Indexed as:

R. v. Chaulk

IN THE MATTER OF the Provincial Offences Act, R.S.O. 1990, c. P.33

Between
Her Majesty the Queen, respondent, and
Allan Chaulk, moving party (defendant)

[1997] O.J. No. 6281

Ontario Court of Justice (Provincial Division)
Etobicoke, Ontario
Quon J.P.

Heard: November 19, 1996.
Judgment: January 21, 1997.
(120 paras.)

Cases considered and referred to:

Amato v. The Queen, [1982] 2 S.C.R. 418 (S.C.C.)
Connelly v. Director of Public Prosecutions, [1964] A.C. 1254 (H.L.)
Director of Public Prosecutions v. Humphrys, [1976] 2 All E.R. 497
 Mills v. Cooper, [1967] 2 All E.R. 100, [1967] 2 Q.B. 459
Re Abarca and The Queen (1980), 57 C.C.C. (2d) 410 (Ont. C.A.)
Re: Abitibi Paper Company Limited and The Queen (1979), 24 O.R. (2d) 742 (Ont. C.A.)
R. v. B., [1986] O.J. No. 799 (Ont. C.A.) per Howland C.J.O., Goodman and Tarnopolsky JJ.A.
Re Ball and The Queen (1977), 35 C.C.C. (2d) 129, 76 D.L.R. (3d) 193, [1978] 1 S.C.R. 1021
R. v. Belair (1988), 41 C.C.C. (3d) 329, 64 C.R. (3d) 179 (Ont. C.A.)
R. v. Douglas John Blake (July 13, 1993) (File #C-12395) (Ont. C.A.)
R. v. Boise Cascade Canada Ltd., [1994] O.J. No. 3279 (Ont. Ct. (Gen. Div.)) at Fort Frances, per Platana J.
R. v. Carosella, [1994] O.J. No. 2969 (Ont. Ct. (Gen. Div.)), per Ouellet J.
R. v. Conway (1989), 49 C.C.C. (3d) 289, [1989] 1 S.C.R. 1659, 70 C.R. (3d) 209 (S.C.C.)
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R. v. J.C.P., [1985] O.J. No. 1353 (O.H.C.), per Pennell J.
R. v. Janvier (1985), 41 Sask. R. 90, [1985] 5 W.W.R. 59 (Q.B.)

R. v. Jewitt, [1985] 2 S.C.R. 128, 21 C.C.C. (3d) 7, 47 C.R. (3d) 193, 20 D.L.R. (4th) 651, 61 N.R. 159, [1985] 6 W.W.R. 127 (S.C.C.)
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Toronto Refiners and Smelters Ltd. v. Jefferies, [1986] O.J. No. 1124 (O.H.C.) at Toronto, per Sirois J.

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The Provincial Offences Act, R.S.O. 1990, c. P.33 [as amended], ss. 1(1), 2(1), 3(1), 3(2), 5.1(5), 7, 9(1), 13(1), 33, 34, 35, 36, 37, 49(1), 50(3), 60, 90
Rules of the Ontario Court (Provincial Division) in Provincial Offences Proceedings, R.R.O. 1990, Reg. 200 [as amended O. Reg. 505/93; O. Reg. 498/94], rule 7
Courts of Justice Statute Law Amendment Act, 1994 S.O. 1994, c. 12 [as amended], subsec. 95(3), s. 109

B. Irvine, Provincial prosecutor.
P. Guillemin, agent for the defendant.

QUON J.P.: —

1. INTRODUCTION

¶ 1 The defendant brings a pre-trial motion to have his proceeding stayed on the grounds of an abuse of process. The defendant was charged under the Highway Traffic Act, R.S.O 1990, c. H.8, for failing to stop for a red light contrary to subsection 144(18). The abuse of process contended relates to the procedural aspect of the matter and not to the substantive determination of the charge. The defendant was initially directed to appear in the Provincial Offences Court on two separate dates for the same charge. A Clerk of the Court on a particular day had sent out two Notices of Trial to the defendant notifying the defendant to appear for his trial on two different dates. The defendant appeared on the earlier of the two dates but the Court was unable to proceed with his matter as the certificate of offence was not before the Court. In addition, the defendant's name had not been listed on that Court's docket. The defendant asserts suffering prejudice, unfairness and detrimental reliance.

2. FACTS

¶ 2 There was this fellow whose name was Allan Chaulk. On the last day of April 1996, he was stopped by a police officer and charged with failing to stop for a red light. He decided to exercise his option to plead not guilty to the charge. He executed a "Notice of Intention to Appear" on May 9, 1996.

¶ 3 At the bottom of his Notice of Intention to Appear document is a Note that gives a warning:

> If you fail to appear at the time and place set for your trial, you will be deemed not to dispute the charge, and a conviction may be entered against you in your absence, without further notice.

¶ 4 Mr. Chaulk waited at his home for a letter from the Court (a Notice of Trial) to inform him of the date and place of his trial. On May 21, 1996, a clerk employed at the Metro West Courthouse sent a handwritten Notice of Trial (the first notice), with information handwritten on the lines and spaces requiring pertinent information, informing Mr. Chaulk that his trial would be held on November 19, 1996, at 80 The East Mall Courthouse at 7:00 p.m. at night. This Notice of Trial also stated:

> Your trial will be held on the date and time noted above at the Ontario Court (Provincial Division) shown. You and your witnesses should be ready for your trial at that time. If you do not appear, you will be deemed not to dispute the charge and the court may convict you in your absence without further notice.

¶ 5 This notice was certified by the clerk that she had sent the notice by mail to the defendant. This notice also included the Court's phone number. The defendant received the first notice on or about May 24, 1996.

¶ 6 On the same day (May 21, 1996) the same clerk also sent another Notice of Trial to Mr. Chaulk. This notice, marked as Exhibit number one in this proceeding, was typed and the pertinent information was of a type-face. Lo and behold, the second notice required Mr. Chaulk to appear for trial on the same charge that he was supposed to appear for on November 19, 1996. Unlike the first notice, the second notice informed Mr. Chaulk that his trial would be held on November 4, 1996, at 7:00 p.m. at night at 80 The East Mall Courthouse to answer to the same fail to stop for a red light charge. This second date for the trial was set earlier than the first notice's trial date. The same clerk also certified on May 21, 1996, that she had sent a copy of the Notice of Trial to the defendant Mr. Chaulk by mail. Mr. Chaulk received the second notice in the mail about five days after he had received the first notice. The second Notice of Trial also stated:

> Your trial will be held on the date and time noted above at the Ontario Court (Provincial Division) shown. You and your witnesses should be ready for your trial at that time. If you do

not appear, you will be deemed not to dispute the charge and the court may convict you in your absence without further notice.

¶ 7 During the period between receiving the first notice and the second notice the defendant had made arrangements for a week's holiday and had put down a substantial deposit of moneys (approximately $700) to attend a hunting camp in northern Ontario during a period that included November 4, 1996.

¶ 8 Once Mr. Chaulk was aware of the two notices and the two different trial dates he phoned the Courthouse. He made this call at the end of May 1996 - about the 31st day of the month. He was advised that if he did not attend on both dates, there would be a fail to appear or fail to respond notice facing him. Mr. Chaulk then retained a professional agent to represent him shortly before the earliest of the two trial dates: November 4, 1996.

¶ 9 On November 4, 1996, Mr. Chaulk's agent, Mr. Guillemin, pursuant to the second Notice of Trial, appeared at the Trial Court at 80 The East Mall. Mr. Chaulk's certificate of offence was not physically in the Courtroom on that particular night, thereby preventing the Court from having jurisdiction to deal with the matter. The Court clerk noted on the ICON printout included with the court documents before me, that Mr. P. Guileman (spelling from document) appeared on November 4, 1996. The Court clerk who recorded that note on November 4 is also my Court clerk on November 19. She stated that she had made that note and that Mr. Guillemin was present that night. She made this attestation on the record. The agent was informed by the Court on November 4 that Mr. Chaulk's trial was set for November 19, 1996.

¶ 10 On November 19, 1996, Mr. Chaulk and Mr. Guillemin appeared before me and recounted their story and asked for this Court to stay the proceeding because of an abuse of process.

Defendant's argument:

¶ 11 The defendant is represented by his agent, Mr. Guillemin. Mr. Guillemin's argument is essentially that a citizen should not be subjected to the mistreatment the defendant had received from the Court Administration and be compelled to appear in Court twice under jeopardy of being convicted for failing to appear. He states November 19 was the second time the matter had been marked for trial. He also admitted that no system is glitch free and infallible but since the defendant had acted in good faith, he ought not to have been poorly treated and poorly served by the Court Administration. This is the central part of the defendant's argument for a finding of abuse.

¶ 12 Mr. Guillemin also points out that the action that compelled the defendant to be subjected to two Court appearances could have been easily remedied. He also stated that from the end of May 1996 to October 1996 the Court Administration failed to correct the mistake at the clerical level as well as failing to notify the defendant that one of the two trial dates would be canceled and for him to attend only one of the two trial dates. If the Court Administration had corrected the error, Mr. Guillemin contends, the defendant would not have found it necessary to hire counsel to attend on the November 4 trial date to explain the defendant's position to the Court. And, because the error was not corrected the defendant was penalized financially for having to hire representation for November 4. Mr. Guillemin contends this is part of the prejudiced suffered by the defendant. He alleges that the abuse is systemic and could have easily been remedied during the months before the first trial date.

¶ 13 Mr. Guillemin also asserted that the defendant relied detrimentally on the first notice of trial setting the trial date for November 19. The defendant had put down a deposit for a holiday that included November 4 prior to the defendant receiving the second notice of trial. The defendant telephoned the Courthouse about the multiple trial dates and was informed if he did not attend on both dates he would face the consequences of failing to appear. Mr. Guillemin states that the Court Administration's conduct, in setting the second trial date compelling the defendant to appear for trial, would cause the defendant to forfeit his deposit.

¶ 14 During Mr. Guillemin's argument I had asked if the defendant was bringing a "Charter motion" to stay the proceeding. The agent replied in the affirmative but failed to clearly explain which of the defendant's Charter

rights were impugned except that some principles of fundamental justice come into play and a citizen should be treated in a better fashion as opposed to being compelled to come twice to Court under jeopardy of being convicted if he failed to respond or appear. Mr. Guillemin emphasized that the defendant did everything he was supposed to do. The defendant filed his ticket and he properly asked for a date and he followed instructions as directed on his ticket and as the Provincial Offences Act requires. Mr. Guillemin also submits that the situation before the Court is unique.

¶ 15 In reply to the prosecution's argument that the defendant ought to have done more than just telephoning the Courthouse seeking assistance, Mr. Guillemin submits the defendant did not have the wherewithal to do more and that he acted accordingly to the information that he had.

¶ 16 Mr. Guillemin prays for a remedy of a stay of proceeding and is not seeking costs under section 60 of the Provincial Offences Act, R.S.O. 1990, c. P.33.

Prosecution's argument:

¶ 17 The Crown is represented by Mr. Irvine, the Provincial prosecutor. Mr. Irvine brings up two points. For his first point, Mr. Irvine wants the Court to be cognizant of the agent's failure to file a Notice of Motion or to give the proper notice of the motion to the prosecution. During this point I asked Mr. Irvine if he was now seeking an adjournment. The prosecutor replied negatively and expressed he was prepared.

¶ 18 The prosecutor's second point is that there is no abuse of process for the following reasons: the defendant has not been prejudiced to any degree and the defendant did not do enough to remedy the error of the two trial dates. The prosecutor contends that when the defendant did not receive an answer the defendant was comfortable with, after he had telephoned the Courthouse, the defendant ought to have done more. The prosecutor suggests that the defendant failed to attend directly at the Courthouse in an attempt to resolve the matter. Instead, the defendant retained an agent to assist him in his difficulties. The prosecutor conceded that although it cost the defendant financially to retain an agent, it was the defendant's right to retain an agent, and as such, the financial cost in retaining an agent should not be considered to be prejudice or hardship to the defendant.

¶ 19 The prosecutor submits that the onus is on the defendant to prove there has been an abusive process. The prosecutor suggests an abuse of process concerns circumstances that are basically oppressive, so that to force an accused or a defendant to proceed to a trial would be patently unfair to him, and arguably bring the administration of justice into disrepute. The prosecutor submits the abuse of process principle does not apply to this case. Instead, the prosecutor submits the circumstances the defendant faced were unfortunately, an administrative matter in which he received two Notices of Trial. The prosecutor also submits the easiest way for the defendant to clarify the two Notices would have been to simply make a trip to the Courthouse and speak to either a clerk or the Court administrator. Mr. Irvine further submitted that a Provincial prosecutor probably would have assisted the defendant; but just making a phone call was not satisfactory. The prosecutor concluded that this did not amount to prejudice or unfairness to the defendant.

3. ISSUES

¶ 20 The issues, I believe, that need to be canvassed and considered by me are:

(1) What are the requirements for giving notice to the prosecutor on a motion to stay the proceeding for an abuse of process or for a breach of the Charter?
(2) Does the Provincial Offences Court have the jurisdiction to stay a proceeding on the basis of an abuse of process?
(3) Is it proper for the Trial Court to decide on a motion to stay the proceeding for an abuse of process at the pre-trial stage of the proceeding?
(4) What is the test used by the Courts in determining whether there has been an abuse of process?

(5) Does the abuse of process doctrine require prosecutorial or police misconduct before it can be classified as an abuse of process?
(6) Has there been an abuse of process in this proceeding?
(7) Has the common law doctrine of abuse of process been subsumed in section 7 of the Charter?
(8) If there is an abuse of process found in this proceeding does the Court have other remedies to cure the abuse or should it use the exceptional power of staying the proceeding?

4. ANALYSIS OF LAW AND FACTS

(ISSUE 1) What are the requirements for giving notice to the prosecutor on a motion to stay the proceeding for an abuse of process or for a breach of the Charter?

¶ 21 The following subrules within rule 7 of the Rules of the Ontario Court (Provincial Division) in Provincial Offences Proceedings, R.R.O. 1990, Reg. 200 [as amended O. Reg. 505/93; O. Reg. 498/94] govern notice requirements for general motions or applications:

7.(1) An application provided for by the Act or these rules shall be commenced by notice of application.
(2) A motion provided for by the Act or these rules shall be commenced by notice of motion.
(3) There shall be at least three days between the giving of notice of application or notice of motion and the day for hearing the application or motion.
(4) An applicant or moving party shall file notice of application or notice of motion at least two days before the day for hearing the application or motion.
(5) Evidence on an application or motion may be given,

(a) by affidavit;
(b) with the permission of the court, orally; or
(c) in the form of a transcript of the examination of a witness.

(6) Upon the hearing of an application or motion and whether or not other evidence is given on the application or motion, the justice may receive and base his or her decision upon information the justice considers credible or trustworthy in the circumstances.
(7) An application or motion may be heard without notice,

(a) on consent; or
(b) where, having regard to the subject-matter or the circumstances of the application or motion, it would not be unjust to hear the application or motion without notice.

(8) Subrules (2) to (5) do not apply in respect of a motion under section 66 of the Act.

¶ 22 In the case at bar, the defendant Mr. Chaulk, the party bringing the motion, did not comply with the notice requirements under rule 7. He did not give 3 clear days notice to the Provincial prosecutor's office of his Notice of motion. The prosecutor was only informed that the defendant intended to bring this motion shortly before the night Court session began on November 19. Mr. Chaulk is represented by a professional agent and as such, the agent ought to have served proper notice on the prosecution. Defendants who are represented by agents or by legal counsel in comparison to unrepresented defendants have an inimitable obligation to follow procedural rules. Ipso facto, agents or legal counsel are compensated to act in this Court and therefore are assumed to know the procedural rules of this level of Court. Even in the trial of minor traffic offences one party cannot proceed strategically by presenting its arguments through "litigation by ambush." If agents or non-lawyers continue to disregard the rules of procedure because it is convenient to do so, or because it is unprofitable to properly follow

procedure then they will be caught by subsection 50(3) of the Provincial Offences Act, R.S.O. 1990, c. P.33. I have the authority under this subsection to bar the recalcitrant agent from appearing in this Court. This Court will not condone this indolent attitude or the intentional disregard for the procedural rules of the Provincial Offences Court. This Court will exercise its discretion under subsection 50(3) to bar persons acting as agents who regularly fail to follow the rules of Court procedure.

> 50.(3) The court may bar any person from appearing as an agent who is not a barrister and solicitor entitled to practise in Ontario if the court finds that the person is not competent properly to represent or advise the person for whom he or she appears as agent or does not understand or comply with the duties and responsibilities of an agent.

¶ 23 Notwithstanding the notice requirement and the onus on agents to act with the utmost propriety, I nevertheless may proceed with the hearing of the defendant's motion if the Provincial Crown consents or waives notice; or I find that it would not be unjust to do so. In the case at bar, I did inquire whether the prosecution desired an adjournment and the reply was in the negative. I therefore find that Mr. Irvine representing the Provincial Crown has waived the requirement of formal notice by the defendant. In addition, I find that it would not be unjust to hear the motion as the circumstances of the motion with regards to the alleged abuse of process warrants the hearing of this motion without formal notice. The inconvenience and prejudice to the defendant would be acerbated if I did not allow this motion to be argued by the defendant tout-de-suite - the defendant and his agent needlessly appeared in Court on November 4, 1996 pursuant to a notice of trial and the Court failed to proceed with the defendant's matter.

¶ 24 The rules governing Constitutional questions or Charter applications are found in the Courts of Justice Statute Law Amendment Act, S.O. 1994, c. 12, subsec. 95(3) and section 109. [my emphasis below]

> 95.(3) Sections 109 (constitutional questions), 125, 126 (language of proceedings), 132 (judge sitting on appeal), 136 (prohibition against photography at court hearings), 144 (arrest and committal warrants enforceable by police) and 146 (where procedures not provided) also apply to proceedings under the Provincial Offences Act and, for the purpose, a reference in one of those sections to a judge includes a justice of the peace presiding in the Ontario Court (Provincial Division).
>
> 109.(1) Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:
>
> 1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or a rule of common law in question.
> 2. A remedy is claimed under subsection 24(1) of the Canadian Charter of Rights and Freedoms in relation to an act or omission of the Government of Ontario.
>
> (2) If a party fails to give notice in accordance with this section, the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted, as the case may be.
>
> (2.1) The notice shall be in the form provided for by the rules of court, or, in the case of a proceeding before a board or tribunal, in a substantially similar form.
>
> (2.2) The notice shall be served as soon as the circumstances requiring it become known, and, in any event, at least fifteen days before the day on which the question is to be argued, unless the court orders otherwise.

...

¶ 25 The staying of a proceeding for a Charter breach is a remedy under subsection 24(1) of the Charter and thus requires the Notice of a Constitutional question in the proper form be served on the Attorney General of Canada and the Attorney General of Ontario. Subsection 109(2.2) requires at least 15 day's notice be given to

the appropriate parties before the Constitutional question or Charter application is to be argued. If the applicant fails to comply with the notice requirements then subsection 109(2) states that the remedy sought shall not be granted. In the case at bar, the applicant-defendant Mr. Chaulk did not fulfill the 15 days notice requirement with regards to any Charter argument or remedy that may be sought from this Court. Mr. Chaulk did not give any notice to the necessary parties for a Charter argument. Therefore, if the abuse alleged is a breach of a Charter right, then I am prohibited by statute pursuant to subsection 109(2) from granting a remedy when the required notice is not given. I have no statutory discretion to proceed with hearing a Charter application without the proper notice given to the appropriate parties. I may only order the 15 day requirement be shortened, as long as notice has been given to the appropriate parties, which was not done in this case.

¶ 26 Criminal proceedings have similar rules that require adequate and proper notice when seeking a Charter remedy. For example, in R. v. Emsley, [1993] O.J. No. 2765 (Ont. Ct. (Gen. Div.)) at Whitby, McIsaac J. explained the policy consideration behind the Rules requiring notice for Charter arguments:

> The considerations that the new Rules are intended to serve are the effective use of court resources, the expeditious determination of criminal matters and the avoidance of prejudice to the opposing party in the sense of providing an adequate opportunity to defend an allegation of Charter violation. Put in cruder terms, the Rules are there to prevent "litigation by ambush". Such a principle has been long recognized in the civil context. Compliance with the Rules is directly related to the quality of justice produced by the Courts.

¶ 27 Consequently, I will not render judgment concerning any possible Charter breach as I am statutorily prevented from granting a remedy as long as the proper notice requirements for a constitutional question have not been fulfilled. I will restrict my consideration on the motion before me to the abuse of process question as it may be determined and applied under the common law.

> (ISSUE 2) Does the Provincial Offences Court have the jurisdiction to stay a proceeding on the basis of an abuse of process?

¶ 28 Initially, there was considerable juristic uncertainty about whether the abuse of process doctrine had been abolished by Rourke v. The Queen, [1978] 1 S.C.R 1021. It was Pigeon J.'s judgment on behalf of the majority for the Supreme Court of Canada that caused this concern among jurists.

Pigeon J. stated at pages 1043-4:

> For the reasons I gave in R. v. Osborn (1970), 1 C.C.C. (2d) 482, 15 D.L.R. (3d) 85, [1971] S.C.R. 184, I cannot admit of any general discretionary power in Courts of criminal jurisdiction to stay proceedings regularly instituted because the prosecution is considered oppressive. In fact, I think the correct view is that which was expressed as follows by Viscount Dilhorne in Director of Public Prosecutions v. Humphrys, [1976] 2 All E.R. 497 at pp. 510-1:
>
> > "In Mills v. Cooper ([1967] 2 All E.R. 100, [1967] 2 Q.B. 459), where justices had dismissed a summons on the ground that it was oppressive and an abuse of the process of the court, Lord Parker C.J. ([1967] 2 All E.R. at 104, [1967] 2 Q.B. at 467), while holding that it was not, said: '... every court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court.'
> >
> > "I must confess to some doubt whether this is a correct statement of the law in relation to magistrates' courts. If it is, it appears to me to be fraught with considerable dangers. One bench, thinking a prosecution should not have been brought, will dismiss it as oppressive and vexatious. Other benches on precisely the same facts may take a completely different view, with the result that there is a lack of uniformity in the administration of justice.

> "Nor is the existence of the power my noble and learned friends, Lord Salmon and Lord Edmund-Davies, think the judge has and its exercise without considerable dangers.
>
> "A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval.
>
> "If there is the power which my noble and learned friends think there is to stop a prosecution on indictment in limine, it is in my view a power that should only be exercised in the most exceptional circumstances."

¶ 29 The dilemma for the lower Courts was whether Rourke was applicable only to true criminal proceedings, inasmuch as Pigeon J. had made reference to "Courts of criminal jurisdiction" - in which he was unable to acknowledge had a general discretionary power to stay proceedings on oppressive prosecution.

¶ 30 Notwithstanding whether Rourke abolished the abuse of power doctrine, the Ontario Court of Appeal decided to preserve the doctrine's applicability for provincial offences. In Re: Abitibi Paper Company Limited and The Queen (1979), 24 O.R. (2d) 742, the Court of Appeal found that since proceedings commenced under Provincial statutes are not, in the strict sense, criminal proceedings, but civil in nature, it would necessarily follow that since Rourke only applied to criminal proceedings, it would have no effect on prosecutions brought under legislation for provincial offences. This was a matter involving a breach of agreement by the provincial Ministry not to prosecute under provincial pollution legislation.

¶ 31 Jessup J.A. in Re: Abitibi Paper found that Pigeon J. in Rourke did not abolish the doctrine but found that the doctrine should only be applied in the most exceptional cases. His Lordship stated at page 748:

> It is therefore submitted that Pigeon J. is denying the existence of a broad jurisdiction to stay proceedings but is affirming the existence of a very narrow discretion.
> ...
> I conclude, therefore, although not without hesitation, that abuse of process has a place in the criminal jurisdiction of our Courts but that its application is limited to cases of the most exceptional circumstances.
> In any event it is clear that in Rourke and in R. v. Osborn (1970), 1 C.C.C. (2d) 482, [1971] S.C.R. 184, 15 D.L.R. (3d) 85, Pigeon, J., was speaking of the jurisdiction of the Courts only in criminal law matters except to the extent that the same rule, if it exists in criminal law, must apply in civil law. The present charges are laid for breaches of provincial statutes and hence are matters of civil law. In the civil law there is an unquestioned jurisdiction to stay proceedings for abuse of process: R. v. Osborn, [1969] 4 C.C.C. 185, [1969] 1 O.R. 152, 1 D.L.R. (3d) 664.

In addition, Arnup J.A. in Re: Abitibi Paper at pages 751-2 stated:

> I do not agree that this appeal requires us to determine the ratio of Rourke v. The Queen (1977), 35 C.C.C. (2d) 129, [1978] 1 S.C.R. 1021, 76 D.L.R. (3d) 193. This prosecution is for breach of two provincial statutes, violation of which is declared to be an offence. It is not a "criminal proceeding". While the prosecution is taking place in the Provincial Court (Criminal Division), it is not taking place in a "court of criminal jurisdiction" as that term is used by Pigeon, J., in giving the majority judgment in Rourke.
>
> Despite the lengthy argument before us on Rourke and the cases that have considered it, I do not think Rourke governs this case, whatever its true ratio may be in seeking to apply it to criminal Courts and criminal cases. The power to prevent abuse of process in civil proceedings has always been recognized, and exists today, unimpaired either by Rourke or by what Pigeon, J., said in R. v. Osborn (1970), 1 C.C.C. (2d) 482, [1971] S.C.R. 184, 15 D.L.R.

> (3d) 85. What this Court said in Osborn, [1969] 4 C.C.C. 185 at pp. 188-9, [1969] 1 O.R. 152 at pp. 155-6, 1 D.L.R. (3d) 664 at pp. 667-8, concerning the power to stay civil proceedings is applicable, in my view, to prosecutions for offences created by provincial statutes, but within the limits quoted in Osborn from the English cases, namely, the power is to be very sparingly exercised and only in very exceptional cases. This case falls within those limits.
>
> In my view, the power to order a stay of civil proceedings must extend, as a matter of principle and logic, to every Court having jurisdiction to hear the relevant proceeding.

Wilson J.A. also in Re: Abitibi Paper at page 753 stated:

> A substantial portion of the argument addressed to us on this appeal was subsumed by counsel under the general heading: "What is left of the doctrine of abuse of process after Rourke?" In my view, the main issue in Rourke was the application of the doctrine to criminal proceedings, an issue which had been left unresolved by the division of opinion expressed by the members of the Supreme Court of Canada in R. v. Osborn (1970), 1 C.C.C. (2d) 482, [1971] S.C.R. 184, 15 D.L.R. (3d) 85.
>
> I do not think that the majority judgment in Rourke v. The Queen (1977), 35 C.C.C. (2d) 129, [1978] 1 S.C.R. 1021, 76 D.L.R. (3d) 193, has in any way affected the application of the doctrine of abuse of process to civil proceedings nor do I read the judgment of Mr. Justice Pigeon as casting any gloss on the existing law on that subject.
>
> I think the doctrine applies in this case and I share the view of my colleagues that any Court having jurisdiction in a civil proceeding has inherent in that jurisdiction the power to determine whether or not the proceedings should be stayed on the basis that the Court's process is being abused. I do not believe that that proposition has in any way been undermined by observations made by members of the Supreme Court of Canada in the context of criminal proceedings.

¶ 32 In short, the Ontario Court of Appeal in Re: Abitibi Paper believed it necessary to preserve the abuse of process doctrine, and to accomplish this task, the Court distinguished Rourke and its applicability by declaring prosecutions of provincial offences to be civil in nature, as opposed to being criminal proceedings.

¶ 33 Subsequent judgments have confirmed this principle in Ontario. The recent unreported decision of R. v. Ontario (Min. of Transportation) (May 9, 1996) (Ont. Ct. (Gen. Div.)) at Sudbury, per Meehan J. at paragraph 15 of his judgment states:

> While there is no doubt that the Courts have a residual discretion to stay proceedings as an abuse of the Court's process, that jurisdiction should be exercised only in the clearest of cases.

¶ 34 Mr. Justice Meehan also confirmed the existence of the abuse of process doctrine for provincial offences at paragraph 4:

> The Provincial Court Judge had jurisdiction to stay the prosecution in this province on the basis that it was a civil prosecution. The Court of Appeal has dealt with this on two occasions, Re: Abitibi Paper Company Limited v. The Queen 24 O.R. (2d) 742; R. v. Boise Cascade Canada Limited 24 O.R. (3d) 483.

¶ 35 This particular matter dealt with the issue of self-prosecution: one government ministry prosecuting another ministry over a regulatory matter. The prosecution was alleged to be abusive by the defendant ministry. The charges stem from materials discharged into the Spanish River near Espanola, Ontario by the Ministry of Transportation contrary to provincial legislation regulating water resources. The Trial Judge stayed the case but was overturned on appeal by Meehan J. who found the prosecution not to be abusive.

¶ 36 In R. v. Navro Inc., [1988] O.J. No. 1693 (O.H.C.) at Toronto, Granger J. found that the Justice of the Peace presiding over the trial of a prosecution under the Environmental Protection Act (provincial legislation)

had the jurisdiction to deny the applicants' motion for a stay based on the abuse of process doctrine. This would also imply that the Justice of the Peace conversely had the jurisdiction to grant a stay if it was warranted.

¶ 37 In Navro the applicants brought a motion before His Worship Justice of the Peace M. Jolicoeur requesting that the trial on the charges be stayed on the grounds of abuse of process arising from an alleged agreement between Navro and the Ontario Ministry of the Environment, that the Ministry agreed not to require the decommission of Navro's location as a waste disposal site to be completed until 90 days after Navro found an alternative location for a waste disposal area. His Worship denied Navro's motion to stay. Navro then brought an application for prohibition before Granger J. Granger J. stated in his judgment:

> Confusion regarding the authority of inferior courts to govern their process, and thereby grant stays for abuse of process, arose from Rourke v. The Queen (1977), 3 S.C.C. (2d) 129, [1978] 1 S.C.R. 1021, 76 D.L.R. (3d) 193. In Rourke, supra, it is unclear if the majority abolished abuse of process in criminal proceedings or simply limited its application to very exceptional cases. In Re Abitibi Paper Company Limited and The Queen (1979), 24 O.R. (2d) 742, the Ontario Court of Appeal clarified that abuse of process is still available with respect to prosecutions for breaches of provincial statutes.
> ...
> Arnup J.A., speaking for the majority, concluded that every court with jurisdiction to hear a proceeding has the jurisdiction to govern its proceedings and to stay the proceedings on the basis of abuse of process.
> Accordingly, His Worship Justice of the Peace M. Jolicoeur acted within his jurisdiction in denying the applicants' motion for a stay.
> ...
> Re Abitibi, supra, merely held that "abuse" of "process" was available for the breach of a "provincial" statute regardless of its availability in criminal proceedings; this does not mean that the holdings in criminal cases are inapplicable to the provincial offence process.

¶ 38 Subsequent to Rourke, it has been declared by the Supreme Court of Canada that the abuse of process doctrine still exists for criminal matters, albeit only in the "clearest of cases". In R. v. B., [1986] O.J. No. 799, the Ontario Court of Appeal per Howland C.J.O., Goodman and Tarnopolsky JJ.A. confirmed the Supreme Court of Canada's preservation of the abuse of process doctrine in Canadian Courts:

> Whatever doubts may have existed after the Supreme Court of Canada trilogy in R. v. Osborn, [1971] S.C.R. 184; Rourke v. The Queen, [1978] 1 S.C.R. 1021; and Amato v. The Queen, [1982] 2 S.C.R. 418, as to whether Canadian courts have a discretionary power to stay proceedings which are an abuse of process, were put to rest by Dickson C.J.C., on behalf of a unanimous Court in R. v. Jewitt (1985), 21 C.C.C. (3d) 7. He adopted, at p. 14, the conclusion of Dubin J.A., on behalf of this Court, in R. v. Young (1984), 13 C.C.C. (3d) 1 at p. 31:
>
> > ... [T]here is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings. It is a power, however, of special application which can only be exercised in the clearest of cases.

¶ 39 Also in R. v. Miles of Music Ltd. (1989), 48 C.C.C. (3d) 96 the Court of Appeal per Blair J.A. (in dissent) at pp. 114-115 recognized the existence of the doctrine as comprehensive, coherent and expansive and empowering Courts to stay proceedings where an abuse of process has occurred.

> The Canadian abuse of process doctrine stemmed from Connelly and Humphrys but it was some time before it took root in Canada. The doctrine was rejected by the Supreme Court of Canada in R. v. Osborn, [1971] S.C.R. 184, 1 C.C.C. (2d) 482, 12 C.R.N.S. 1, 15 D.L.R. (3d) 85, R. v. Rourke, [1978] 1 S.C.R. 1021, 35 C.C.C. (2d) 129, 38 C.R.N.S. 268, 76 D.L.R. (3d)

193, [1977] 5 W.W.R. 487, and Amato v. R., [1982] 2 S.C.R. 418, 69 C.C.C. (2d) 31, 29 C.R. (3d) 1, 140 D.L.R. (3d) 405, 42 N.R. 487, [1983] 1 W.W.R. 1, although strong dissents were written in the last two cases. The first Canadian case in which the doctrine was fully recognized was this court's decision in R. v. Young (1984), 46 O.R. (2d) 520, 10 C.R.R. 307, 13 C.C.C. (3d) 1, 40 C.R. (3d) 289, 3 O.A.C. 254 (C.A.), where Dubin J.A. stated at p. 551 O.R., p. 340 C.R.R., p. 31 C.C.C.:

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

This decision was approved by the Supreme Court of Canada in R. v. Jewitt, [1985] 2 S.C.R. 128, 21 C.C.C. (3d) 7, 47 C.R. (3d) 193, 20 D.L.R. (4th) 651, 61 N.R. 159, [1985] 6 W.W.R. 127, where Chief Justice Dickson specifically adopted the passages quoted above from Lord Devlin's judgment in Connelly and from Mr. Justice Dubin's judgment in Young and said at p. 136 S.C.R., p. 14 C.C.C.:

> It seems to me desirable and timely to end the uncertainty which surrounds the availability of a stay of proceedings to remedy abuse of process. Clearly, there is a need for this Court to clarify its position on such a fundamental and widereaching doctrine.

It can now be said that abuse of process has emerged in Canada as a comprehensive, coherent and expansive doctrine enabling courts to stay proceedings where such abuse has occurred.

¶ 40 Based on the proceeding judgments, I conclude that the Provincial Offences Court has inherent jurisdiction under the common law to stay a proceeding on the basis of an abuse of process.

> (ISSUE 3) Is it proper for the Trial Court to decide on a motion to stay the proceeding for an abuse of process at the pre-trial stage of the proceeding?

¶ 41 Justice Stone in R. v. Valliere, [1995] O.J. No. 4074 (Ont. Prov. Div.) at Oshawa did not preclude pre-trial motions for staying proceedings from being brought at the start of the trial. However Stone J. was careful to mention that in situations where facts are in dispute then the motion should not be decided until later in the proceedings.

> [para42] I accept that there are situations when motions directed to terminating the charges may properly be brought at the start of the trial or, where available, on a motion in the trial court before the trial date. Such situations usually involve questions of pure law. However, even these are fraught with danger, as the appellate courts clearly prefer to see the full factual situation that has given rise to the legal challenge (see for example R. v. Mills and R. v. Martin). Where, however as here, there were important and unusual issues raised, dependent upon facts that were holly contested, in my view the motion to stay for abuse of process ought not to have been decided until much later in the process, and in any event not until the close of the prosecution's case (R. v. Francois (1993), 15 O.R. (3d) 627 (O.C.A.) at p. 630).

¶ 42 Stone J. concluded that the motion to stay the proceedings for an abuse of process in Valliere had been brought prematurely because the evidence presented in support of the motion had been incomplete.

> [para48] ... Because the matter was dealt with on a pre-trial motion, the evidence predictably was incomplete relative to what might have been available at trial. It was inappropriate to

> decide the abuse of process issue at that early stage and so it would be just as inappropriate for me to substitute my verdict on those incomplete facts.

¶ 43 In R. v. Ontario (Ministry of Transportation), [1996] O.J. No. 1864 (Ont. Ct. (Gen. Div.)) at Sudbury, Meehan J. concluded that the Trial Judge had jurisdiction to stay the proceeding which had been dealt with prior to a plea.

> [para4] An argument was presented that the Provincial Offenses Act, and more particularly s. 121, fails to deal with the question of a stay in the same way that the Criminal Code now deals with a Judge's order to stay. R. v. Jewitt 21 C.C.C. (3d) 7, a decision of the Supreme Court of Canada is authority for the proposition that a stay after a plea is a judgment or verdict of acquittal. In my view, the action of the Provincial Court in acceding to counsels' request to deal with this matter before a plea does not deprive the parties of an appeal under s. 121. The Provincial Court Judge had jurisdiction to stay the prosecution in this province on the basis that it was a civil prosecution. The Court of Appeal has dealt with this on two occasions, re: Abitibi Paper Company Limited v. The Queen 24 O.R. (2d) 742; R. v. Boise Cascade Canada Limited 24 O.R. (3d) 483.

¶ 44 Although I am not proceeding with deciding this motion to stay the proceeding based on a Charter breach I will refer to two Court of Appeal decisions on pre-trial motions regarding abuse of process and Charter breaches and applications to stay the proceeding.

¶ 45 In R. v. Francois (1993), 15 O.R. (3d) 627, Finlayson J.A. for the Court of Appeal at pp. 629-630 decided it to be prudent to have the motion for a stay decided after the trial or decided at the earliest, after the Crown had closed its case. In this case the abuse argued dealt with the unfairness of the trial. The Court felt it needed more evidence about whether proceeding with the trial would be unfair and the evidence disclosing that unfairness could only be evaluated during the trial itself.

> Where, as here, the respondent contended that the delay so adversely impacted upon the fairness of the trial as to constitute a breach of his s. 7 Charter rights, it is not apparent to me how this complaint can be evaluated without a trial. In my view, the appropriate course for the trial judge in this case would have been to reserve on the motion for a stay until after the trial, or at least until the Crown had closed its case.

¶ 46 In R. v. Dikah (1994), 89 C.C.C.(3d) 321 (Ont. C.A.) per Doherty J.A. at page 332 comments on the timing of hearing a motion to stay the proceeding:

> The motion to stay was heard and decided during the trial before the Crown had completed its case. A trial judge has a discretion as to when in the proceedings a Charter motion should be heard and decided. This trial judge cannot be criticized for proceeding as she did since neither party objected nor suggested an alternative procedure. For future guidance, however, such motions should normally be decided after the trial is completed and a verdict rendered ...

¶ 47 In the instant case, the facts concerning the abuse of process have not been challenged by the prosecution. Whether there has been an abuse of process will turn on facts which are not germane to proving the charge against the defendant. The facts relate instead to the procedural aspect of the proceeding on which the defendant bases the alleged abuse of process. The abuse in question concerns the procedure which notifies the defendant of his Court date. I conclude therefore that the case before me is a situation which may be properly brought before trial and does involve deciding basically a question of law. The complaint of abuse can be evaluated here without a full trial.

> (ISSUE 4) What is the test used by the Courts in determining whether there has been an abuse of process?

¶ 48 Lee Stuesser in his article "Abuse of Process: The Need To Reconsider" in 29 C.R. (4th) 92 at pp. 92-93 describes the abuse of process doctrine cases as falling into two camps: a narrow and a broad camp - pertaining to when the Courts should exercise its power to control the abuse of process.

> The doctrine of abuse of process is based upon the inherent power of judges to supervise the court process over which they preside. Tension arises over the extent of this power. There are two camps. The "narrow" camp cautions against any expansive exercise of judicial review lest it interfere with prosecutorial discretion. The "broad camp" looks to the courts "to prevent anything which savours of abuse of process".

¶ 49 The abuse of process doctrine is applicable to criminal prosecutions and to provincial offences. Provincial offences have been identified as quasi-criminal offences, regulatory offences, public welfare offences or statutory offences [see page 9 of Drinkwalter and Ewart's tome "Ontario Provincial Offences Procedure" (Toronto, Canada: The Carswell Company Limited, 1980)].

¶ 50 John Swaigen at pages 208-209 in his reference work: "Regulatory Offences in Canada - Liability & Defences" (Scarborough, Canada: Carswell - Thomson Professional Publishing, 1992) defines the abuse of process doctrine as it generally relates to public welfare offences. He concludes that the abuse of process alleged must be examined for its effect and not for the purpose of the action alleged to be the abuse. He also states that "some prejudice" other than what results from being prosecuted must normally be present to constitute an abuse of process. He also concludes that government misconduct does not need to be proven in order for a Court to find an abuse of process. [emphasis added below is my own]

> Abuse of process is an ill-defined and amorphous doctrine, which is available only in exceptional circumstances, and in the clearest of cases. Its essence is the oppressive effect of the action of government officials, not the purpose of the actions. It is now clear that a prosecution can constitute an abuse of process even in the absence of government misconduct. ... While an abuse of process is seldom found unless there has been some detrimental reliance on the promises or acts of government officials and some prejudice to the accused from the prosecution beyond the normal prejudice arising from being prosecuted, the courts have left open the possibility that selective prosecution could constitute a breach of fundamental justice even without the elements of detrimental reliance and prejudice. ...

¶ 51 Also Drinkwalter and Ewart in their legal tome at pages 31-32 define the abuse of process doctrine:

> Although the courts have traditionally rigorously refrained from becoming involved in prosecutorial decisions made by the Attorney General or his agents, they have occasionally departed from this salutory attitude when provoked by what they perceived to be extremely prejudicial fact situations. The doctrine under which they have done so has been defined by Laskin C.J.C. [Dissenting, in Rourke v. The Queen (1977), 35 C.C.C. (2d) 129 (S.C.C.) at page 139] as "a way of controlling prosecution behaviour which operates prejudicially to accused persons". Put at its highest, it is a means of protecting the court process and safeguarding an accused from oppression and prejudice by allowing the accused to move for a stay of proceedings when the proceeding instituted is frivolous, vexatious or lacking in bona fides.
> The doctrine has been considered to be applicable in the following circumstances, among others: to prevent the use of criminal courts to realize on a civil claim or collect a debt; to stay a proceeding when a charge is withdrawn by the Crown and subsequently re-laid; to prevent the Crown from proceeding on a second identical information after the accused has been discharged following a preliminary inquiry; to prevent excessive and unnecessary delays in bringing an accused to trial after the charge or after committal for trial; and to curb the use of entrapment by the police.

¶ 52 In R. v. Miles of Music Ltd. (1989), 48 C.C.C. (3d) 96 (O.C.A.), Blair J.A. enumerated the essential features of the abuse of process doctrine in his dissenting judgment at pages 115-117. He concludes that an abuse of process depends on an objective judicial assessment of the total effect of the proceeding; that the abuse

does not have to be committed by the police or the prosecutor or that they had an improper motive; that situations of abuse of process are not limited and are open to be applied to new situations of abuse; that it is applicable only in the "clearest of cases"; and that the defendant or accused has the onus of establishing on a balance of probabilities that an abuse of process has occurred.

It can now be said that the abuse of process has emerged in Canada as a comprehensive, coherent and expansive doctrine enabling courts to stay proceedings where such abuse has occurred. The essential features of the doctrine can be stated in summary form.

1. Whether an abuse of process has occurred depends upon an objective judicial assessment of the total effect or result of the proceedings. It is not necessary to establish, in addition, any impropriety or improper motive on the part of the police or the prosecutor. In R. v. Keyowski (1988), 40 C.C.C. (3d) 481, [1988] 1 S.C.R. 657, [1988] 4 W.W.R. 97 (S.C.C.), Madam Justice Wilson said at pp. 482-3 C.C.C., p. 659 S.C.R.:

> To define "oppressive" as requiring misconduct or an improper motive would, in my view, unduly restrict the operation of the doctrine ... Prosecutorial conduct and improper motivation are but two of many factors to be taken into account when a court is called upon to consider whether or not in a particular case the Crown's exercise of its discretion ... amounts to an abuse of process.

2. It is not necessary that the Crown, represented by the police or the prosecutor, be the "abuser". It is true that the categories of abuse of process deduced by Laskin C.J.C. from his survey of decided cases in Rourke at pp. 135-7 in the main consisted of abuses by the executive. These included: charges withdrawn and re-laid, excessive and unexplained delay in bringing the accused to trial after the charge and accused denied ability to make full answer and defence. In addition, he described another category of abuse of process at p. 137:

> One such situation, recognized long ago in case law, arises where use is sought to be made of the criminal courts to collect a debt or to realize on some civil claim ...

In such a situation, the Crown is unaware of the improper motive of the complainant laying the criminal charge, and is not a party to the complainant's plan to use the criminal law to serve his private purpose. The Courts have uniformly rejected the Crown argument that its lack of direct involvement in any misconduct can defeat a claim of abuse of process: see R. v. Janvier (1985), 41 Sask. R. 90, [1985] 5 W.W.R. 59 (Q.B.), at pp. 64-65 W.W.R. and R. v. Inuvik Coastal Airways Ltd., [1984] N.W.T.R. 92 (S.C.), at pp. 122-23. The decisions of this court in R. v. Leroux (1928), 50 C.C.C. 52, [1928] 3 D.L.R. 688, 62 O.L.R. 336, and R. v. Leclair (1956), 115 C.C.C. 297, 23 C.R. 216, [1956] O.W.N. 336, exemplify the principle affirmed by Laskin C.J.C. in Rourke, supra. In Leroux, Grant J.A. stated at p. 341 O.L.R.:

> ... the complainant, by threatening prosecution, endeavoured to obtain payment of a debt. What was done in this case amounted to an abuse of the process of the Court and should not be tolerated.

R. v. Inuvik Coastal Airways Ltd., supra, is a recent example of the rule that it is an abuse of process to use the criminal law to enforce the terms of a contract.

3. The categories of abuse of process are not closed, as Laskin C.J.C. recognized in Rourke at p. 1034 S.C.R., p. 139 C.C.C.:

> ... the decisions ... do indicate by their very diversity the utility of a general principle of abuse of process which Judges should be able to invoke in appropriate circumstances to mark their control of the process of their Courts and to require fair behaviour of the Crown towards accused persons.

The expansive nature of the doctrine, which must be applied on a case by case basis, is noted by Alan W. Mewett and Morris Manning in Criminal Law, 2nd ed. (Toronto: Butterworths, 1985) where, after reviewing a number of decisions, the authors state at pp. 422-23:

> These cases merely illustrate the types of situations that may raise the issue of abuse of process. As Estey J. suggested in Amato they are not, and cannot be, exhaustive. It is for the courts to determine, having regard to all the circumstances of the case, whether in each particular case, there has been an abuse and whether it ought to stay proceedings on that ground.

A recent example of the openness of the doctrine was its extension by the Supreme Court of Canada in R. v. Mack, Dickson C.J.C., Beetz, Estey, McIntyre, Lamer, Wilson, Le Dain, La Forest and L'Heureux-Dube JJ., December 15, 1988 [now reported] [1988] 2 S.C.R. 903, 37 C.R.R. 277, 44 C.C.C. (3d) 513, 67 C.R. (3d) 1, 90 N.R. 173, [1989] 1 W.W.R. 577] to include entrapment as an abuse of process rather than a substantive criminal defence as Laskin C.J.C. had forecast in his dissenting judgment in Rourke, supra. Recently, the Supreme Court of Canada recognized in Mack that the doctrine is not limited to established categories by extending it to include entrapment as an abuse of process rather than a substantive criminal defence.

> 4. The doctrine of abuse of process applies only in the "clearest of cases". The court must take into account the total impact of the process against the party complaining of abuse. Wilson J. in Keyowski, supra, held that whether the abuse complained of fell into the "clearest of cases" category must be determined on a case by case basis.
>
> 5. The accused has the onus of establishing on a balance of probabilities that an abuse of process has occurred. In R. v. D.(T.C.) (1987), 38 C.C.C. (3d) 434, 61 C.R. (3d) 168 (Ont. C.A.) Martin J.A. said at p. 182 C.R.:
>
> > The onus of establishing that there has been an abuse of process is on the respondent. He must establish on a balance of probabilities that the Crown, by seeking to proceed on a second trial, is acting in an oppressive or vexatious manner or that the prosecution is offensive to the principles of fundamental justice and fair play.

¶ 53 Madam Justice L'Heureux-Dubé in R. v. O'Connor (1995), 103 C.C.C. (3d) 1 (S.C.C.) at page 33 describes the standard formulation of the test for finding an abuse of process in which the remedy of staying a proceeding may be invoked:

> The modern resurgence of the common law doctrine of abuse of process began with the judgment of this Court in R. v. Jewitt (1985), 21 C.C.C. (3d) 7, 20 D.L.R. (4th) 651, [1985] 2 S.C.R. 128. In Jewitt, the Court set down what has since become the standard formulation of the test, at p. 14 C.C.C., pp. 658-9 D.L.R.:
>
> > Lord Devlin has expressed the rationale supporting the existence of a judicial discretion to enter a stay of proceedings to control prosecutorial behaviour prejudicial to accused persons in Connelly v. Director of Public Prosecutions, [1964] A.C. 1254 (H.L.) at p. 1354:

> Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or who are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused.
>
> I would adopt the conclusion of the Ontario Court of Appeal in R. v. Young, supra, and affirm that [at p. 31]:
>
> > "... 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 and 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".

(Emphasis added.) The general test for abuse of process adopted in that case has been repeatedly affirmed: R. v. Keyowski (1988), 40 C.C.C. (3d) 481 at p. 482, [1988] 1 S.C.R. 657, 62 C.R. (3d) 349; R. v. Mack (1988), 44 C.C.C. (3d) 513 at p. 541, [1988] 2 S.C.R. 903, 67 C.R. (3d) 1, R. v. Conway (1989), 49 C.C.C. (3d) 289 at p. 302, [1989] 1 S.C.R. 1659, 70 C.R. (3d) 209, R. v. Scott (1990), 61 C.C.C. (3d) 300 at pp. 311-12, [1990] 3 S.C.R. 979, 2 C.R. (4th) 153, and most recently in R. v. Power (1994), 89 C.C.C. (3d) 1 at pp. 7-10, [1994] 1 S.C.R. 601, 29 C.R. (4th) 1.

¶ 54 I have reviewed numerous decisions on the abuse of process doctrine and have ascertained that beyond the standard formulation of the test for abuse of process there has also developed non-standard formulations of the test. I have not included an exhaustive list below but some examples of the variation of the standard test are found in the following cases:

¶ 55 In R. v. MacDonald, [1988] O.J. No. 188 (O.H.C.) Potts J. used the following phrases to describe the use of the abuse of process doctrine "to prevent unfairness" and is "limited to cases of the most exceptional circumstances" as well as being limited to cases "where conduct is vexatious, unfair and oppressive". [emphasis is mine]:

> It is now well recognized that abuse of process is used in criminal proceedings to control court process and to prevent unfairness.
> ...
> The Court of Appeal [in Re: Abitibi Paper Company Limited and The Queen (1979), 24 O.R. (2d) 742] recognized that abuse of process in criminal jurisdiction is "limited to cases of the most exceptional circumstances", as well as being limited to cases where conduct is vexatious, unfair and oppressive (at pp. 494-496). The Court found that such was the conduct by the Ministry in this case - and the proceedings were stayed.

¶ 56 In R. v. Crneck, Bradley and Shelley (1980), 55 C.C.C. (2d) 1, Mr. Justice Krever considered counsel's argument that the case set out two alternate tests of unfairness for an abuse of process: the undermining of the administration of justice or manifest prejudice to the accused. He referred to the alternative tests at page 10 of his decision:

> The next question, then, is whether this case falls within the category of cases of the most exceptional circumstances.
> The submission on behalf of Miss Bradley was put, as I understood it, in the alternative. For the Crown to have reneged on an agreement to extend immunity from prosecution to an

> accused person in return for co-operation from that person, which is in fact given, undermines the administration of justice and brings the entire system of the administration of justice into disrepute. The alternative submission was that whether or not that principle can result in an abuse of process where there is a withdrawal from an agreement to confer immunity, if that does not amount to an abuse of process, there was manifest prejudice in this case which brought about an abuse of process.

¶ 57 Krever J. in R. v. Crneck at page 10 also used the words "unconscionable conduct" in giving an hypothetical example of an abuse of process involving prosecutorial misconduct [my emphasis]:

> a promise of a grant of immunity to "A", who, along with "B" was alleged to have committed a crime. "A" assists the Crown and testifies against "B", who in the result is convicted. The Crown then turns around and prosecutes "A" for the same crime, contrary to the terms of the agreement. Would that conduct not be regarded, not only by lawyers, but by the community at large, as unconscionable?

¶ 58 In R. v. L.J.G., [1995] O.J. No. 1242 (Ont. Ct. (Gen. Div.)) at Windsor, Ontario, Cusinato J. at paragraph 55 states:

> [para55] The principle permitting a stay of proceeding must be founded either within the remedies provided by the Charter or within the common law.

¶ 59 At paragraph 91 Cusinato J. observes that on the totality of the facts, if the Crown's action in continuing with a prosecution is considered oppressive and the prosecution is offensive to the principles of fundamental justice and fair play, although the abusive conduct is not directly attributable to the Crown, this Crown conduct in continuing with the prosecution itself may still constitute an abuse of process:

> [para91] It may well be that the executive conduct Justice Krever was referring to for abuse of process, does not relate to direct Crown involvement in the loss of evidence or delay, but rather the Crown's action in a continued prosecution where on all the facts this conduct is oppressive and the prosecution is offensive to the principles of fundamental justice and fair play.

¶ 60 At paragraphs 95 to 98 Cusinato J. considers the issue of "major prejudice" in relation to an abuse of process:

> [para95] To this end, on the issue of prejudice, both on an application under the Charter, or abuse of process under the common law to stay a proceeding, I refer to the unreported decision of Her Majesty the Queen v. Douglas John Blake, File #C-12395, C.A., July 13, 1993.
> [para96] This case dealt with the unavailability of the complainant's statements to the Peel Police which apparently were lost.
> [para97] As to this lost material, the court had this say,
>
> > "The showing of some prejudice is not a sufficient basis for a decision that an accused person's Charter rights under s. 7 and 11(d) would be infringed, if the accused were required to stand trial. What must be demonstrated on a balance of probabilities is that the missing evidence creates a prejudice of such magnitude in importance, that it can be fairly said to amount to a deprivation of the opportunity to make full answer and defence."
>
> [para98] To satisfy the common law requirement for abuse of process, the accused must demonstrate major prejudice, that because of the lost evidence, the continuation of the prosecution would be oppressive.

¶ 61 Cusinato J. considers two other factors in deciding whether an application to stay a proceeding for abuse of process would succeed besides the requirement of the "clearest of cases". He found that if there was no "clear

prejudice" to the accused where the charges are "serious" then the remedy of a stay of a proceeding may not be granted. This is found at paragraph 99: [emphasis below is my own]

> [para99] This right of a court to stay proceedings, as confirmed in R. v. Young may be exercised only in the clearest situation, and as stated by Justice Martin in R. v. Belair, supra, at 339, where there is no clear prejudice to the accused, and where the charges are serious, this could be fatal to the claim that the proceedings be stayed.

¶ 62 Cusinato J. also considered in paragraph 100 whether a third party act would be an abuse of process. He concluded that the actions of a third party did not matter but whether the accused had been deprived in making a full answer and defence:

> [para100] In my consideration of R. v. Carosella, supra, [(November 24, 1994)(Ont. Ct. (Gen. Div.)), per Ouellet J.] his Honour had this to say at pg. 8.
>
> > "Here the destruction of the notes has been by an employee of the Crisis Centre, a Third Party, not directly involved in the prosecution. The question then is, can the actions of the Third Party in this instance be sufficient grounds to support a stay of proceedings? I agree with defence counsel. It matters not who destroyed the notes. The question to be determined is whether that destruction of notes has deprived the accused of making full answer and defence."

¶ 63 Cusinato J. in concluding there was no abuse of process in R. v. L.J.G. made the following determinations: the accused failed to show "major prejudice which prevented the accused from having a fair trial" or that "the continued prosecution is offensive to the principles of fundamental justice and fair play".

> [para103] In my examination, if the relief requested cannot find its source, under the Charter, we are left alone with the common law remedy of abuse of process. In either case, the onus is on the accused to show that the prejudice is of such degree that the accused's right to a fair trial is no longer available. (See R. v. D.(T.C.) supra, 152, at 153 and 167, Arbour J.A.)
> [para104] As concluded by Tarnopolsky J.A. in R. v. Miles of Music, supra, at pg. 122, to succeed in either case whether a breach under the Charter or under the common law remedy of abuse of process, he approved of the conclusions of Martin J.A. in R. v. D.(T.C.) supra.
>
> > "The onus is on the respondent to establish either, that the Crown has acted in an oppressive or vexatious manner or that the prosecution is offensive to the principles of fundamental justice and fair play."
>
> ...
> [para106] ... He has further failed both under the requirements of the Charter and the common law application of abuse of process to establish major prejudice or that the continued prosecution is offensive to the principles of fundamental justice and fair play. It is for these reasons, the application is dismissed.

¶ 64 In R. v. J.C.P., [1985] O.J. No. 1353 (O.H.C.), Pennell J. states initially the real test for abuse of process in general terms and then particularizes the test. The general test was whether there is any violation of the fundamental canons of fairness. In a particular case, the test required the existence of "harassment, oppression, prejudice or manifest hardships imposed upon the accuse" as an abuse of process [my emphasis below]:

> What constitutes an abuse of process has been so frequently and so recently enunciated by the courts that no useful purpose would be served by attempting to restate it at length. Certain criteria however may be recalled.
> The real test is whether there is any violation of the fundamental cannons of fairness that are fused in the whole nature of our judicial process. To make the matter particular, the court has to consider whether there was harassment, oppression, prejudice or manifest hardships

> imposed upon the accused: see Re Ball and The Queen (1977), 35 C.C.C. (2d) 129, 76 D.L.R. (3d) 193, [1978] 1 S.C.R. 1021; Re Regina and Currie, (supra), Re Abarca and The Queen (1980), 57 C.C.C. (2d) 410 (Ont. C.A.). The question of abuse of process, aye or no, cannot be determined by reference to any formula. Each claim to protection against abuse of process must be considered in the particular context of the particular
> ...
> I am of opinion that there is absent the necessary oppression, harassment, prejudice or manifest hardship on the defendant to the degree required to invoke the doctrine of abuse of process.

¶ 65 In the decision of R. v. Boise Cascade, [1994] O.J. No. 3279 (Ont. Ct. (Gen. Div.)) at Fort Frances, Platana J. stayed the proceedings of a charge under provincial legislation and found that a finding of abuse of process requires a delicate balancing of rights and interests in the context of society's changing perception of what is fair and just [my emphasis below]:

> [para38] ... Counsel has also referred to me the decision in R. c. Gravel Chevrolet Oldsmobile Inc. 8 C.R. (4th), 316,
>
> > "Considering the exceptional circumstances of the case, the proceedings should be Stayed without discussing the validity of the officially induced error. The State, which has full knowledge of an advertising contest that a person is about to manage, cannot approve it by requiring the payment of a fee, despite its illegality, and then charge the person before a criminal court. The State cannot use the judicial process to obtain the conviction of a person induced into error by the system"
>
> [para39] Further, in R. v. D.(E.) 73 O.R. (2nd), 758 at 767,
>
> > "A finding of abuse of process requires a delicate balancing of rights and interests, not in the abstract, but in the context of society's changing perception of what is fair and just."
>
> ...
> [para41] In circumstances such as this, it is in my view not fair and just that the Appellant should be required to face a charge of having committed an offence by doing the very act which it was permitted to do by the same administering authority.

¶ 66 In Toronto Refiners & Smelters Ltd. v. Jefferies, [1986] O.J. No. 1124 (O.H.C.) at Toronto, Sirois J. used the words "bad faith and ulterior motive" in reference to the conduct of the party laying the charge [my emphasis added below]:

> Turning to the abuse of process, I find that the evidence does not disclose any bad faith or ulterior motive on the part of the complainant. It is stated in the case of Re: Abitibi Paper Company Limited and The Queen 24 O.R. (2d) p. 742 at p. 749:
>
> > That abuse of process has a place in the criminal jurisdiction of our courts but that its application is limited to cases of the most exceptional circumstances.

¶ 67 Harris J. in R. v. Mountain Folk Ltd., [1990] O.J. No. 725 (Ont. Prov. Ct.) at Toronto, weighed the "community's sense of fair play and decency" with the "public's interest in having a charge determined on its merits after a fair trial" in not staying a proceeding brought under provincial legislation [my emphasis added below]:

> It must be remembered, as this court has recently had occasion to point out, that, in weighing the competing interests involved in the doctrine of abuse of process, the public has an interest in seeing that criminal charges are determined on their merits after a fair trial: R. v. Belair (1988), 41 C.C.C. (3d) 329 at p. 339, 64 C.R. (3d) 179 (Ont. C.A.); see also R. v. Conway,

> March 29, 1988 [summarized 4 W.C.B. (2d) 276 (Ont. C.A.)], (since reported 49 C.C.C. (3d) 289).
> ...
> ..., I find that the applicant has not discharged the onus resting upon it to establish on a balance of probabilities that the crown has acted in an oppressive or vexatious manner or that the within prosecution is offensive to the principles of fundamental justice and fair play. See R. v. D.(T.C.), supra. In view of this finding, it is unnecessary for me to consider or apply the "clearest of cases" test set out in R. v. Jewitt, supra.
>
> In my view, the public has an interest in the within charge being determined on its merits after a fair trial, In light of the circumstances, I find that the trial. In light of not offend the community's sense of fair play and decency. On the contrary, staying the proceedings would in my view offend the community's sense of justice and accordingly this is not a case in which the abuse of process doctrine should be invoked. See R. v. Belair and R. v. Miles of Music, supra.

¶ 68 Finally, in R. v. Ontario (Min. of Transportation), [1996] O.J. No. 1864 (Ont. Ct. (Gen. Div.)) at Sudbury, per Meehan J. referred to cases which used different adjectives to describe the non-standard test for abuse of process. He refers to a prosecution that "offends the community conscience" and "flagrant impropriety of the prosecution" as a test for an abuse of process. [my emphasis added below]:

> [para5] ... By analogy, while this is a common law application for stay, the law as set out in R. v. Heaslip et al. (1983), 9 C.C.C (3d), p. 480 is sufficient for me to find that there is jurisdiction to deal with this as a matter of law alone. A decision taken that a prosecution offended the "community conscience" is also reviewable in this province by an Appellant Court on the authority of R. v. Dikah (1994), 89 C.C.C. (3d) 321.
> ...
> [para15] While there is no doubt that the Courts have a residual discretion to stay proceedings as an abuse of the Court's process, that jurisdiction should be exercised only in the clearest of cases. R. v. Light (1993), 78 C.C.C. (3d) 221, a decision of the British Columbia Court of Appeal dealt with prosecutorial discretion. There, Mr. Justice Wood indicated:
>
> > "For the decision to prosecute, whether by way of informations sworn or direct indictment, involves the administrative exercise of both discretion and judgment in the accusatorial function of the executive branch of government. And, the cases make it very clear that if any jurisdiction exists to review the conduct of the Attorney General in the exercise of that function it must be exercised only in cases of flagrant impropriety. In the absence of clear and unmistakable evidence of abuse of powers and privileges of that office such a decision is not reviewable by the Courts."
>
> [para16] In my view, there is nothing in the material here which shows a flagrant impropriety in the prosecution of this offense.

¶ 69 Lee Stuesser in his article "Abuse of Process: The Need To Reconsider" in 29 C.R. (4th) 92 at p. 104 sums up succinctly what the abuse of process test searches for - "unfairness" or "oppressive proceeding".

> The problem is that the law on abuse of process is not being guided on principle, but by impression. Courts grant a stay because to proceed would be "unfair" or result in an "oppressive proceeding". Courts overturn because they find that there is no unfairness or that it would not be oppressive to continue.

¶ 70 At page 94 Stuesser comments on the two concerns the Supreme Court of Canada has identified in determining whether an abuse of process exists:

> ... in a unanimous decision in R. v. Keyowski, affirmed the above statement of law and went on to state that a stay should be granted either when there was a violation of the community's

> sense of "fair play and decency" or when the court's process was "oppressive or vexatious". The Supreme Court, therefore, has identified two separate concerns - "unfairness" and "oppressive proceedings" ...

¶ 71 Further, at page 95 Stuesser states:

> "Unfairness" has a clearer meaning if we speak of "trial unfairness". The second purpose, maintaining the integrity or reputation of the criminal justice system, certainly includes trial fairness; the system would be brought into disrepute if unfair trials were allowed to proceed.

¶ 72 In reference to the integrity of the criminal justice system Stuesser at page 96 finds that the Courts process may be subject to an abuse of process finding:

> It may involve "imperfections" in the process and the courts are called upon to redress the system error.

Stuesser also at pp. 94-95 states:

> What are the fundamental concerns that result in unfairness or that go to make the proceedings oppressive? David Paciocco, in a thoughtful article on the subject ["The Stay of Proceeding as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept" (1991) 15 Crim. L.J. 315 at p. 331], puts forth two rationales for the doctrine:
>
> 1) to ensure that accused persons are given a fair trial, and
> 2) to preserve the reputation of the administration of justice.

¶ 73 In summary, there has been a standard test adopted by the Supreme Court of Canada in R. v. O'Connor, but as can been deduced from the decisions I have reviewed, there are variations of the test to determine whether there is an abuse of process. It should be remembered that the abuse complained of and the remedy of staying the proceeding have to be evaluated separately. That is, the Court has to decide first whether there is an abuse of process and then secondly whether it should grant the remedy of staying the proceeding.

¶ 74 The onus lies on the person complaining of the abuse to prove the abuse on a balance of probabilities (R. v. Miles of Music). However, the Court can only exercise its power to stay the proceeding in the "clearest of cases" (R. v. Young) or, that its power is to be sparingly exercised and only in exceptional cases or circumstances (Re: Abitibi Paper), or to be invoked in appropriate circumstances (Rourke v. The Queen per Laskin C.J.C.).

¶ 75 It is not necessary that the abuser be the police or the prosecutor (R. v. Miles of Music). The abuse can be committed by a third party (R. v. L.J.G.). The continuing of a prosecution by a prosecutor may be considered oppressive and therefore an abuse of process even though the prosecutor is not directly responsible for an abuse related to the charge (R. v. L.J.G.).

¶ 76 There is no exhaustive list of situations that are abuses of process (R. v. Miles of Music). The situations are open for the Court to decide on a case by case analysis whether there is an abuse of process. The finding of abuse requires a delicate balancing of rights and interests in the context of society's changing perception of what is fair and just (R. v. Boise Cascade). The Court has to weigh the "community's sense of fair play and decency" with the "public's interest in having a charge determined on its merits after a fair trial" (R. v. Mountain Folk Ltd.).

¶ 77 Two goals in the application of the abuse of process doctrine do emerge from my review: "preventing unfairness" and "preserving the integrity of the justice system". To protect the integrity of the criminal justice system, the Court may redress the system error involving imperfections in the process (Stuesser's article). Fairness usually means trial fairness (Stuesser's article).

¶ 78 From the general test for an abuse of process in which there has been a violation of fundamental canons of fairness, the abuse can only be determined after a further analysis of the particulars concerning the necessary presence of harassment, prejudice or manifest hardship (R. v. J.C.P.).

¶ 79 In addition, the Court has to objectively assess the total impact of the process against the party complaining of the abuse or, the total effect of the proceeding (R. v. Miles of Music Ltd.) and has to regard all the circumstances of the case in determining whether there has been an abuse (Amato v. The Queen). The Court also has to consider the seriousness of the charge in relation to the finding of prejudice pertinent to the accused (R. v. Belair).

¶ 80 In less serious matters, as in provincial offences, statutory offences, public welfare or regulatory offences, an abuse of process may be found if the accused detrimentally relies on acts of government officials and some prejudice to the accused results (Swaigen's article). The Courts have to resolve in trials of less serious offences whether it should use its powers to supervise the Court process within the narrow camp (cautions against any expansive exercise of judicial review lest it interfere with prosecutorial discretion) or within the broad camp (to prevent anything that savours of abuse of process).

¶ 81 Ultimately, I have failed to find any pronouncement by the judiciary or by academic writers differentiating between the application of the abuse of process doctrine to true criminal prosecutions and provincial offences. I however am of the opinion that the doctrine's use for provincial offences matters ought to be less stringently applied than for criminal prosecutions, especially for less serious provincial offences, in light of society's changing perception of what is fair and just. Therefore, I believe that the Swaigen's broader camp is more appropriate for these less serious provincial offences.

> (ISSUE 5) Does the abuse of process doctrine require prosecutorial or police misconduct before it can be classified as an abuse of process?

¶ 82 Madam Justice Wilson in R. v. Keyowski (1988), 40 C.C.C. (3d) 481, [1988] 1 S.C.R. 657, [1988] 4 W.W.R. 97 (S.C.C.), at pp. 482-3 C.C.C., p. 659 S.C.R. states that the doctrine of abuse of process is not limited to misconduct or improper motivation by the prosecutor or the police:

> To define "oppressive" as requiring misconduct or an improper motive would, in my view, unduly restrict the operation of the doctrine ... Prosecutorial conduct and improper motivation are but two of many factors to be taken into account when a court is called upon to consider whether or not in a particular case the Crown's exercise of its discretion ... amounts to an abuse of process.

¶ 83 I also adopt Blair J.A.'s criteria set out in R. v. Miles of Music Ltd. (1989), 48 C.C.C. (3d) 96 (O.C.A.). His Lordship found that the "abuser" did not have to be the prosecutor or the police.

¶ 84 In the instant case, the abuse in question had been committed initially by a Clerk in Court Administration who had negligently notified the defendant that his trial would be held on two separate dates. The alleged abuse was further aggravated by Court Administration when it failed to correct the error after the defendant notified Court Administration of the multiple dates.

> (ISSUE 6) Has there been an abuse of process in this proceeding(?)

¶ 85 In the case at bar, which involves a minor traffic offence commenced under the provincial Highway Traffic Act, it appears appropriate for me to adopt Stuesser's "broad camp" scenario in deciding whether I should use my inherent power to control the process of this Court. To reiterate, the "broad camp" power looks to the Court "to prevent anything which savours of abuse of process". The defendant's charge before me is not serious. It does not, upon the facts presently before me, involve an accident or a fatality.

¶ 86 Subsection 5.1(5) of the Provincial Offences Act requires the Clerk of the Court notify the defendant with the time and place of the Provincial Offences trial.

> 5.1(5) If a defendant files a notice of intention to appear under subsection (3), the clerk of the court shall inform the defendant and the prosecutor of the time and place of the trial.

¶ 87 I find the action of the Clerk issuing two different Notices of Trial for two different dates constitutes an abuse of process. The abuse does not have to result from police or prosecutor misconduct (R. v. Miles of Music Ltd.). I consider the Clerk who issued the two notices of trial to be a third party and third parties may be the cause of the abuse (R. v. L.J.G.). The police or the prosecutor had no hand in the abuse complained of by the defendant.

¶ 88 The abuse was aggravated in that the defendant notified the administration for the Court of the multiple Court dates but was informed to attend on both dates. Further to the inconvenience and prejudice suffered by the defendant, the defendant's name was not on the Court docket for the earliest of the two trial dates and the charge was not present in the Court in order for the defendant to proceed with his trial on November 4.

¶ 89 When Court Administration was informed of the error, it should have rectified the problem. Court Administration should have made sure either the matter would proceed on the earliest of the two dates or inform the defendant by both mail or telephone if necessary, that the later of the two dates would be the trial date. A letter confirming the new date should have been sent in the mail to the defendant notifying of the change to the second date with a proviso to call the trial scheduler if the defendant would be unable to appear on the second date. The defendant had booked holidays covering the November 4, 1996 Court date between the time he received the first notice for the November 19 trial date and the date he received the second notice for November 4.

¶ 90 There is absent any letter from the clerk of the Court notifying the defendant of the change of the trial date from November 19, 1996 to November 4, 1996. Absent this letter changing the trial dates in the Court documents before me, I find that the defendant's recollection of events is credible.

¶ 91 I agree with Mr. Guillemin's submissions that the defendant has suffered prejudice. He had to pay for representation for one extra Court date. The prosecutor contends there is no prejudice because the defendant has a right to retain counsel. I find that the extra day of attendance for trial has caused financial hardship and prejudice to the defendant. The error of setting two trial dates has inevitably caused the defendant to retain representation for two dates - one of which should not have been necessary. The prosecutor's contention would only apply to one of the two trial dates, but not for both.

¶ 92 I also agree with Mr. Guillemin that this is a unique situation and therefore falls within exceptional circumstances (Re: Abitibi Paper)

¶ 93 With regards to the prosecutor's submission that the onus was on the defendant to do more than just to telephone the Courthouse, I would have to be in disagreement. I accept Mr. Guillemin's submission that the defendant acted in good faith and did what was required of him. He telephoned the Courthouse using a telephone number inscribed on the Notice of Trial and was told he had to attend or suffer the consequences for not appearing. The Notice of Trial also informed him that if he failed to appear "at the time and place set for your trial, you will be deemed not to dispute the charge, and a conviction may be entered against you in your absence, without further notice".

¶ 94 I also find that the defendant has been treated unfairly by Court Administration and detrimentally relied on the two Notices of Trial such that he suffered financially by having to hire representation for one extra Court date. I would also consider it oppressive to allow the prosecutor to continue with this prosecution after I have found hardship and prejudice (R. v. L.J.G.).

¶ 95 In regards to Mr. Guillemin's position that the abuse was systemic, I adopt Stuesser's comment at page 96 of his article that the Courts are called upon to redress the system error which invokes "imperfections" in the process.

¶ 96 In weighing the "public's interest in having a charge determined on its merits after a fair trial" and the "community's sense of fair play and decency" (R. v. Mountain Folk Ltd.), I find that the unfairness experienced by the defendant is disproportionate to the public's interest in effective prosecution of offences (R. v. Conway). I also find that the societal interest in what is fair and just would not permit the prosecution for a minor traffic offence to continue after the hardship and prejudice experienced by the defendant before the trial (R. v. Boise Cascade). Also the preservation of the integrity of the justice system is foremost in my decision for finding an abuse of process.

> (ISSUE 7) Has the common law doctrine of abuse of process been subsumed in section 7 of the Charter?

¶ 97 Lee Stuesser in his article "Abuse of Process: The Need To Reconsider" in 29 C.R. (4th) 92 at p. 103 discusses whether the Charter has subsumed the common law abuse of process. He opines that the common law should remain as an alternative to the Charter as not all fact situations of abuse are caught by the Charter.

> On the other hand, this is not to say that the Charter has subsumed the common law. In my view, there is place for common law abuse of process and for Charter relief to co-exist resting upon the same concerns and principles. The reason that common law abuse of process needs to remain is that not all abuses will be caught by the Charter. The Charter is restricted in certain technical ways. For example, in Miles Music, supra, the Ontario Court of Appeal found that the Charter did not apply because the abuse in that case was founded on the improper motives of third parties other than the state representatives. The same situation may apply where the abuse, although done by the state representatives, is directed at persons other than the accused. The Charter requires that only the person "whose rights" ... have been infringed" may seek redress under s. 24. The accused lacks standing. Another situation not caught by the Charter is when the offence charged does not threaten the "life, liberty and security" of the accused. Admittedly, these situations will be rare, but for the aggrieved party the common law would provide a means of redress.

¶ 98 The Supreme Court has finally ruled on the issue of whether the common law abuse of process has been subsumed in the Charter. Madam Justice L'Heureux-Dubé for the majority in R. v. O'Connor (1995), 103 C.C.C. (3d) 1 (S.C.C.) at pp. 34-38 concludes that realistically the common law doctrine of abuse of process has been subsumed in the Charter but that it is necessary to keep the distinction as there are certain situations when the Charter does not apply and it remains necessary to remedy an abusive situation with the common law doctrine:

> ... I would note the beginnings of a strong trend toward convergence between the Charter and traditional abuse of process doctrine ...
>
> I recognize that this Court has consistently, albeit implicitly, considered abuse of process separately from the Charter. In Conway, supra, it considered abuse of process separately from the s. 11(b) considerations arising from the accused facing a third trial. In Scott, supra, in the context of an immediate stay by the Crown upon the posing by defence counsel of a question which would have revealed the identity of a police informer, the majority again considered abuse of process separately from an examination of whether the accused's s. 11(b) rights had been violated by the Crown's subsequent reinitiation of the proceedings. Finally, in Power, supra, it found no abuse of process in the Crown's failure to call further evidence after the trial judge had excluded a key breathalyzer sample and did not address the possibility of a Charter violation at all. In my view, however, the issues addressed in each of these three cases could have been addressed equally effectively under the Charter. In none of these decisions did the majority of this Court actively turn its mind to the interaction between the Charter and the common law doctrine of abuse of process. On the only occasion that it did, moreover, it expressly declined to address the issue: Keyowski, supra, at pp. 660-61. On the other hand, in Mack, supra, this Court commented at pp. 939-40 and again at p. 976 upon the strong parallels that exist between the two regimes.
>
> I also recognize that, despite these strong parallels, the common law and Charter analyses have often been kept separate because of the differing onus of proof upon the accused under the two

regimes. In R. v. Keyowski (1986), 28 C.C.C. (3d) 553 (Sask. C.A.), at pp. 561-62, for instance, it was noted that while the burden of proof under the Charter was the balance of probabilities, the burden under the common law was the "clearest of cases". It is important to remember, however, that even if a violation of s. 7 is proved on a balance of probabilities, the court must still determine what remedy is just and appropriate under s. 24(1). The power granted in s. 24(1) is in terms discretionary, and it is by no means automatic that a stay of proceedings should be granted for a violation of s. 7. On the contrary, I would think that the remedy of a judicial stay of proceedings would be appropriate under s. 24(1) only in the clearest of cases. In this way, the threshold for obtaining a stay of proceedings remains, under the Charter as under the common law doctrine of abuse of process, the "clearest of cases".

Remedies less drastic than a stay of proceedings are of course available under s. 24(1) in situations where the "clearest of cases" threshold is not met but where it is proved, on a balance of probabilities, that s. 7 has been violated. In this respect the Charter regime is more flexible than the common law doctrine of abuse of process. However, this is not a reason to retain a separate common law regime. It is important to recognize that the Charter has now put into judges' hands a scalpel instead of an axe -- a tool that may fashion, more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system. Even at common law, courts have given consideration to the societal (not to mention individual) interests in obtaining a final adjudication of guilt or innocence in cases involving serious offences. In Conway, supra, at p. 1667, for instance, I elaborated upon the essential balancing character of abuse of process in the following terms:

> [Abuse of process] acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfill its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings. [Emphasis added.]

I see no reason why such balancing cannot be performed equally, if not more, effectively under the Charter, both in terms of defining violations and in terms of selecting the appropriate remedy to perceived violations. See, by analogy, Morin, supra.

For these reasons, I conclude that the only instances in which there may be a need to maintain any type of distinction between the two regimes will be those instances in which the Charter, for some reason, does not apply yet where the circumstances nevertheless point to an abuse of the court's process. Because the question is not before us, however, I leave for another day any discussion of when such situations, if they indeed exist, may arise. As a general rule, however, there is no utility in maintaining two distinct approaches to abusive conduct. The distinction is one that only lawyers could possibly find significant. More importantly, maintaining this somewhat artificial dichotomy may, over time, create considerably more confusion than it resolves.

The principles of fundamental justice both reflect and accommodate the nature of the common law doctrine of abuse of process. Although I am willing to concede that the focus of the common law doctrine of abuse of process has traditionally been more on the protection of the integrity of the judicial system whereas the focus of the Charter has traditionally been more on the protection of individual rights, I believe that the overlap between the two has now become so significant that there is no real utility in maintaining two distinct analytic regimes. We should not invite schizophrenia into the law.

¶ 99 Mr. Justice Major in his dissenting opinion in R. v. O'Connor at page 79 agreed with Madam Justice L'Heureux-Dubé that the common law abuse of process has been subsumed in the Charter unless circumstances arise to which the Charter does not apply.

¶ 100 In the case at bar, I am prevented from giving consideration to any Charter breach, as the exercise would be fruitless, in that the defendant, by failing to follow the requirements of proper and adequate notice to the Provincial Prosecutor and the appropriate parties, has prevented me in any event from granting any remedy under the Charter if such a Charter breach would have been made out. Ergo, this is a situation contemplated by the Supreme Court where it is necessary to use the common law doctrine of abuse of process since the Charter is not available to the defendant - only to the extent that I am prevented by statute from granting any remedy under the Charter. This does not mean that no Charter breach has occurred, but that at this time I find it unnecessary to apply any Charter analysis to the alleged abuse complained of by the defendant.

> (ISSUE 8) If there is an abuse of process does the Court have other remedies to cure the abuse or should it use the exceptional power of staying the proceeding?

¶ 101 The applicant defendant in the instant case seeks an order from this Court for a stay of proceeding as a remedy for the abuse of process. Such an order to stay a proceeding is an extraordinary remedy as it in effect stops the proceeding - unless the order is overturned by an Appellate Court.

¶ 102 In R. v. Jewitt, [1985] 2 S.C.R. 128, 21 C.C.C. (3d) 7, 47 C.R. (3d) 193, 20 D.L.R. (4th) 651, 61 N.R. 159, [1985] 6 W.W.R. 127 (S.C.C.) at page 15 of 21 C.C.C. (3d) the Court defines a stay of proceeding:

> A stay of proceedings is a stopping or arresting of a judicial proceedings by the direction or order of a court. As defined in Black's Law Dictionary, 5th ed. (1979), it is a kind of injunction with which a court freezes its proceedings at a particular point, stopping the prosecution of the action altogether, or holding up some phase of it. A stay may imply that the proceedings are suspended to await some action required to be taken by one of the parties as, for example, when a non-resident has been ordered to give security for costs. In certain circumstances, however, a stay may mean the total discontinuance or permanent suspension of the proceedings.

¶ 103 Bovard J. in Toronto (Metropolitan) v. Miller, [1994] O.J. No. 209 (Ont. Ct. (Prov. Div.)) at Toronto finds that the remedy of staying a proceeding must be flexible and open to new situations. His Honour also specifies two situations in which staying a proceeding is appropriate in his judgment under the heading "THE POWER TO STAY PROCEEDINGS":

> [para13] I have not been able to find an exhaustive list of when a stay of proceedings is appropriate. I doubt one exists and I do not think it would be desirable to try to create one. The court must maintain a flexible and open approach to this issue in order to respond to new situations.
> [para14] However, it is possible to state generally two situations which appear to be the most common in which stays of proceedings have been found to be appropriate: [1] abuses of process and, [2] breaches of Charter rights.

¶ 104 Lee Stuesser in his article "Abuse of Process: The Need To Reconsider" in 29 C.R. (4th) 92 at p. 101-102 comments on the issues needed to be addressed before on deciding on a stay of proceeding as the appropriate remedy:

> The judgment of Mr. Justice Blair of the Ontario Court of Appeal in R. v. Miles of Music Ltd. is instructive. Mr. Justice Blair summarized the principles of abuse of process. He reaffirmed the Ontario Court of Appeal's position that in abuse of process cases the accused has the onus on a balance of probabilities. With respect to "clearest cases" he explained that it required the courts to take "into account the total impact of the process against the party complaining of abuse". Presumably this would include the impact of granting a stay of proceeding. The granting of the stay is made part of the balancing. All relevant factors are considered: the seriousness of the offence, the seriousness of the violation, the seriousness of the prejudice to the accused and a clear articulation of that prejudice, the bad faith or good faith of the police or prosecutor.

¶ 105 Madam Justice L'Heureux-Dubé's for the majority of the Supreme Court of Canada in R. v. O'Connor (1995), 103 C.C.C. (3d) 1 at page 43 describes when the remedy of staying a proceeding is appropriate [emphasis is mine]:

> It must be remembered that a stay of proceedings is only appropriate "in the clearest of cases", where the prejudice to the accused's right to make full answer and defence cannot be remedied, or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution was to be continued.

¶ 106 Lee Stuesser in his article "Abuse of Process: The Need To Reconsider" in 29 C.R. (4th) 92 at p. 103 discusses the remedy of staying a proceeding for the common law abuse of process in relationship to a remedy under the Charter for a Charter breach. He concludes that the remedy of staying a proceeding under both the Charter and the common law will only be appropriate when no other remedy can cleanse the prejudice.

> ... the process for determining an abuse of process and providing a remedy will be the same under the common law or under the Charter. Step one: under the Charter, the accused must prove a breach of the Charter on a balanced of probabilities; under the common law, the accused must prove the abuse on a balance of probabilities. Step two: under the Charter, once a breach is shown the court turns to a remedy that is "appropriate and just" in the circumstances; under the common law, once the abuse is shown the court will look to appropriate remedies. Under the common law and under the Charter, stay of proceedings will only be appropriate when no other remedy can properly cleanse the prejudice. In other words, in both instances a stay of proceeding is a last resort.

¶ 107 Madam Justice L'Heureux-Dubé for the majority in R. v. O'Connor (1995), 103 C.C.C. (3d) 1 (S.C.C.) at pp. 36-37 comments on looking at other remedies for an abuse of process instead of staying a proceeding:

> I would note the beginnings of a strong trend toward convergence between the Charter and traditional abuse of process doctrine. In R. v. Xenos (1991), 70 C.C.C. (3d) 362 (Que. C.A.), for instance, the accused had been charged with arson and attempting to defraud an insurance company. It emerged in cross-examination that the Crown's key witness had arranged with the insurers to be paid $50,000 by the insurers if the accused was convicted. The trial judge found an abuse of process, but declined to order a stay. Rather, in convicting the accused, he said that he had ignored this evidence. The Court of Appeal agreed in principle with the trial judge that a stay was not the only remedy for an abuse of process and went on to rule that the appropriate remedy was in fact to exclude the witness's testimony in a new trial before a different judge. This case is an excellent example, in my mind, of how courts are becoming increasingly bold and innovative in finding appropriate remedies in lieu of stays for abuses of process. Professor Stuesser points out in "Abuse of Process: The Need to Reconsider" (1994), 29 C.R. (4th) 92, at p. 99, moreover, that the common law in the United Kingdom and Australia urges judges to look at lesser remedies before entering stays of proceedings. He argues that these authorities support the view that even under the common law, the remedy for abuse of process is no longer only a stay of proceedings.

¶ 108 In determining the appropriate remedy under a Charter breach Madam Justice L'Heureux-Dubé's in R. v. O'Connor at page 42-43 speaks about weighing the seriousness of the charge against societal and individual interests in having a trial to determine guilt or innocence of an accused. It must be noted that her Ladyship had determined at paragraph 68 on pages 37-38 that the remedy of staying a proceeding for the common law abuse of process and for a Charter breach was only to be granted in the "clearest of cases":

> Finally, in determining whether the prejudice to the integrity of the judicial system is remediable, consideration must be given to the societal and individual interests in obtaining a determination of guilt or innocence. It goes without saying that these interests will increase commensurately to the seriousness of the charges against the accused. Consideration should be given to less drastic remedies than a stay of proceedings ...

¶ 109 With regards to the motion before me to stay the proceeding I find that there is no other appropriate remedy. As I determined earlier, this charge is not serious. The societal and individual interests in obtaining a determination of guilt or innocence in a minor traffic charge are not greater than the protection of the integrity of the justice system. This charge is not serious as there is no evidence of a fatality or an accident causing damage or injury.

¶ 110 An adjournment would obviously not remedy any prejudice to the defendant. Again, it would only aggravate the prejudice and inconvenience to the defendant. The award of costs would be inadequate. Costs would not remedy the prejudice to the integrity of the justice system. The inconvenience to the defendant is inexcusable. If the clerk had not committed the error, there would not have been any prejudice or inconvenience inflicted on the accused. On the date of giving this ruling on the motion, it would have necessitated the defendant attending three times in Court. Furthermore, if any witnesses for the defence would have attended each Court date, then they would have also been inconvenienced unduly. The appropriate remedy therefore, is a stay of proceeding, as I find the affront to fair play and decency is much greater than the societal interest in the effective prosecution of this matter.

¶ 111 I especially adopt Madam Justice L'Heureux-Dubé's comment in R. v. O'Connor at page 38:

> Even at common law, courts have given consideration to the societal (not to mention individual) interests in obtaining a final adjudication of guilt or innocence in cases involving serious offences. In Conway, supra, at p. 1667, for instance, I elaborated upon the essential balancing character of abuse of process in the following terms:
>
> > [Abuse of process] acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfill its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings. [Emphasis added.]

5. CONCLUSION

¶ 112 The defendant failed to give proper notice that he was bringing a motion to stay the proceeding. As the prosecutor did not request an adjournment, I deemed notice waived by the prosecutor. Also, it was not unjust to hear the motion based upon the circumstances presented by the defendant. However, the defendant also sought a remedy under the Charter for the abuse of process. I was statutorily barred from granting a Charter remedy as the defendant failed to give proper notice to the necessary parties. Therefore, my ruling touched only the abuse of process as found in the common law regime and not under the Charter.

¶ 113 Post-Rourke judgments have maintained the existence of the abuse of process doctrine to control the Court process. The Provincial Offences Court has inherent jurisdiction to stay a proceeding on the basis of an abuse of process.

¶ 114 The facts presented by the defendant were unchallenged by the prosecutor. Therefore, the facts relating to the abuse were not at issue and did not have to be evaluated during a trial. The facts themselves were not germane to proving the charge and related only to the procedural aspect of the proceeding. I concluded it was appropriate for me to rule on the motion at the pre-trial stage.

¶ 115 Madam Justice L'Heureux-Dubé set out the standard test for finding an abuse of process in R. v. O'Connor. There are also variations of the standard test and broader issues to be canvassed in deciding whether there is an abuse of process. The onus in proving the abuse lies on the defendant who sought the stay. The Court has to weigh the "community's sense of fair play and decency" with the "public's interest in having a charge determined on its merits after a fair trial" on a complaint of abuse. In general, the Court has to consider the total effect of the proceeding against the defendant complaining of the abuse and take into account all the circumstances of the case. In addition, the Court has to consider the seriousness of the charge in relation to any

prejudice inflicted on the defendant. In less serious matters, especially minor traffic offences, it is my opinion that a broader application of the abuse of process doctrine is warranted.

¶ 116 It is not necessary that the police or prosecutor are responsible for the abuse. As in this case, a clerk in Court Administration and Court Administration were the cause of the abuse. Two notices of trial were sent out with two different trial dates and Court Administration did not rectify the error when informed by the defendant. Third parties may be the cause of the abuse which does not preclude the Court from finding abuse.

¶ 117 There was an abuse of process in this case. The defendant suffered prejudice and financial hardship for having to hire representation for one extra trial date. This particular case was unique and of exceptional circumstances. I found the defendant acted in good faith and did what was required in notifying Court Administration about the error. I also found the defendant was treated unfairly by Court Administration and the defendant relied to his detriment on the two Notices of Trial sent to him. The "unfairness" experienced by the defendant, albeit not related to trial unfairness or to the charge, was disproportional to societal interest in convening a trial in this matter.

¶ 118 The Supreme Court of Canada in R. v. O'Connor has determined that the common law doctrine has been subsumed in the Charter except for situations not caught by the Charter. The common law doctrine is applicable in this instant case as the defendant could not seek a remedy under the Charter.

¶ 119 No other remedy short of a stay of proceeding was appropriate in this matter as irreparable prejudice would be caused to the integrity of the justice system if the prosecution were to be continued. Therefore staying this proceeding for abuse of process is the proper remedy.

6. ORDER

¶ 120 The motion by the defendant is granted and the proceeding is stayed on the basis of an abuse of process.

QUON J.P.

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