issue on a plea of *autrefois acquit* or *autrefois convict* to a count is tried and it appears
>
> > (a) that the matter on which the accused was given in charge on the former trial is the same in whole or in part as that on which it is proposed to give him in charge, and
> >
> > (b) that on the former trial, if all proper amendments had been made that might then have been made, he might have been convicted of all the offences of which he may be convicted on the count to which the plea of *autrefois acquit* or *autrefois convict* is pleaded,
>
> the judge shall give judgment discharging the accused in respect of that count.

[10] The onus in demonstrating that the plea of *autrefois acquit* is made out rests on the accused, on a balance of probabilities (*R. v. Innocente*, 2004 NSSC 125, at para. 51). The principle underlying the plea is that an accused should not be repeatedly subject to state prosecutions and put in jeopardy for a matter already determined.

[11] *Autrefois acquit* is based on the principle that no one should be placed in jeopardy twice for the same matter. This is a fundamental foundation of criminal law, as stated by Rand, J., in *Cullen v. The King*, [1949] S.C.R. 658, at 668:

> … the reasons underlying that principle are grounded in deep social instincts. It is the supreme invasion of the rights of an individual to subject him by the physical power of the community to a test which may mean the loss of his liberty or his life; and there is a basic repugnance against the repeated exercise of that power on the same facts unless for strong reasons of public policy.

[12] As stated in *R. v. Bremner*, 2007 NSCA 53, the purpose of the double jeopardy principle "is to provide protection against abusive charging practices" (para. 26). In *Bremner, supra*, Cromwell, J.A. (as he then was), commented on the narrow application of the special pleas of *autrefois acquit* and *autrefois convict*:

> [26] ... Although the special pleas of *autrefois acquit* and *convict* provide some check on abuse of prosecutorial discretion, they are by no means either the only or even the main vehicles which fulfill that function. Our law has evolved so that the special pleas are applied quite narrowly: they simply prevent an accused from being placed in jeopardy more than once for the same matter. Broader issues of allegedly abusive charging practices, such as the Crown splitting up one matter into a multitude of charges, are addressed more directly through the power of the court to prevent abuse of its process... [Emphasis added.]

[13] In *Bremner*, *supra*, the Nova Scotia Court of Appeal set out the three elements that must be established in order to successfully plead *autrefois acquit*, those being jeopardy, finality, and identity: "To succeed on the special plea, the accused must have been in jeopardy in the previous proceeding, there must have been a final disposition of it and the jeopardy must have been with respect to the same matter as that now before the court" (para. 46).

[14] I will address each element in turn.

Jeopardy

[15] The first question is whether the accused was ever placed in jeopardy. There are competing lines of authority respecting when an accused is placed in jeopardy. One line holds that an accused is in jeopardy once a plea is entered, before a court of competent jurisdiction: see *Petersen v. The Queen*, [1982] 2 S.C.R. 493 at 501, and *R. v. Conrad*, (1983), 150 D.L.R. (3d) 331 (N.S.S.C.(A.D.)) at para. 21.

[16] Another line of authority suggests that an accused is not placed in jeopardy until evidence is called: *R. v. Selhi,* [1990] 1 S.C.R. 277.

[17] In this case, the July 7, 2006 indictment was before the Supreme Court and G. S. had elected trial in the Supreme Court by judge and jury. Instead of proceeding to trial on April 23, 2007, the Crown withdrew the indictment. G.S. was not called upon to enter a plea prior to the withdrawal of the indictment.

[18] Whether the decisions in *Petersen, supra,* and *Conrad, supra,* are followed or *Selhi, supra*, the accused before me was never asked to enter a plea and no evidence was called. By either standard, the accused was not placed in jeopardy on the earlier occasion. Accordingly, the plea of *autrefois acquit* is not available.

[19] In the event I am wrong in holding that the accused was not placed in jeopardy on the first occasion, I will go on to address the other elements of *autrefois acquit*.

Finality

[20] The next question is whether these matters were dealt with finally by a court of competent jurisdiction. At the 2006 appearance, the court stated that the matter was "not going to be proceeding" and told G.S. "he was free to go." Clearly no acquittal was entered. At no point did Justice MacLellan state that the charge had been dismissed or that the accused had been acquitted or found not guilty.

[21] Competing lines of authority are again engaged in this question. There is authority for the proposition that a withdrawal of a charge can be tantamount to an acquittal. In *Conrad, supra*, for instance, the withdrawal of a summary offence ticket information was deemed to be tantamount to an acquittal. MacDonald J.A., (as he then was) for the court, referenced *R. v. Lucas* (1983), 57 N.S.R. (2d) 159 (S.C.A.D.), where a charge under the same section of the *Motor Vehicle Act* was dismissed on the ground that the accused's rights under s. 11(a) of the *Charter of Rights and Freedoms* had been violated (*Conrad* at paras. 29-31). The Crown argues that the Court in *Conrad* determined that the summary offence ticket information had been withdrawn because the accused had a defence in law to the offence as charged. However, the court in *Conrad* said, at para. 31:

> …the right of an accused person to be informed of the specific offence charged against him was never an issue here. In addition, Mr. Conrad has not challenged the validity of the summary offence ticket information and consequently no argument nor submissions were made with respect thereto.

[22] MacDonald J.A. concluded that:

> …on the facts of this case the withdrawal of the information was tantamount to an acquittal or dismissal and affords Mr. Conrad a valid defence based on *res judicata* to the second charge laid with respect to the same subject matter encompassed by the first information (para. 21).

[23] In this case, the indictment was not withdrawn on the basis of an available defence or some technical issue in the drafting of the indictment.

[24] Among the cases relied on by the defence is *The Queen v. Riddle*, [1980] 1 S.C.R. 380, where the accused pleaded not guilty to a charge of common assault. The matter proceeded to trial and the Crown sought an adjournment, as the complainant was not present. The Court refused the adjournment, the Crown called no evidence and the charge was dismissed, with the accused being discharged. A week later, a new information was sworn. When the matter proceeded to court, the accused entered a plea of *autrefois acquit*. This was a summary conviction matter and the Court, after reviewing the law and the test, concluded that the special plea was properly invoked. The Court said, at page 399:

> … it is not readily apparent why the Crown should have the right to decline to adduce evidence in support of its charge and then assert the irrelevance of a dismissal consequent thereon, or why the Crown should be enabled to avoid the effect of refusal of an adjournment by declining to lead evidence and laying a fresh information following dismissal of the first charge. It is the intent of the *Code* that summary conviction matters be disposed of with dispatch. No good purpose is served by introducing unwarranted complexities into what are, or should be, simple and straight-forward and expeditious procedures..

[25] This case is distinguishable on its facts. In *Riddle* the matter proceeded to trial and the Crown called no evidence, with the Court then dismissing the charges. Here, the Crown withdrew the matter and the accused was neither asked nor called upon to enter a plea.

[26] In *Selhi*, *supra*, the Supreme Court of Canada appeared to contradict its earlier decision in *Riddle*, *supra*, without expressly referring to it (or to any other authorities). In *Selhi*, the Crown withdrew two informations after the accused pleaded not guilty but before evidence was called. The Crown immediately issued a new information, consolidating the two previous charges. The sole issue was "whether the withdrawal of the informations can be characterized as in the nature of

an acquittal" (277). In affirming that the *autrefois* plea was not available, the Chief Justice said, for the court, at 278:

> ... The withdrawal flowed from a purely technical consideration, and did not represent a decision on legal or factual grounds. Moreover, to expose the accused to a new information based upon the same events and offences mentioned in the original informations would expose him to no prejudice. Finally, the withdrawal occurred at the very beginning of the trial, before any evidence was adduced...

[27] The Crown submits that the Nova Scotia Court of Appeal decision in *Conrad* predates *Selhi* and to the extent that *Conrad* is inconsistent with *Selhi* it has been overturned and *Selhi* is binding upon the Court. Furthermore, the Crown says *Conrad* is factually distinguishable.

[28] *Conrad*, *supra*, seems to be at odds with later caselaw. However, while *autrefois acquit* was accepted in that case, a distinguishing factor is that the accused was arraigned and entered a plea before the Crown sought to withdraw the summary offence ticket and proceed on a long form information. Once that second information was sworn and the accused was charged, he pleaded *autrefois acquit*. The Court held that the withdrawal of the information was tantamount to an acquittal or dismissal and afforded Mr. Conrad with a defence based on *res judicata*.

[29] The defence also relies on *R. v. Ennis*, [1999] O.J. No. 4923, 1999 CarswellOnt 4091 (Ont. Ct. J.), where the Crown withdrew a summary assault charge on the first appearance due to lack of evidence, and later brought a more extensive multiple count indictment, which was stayed on the ground of *autrefois acquit*. However, in *Ennis*, the Crown conceded that the accused was in jeopardy, as he had entered pleas of not guilty on the original information (para. 42). This is distinguishable from the case at bar where the accused was never called to plea. The Court in Ennis applied *Conrad*, holding that it was distinguishable from *Selhi* (paras. 50-55).

[30] The difficulties with regards to the various case law are illustrated in *Ennis,* where a helpful summary appears. After quoting the requirements for the *autrefois* pleas in s. 609(1) of the *Criminal Code*, Clarke J. said:

> 41 This section establishes what is required to successfully advance a plea of *autrefois acquit*. An accused should be discharged if it is shown that;
>
> a. *The earlier trial was on a charge which was in whole or in part the same as the later one; and,*

b. *He or she was in jeopardy of being convicted at the earlier trial of the offence now before the court.*

42 It is conceded by the crown that Mr. Ennis was in jeopardy on one charge of assault bodily harm and one charge of uttering threats when pleas of not guilty were entered on the original information on March 25th, 1997.

43 In *R. v. Riddle* (1979), 48 C.C.C. (2d) 365 (S.C.C.), the accused was charged with a common assault. A plea of not guilty was entered and the matter was adjourned for trial. On the appointed date the case was not heard and a new trial date was set. On this second date for trial the informant failed to appear. An application for adjournment by the crown was refused. The crown then called no evidence and the trial judge dismissed the charge. A week later the informant swore a new information, identical to the previous one. At trial on this charge the plea of *autrefois acquit* was upheld and the charge was dismissed. Appeals by the crown to the Alberta Court of Appeal and the Supreme Court of Canada were dismissed.

44 In *Riddl*e the Supreme court held that a criminal trial commences and an accused is normally in jeopardy from the moment issue is joined before a judge having jurisdiction and the prosecution is called upon to present its case in court. The accused continues in jeopardy until final determination of the matter by rendering of the verdict.

45 The court also said that the term "*on the merits*" does nothing to further the test for the application of the double jeopardy maximum. The court said that there is no basis in the *Code* or in the common law for any superadded requirement that there must be a trial on the merits. That phrase merely serves to emphasize the general requirement that the previous dismissal must have been made by a court of competent jurisdiction whose proceedings were free from jurisdictional error and which rendered judgment on the charge.

46 In *R. v. Petersen* (1982), 69 C.C.C. (2d) 385 (S.C.C.) it was held that no direct invitation must be issued to the crown to call evidence before it could be said that the issue had been joined and the accused placed in jeopardy. Once a plea is entered before a court of competent jurisdiction the accused is in jeopardy. Where the trial court proceeds to a determination in the nature of an acquittal or dismissal proceedings on new informations raising the same allegations will be barred.

47 In *R. v. Conrad*, (1983), 6 C.C.C. (3d) 226 (N.S. C.A.), a decision of the Nova Scotia Court of Appeal, MacDonald, J.A. held at page 230;

> It is clear from *Riddle* and *Peterson* cases that a disposition of a charge that can later be relied upon to support a plea of autrefois acquit does not require a hearing of evidence and a finding based thereon of guilt or innocence. All that is required is that the accused establish that he has previously been placed in jeopardy on the same matter before the court of competent jurisdiction and that there was a disposition of the matter by way of an acquittal, conviction, dismissal or something equivalent thereto. Accordingly where an accused has been arraigned and pleaded not guilty to

> a provincial motor vehicle offence a plea of autrefois acquit or the defence of res judicata is available if the crown subsequently withdraws the charge and relays an identical information notwithstanding the withdrawal was with the permission of the trial judge. In such circumstances the withdrawal of the information is equivalent to a dismissal of the charge.

48 In that case Mr. Conrad was charged on a summary offence ticket information that he did unlawfully commit he (sic) offence of "operating overweight vehicle contrary to s. 172(2) of the *Motor Vehicle* Act". He had previously entered a plea of not guilty to that charge and was remanded to June 24, 1982 for trial. On June 24, 1982 when the case was called the crown requested permission of the court to withdraw the summary offence ticket information and proceed on a "long-form information". Over the objection of defence counsel permission to withdraw was granted by the court. Mr. Conrad was then arraigned on the "long-form information" charing (sic) him with the same offence contrary to s. 172(2) but in the following words that he:

> On or about the 28th day of April 1982 did unlawfully operate upon a bridge, a combination of vehicles equipped with pneumatic tires having a gross weight in excess of 14,400 kilograms of the maximum gross weight of 27,000 kilograms permitted on a bridge prescribed by Section 2(7) of the Regulations respecting Weights and Loads of Vehicles made pursuant to Section 172(2) of the *Motor Vehicle Act.*

To this charge Mr. Conrad entered a plea of autrefois acquit. The trial judge gave effect to this plea as did the country court judge on appeal by the crown. On further appeal by the crown to the Nova Scotia Court of Appeal which also dismissed the crown's appeal MacDonald, J.A. said at page 233:

> For the foregoing reasons it is my opinion that on the facts on this case the withdrawal of the information was tantamount to an acquittal or dismissal and affords Mr. Conrad a valid defence based on *res judicata* to the second charge laid with respect to the same subject matter encompassed by the first information.

The crown applied for leave to appeal to the Supreme Court of Canada. The Supreme Court of Canada did not grant leave and therefore upheld the judgment of the Nova Scotia Court of Appeal. (*R. v. Conrad* (1983), 59 N.S.R. (2d) 180 (S.C.C.)).

49 In *R. v. Selhi* (1990), 53 C.C.C. (3d) 576 (S.C.C.) the accused was charged with blowing over and leaving the scene of an accident. He was charged with these two offences on separate informations. The date of the alleged occurrence was March 4th, 1984. On March 19th, 1984 the accused entered pleas of not guilty. The matter was adjourned to April 6th, 1984 to set a date for trial. On April 6th, 1984 the charges were withdrawn at the request of the crown and one single new information sworn that day was presented to the court alleging both offences. No trial date had been set prior to the withdrawal of the first two informations and no

> evidence had been heard. On April 27th, 1984 the accused entered the special pleas of *autrefois acquit* to both counts in the information sworn on April 6th, 1984.

[31] The difficulty is further compounded by the result in *Ennis*, where, notwithstanding *Selhi*, the court took the view that *Conrad*, though apparently rejected in *Selhi*, was still good law, and applied it. Put simply, the caselaw is inconsistent and somewhat confusing.

[32] In *R. v. S.S.C.*, 2001 ABQB 959, the Court concluded that the Supreme Court of Canada decision in *Selhi* must have implicitly overruled its previous decision in *Riddle*. Lee J. commented on the practice of the Crown withdrawing matters:

> [55] For example the Crown may be unhappy after the Accused testifies in a trial, or even after only one of its witnesses begins to testify, and seeks to "withdraw" the charge and begin again. In real life, no one knows why the Crown "withdraws" nor does the Crown have to say why it withdraws, nor can the Court do anything about a "withdrawal" even if it wants to in most cases.
>
> ...
>
> [57] If a certain degree of common sense is not applied to situations such as this, "withdrawals" themselves would not be allowed as that term does not appear in the *Criminal Code*. Clearly the Supreme Court of Canada in *Selhi* accepted "withdrawals" as extant because they used the term several times.

[33] In *S.S.C.* the Court held that the mere withdrawal by the Crown before any evidence was called was not sufficient to sustain a special plea of *autrefois acquit*. Lee J. said:

> [42] I am not certain that anything turns on the fact that in *Selhi* the matters were proceeded with summarily as opposed to the case at bar where the matters have all been proceeded by way of Indictment.
>
> [43] The fact the summary proceeding charges in *Selhi* were not withdrawn on the date fixed for trial, whereas the simple assault charge proceeded by way of Indictment in the case at bar was withdrawn on the date fixed for trial, is not a distinction upon which I conclude anything turns.
>
> [44] I do think, however, that something does turn on the fact that in the case at bar a simple charge of assault is being substituted with the more serious charge of sexual assault.
>
> ....
>
> [50] Neither the *Ennis* case nor the Alberta case of *Mullen* were ever appealed, further adding to the lack of a final conclusion to this now long standing issue of sorts.

> [51] The Alberta decision in *Mullen* is in my respectful conclusion only as good as the Alberta Court of Appeal decision it relies on, *Blair* and *Karashowsky*. In my respectful opinion *Blair* and *Karashowsky* is somewhat inconsistent in its handling of the issue of autrefois acquit. The Supreme Court of Canada in *Riddle* appears to have accepted *Blair* and *Karashowsky* in terms of the issue of dealing with an information "on its merits". I conclude, however, that the Supreme Court of Canada's subsequent decision in *Selhi* must be seen as implicitly overruling its previous decision in *Riddle*, since the two decisions cannot stand together in my respectful opinion.
>
> [52] I acknowledge that it is very unusual for the Supreme Court of Canada to overrule a prior written decision by way of short oral reasons without even referring to the prior case, but this must be the case since *Selhi* and *Riddle* are otherwise irreconcilable.

[34] Given the development of the law and given the particular circumstances of this case, the withdrawal here is not tantamount to an acquittal.

[35] Given the distinguishing circumstances between the matter before me and the facts in *Conrad*, and given the more recent pronouncement by the Supreme Court of Canada in *Selhi*, I conclude there was no finality in this matter. There was no acquittal and nothing that could be said to be tantamount to an acquittal.

[36] The Crown advances an additional argument on the issue of finality, asking me to infer that the reason the Crown withdrew the indictment and found that there was "no realistic prospect of conviction" was because the complainant was simply not able to participate in a trial at that time. The information indicates that at the time of the alleged offences the complainant was approximately ten years old. By the time the trial was scheduled in 2007, the complainant was thirteen years old. The Crown points to the preliminary inquiry in 2006 and the complainant's 2005 statement to the RCMP as evidence that the complainant had great difficulty speaking about the events. Noting that it is not unheard of for a complainant in an alleged sexual assault case to be unable to testify at trial, the Crown argues that a withdrawal of a charge until a complainant is able to testify, and re-laying the charge at a later date, is a legitimate exercise of prosecutorial discretion. The Crown refers to *R. v. Kalenuik*, [2005] O.J. No. 4673, where the issue was not an *autrefois* plea, but a *Charter* application respecting delay under s. 11(b) of the *Charter*, and a related argument respecting abuse of process. The applicant had been previously charged with drug offences, which the Crown withdrew before trial, a year-and-a-half after they were laid. One year later the Crown laid a new information with the prior charges and two additional conspiracy charges. The applicant argued, unsuccessfully, that the passage of 34 months since the first information was sworn

violated his right to be tried within a reasonable time. In addressing the effect of the stay by the Crown, the court said:

> 34 While cases involving allegations of pre-charge or appellate delay may have some similarities to a case involving a Crown stay of proceedings, in my opinion the factual circumstances at bar are most similar to a case where the Crown has withdrawn a charge or charges and subsequently caused them to be relaid...
>
> 35 It is not difficult to envision a situation where a serious charge, for example a sexual assault, is alleged to have been committed and a charge laid. Subsequent to the laying of the charge it is withdrawn because of the inability of the complainant to testify, and some significant time, perhaps even years later, when the complainant is able to testify and desirous of having the matter going ahead the charge is relaid. I find it difficult to believe that it was the intention of the framers of the *Charter* that this passage of time would be taken into account in a section 11(b) analysis so as to prevent a trial being heard on the merits.

[37] There is no dispute that the Crown has the discretion to stay or withdraw and re-lay a charge, although this is subject to an application for a stay on the basis of abuse of process if the circumstances require it: see, for instance, *R. v. Durack* (1998), 168 Sask. R. 36, [1998] S.J. No. 203 (Sask. C.A.) and *R. v. V.C.*, [2017] M.J. No. 370, 2017 MBQB 94.

[38] I am not satisfied that the Crown's submission on the possible reason for the withdrawal of the 2006 charge is relevant to whether the element of finality has been established. I do not need to infer or make a finding concerning why the matter did not proceed. The fact is *Selhi, supra,* as a decision of the Supreme Court of Canada, is binding. The withdrawal here was not tantamount to an acquittal.

Identity

[39] The Crown does not dispute the charges alleged in the July 7, 2000, indictment are the same charges alleged in the September 11, 2018, indictment. This aspect of the test is met.

Conclusion on *autrefois acquit*

[40] The plea of *autrefois acquit* is not available to the accused. He was never called upon to enter a plea and the Crown called no evidence. He was never in jeopardy. The withdrawal of the indictment was not an acquittal, a conviction, or a

discharge under section 737(1) of the *Criminal Code.* It is not a final disposition, Furthermore, the earlier proceeding was never dismissed for want of prosecution. Consequently, section 485.1 of the *Criminal Code* has no application.

Abuse of Process

[41] The defence seeks a stay of the proceeding as an alternative to the plea of *autrefois acquit*. While the defence did not raise an issue of abuse of process in earnest in its written submissions before the Court, counsel raised this argument more fully at the hearing. The test for abuse of process was commented on in *R. v. Jewitt*, [1985] 2 S.C.R. 128, where Dickson C.J.C. said, for the court:

> 25. I would adopt the conclusion of the Ontario Court of Appeal in *R. v. Young, supra,* and affirm 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". I would also adopt the caveat added by the Court in *Young* that this is a power which can be exercised only in the "clearest of cases".

[42] A stay of proceedings is a drastic remedy and only available in the clearest of cases. Moldaver J. said, for the majority, in *R. v. Babos*, 2014 SCC 16:

> [30] A stay of proceedings is the most drastic remedy a criminal court can order (*R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 53). It permanently halts the prosecution of an accused. In doing so, the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits. In many cases, alleged victims of crime are deprived of their day in court.

[43] The majority in *Babos, supra*, set out a three part test for determining whether to grant a stay of proceedings:

> [31] Nonetheless, this Court has recognized that there are rare occasions —the "clearest of cases" — when a stay of proceedings for an abuse of process will be warranted (*R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 68). These cases generally fall into two categories: (1) where state conduct compromises the fairness of an accused's trial (the "main" category); and (2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the "residual" category) (*O'Connor*, at para. 73). The impugned conduct in this case does not implicate the main category. Rather, it falls squarely within the latter category.

> [32] The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
>
> > (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);
> >
> > (2) There must be no alternative remedy capable of redressing the prejudice; and,
> >
> > (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*ibid.*, at para. 57).

[44] While the court has the discretion to stay charges for abuse of process, there has been no abuse of process demonstrated in this matter. There is no prejudice to G.S.'s right to a fair trial. The defence says that the passage of time could impact memories. While that is true, it does not strike at the heart of the accused's right to a fair trial in a way that would call for the drastic remedy of a stay of proceedings.

[45] Allowing the prosecution of an alleged historic sexual offence against a child which has not previously been tried would not undermine the integrity of the justice system. Furthermore, a balancing of the interests favor this matter proceeding to trial and being heard on its merits. There is no misconduct to denounce and society has an interest in having a final decision on the merits in this matter.

[46] There is nothing on the facts that would violate the community's sense of fair play and decency. The matter was withdrawn and no promises were made to either G.S. or his then counsel respecting any future proceedings. Prior defence counsel took no issue with the action taken by the Crown on April 23, 2007, withdrawing the indictment.

[47] There has been no basis articulated by the Defence which would provide a proper foundation for a finding of an abuse of process which would call for the drastic remedy of a stay.

Conclusion

[48] Accordingly, the plea of *autrefois acquit* does not apply in the circumstances, and no abuse of process has been established calling for a stay of proceedings.

Brothers, J.