



SUPREME COURT OF CANADA

CITATION: R. v. Babos, 2014 SCC 16

DATE: 20140221

DOCKET: 34824

BETWEEN:

Antal Babos

Appellant

and

Her Majesty The Queen

Respondent

AND BETWEEN:

Sergio Piccirilli

Appellant

and

Her Majesty The Queen

Respondent

CORAM: McLachlin C.J. and LeBel, Abella, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT: Moldaver J. (McLachlin C.J. and LeBel, Cromwell, Karakatsanis and Wagner JJ. concurring)
(paras. 1 to 74)

DISSENTING REASONS: Abella J.
(paras. 75 to 87)

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R. v. BABOS

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Indexed as: R. v. Babos

2014 SCC 16

File No.: 34824.

2013: October 9; 2014: February 21.

Present: McLachlin C.J. and LeBel, Abella, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law — Stay of proceedings — Abuse of process — Accused charged with offences related to firearms and importation, production and trafficking of methamphetamine — Accused alleging Crown misconduct in obtaining medical records, police collusion to mislead court, and Crown threats pressuring accused to plead guilty — Trial judge staying proceedings — Whether stay of proceedings necessary to protect integrity of justice system.

The accused were charged with numerous firearms offences, as well as offences related to the importation, production and trafficking of methamphetamine. During the course of the trial, the accused brought an application to stay the proceedings for abuse of process. They took issue with three forms of state misconduct: attempts by the Crown to intimidate them into foregoing their right to a trial by threatening them with additional charges should they choose to plead not guilty, collusion on the part of two police officers to mislead the court about the seizure of a firearm, and improper means used by the Crown in obtaining the medical records of one of the accused. The trial judge stayed the proceedings. The Court of Appeal set aside the stay and ordered a new trial.

Held (Abella J. dissenting): The appeals should be dismissed.

Per McLachlin C.J. and LeBel, Cromwell, **Moldaver**, Karakatsanis and Wagner JJ.: A stay of proceedings for an abuse of process will only be warranted in

the clearest of cases. Two types of state conduct may warrant a stay. The first is conduct that compromises the fairness of an accused's trial (the "main category"). The second is conduct that does not threaten trial fairness but risks undermining the integrity of the judicial process (the "residual" category). The test for determining 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 to the integrity of the justice system that will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome, (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 must balance the interests in favour of granting a stay against the interest that society has in having a final decision on the merits.

When the residual category is invoked, the first stage of the test is met when it is established that the state has engaged in conduct that is offensive to societal notions of fair play and decency, and that proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. At the second stage of the test, the focus is on whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward. Finally, the court must decide whether staying the proceedings or having a trial despite the impugned conduct better protects the integrity of the justice system. This inquiry necessarily demands balancing. The court must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is isolated

or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits.

In the instant case, the three forms of state misconduct that are at issue fall squarely within the residual category. The trial judge erred in his assessment of the impugned misconduct and in concluding that a stay of proceedings was warranted. As regards the medical records, the trial judge made a palpable and overriding error in finding that the Crown's conduct occasioned prejudice to the integrity of the justice system. With respect to the police collusion, apart from its limited extent, the trial judge failed to consider the existence of another remedy that would have overcome the threat posed to the integrity of the justice system — namely, excluding the firearm from evidence in respect of both accused. As for the threats made by the Crown, while they were reprehensible and should not be repeated, the trial judge failed to consider that they were made more than a year before the trial began, and that the accused took no steps for over a year to address the Crown's conduct. These factors shed light on how seriously the accused took the threats. The trial judge also failed to consider that the Crown prosecutor who made the threats was removed from the case months before the trial started. Moreover, the trial judge failed to balance the need for a stay against society's interest in a trial on the merits. When the impugned misconduct is weighed against society's interest in a trial, this is not one of the clearest of cases where the exceptional remedy of a stay of proceedings is warranted.

Per Abella J. (dissenting): A stay of proceedings may be imposed when the state conduct is so profoundly and disproportionately inconsistent with the public perception of what a fair justice system requires, that proceeding with a trial means condoning unforgiveable conduct. A Crown who makes threats intended to bully an accused into foregoing his or her right to a trial, takes fatal aim at the heart of the public's confidence in that integrity.

The unjustifiable nature of the Crown's conduct in this case was not mitigated by the length of time between the threats and the trial. Time is not a legal remedy for a fundamental breach of the Crown's role and the passage of time does not attenuate her unpardonable conduct. It was the mere fact that the threats were made at all that was key, not when they were made.

Moreover, a further balancing exercise was not required in the circumstances. The trial judge was unequivocal in concluding that the conduct justified a stay, and there was none of the uncertainty as to the propriety of a stay that is a condition precedent to the need for a balancing exercise. When a trial judge has found that the conduct cannot be condoned because it is such an exceptional assault on the public's sense of justice, it is conceptually inconsistent to ask the court to undermine its own conclusion by re-weighing the half of the scale that contains the public's interest in trials on the merits. The public has an interest not only in trials on the merits, it has an even greater interest in knowing that when the state is involved in proceedings, particularly those that can result in an individual's loss of liberty, it will

put fairness above expedience. Justice is not only about results, it is about how those results are obtained. When a Crown threatens an accused with additional offences if he or she does not plead guilty, the public's interest in the results of a trial must yield to the transcendent interest in protecting the public's confidence in the integrity of the justice system.

Cases Cited

By Moldaver J.

Referred to: *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391; *R. v. Keyowski*, [1988] 1 S.C.R. 657; *R. v. Waugh* (1985), 68 N.S.R. (2d) 247; *R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509; *R. v. Zarinchang*, 2010 ONCA 286, 99 O.R. (3d) 721; *R. v. Conway*, [1989] 1 S.C.R. 1659; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651; *Boucher v. The Queen*, [1955] S.C.R. 16; *United States of America v. Cobb*, 2001 SCC 19, [2001] 1 S.C.R. 587.

By Abella J. (dissenting)

R. v. O'Connor, [1995] 4 S.C.R. 411; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391; *R. v. Conway*, [1989] 1 S.C.R. 1659; *United States of America v. Shulman*, 2001 SCC 21, [2001] 1 S.C.R. 616; *R. v.*

Regan, 2002 SCC 12, [2002] 1 S.C.R. 297; *R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 8, 11(b), 24.

Criminal Code, R.S.C. 1985, c. C-46, ss. 574(1)(b), 577.

APPEALS from a judgment of the Quebec Court of Appeal (Duval Hesler C.J. and Chamberland and Doyon JJ.A.), 2012 QCCA 471, [2012] J.Q. n° 2107 (QL), 2012 CarswellQue 1987, SOQUIJ AZ-50839397, setting aside the stay of proceedings entered by Garneau J. and ordering a new trial, 2008 QCCQ 11373, [2008] J.Q. n° 12838 (QL), 2008 CarswellQue 12200, SOQUIZ AZ-50525272 (*sub nom. R. v. Piccirilli*). Appeals dismissed, Abella J. dissenting.

Franco Schiro and Xuan Trung Nguyen, for the appellant Antal Babos.

Guylaine Tardif, Jean-Pierre Pilon and Maxime Wilkins, for the appellant Sergio Piccirilli.

Gilles Villeneuve and François Lacasse, for the respondent.

The judgment of McLachlin C.J. and LeBel, Cromwell, Moldaver, Karakatsanis and Wagner JJ. was delivered by

I. Introduction

[1] This appeal provides the Court with an opportunity to revisit the law of abuse of process as it relates to state conduct that impinges on the integrity of the justice system but does not affect trial fairness — sometimes referred to as the “residual category” of cases for which a judicial stay of proceedings may be ordered. In particular, we are tasked with clarifying the approach to be followed when determining whether a stay of proceedings should be ordered where such conduct is uncovered.

[2] As we shall see, the appellants, Antal Babos and Sergio Piccirilli, complain about three forms of state misconduct:

- (1) Attempts by the original provincial Crown Attorney to intimidate them into foregoing their right to a trial by threatening them with additional charges should they choose to plead not guilty;
- (2) Collusion on the part of two police officers to mislead the court about the seizure of a firearm from Mr. Babos’s car; and
- (3) Improper means used by a federal Crown Attorney in obtaining Mr. Piccirilli’s medical records from the detention centre where he was being detained pending trial.

[3] Notably, the appellants do not argue that they cannot receive a fair trial as a result of the alleged incidents of misconduct — they accept that they can. They submit instead that this is one of the clearest of cases in which a stay of proceedings is necessary to preserve and protect the integrity of the justice system. Anything short of that would amount to judicial condonation of egregious misconduct and erode the public's confidence in the administration of justice.

[4] And that, the appellants say, is the basis upon which the trial judge ordered a stay of proceedings in their case. In doing so, he made no error. His decision was discretionary and entitled to deference, and the Quebec Court of Appeal should not have interfered. Hence, the appellants seek to have the order of the trial judge reinstated.

[5] For the reasons that follow, I would not give effect to the appellants' submissions. In my respectful view, the trial judge committed errors in assessing all three forms of state misconduct. As regards Mr. Piccirilli's medical records, he made a palpable and overriding error in assessing the Crown's conduct. With respect to the police collusion, apart from its limited extent, the trial judge failed to consider that excluding the firearm found in Mr. Babos's trunk would have overcome whatever threat it posed to the integrity of the justice system. As for the threats by the provincial Crown, while they were reprehensible and should not be repeated, the trial judge overstated their seriousness and failed to balance the need for a stay against society's interest in a trial on the merits.

[6] When the impugned misconduct is properly considered and the correct legal framework is applied, a stay is unwarranted. Accordingly, I would dismiss the appeals.

II. Background Facts

[7] On February 17, 2006, Mr. Babos was pulled over by Constables Guy Brière and Marc Sénéchal. The officers believed that Mr. Babos was transporting guns. Upon searching the trunk of his car, they found a semi-automatic firearm. Mr. Babos was arrested.

[8] On June 21, 2006, Mr. Piccirilli was arrested. Both he and Mr. Babos were ultimately charged with numerous firearms related offences, as well as offences related to the importation, production and trafficking of methamphetamine.

[9] The instances of threatening conduct by Crown counsel are said to have occurred between June 2006 and February 2007. Specifically, the provincial prosecutor assigned to the case, Ms. Valérie Tremblay, was accused of threatening Mr. Piccirilli on three separate occasions with additional charges if he did not plead guilty.

[10] According to Mr. Patrice Duliot, Mr. Piccirilli's former lawyer, Ms. Tremblay told him, in the presence of Mr. Piccirilli, that [TRANSLATION] "if your client doesn't settle, he's gonna be hit by a train" (A.R., vol. V, at p. 5). Mr. Piccirilli

claimed that on another occasion, either in June or September 2006, Ms. Tremblay threatened him personally in the courtroom. According to Mr. Piccirilli, she said [TRANSLATION] “if you proceed, we’ll bring other charges against you” and that she would [TRANSLATION] “use section 577” and go “straight to trial” (*ibid.*, at pp. 63, 65 and 69).¹ Another of Mr. Piccirilli’s counsel, Ms. Guylaine Tardif, deposed in an affidavit that in November 2006 or February 2007, Ms. Tremblay told her that Mr. Piccirilli would be charged with money laundering and organized crime offences if he did not plead guilty. Ms. Tremblay asked Ms. Tardif to relay this message to her client (A.R., vol. VII, at pp. 147-48). Although Mr. Babos was not threatened directly, no issue is taken with the fact that the threats conveyed to Mr. Piccirilli would have come to his attention.

[11] The appellants’ trial began in April 2008. Notably, by February 2008, Ms. Tremblay was no longer on the file. She had been removed for health reasons and replaced by a federal prosecutor, Ms. Kovacevich, when the charges against the appellants were joined in a single indictment. It was at this juncture that the appellants were charged with four additional offences relating to organized crime, firearms and drug trafficking. The additional charges stemmed from evidence led at the appellants’ preliminary hearings. By this point, neither the appellants nor their counsel had mentioned the alleged threats made by Ms. Tremblay. Indeed, the threats did not surface until they were brought to the attention of the trial judge some six months into the trial and at least eighteen months after they were made.

¹ “577” is a reference to s. 577 of the *Criminal Code*, R.S.C. 1985, c. C-46, which empowers a Crown to prefer a “direct indictment”, bypassing an accused’s right to a preliminary inquiry.

[12] At the outset of the trial, Mr. Babos alleged that the police had illegally searched the trunk of his car and he sought to have the firearm they seized excluded from evidence under s. 24(2) of the *Canadian Charter of Rights and Freedoms*. On the s. 24(2) application, a key factual issue was whether Mr. Babos consented to the search and opened the trunk himself. Constables Brière and Sénéchal testified at the hearing. Cst. Brière testified that it was Mr. Babos who opened the trunk of the car. This testimony differed from the version of events he had given at the preliminary inquiry.² When defence counsel confronted Cst. Brière with the change, Cst. Brière explained that he had spoken to Cst. Sénéchal while they were waiting to testify, and that Cst. Sénéchal had [TRANSLATION] “convinced” him that the new version of events was the truth (A.R., vol. II, at p. 172).

[13] The trial judge concluded that the trunk had been illegally searched and that Mr. Babos’s rights under s. 8 of the *Charter* had been violated. He also found that the officers had colluded for the purpose of misleading the court. The firearm found in the trunk was excluded.

[14] In June 2008, during the continuation of the trial, the Crown attempted to adduce the same firearm against Mr. Piccirilli. Mr. Piccirilli objected. The Crown took the position that Mr. Piccirilli had no standing to allege a violation of his s. 8 rights because the car from which the firearm was seized belonged to Mr. Babos. Again Cst. Brière testified, and again his evidence was somewhat different than

² At the preliminary inquiry, Officer Brière testified that he had opened the trunk of the car.

before.³ The trial judge ruled in favour of the Crown on the issue of standing, but did so provisionally; he reserved to Mr. Piccirilli the right to present another motion [TRANSLATION] “in due course if necessary” (A.R., vol. III, at p. 124).⁴

[15] On October 3, 2008, with the trial still ongoing, Mr. Babos brought an application to stay the charges for unreasonable delay under s. 11(b) of the *Charter*. That same week, on October 7, 2008, Mr. Piccirilli had a heart attack and the trial was adjourned. Mr. Piccirilli applied for bail, alleging that the detention centre in which he was being held was unable to adequately care for his health. As part of his application, Mr. Piccirilli undertook to provide the court with his medical report and list of medications.

[16] Ms. Kovacevich contacted the detention centre directly and spoke to Mr. Piccirilli’s doctor. Ms. Kovacevich asked him to provide an affidavit explaining whether medical staff at the detention centre had followed up on Mr. Piccirilli’s health since his heart attack and whether Mr. Piccirilli had been receiving his medication since his hospitalization. On October 23, 2008, Mr. Piccirilli’s doctor provided the Crown with medical documents pertaining to Mr. Piccirilli. Ms. Kovacevich immediately disclosed these documents to Mr. Piccirilli’s counsel, but she initially refused to divulge their source. A few days later, in an affidavit dated

³ Cst. Brière testified that Mr. Babos opened the trunk most of the way, and that he opened the trunk [TRANSLATION] “a little bit” (A.R., vol. III, at p. 217).

⁴ As matters turned out, the trial judge never did make a final ruling on the admissibility of the firearm against Mr. Piccirilli. Instead, he ended up staying the proceedings against Mr. Piccirilli and in doing so, he took into account the Crown’s attempt to introduce the firearm against him despite his earlier finding of collusion on the part of the officers.

October 30, 2008, she explained that the medical records had been sent from the detention centre by Mr. Piccirilli's doctor (A.R., vol. VII, at pp. 186-87).

[17] When Mr. Babos's s. 11(b) application resumed in late October, Mr. Babos's former counsel (Mr. Duliot) testified. It was in the course of his testimony that Ms. Tremblay's threatening conduct came to light for the first time. After hearing evidence regarding Ms. Tremblay's conduct, the trial judge asked Ms. Kovacevich if she wanted to call any witnesses or have Ms. Tremblay prepare an affidavit. Ms. Kovacevich declined. She explained that the only response she could make was that the state of Ms. Tremblay's health did not allow her testify, that the alleged threats were not admitted, and that no postponement was requested to have her testify.

[18] Both appellants brought an application to stay the proceedings for abuse of process shortly thereafter. On November 14, 2008, the trial judge granted the application and the charges against the appellants were stayed.

III. Judgments Below

A. *The Quebec Court, 2008 QCCQ 11373 (CanLII)*

[19] Garneau J. stayed the proceedings against both appellants. He based his decision to do so on three instances of state misconduct: 1) Ms. Tremblay's threats to the appellants that they would face additional charges if they did not plead guilty; 2)

collusion on the part of Constables Brière and Sénéchal to mislead the court; and 3) Ms. Kovacevich's improper conduct in securing Mr. Piccirilli's medical records from the detention centre without first obtaining his consent.

[20] Commencing with Ms. Tremblay's threatening conduct, the trial judge described the threats as [TRANSLATION] "unacceptable, intolerable, unjustifiable, illegal and, above all, undemocratic" (para. 59). The trial judge was also critical of the Crown attorney's office for failing to take any steps to address Ms. Tremblay's conduct, noting that "nothing, absolutely nothing" had been done by the "representative of the Attorney General" to "remedy or even try to remedy the situation" (para. 66). Instead, the Crown had "remained entrenched in its position" (para. 66). The trial judge found that the threats had tarnished the reputation of the judicial system and impacted the fairness of the accuseds' trial. Allowing the trial to continue in the face of these threats would be "shocking and outrageous" (para. 78). According to the trial judge, Ms. Tremblay's misconduct was sufficient in and of itself to warrant a stay of proceedings.

[21] With respect to collusion, the trial judge made a finding that Constables Brière and Sénéchal colluded in order to mislead the court. This finding was based on Cst. Brière's admission that he had spoken to Cst. Sénéchal before testifying, and that Cst. Sénéchal had [TRANSLATION] "convinced" him that Mr. Babos had opened the trunk of the car (para. 12). The trial judge also found that the Crown's later

attempt to lead the firearm seized from the trunk against Mr. Piccirilli perpetuated the officers' collusion.

[22] Finally, regarding Mr. Piccirilli's medical records, the trial judge concluded that the Crown should have taken the [TRANSLATION] "necessary precautions" to ensure that the confidentiality of Mr. Piccirilli's records was respected (para. 53). The trial judge also found that there had been a "lack of transparency" because the Crown had "always refused" to disclose the source of the information once she had obtained it (para. 56).

[23] In the face of these three instances of misconduct, but particularly Ms. Tremblay's threats, the trial judge stayed the proceedings against both appellants.

B. *The Quebec Court of Appeal, 2012 QCCA 471 (CanLII)*

[24] Doyon J.A., writing for a unanimous court, set aside the stay of proceedings and ordered a new trial. A stay of proceedings was only to be granted in [TRANSLATION] "extreme cases" where no other remedy was possible (para. 56). This was not such a case.

[25] Acknowledging that Ms. Tremblay's threats were [TRANSLATION] "unacceptable" and "outrageous", Doyon J.A. noted that the impact of the threats was lessened by the fact that they were made over a year before the trial began and that

Ms. Tremblay had long since been replaced as the prosecutor in charge of the case (paras. 59 and 73).

[26] As for the trial judge's finding that Constables Brière and Sénéchal colluded to mislead the court, Doyon J.A. considered this finding to be a palpable and overriding error. Cst. Brière explained why his testimony had changed. The trial judge's determination that the officers' conduct amounted to collusion lacked an evidentiary foundation.

[27] With respect to Ms. Kovacevich's conduct in securing Mr. Piccirilli's medical records, Doyon J.A. concluded that there was no misconduct and that the trial judge committed another palpable and overriding error in finding otherwise. Mr. Piccirilli put his medical condition in issue and at least implicitly waived his right to invoke confidentiality in the information. The Crown was free to seek evidence to contradict Mr. Piccirilli's assertions for purposes of resisting his application for interim release.

[28] Having reassessed the facts, Doyon J.A. observed that Ms. Tremblay's threats remained the sole cause of concern. In assessing whether those threats warranted a stay, he noted that they were uttered months before trial, by a Crown who was replaced before trial, and about whom the appellants did not complain until after their trial had been in progress for at least six months. In his view, this did not amount to an extreme case that required a stay of proceedings.

IV. Issues

[29] The narrow issue on appeal is whether the trial judge erred in granting a stay of proceedings. More broadly, we are tasked with clarifying the proper analysis to be undertaken when a stay of proceedings is sought for prior state conduct that is said to impinge on the integrity of the justice system.

V. Analysis

A. *Abuse of Process and Stays of Proceedings*

[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.

[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).

[33] The test is the same for both categories because concerns regarding trial fairness and the integrity of the justice system are often linked and regularly arise in the same case. Having one test for both categories creates a coherent framework that

avoids “schizophrenia” in the law (*O’Connor*, at para. 71). But while the framework is the same for both categories, the test may — and often will — play out differently depending on whether the “main” or “residual” category is invoked.

[34] Commencing with the first stage of the test, when the main category is invoked, the question is whether the accused’s right to a fair trial has been prejudiced and whether that prejudice will be carried forward through the conduct of the trial; in other words, the concern is whether there is *ongoing* unfairness to the accused.

[35] By contrast, when the residual category is invoked, the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial — even a fair one — will leave the impression that the justice system condones conduct that offends society’s sense of fair play and decency. This harms the integrity of the justice system. In these kinds of cases, the first stage of the test is met.

[36] In *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, this Court described the residual category in the following way:

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. [para. 91]

[37] Two points of interest arise from this description. First, while it is generally true that the residual category will be invoked as a result of state *misconduct*, this will not always be so. Circumstances may arise where the integrity of the justice system is implicated in the absence of misconduct. Repeatedly prosecuting an accused for the same offence after successive juries have been unable to reach a verdict stands as an example (see, e.g., *R. v. Keyowski*, [1988] 1 S.C.R. 657), as does using the criminal courts to collect a civil debt (see, e.g., *R. v. Waugh* (1985), 68 N.S.R. (2d) 247 (S.C. (A.D.))).

[38] Second, in a residual category case, regardless of the type of conduct complained of, the question to be answered at the first stage of the test is the same: whether proceeding in light of the impugned conduct would do further harm to the integrity of the justice system. While I do not question the distinction between ongoing and past misconduct, it does not completely resolve the question of whether carrying on with a trial occasions further harm to the justice system. The court must still consider whether proceeding would lend judicial condonation to the impugned conduct.

[39] At the second stage of the test, the question is whether any other remedy short of a stay is capable of redressing the prejudice. Different remedies may apply depending on whether the prejudice relates to the accused's right to a fair trial (the main category) or whether it relates to the integrity of the justice system (the residual category). Where the concern is trial fairness, the focus is on restoring an accused's right to a fair trial. Here, procedural remedies, such as ordering a new trial, are more likely to address the prejudice of ongoing unfairness. Where the residual category is invoked, however, and the prejudice complained of is prejudice to the integrity of the justice system, remedies must be directed towards that harm. It must be remembered that for those cases which fall solely within the residual category, the goal is *not* to provide redress to an accused for a wrong that has been done to him or her in the past. Instead, the focus is on whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward.

[40] Finally, the balancing of interests that occurs at the third stage of the test takes on added significance when the residual category is invoked. This Court has stated that the balancing need only be undertaken where there is still uncertainty as to whether a stay is appropriate after the first two parts of the test have been completed (*Tobiass*, at para. 92). When the main category is invoked, it will often be clear by the time the balancing stage has been reached that trial fairness has not been prejudiced or, if it has, that another remedy short of a stay is available to address the concern. In those cases, no balancing is required. In rare cases, it will be evident that state

conduct has permanently prevented a fair trial from taking place. In these “clearest of cases”, the third and final balancing step will often add little to the inquiry, as society has no interest in unfair trials.

[41] However, when the residual category is invoked, the balancing stage takes on added importance. Where prejudice to the integrity of the justice system is alleged, the court is asked to decide which of two options better protects the integrity of the system: staying the proceedings, or having a trial despite the impugned conduct. This inquiry necessarily demands balancing. The court must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits.⁵ Clearly, the more egregious the state conduct, the greater the need for the court to dissociate itself from it. When the conduct in question shocks the community’s conscience and/or offends its sense of fair play and decency, it becomes less likely that society’s interest in a full trial on the merits will prevail in the balancing process. But in residual category cases, balance must always be considered.

[42] This Court’s recent decision in *R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509, attests to the need for balancing when the conduct in question falls solely within the residual category. In *Bellusci*, the accused was assaulted in the back of a

⁵ At this stage, whether the impugned conduct is a systemic and ongoing problem or lies purely in the past may also become relevant. Where the conduct is ongoing and systemic, it may be more difficult for the court to dissociate itself from it with anything less than a stay.

van by a prison guard while he was shackled and handcuffed. The accused was charged with assaulting the guard and intimidating a justice system participant. Fish J., writing for a unanimous Court, upheld the trial judge's decision to issue a stay of proceedings for state misconduct falling in the residual category. In doing so, he noted that the trial judge had

appreciated the need to balance the competing interests at play in contemplating a stay of proceedings. He expressly took into account the difficult position of prison guards, the importance to the justice system of ensuring their protection, the seriousness of the charges against the accused, the integrity of the justice system, and the nature and gravity of the violation of Mr. Bellusci's rights. Only then did he conclude that a stay was warranted. [Emphasis added; para. 29.]

[43] The Ontario Court of Appeal has also recently emphasized the importance of the balancing stage when the residual category is in issue:

In some cases, an accused who is granted a stay under the residual category realizes a windfall. Thus, it is important to consider if the price of the stay of a charge against a particular accused is worth the gain. Does the advantage of staying the charges against this accused outweigh the interest in having the case decided on the merits? In answering that question, a court will almost inevitably have to engage in the type of balancing exercise that is referred to in the third criterion. [Emphasis added.]

(*R. v. Zarinchang*, 2010 ONCA 286, 99 O.R. (3d) 721, at para. 60)

[44] Undoubtedly, the balancing of societal interests that must take place and the "clearest of cases" threshold presents an accused who seeks a stay under the

residual category with an onerous burden. Indeed, in the residual category, cases warranting a stay of proceedings will be “exceptional” and “very rare” (*Tobiass*, at para. 91). But this is as it should be. It is only where the “affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases” that a stay of proceedings will be warranted (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667).

[45] To recapitulate, while the framework is the same for both categories, the test may — and often will — play out differently depending on whether the “main” or “residual” category is invoked.

[46] The following hypothetical may serve as a useful illustration. Take a case where it is discovered, after trial, that the police have tampered with the jury in order to secure the conviction of an accused. Manifestly, the police conduct would impinge on the accused’s right to a fair trial — but it would also impinge on the integrity of the justice system.

[47] Ordering a new trial would probably redress the unfairness of the original trial. But the inquiry would not end there. The court would also have to decide whether ordering a new trial, or some other remedy, would suffice to dissociate it from the prejudice occasioned to the integrity of the justice system by the police misconduct. If no remedy would suffice, the court would have to engage in the balancing process and determine whether the integrity of the justice system would be better served by a stay of proceedings or a full trial on the merits. Given the

seriousness of the misconduct — jury tampering strikes at the very heart of the criminal justice system — the residual category might well necessitate a stay of proceedings to redress the threat to the integrity of the justice system, even though the unfairness that marred the first trial could be cured by a second trial.

B. *Whether a Stay of Proceedings Was Warranted in the Instant Case*

[48] The standard of review for a remedy ordered under s. 24(1) of the *Charter* is well established. Appellate intervention is warranted only where a trial judge misdirects him or herself in law, commits a reviewable error of fact, or renders a decision that is “so clearly wrong as to amount to an injustice” (*Bellusci*, at para. 19; *Regan*, at para. 117; *Tobiass*, at para. 87; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at paras. 15 and 51).

[49] In the instant case, the appellants acknowledge that trial fairness is not in issue. They accept that the trial judge viewed the misconduct as coming within the residual category. Approaching the matter from that perspective, I am respectfully of the view that the trial judge erred in assessing all three forms of alleged state misconduct.

(1) The Medical Records

[50] In order for the Crown’s conduct in securing Mr. Piccirilli’s medical records to factor into a decision to stay proceedings, it must pass the first stage of the

test. That is, the appellants must show that Ms. Kovacevich's conduct was prejudicial to the integrity of the justice system. The trial judge appears to have found that this requirement was met when, after considering her conduct, he held that [TRANSLATION] "[t]his conduct will be taken into consideration in reviewing the abuse of process motion" (para. 57).

[51] The trial judge committed a palpable and overriding error in reaching the conclusion that this conduct impinged on the integrity of the justice system. In the first place, he erred in concluding that the Crown's conduct was marked by a lack of transparency because the Crown had [TRANSLATION] "always refused to disclose the source of the information" (para. 56). In fact, the Crown disclosed the source of the information within a matter of days. In addition, the trial judge failed to consider that Mr. Piccirilli had put his health in issue in his application for interim release and had undertaken to provide the court with his medical records. The trial judge also failed to consider that Ms. Kovacevich had asked the medical staff at the jail to provide an affidavit explaining the medical care Mr. Piccirilli had received since his heart attack. It appears that Mr. Piccirilli's doctor took it upon himself to forward the appellant's medical records to the Crown.

[52] In my view, when the Crown's conduct is considered free of the trial judge's errors, it is clear that it occasioned no prejudice to the integrity of the justice system. Mr. Piccirilli had put the state of his health in issue. Ms. Kovacevich sought an affidavit from the jail Mr. Piccirilli was being held in. When she received more

than she asked for — Mr. Piccirilli’s confidential medical records — she immediately disclosed the information to Mr. Piccirilli’s counsel. Within a matter of days, she also disclosed the source of the information.⁶ Accordingly, the appellants’ argument fails at the first stage of the test.

(2) The Police Collusion

[53] The Court of Appeal disagreed with the trial judge’s finding that Constables Brière and Sénéchal colluded to mislead the court. I too have serious reservations with the trial judge’s finding. Indeed, had I been the trial judge, I doubt that I would have reached the same conclusion. However, having seen the witnesses, the trial judge was in a better position to assess the matter. Accordingly, his finding is entitled to deference.

[54] That said, at the first stage of the test, the officers’ conduct must be looked at in context. Cst. Brière changed his testimony on a central issue: whether he or Mr. Babos opened the trunk of the car. He did so, however, after having testified at the preliminary inquiry. As an officer, he surely knew that this change would be the subject of questioning by defence counsel. Changes in an officer’s testimony are routinely exposed in cross-examination. And when Cst. Brière was predictably questioned about why his story had changed, he immediately explained that he had spoken with Cst. Sénéchal and had been [TRANSLATION] “convinced” of the true

⁶ Admittedly, the Crown’s initial refusal to disclose the source of the information was bizarre, but this refusal was short-lived.

version of events (A.R. vol. II, at p. 172). There was no attempt by the officers to cover up their discussions or to hide anything from the court. To the extent this amounts to collusion, it does so in the most technical sense. Whatever threat it poses to the integrity of the justice system must surely be slight.

[55] However, given the trial judge's finding, it is necessary to proceed to the second stage of the test and ask whether there is another remedy, short of a stay, capable of redressing the prejudice to the integrity of the judicial system occasioned by the collusion.

[56] Two concerns to the integrity of the justice system arise out of the trial judge's finding of collusion: 1) the impropriety of police collusion designed to mislead the court, and 2) the Crown's attempt to introduce the firearm against Mr. Piccirilli in the wake of the trial judge's finding of collusion. Manifestly, both are improper. But there was another remedy before the trial judge that would have addressed both, namely: refusing to admit the firearm against Mr. Piccirilli even though he had no standing under s. 8 of the *Charter* to challenge its admissibility. The trial judge erred in failing to consider that alternative.

[57] Excluding the firearm against Mr. Piccirilli would serve to dissociate the court from the officers' collusion and the Crown's misguided attempt, in the face of that finding, to introduce the firearm against Mr. Piccirilli. Both forms of misconduct were intended to achieve the same end — admission of the firearm into evidence. Excluding the firearm against Mr. Piccirilli — even though it was likely admissible

against him — purges the problematic evidence from the trial, thereby dissociating the court from the misconduct in question. By doing so, it cannot be said that the misconduct has a lingering effect on the integrity of the justice system. In my view, this remedy fully addresses any prejudice occasioned to the justice system by the impugned conduct. Hence, there is no need to go further in the analysis.

(3) The Crown's Threatening Conduct

[58] In the end, I view this case as turning on the Crown's threatening conduct.

[59] The distinction between the Crown's conduct in this case and legitimate plea bargaining practices should be made clear at the outset. It is perfectly proper for the Crown to indicate that it will drop certain charges, grounded in the evidence, if the accused pleads guilty. It is also proper for a Crown to advise counsel that if evidence arises at the preliminary inquiry that would support additional charges, they may be added to the indictment under s. 574(1)(b) of the *Criminal Code*.⁷ Where discussions of this sort occur with counsel after substantial disclosure has been provided, the accused and his or her lawyer are able to make an informed decision as to how to proceed and nothing improper has occurred.

⁷ Section 574(1)(b) of the *Criminal Code* allows the Crown to lay additional charges, supported by the evidence that has been adduced at the preliminary inquiry.

[60] The Crown's conduct in this case was of a different nature. The impugned comments were made early on in the proceedings, before the appellants and their counsel had sufficient disclosure to make an informed decision as to how they wished to proceed. Moreover, in at least one instance, the comments occurred in the presence of one of the appellants, Mr. Piccirilli. And the Crown's language was nothing short of threatening. Mr. Piccirilli was told, for example, that if he did not settle, he was going to be [TRANSLATION] "hit by a train" (A.R., vol. V, at p. 5). Put simply, the Crown's threats were intended to pressure the appellants into forgoing their right to a trial.

[61] Without question, the bullying tactic to which Ms. Tremblay resorted was reprehensible and unworthy of the dignity of her office. It should not be repeated by her or any other Crown. In her capacity as a Crown, Ms. Tremblay's role was that of a quasi-judicial officer. Her function was to be "assistant to the Court in the furtherance of justice, and not to act as counsel for any particular person or party" (*Boucher v. The Queen*, [1955] S.C.R. 16, at p. 25). In threatening to charge Mr. Piccirilli with more offences if he did not plead guilty, Ms. Tremblay betrayed her role as a Crown. Manifestly it is the type of conduct the court should dissociate itself from.

[62] However, the threats must be considered in their context. With respect, the trial judge did not do so. Here, there were several factors which the trial judge failed to consider. With respect, he erred in this regard.

[63] The threats were made more than a year before the trial began. The 18-month long silence of the appellants and their counsel sheds some light on how seriously they took the threats. Had they been taken seriously, one might have expected counsel to respond immediately. Surely the proper course of action was not to sit back for over a year before applying, mid-trial, for a stay of proceedings. Instead, counsel should have confronted Ms. Tremblay and, failing an adequate response by her, brought the matter immediately to the attention of a senior Crown or a judge. That way, Ms. Tremblay could have been removed from the file during the early stages of the proceedings. Be that as it may, as it turned out, she was removed from the case months before the trial started — and it was not until six months after the trial was underway that the threats first came to light.

[64] As indicated, context is essential in considering the seriousness of the threatening conduct. By the time the misconduct came to light, Ms. Tremblay had long since been removed from the case and no longer played any part in it. The trial judge acknowledged this fact but did not consider it to be an attenuating factor because the Crown's office had taken no steps [TRANSLATION] "to remedy or even try to remedy the situation" once the threats were revealed and had instead "remained entrenched in its position" (para. 66). With respect, this observation does not accurately reflect the facts. At the point when the threats first came to light, they were unproven and Ms. Tremblay's health did not allow her to testify.⁸ The Crown's office did not condone Ms. Tremblay's actions, but simply left it to the appellants to

⁸ Fresh evidence was tendered before this Court in which Ms. Tremblay denies ever having made the threats in question. Given the disposition of the appeal, this evidence is irrelevant and there is no need to consider the Crown's motion to adduce it.

prove the threats. Surely the Crown's office cannot be faulted for taking that approach, especially in the absence of any evidence suggesting that Ms. Tremblay's conduct was systemic.

[65] Moreover, the trial judge did not consider the passage of time between when the threats were made and when they were first brought to light. He made no mention of this in his reasons. In this regard, while I agree in general with Justice Abella that the passage of time itself cannot “retroactively cure intolerable state conduct” (at para. 82), its significance here is that it serves as a yardstick against which to measure just how serious Ms. Tremblay's conduct was perceived by the defence. The fact that defence counsel took no steps for over a year to raise concerns — and then, almost by accident in the context of a s. 11(*b*) delay motion — sheds important light on this subject. The trial judge erred in failing to take this into account.

[66] Manifestly, Ms. Tremblay's misconduct was serious enough to warrant proceeding to the second stage of the test. That said, in my respectful view, when the mitigating factors which the trial judge failed to consider are taken into account, the trial judge's conclusion that the threats amounted to [TRANSLATION] “abuse of the worst kind” is simply not borne out (para. 78).

[67] Turning to the second stage of the test, as no argument was made that there was an alternate remedy capable of redressing the particular harm caused to the integrity of the justice system by the threats, I need not finally decide whether such a

remedy was available. Instead, I turn to the third stage of the test, namely, whether Ms. Tremblay's conduct was sufficiently egregious to warrant a stay of proceedings.

[68] The answer lies in the balancing process — an exercise which the trial judge did not undertake. The question at this stage is whether the integrity of the justice system is better preserved by staying the proceedings, or proceeding in the face of the Crown's threatening conduct to a trial.

[69] This balancing requires weighing the seriousness of the misconduct against the societal interest in having a trial. At this stage, the very serious nature of the charges facing the appellants — 22 charges concerning firearms, illegal drugs, and organized crime — looms large. Society has a profound interest in seeing justice done by having the guilt or innocence of the appellants determined through a full trial on the merits. When the impugned misconduct — threats uttered more than a year before trial by a Crown no longer on the case — is weighed against society's interest in a trial, I am satisfied that this is not one of the "clearest of cases" where the exceptional remedy of a stay of proceedings is warranted.

[70] The appellants contend that this case is analogous to *United States of America v. Cobb*, 2001 SCC 19, [2001] 1 S.C.R. 587, a case in which this Court upheld a stay of proceedings. In *Cobb*, the accused were facing extradition proceedings from Canada to the United States. They were granted a stay after the American prosecutor on the file hinted to the media that uncooperative fugitives would be subjected to rape in prison, and the judge presiding over their trial in the

United States commented that uncooperative defendants would get the maximum jail sentence legally available.

[71] This case is a far cry from *Cobb*. In *Cobb*, the American prosecutor had threatened the accused with sexual violence. Here, the Crown threatened to charge the accused with additional offences if they did not plead guilty. While that was improper, the threats related to something she could have done legally under s. 574(1)(b) of the *Criminal Code*. Moreover, the decision to stay the proceedings in *Cobb* was motivated in large part by the fact that the prosecutor who made the threats remained in charge of the prosecutions. This Court noted that extraditing the accused would return them to an “ominous climate” in which the American prosecutor and judge would play a “large, if not decisive role” in determining their “ultimate fate” (*Cobb*, at para. 43). Here, Ms. Tremblay was off the case long before trial. In my view, *Cobb* provides little or no assistance to the appellants.

VI. Conclusion

[72] In deciding that a stay of proceedings is unwarranted in this case, I have assessed the three forms of alleged misconduct individually. The Crown’s conduct in securing Mr. Piccirilli’s medical records occasioned no prejudice to the integrity of the justice system. The harm caused by the finding of police collusion was curable through an alternate remedy: excluding the firearm from evidence against both appellants. And the Crown’s threatening conduct, while reprehensible, did not approximate the type of shocking conduct needed to justify a stay.

[73] This case lent itself to an individualistic approach. The three alleged instances of misconduct were separate and distinct, committed at different times by different players. There was no link between them. And in only one instance — the Crown’s threatening behaviour — was it necessary to consider the third stage of the test and balance the Crown’s misconduct against society’s interest in a trial on the merits. That said, I should not be taken as suggesting that an individualistic approach should always be followed. Indeed, a judge who is required to balance several instances of misconduct against the societal interest in a trial will almost certainly wish to consider the conduct cumulatively and in its full context. As well, there may be cases where the nature and number of incidents, though individually unworthy of a stay, will require one when considered together. But this is not such a case.

[74] For these reasons, I would dismiss the appeals.

The following are the reasons delivered by

ABELLA J. —

[75] A stay should only be imposed in the clearest of cases, as Justice Moldaver points out, since it has the effect of precluding proceedings which determine the merits of a case, something to which the public — and the parties — are entitled. But the public is also entitled to have confidence in the integrity of the justice system. A Crown who makes threats intended to bully an accused into

foregoing his or her right to a trial, takes fatal aim at the heart of the public's confidence in that integrity.

Analysis

[76] A stay may be justified for an abuse of process under the residual category when the state's conduct "contravenes fundamental notions of justice and thus undermines the integrity of the judicial process" (*R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 73). A stay may be justified, in exceptional circumstances, when the conduct "is so egregious that the mere fact of going forward [with the trial] in the light of it [would] be offensive" (*Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 91).

[77] There are two public interests at play: "the affront to fair play and decency" and "the effective prosecution of criminal cases". Where the affront is "disproportionate", the administration of justice is "best served by staying the proceedings" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667).

[78] In other words, when the conduct is so profoundly and demonstrably inconsistent with the public perception of what a fair justice system requires, proceeding with a trial means condoning unforgivable conduct.

[79] The Crown who is the focus of this appeal threatened one of the co-accused, Sergio Piccirilli, on three separate occasions. The threats were made twice to

Mr. Piccirilli personally and once to his lawyer. All were to the effect that if Mr. Piccirilli did not plead guilty, he would be charged with additional, serious offences. By the time the trial started several months after the last threat, the Crown was on medical leave and a new Crown was assigned to the case. New charges were in fact brought.

[80] The trial judge concluded that the Crown's conduct was in "bad faith", "unacceptable", "intolerable", "unjustifiable", and was one of the "exceptional and rare cases" that justified a stay .

[81] The Court of Appeal agreed that the threats were "unacceptable" and "outrageous", but found that the trial judge erred in imposing a stay because he did not undertake a sufficient balancing or sufficiently consider the context. That context included the fact that the threats were made more than a year before the trial began, that counsel did not react immediately, and that the Crown was replaced for health reasons months before the trial started. In other words, the impact of the threats was mitigated by the passage of time and the change in personnel.

[82] With great respect, however, the passage of time does not operate to attenuate what was unpardonable conduct. Time is not a legal remedy for a fundamental breach of the Crown's role, and cannot retroactively cure intolerable state conduct. The reason, therefore, that the trial judge did not mention the passage of time in assessing the impact of the threats on the public's confidence in a fair justice system, is that it was not relevant. It was the fact that the threats were made at

all that was key, not when they were made (*United States of America v. Shulman*, [2001] 1 S.C.R. 616).

[83] Moreover, I am not persuaded that a balancing exercise was required here. The trial judge was unequivocal in concluding that the abuse justified a stay. There was none of the uncertainty as to the propriety of a stay that this Court said was a condition precedent to the need for a balancing exercise (*Tobiass*, at para. 92; *R. v. Regan*, [2002] 1 S.C.R. 297, at para. 57).

[84] But in any event, it is not at all clear to me how one goes about such a balancing. When a trial judge has concluded that conduct is “so egregious that the mere fact of going forward in the light of it will be offensive” (*Tobiass*, at para. 91), against what does one balance that singularly egregious state conduct? When a trial judge has found that the conduct cannot be condoned because it is such an exceptional assault on the public’s sense of justice, it seems to me to be conceptually inconsistent to nonetheless ask the court to undermine its own conclusion by re-weighing the half of the scale that contains the public’s interest in trials on the merits. It is one thing to require that trial judges look at the “competing interests at play” (*R. v. Bellusci*, [2012] 2 S.C.R. 509, at para. 29) before concluding that the state conduct could not be condoned, but how, having concluded that it could not be condoned, can such conduct be subjected to yet *another* balancing of factors to determine whether it is nonetheless pardonable?

[85] Of course the public has an interest in trials on the merits, but it has an even greater interest in knowing that when the state is involved in proceedings, particularly those that can result in an individual's loss of liberty, it will put fairness above expedience. Justice is not only about results, it is about how those results are obtained. When a Crown threatens an accused with additional offences if he or she does not plead guilty, the public's interest in the results of a trial must yield to the transcendent interest in protecting the public's confidence in the integrity of the justice system.

[86] In *Bellusci*, this Court cautioned appellate courts to exercise restraint with respect to the findings of the trial judge, intervening only if the trial judge "misdirects himself or if his decision is so clearly wrong as to amount to an injustice" (at para. 17; see also *Regan*, at para. 117; *Tobiass*, at para. 87). There was no such misdirection or injustice here. On the contrary, the trial judge concluded that a stay was justified in order to *prevent* an injustice to the justice system itself. I agree.

[87] I would allow the appeals.

Appeals dismissed, ABELLA J. dissenting.

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