** Unedited **

Indexed as:

R. v. Taker

IN THE MATTER OF an application to stay proceedings as an abuse of process

Between
Her Majesty the Queen, respondent, and
Earl Blair Taker, applicant

[1996] O.J. No. 3276
DRS 97-00418

Ontario Court of Justice (Provincial Division)
Bigelow Prov. J.

August 16, 1996.
(19 pp.)

Civil rights — Trials, due process, fundamental justice and fair hearings — Procedural fairness, scope of — Criminal and quasi-criminal proceedings — Fair hearing, what constitutes — Right of accused to disclosure — Right to be informed of alleged offence.

Application for an order to stay proceedings under section 24(1) of the Canadian Charter of Rights and Freedoms. The accused claimed there had been an abuse of process. The accused, who was a police officer, had been charged with driving with a blood alcohol level over .08 and with causing bodily harm while operating a motor vehicle while impaired. Counsel for the accused claimed that the Crown Attorney had agreed to drop the charges when defence counsel pointed out that the accused's right to counsel read to him before a blood sample was taken. The Crown then reneged and added a charge of dangerous driving to the indictment. The Crown had obtained the accused's medical records from the hospital where he was treated after the accident. The accused was misled as to the existence of certain documents in the file and did not have full knowledge of the case against him when he made his election.

HELD: The information which contained the charge of dangerous driving was stayed. The accused was allowed to re-elect his mode of trial on the remaining information. There had been an abuse of process in the manner in which the case had been conducted by the Crown. Taken as a whole, the conduct of the Crown connoted an unfairness in the prosecution. The accused had faced two charges for seven months while the Crown failed to make further investigation or to follow its own policies with respect to screening charges; it reneged on an agreement, failed to provide disclosure and pressured the accused into making an election prematurely.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 24(1). Criminal Code, ss. 253(b), 255(2).

Counsel:

D. Paciocco, for the applicant.
D. McGarry, for the respondent.

¶ 1 **BIGELOW PROV. J.**:— Counsel on behalf of the Applicant has brought an Application for an Order pursuant to section 24(1) of the Canadian Charter of Rights and Freedoms staying proceedings in the matter herein or for such other remedy as may be appropriate. The Application is based on an allegation of abuse of process. The Application was heard commencing on the 29th day of July, 1996 and evidence and argument was heard over 5 days. I indicated at the conclusion of argument that I would reserve decision in Order to fully consider the evidence and the arguments of the parties. I also indicated that I would release my decision to the parties at the latest on August 19th, 1996 and remanded the matter to August 26th to be spoken to.

¶ 2 Due to the nature of this Application and the extensive evidence heard on it, it is necessary to review the evidence in some detail.

The Applicant's Evidence

Mr. Michael Edelson

¶ 3 The sole witness called on behalf of the Applicant was Mr. Michael Edelson, Barrister and Solicitor. He is an experienced Criminal Lawyer having been called to the Bar in 1977 and having practised in the Ottawa area since that time. He was retained by the Applicant to represent him on charges arising out of an Information sworn the 7th day of June, 1995 alleging that he:

> on or about the 2nd day of April, 1995 ... having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded eighty milligrams of alcohol in one hundred millilitres of blood, did operate a motor vehicle, contrary to section 253(b) of the Criminal code of Canada;
>
> And further that .... on or about the 2nd day of April, 1995 .... while his ability to operate a motor vehicle was impaired by alcohol did operate a motor vehicle and thereby caused bodily harm to Cynthia Anderson contrary to section 255(2) of the Criminal Code of Canada. [See Note 1 below]

Note 1: Information sworn the 7th day of June, 1995, Exhibit 1.]

¶ 4 Mr. Taker first appeared in court on the 25th of July, 1995 at which time an Associate of Mr. Edelson's requested that the matter be adjourned for 2 weeks [See Note 2 below] and Mr. Taker was provided with a document entitled an Intake Information signed by an experienced Assistant Crown Attorney, Mr. McDougall. This document indicated that the Crown intended to proceed with both counts on the Information and would be electing to proceed by indictment but did not indicate what position the Crown

would take on sentencing if a guilty plea were entered prior to trial. The Form also indicated at the top:

> A summary of the position of the Crown Attorney with respect to this case after an initial review of the case has been noted below. This position is subject to review or to facts that may come to light later. [See Note 3 below.]

Note 2: Transcript of Proceedings on July 25th, 1995, Exhibit 2a.]

Note 3: Document entitled Intake Information, Exhibit 3.]

¶ 5 Mr. Taker next appeared in Court on August 8th, 1995 at which time Mr. Edelson indicated that he had not yet received any disclosure and requested that the matter be adjourned for 3 weeks. [See Note 4 below] Disclosure was in fact received in his office on the afternoon of August 8th. After a number of further adjournments and meetings with Mr. Taker, a letter was sent to the Crown requesting further disclosure on the 2nd of October, 1995. [See Note 5 below] On the 17th of October, 1995 Mr. Edelson again appeared in court on the matter and indicated that disclosure was still outstanding but that he wished to schedule a Judicial Pre-Trial (JPT). The court advised that the earliest date for a JPT was November 28th and the JPT was scheduled for that date. [See Note 6 below]

Note 4: Transcript of Proceeding on August 8th, 1995, Exhibit 2b.]

Note 5: Letter from Mr. Edelson to Crown Attorney's Office, Exhibit 4.

Note 6: Transcript of Proceedings on October 17th, 1995, Exhibit 2f.

¶ 6 On November 28th, 1995 a JPT was held before Regional Senior Judge Lennox (as he then was). The Crown was represented by a Ms. McCormick. Although there was a policy that the Investigating Officer (10) was to be in attendance at all JPTs, he did not attend and no explanation was given for this. [See Note 7 below] Mr. Edelson advised that he felt that the Crown had significant problems with its case and wanted the Crown to consider whether the charges should be withdrawn. In particular he advised that it appeared that the police officer who made a demand for blood samples from the accused had failed to advise him of his right to counsel which, in his view, would make the admissibility of the results of the analysis of any samples taken unlikely. Ms. McCormick indicated that she was not in a position to discuss withdrawal as she had not reviewed the file in sufficient detail. Mr. Edelson requested that a Crown be assigned to the case so that the file could be properly reviewed.

Note 7: It should be noted that Judge Lennox requested an explanation for the IO's failure to attend and it appears that no explanation was ever provided. Certainly no explanation was provided in evidence on this application.

¶ 7 Shortly after the JPT Mr. Edelson was approached in the cafeteria of the Ottawa Courthouse by Mr. G. Dzioba, a Crown Attorney, who advised him that he had been assigned the Taker file. They sat down in the cafeteria and Mr. Edelson advised Mr. Dzioba that he wanted him to consider the withdrawal of all charges based on the following factors:

1. The failure to read the accused his rights to counsel;
2. The failure of the officer making the demand for breath samples to advise the accused that a second sample would be available for him to have analyzed (R. v. Egger [See Note 8 below.]);
3. The lack of reasonable and probable grounds for the making of the demand; and
4. The fact that a number of witnesses indicated that Mr. Taker was not impaired shortly prior to the accident.

Note 8: (1993) 21 C.R. (4th) 186 (S.C.C.)

Mr. Dzioba indicated that he would review the file and contact him with his decision.

¶ 8 In mid December, Mr. Edelson and Mr. Dzioba again spoke in the cafeteria at which time Mr. Dzioba advised that he had been in contact with the officer who had made the demand for blood samples. Shortly thereafter both counsel again met in the cafeteria and Mr. Dzioba advised that he would be withdrawing the charges on Mr. Taker's next court appearance. Mr. Edelson then advised his client that the charges were to be withdrawn.

¶ 9 On the 2nd of January, 1996 Mr. Edelson attended court with Mr. Taker expecting that the charges would be withdrawn. However, a paralegal appearing for the Crown on that date showed Mr. Edelson a memorandum from Mr. Dzioba [See Note 9 below] which in her view was not clear and she indicated that she wished to contact the investigating officer. The matter was then adjourned for one week.

Note 9: Memorandum from G. Dzioba dated the 18th of December, 1995, Exhibit 11.]

¶ 10 Shortly thereafter Mr. Edelson received a letter dated the 4th of January, 1996 from Mr. A. Berzins, Crown Attorney for the Judicial District of Ottawa-Carleton, indicating that the charges would not be withdrawn and that at Mr. Taker's next appearance a new Information would be placed before the Court containing the original charges as well as with further charges of one count of impaired driving causing bodily harm and two counts of dangerous driving causing bodily harm. [See Note 10 below] The letter also indicated:

> Since you have already had 10 adjournments I expect that you will set a date for trial or preliminary inquiry;

and that:

> I note from the file that you have already received disclosure. Please let me know if there are any disclosure issues still outstanding.

Note 10: Letter from A. Berzins to M. Edelson dated the 4th of January, 1996, Exhibit 12.

Subsequent to receiving that letter Mr. Edelson met with Mr. Berzins in his office because he wanted to know what had caused Mr. Dzioba's decision to be reversed. Mr. Berzins indicated "the son of a bitch is a cop and he was drunk." When Mr. Edelson spoke to Mr. Dzioba about what had happened, he was told that it was out of his hands and that he had been taken off the case.

¶ 11 On the 19th of January, 1996 Mr. Edelson wrote to Mr. Berzins taking rather strong exception to the decision to renege on the undertaking to withdraw the charges and requesting "all new disclosure which motivated you to lay these new charges."

¶ 12 On the 23rd of January Mr. Taker elected trial by Provincial Court Judge and set a date for trial. [See Note 11 below.]

Note 11: Transcript of Proceeding on January 23rd, 1996, Exhibit 2k.

¶ 13 Mr. Berzins wrote to Mr. Edelson on the 25th of January indicating:

> I personally reviewed the file and made the decision with respect to the charges on which the Crown would proceed. You asked to be provided with "all new disclosure that motivated you to lay these new charges." I based my opinion on the contents of the file and my understanding is that you have a copy of everything in it. If you wish, you may provide me with a list of the items which you have and I will make sure that it is complete. [See Note 12 below]

Note 12: Letter from Mr. Berzins to Mr. Edelson dated the 25th of January, 1996, Exhibit 15.]

¶ 14 In February Mr. Edelson became aware that a search warrant had been executed at the Ottawa General Hospital and his client's medical records seized.

¶ 15 Mr. Edelson also gave evidence of his opinion that the factual circumstances in this case would have a negative impact on the willingness of counsel to discuss cases openly with the Crown and the negative impact this could have on the Attorney General's investment strategy. He also indicated that in his view his client had been prejudiced by the laying of further charges in that, if he had been facing charges of dangerous driving from the beginning, an expert would likely have been retained to examine both the accident site and the vehicles and that was no longer possible.

The Respondent's Evidence

Mr. George Dzioba

¶ 16 Mr. Dzioba has been an Assistant Crown Attorney in the Ottawa area for 24 years. He recalled receiving a memo assigning the Taker file to him in November, 1995. Shortly thereafter he met Mr. Edelson in the cafeteria and advised him that he had been assigned the file. He recalled Mr. Edelson telling him that he had a problem with the case in that no rights to counsel had been given. He indicated that they may have sat down to talk but that in any event the conversation was short and that Mr. Edelson could have mentioned that the officer making the demand for blood samples did not have reasonable and probable grounds since

defence counsel always make that argument and he generally ignored it. He did not recall any mention of the Egger decision. He did indicate that he supposed Mr. Edelson asked him to review the file with a view to a withdrawal.

¶ 17 After reviewing the file he sent a memo to the IO indicating that it appeared that no Right to Counsel had been given to the accused and asking if this was correct [See Note 13 below] He received replies from the IO indicating that Rights to Counsel were not given and that the accused was unconscious at the scene of the accident. [See Note 14 below] He also received a memo from the officer who made the demand for blood samples who confirmed that he had not given the accused his Right to Counsel. [See Note 15 below]

Note 13: Memo to P.C. Putinski, Exhibit 6.

Note 14: Memo from P.C. Putinski, Exhibit 8.

Note 15: Memo from P.C. Jesty, Exhibit 7.

¶ 18 Subsequently he reviewed the file again and then spoke to the IO either in person or on the phone. After this conversation he wrote a memo to the IO indicating that the charge was to be withdrawn at the Accused's next court appearance and included a copy of that memo in the file. [See Note 16 below] The conclusion of that memo read:

> Consequently, it is my intention that the charges under the Criminal Code be withdrawn when the case is in court on January 2nd, 1996. If you disagree, or there is something on the facts which I have missed and not considered, please get in touch with me.

Note 16: Memo to P.C. Putinski, Exhibit 11.

¶ 19 In his evidence he indicated that, if the IO had objected to the withdrawal, he would have given him a chance to put his case. However, he did not receive any reply to the memo. He also informed Mr. Edelson that the charges were to be withdrawn.

¶ 20 Mr. Dzioba was on holiday on the 2nd of January, 1996 and returned to work on the 3rd of January, 1996. On January 3rd he received a Memo from Ms. Donaldson indicating that she had not withdrawn the charge and that both the complainant and the IO wished to speak to him. Subsequently he spoke to Mr. Berzins who asked him how he had reached his opinion on the case. He told Mr. Berzins that he was of the view that the results of the blood analysis would not be admissible, without that there was insufficient evidence to establish impaired driving and that there was also insufficient evidence to establish dangerous driving. Mr. Berzins asked him if he had considered attempting to gain access to any medical records which might exist at the hospital and he indicated that he had not considered that.

Mr. Adrejs Berzins

¶ 21 Mr. Berzins is the Crown Attorney for the Judicial District of Ottawa-Carleton. He was called to the Bar in 1973 and has been the Crown Attorney since 1984. His responsibilities include overall supervision of the Assistant Crown Attorneys in his jurisdiction, setting local policies in his office and ensuring that Ministry wide policies are implemented as well as prosecuting cases himself.

¶ 22 He indicated that the Crown Policy Manual Policy No. D-2 [See Note 17 below] provided that Drinking/Driving offences were to be given high priority and that such charges should be reviewed early to ensure that the appropriate charges have been laid and that sufficient evidence is available to prosecute the offences. He attempted to assign serious drinking/driving offences to experienced Assistant Crown Attorneys and he tried to keep track of the more serious charges but that there were an average of 100 new charges related to drinking/driving offences laid each month in the jurisdiction.

Note 17: Exhibit 19.

¶ 23 He also reviewed Crown Policy No. C-S. 1 concerning charge screening. That policy indicates that charges must be screened by Crown Counsel "as soon as practical after the charge arrives at the Crown's office and prior to setting a date for trial or preliminary hearing." [See Note 18 below.] The policy further requires that Crown Counsel consider among other issues whether the investigation is complete, whether there is a reasonable prospect of conviction and whether the prosecution is in the public interest. In February, 1994 Mr. Berzins had sent a directive to a number of Assistant Crown Attorneys who were particularly involved in screening charges indicating that when screening charges of impaired driving or driving over 80 they should consider whether a charge of dangerous driving should be laid. [See Note 19 below.] He believed that this directive was well known in his office.

Note 18: Exhibit 20, at page 2.

Note 19: Exhibit 21.

¶ 24 Crown Policy No. R-1 concerning resolution discussions indicates that as a general rule counsel must honour all agreements reached after resolution discussions but that:

> on rare occasions it is appropriate for senior Crown counsel after reviewing an agreement made by a Crown, to repudiate that agreement if the accused can be restored to his or her original position, and if the agreement would bring the administration of justice into disrepute. [See Note 20 below]

Note 20: Exhibit 22, at page 2.

Mr. Berzins indicated that repudiating an agreement was a serious matter and that he was very reluctant to repudiate an agreement made by Crown Counsel and only did so once or twice a year.

¶ 25 Policy in his office is that whenever a police officer is charged with an offence, it is to be brought to his attention so that he can consider whether it is necessary to bring in outside counsel in order to avoid an appearance of bias.

¶ 26 He first became aware of this case on the 2nd of January, 1996 when it was brought to his attention by Ms. Donaldson. She indicated to him that on her review of the file, it appeared that they were waiting for a response from the IO. After reviewing the file, he called the IO and indicated to him that in his view the charges should not be withdrawn and recommended further investigation as well as further charges of

dangerous driving. He did this based on the following consideration:

1. that there was a serious accident involved where life threatening injuries had occurred;
2. that the blood sample seized pursuant to a demand indicated a reading of .18, over twice the legal limit, although he also realized that there was a significant issue with respect to the admissibility of that evidence;
3. several witnesses noticed a strong smell of alcohol corning from the accused;
4. witnesses indicated that the accused had been at a Bonspiel that evening where considerable drinking had occurred;
5. although some witnesses indicated that the accused did not appear to be impaired when he left the Bonspiel, the bartender indicated that he had asked the accused how he was going to get home and the accused had indicated that he had a ride; and
6. the accident occurred on a straight road where the accused had driven straight through a clearly marked stop sign on a road he probably had travelled on extensively without slowing down.

Therefore, he felt that this was one of those rare cases where he must overrule the agreement made by Mr. Dzioba. On the 3rd of January he met with Mr. Dzioba and questioned him about the basis for his decision to withdraw. His recollection was the Mr. Dzioba indicated that he did not consider dangerous driving charges. On the 4th of January, 1996 he sent a memo to Mr. Dzioba confirming that meeting. [See Note 21 below]

Note 21: Exhibit 25.

Also on the 4th of January he sent a letter to the IO requesting that he "ascertain whether the hospital did a blood analysis and if so was the presence of alcohol detected, [See Note 22 below] and a letter to Mr. Edelson advising him that the charges would proceed and a new Information would be placed before the court. [See Note 23 below.]

Note 22: Exhibit 23.

Note 23: Exhibit 12

Finding of Fact

¶ 27 There is little dispute in terms of the chronology of events in this matter. However, some comments with respect to the evidence are required. It was argued before me that there was a conflict between the evidence of Mr. Edelson and Mr. Dzioba with respect to how much information Mr. Edelson had provided to Mr. Dzioba about potential problems with the Crown's case. I note that neither individual had any notes with respect to this conversation and I can find no reason to accept one version over the other. I find that both individuals were giving their best recollection of the conversation. In addition, given the facts of this particular case, nothing of significance turns on this point.

¶ 28 Mr. Berzins indicated that there was a policy in his office that all charges against police officers were to be referred to him for consideration of the appointment of outside counsel. I note that three separate experienced Assistant Crown Attorneys reviewed this matter prior to Mr. Berzins being advised of its existence. The only conclusion I can draw is that, if such a policy existed, it was regularly ignored.

¶ 29 At the time Mr. Berzins wrote to Mr. Edelson on the 4th of January, 1996 he had on his own evidence reviewed the file carefully and had to have noted that the memos from the IO and the officer who made the blood demand in response to Mr. Dzioba's enquiry had not been disclosed to Mr. Edelson yet he indicated in his letter that he understood Mr. Edelson had received disclosure. In his further letter of the 25th of January he again failed to indicate the existence of those memos but merely indicated to Mr. Edelson that if he wished to provide him with a list of what he had received by way of disclosure he would review the file to ensure that nothing was missing. I can only find that this was misleading.

¶ 30 At the time that Mr. Berzins wrote to Mr. Edelson on the 4th of January, he indicated that "since you have already had 10 adjournments I expect that you will set a date for trial or preliminary." [See Note 24 below] At that time he had discussed with the IO the obtaining of medical records and certainly should have known that, if such records existed and were obtained, they could substantially change the complexion of the case against Mr. Taker yet he failed to indicate in any way that further investigation was being undertaken. This allowed for the accused to make his election without having full knowledge of the case against him. Mr. Berzins in his evidence indicated that the Crown would have consented to a re-election after receiving the further evidence from the execution of the search warrant, however, it does not appear that the accused was ever advised of this. I certainly agree that the Crown is not required to reveal to an accused all of its investigative techniques prior to using them, however, in my view, in this particular case, where the Crown expected that the investigation would be completed shortly, it would not have prejudiced the Crown case to indicate that some further investigation was underway and that a brief adjournment to determine the results of that investigation would have been appropriate. Mr. Berzins further indicated that in his view this new evidence was unlikely to have any impact on the accused's election. I find that rather hard to accept and in any event it is not for Crown Counsel to decide whether evidence will impact on an accused's election. R. v. Stinchcombe [See Note 25 below] makes it clear that disclosure should be complete prior to the accused's election.

Note 24: Exhibit 12.

Note 25: (1991) 68 C.C.C. (3d) 1 (S.C.C.)

Mr. Berzins indicated that when he met with Mr. Dzioba on the 3rd of January, 1996 Mr. Dzioba told him that he had not considered laying charges of dangerous driving. Mr. Dzioba on the other hand indicated that he had considered those charges and told Mr. Berzins he had. Mr. Dzioba indicated this without any prompting and was quite clear about it. Mr. Berzins had a very hazy recollection of when this conversation had taken place and was only able to confirm when it had taken place when he reviewed the memo he drafted to Mr. Dzioba after the meeting. I note that in that memo he states what he had "pointed out" a number of things to Mr. Dzioba. Based on hearing the evidence of Mr. Dzioba and Mr. Berzins and the tone of that memo, I prefer the evidence of Mr. Dzioba on that point.

¶ 31 It was argued that although the decision of Mr. Dzioba may not have been a decision that all Crown Attorney's would have agreed with, it was not so unconscionable as to be overturned. It was clear in my view that Mr. Berzins was strongly of the view that the agreement was unconscionable. I accept that is and was his

belief without indicating that another person in the same position might have come to a different conclusion.

The Law

¶ 32 The law with respect to abuse of process has recently been extensively considered by the Supreme Court of Canada in R. v. O'Connor. [See Note 26 below] L'Heureux-Dubé, J. in her reasons gives an extensive analysis of the doctrine of abuse of process and finds that, although situations may exist where abuse of process needs to be considered aside from situations where there is an allegation of a breach of the Charter, in most cases it is appropriate to consider abuse of process as a breach of the Charter. She then goes on to state:

> ... I do not think that it is helpful to speak of there being one particular "right against abuse of process" within the Charter. Depending on the circumstances, different Charter guarantees may be engaged. For instance, where the accused claims that the Crown's conduct has prejudiced his ability to stand trial within a reasonable time, abuses may be best addressed by reference to section 11(b) of the Charter, to which the jurisprudence of this court has now established fairly clear guidelines. Alternatively, the circumstances may indicate an infringement of the accused's right to a fair trial, embodied in sections 7 and 11(d) of the Charter. In both of these situations, concern for the individual rights of the accused may be accompanied by concerns about the integrity of the judicial system. In addition, there is a residual category of conduct caught by section 7 of the Charter. This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the Charter, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

Note 26: (1995) 103 C.C.C. (3d) 1 (S.C.C.).

In my view all of the case law dealing with abuse of process must now be read in light of O'Connor.

¶ 33 If an abuse of process is found the next issue is what remedy, if any, is appropriate in the circumstances. There is no doubt that a stay of proceeding is the remedy of last resort only to be granted in the clearest of cases. However, if the abuse of process constitutes a breach of the Charter, section 24(1) authorizes the court to grant "such remedy as the court considers appropriate and just in the circumstances."

Conclusions

¶ 34 In my opinion the way that this case has been dealt with by the Crown does in fact constitute an abuse of process, in that a reasonable member of the public would find that the prosecution has been conducted in such a manner as to connote unfairness. In making this finding I note that no one action of the Crown would have necessarily constituted an abuse of process but taken as a whole the conduct of the case by the Crown does connote an unfairness in the prosecution. For 7 months the accused faced 2 charges while the Crown failed to make any further investigation, or to follow its own policies with respect to screening the charges. The Crown appeared at a Judicial Pre-Trial unprepared and the Investigating Officer failed to attend

for unknown reasons. The accused was advised that all charges were to be withdrawn and then learned a few weeks later that not only were the charges not to be withdrawn but further charges were to be added. The Crown then failed to provide disclosure of relevant information (the further written statements of police officers) and finally attempted to pressure the accused into making his election when the Crown was aware that further investigation was occurring and the results of that investigation would be available in a short time.

¶ 35 Mr. Paciocco argued that for the Mr. Berzins to take into account as a factor in his the fact that the accused was a police officer was an abuse. After considering this fact carefully, I am not satisfied that the fact that an accused is a police officer is not a factor which could be considered along with other factors by the Crown in the exercise of its discretion.

¶ 36 Having found that there was an abuse of process consideration must be given to what remedy, if any, would be appropriate in all the circumstances. Both the interests of the accused and the interests of the administration of justice must be considered as well as the public's interest in having serious allegations of criminal behaviour dealt with on the merits in open court.

¶ 37 I note that this situation is not like many situations where the accused has given something up in return for the Crown agreeing not to proceed. This was in my view much closer to the situation which was described in R. v. Crneck et. al. by Krever, J. as a 'unilateral' decision by the Crown. [See Note 27 below] Mr. Paciocco argued strenuously that the effect on the administration of justice would be the same whenever a Crown reneged on an undertaking. He referred to a number of comments in the Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions, known as the Martin Report which underline the importance of Crown undertakings and the importance of resolution discussions. There is no question about the significance of the Crown complying with undertakings made during resolutions discussions, however, it is also clear that not every breach of an undertaking by the Crown should result in a stay of proceedings. In this case Mr. Edelson clearly pointed out deficiencies with the Crown's case but made no concessions on behalf of his client. There were, in my view, no negotiations but rather only discussions. I consider this as one of the relevant circumstances in considering what would be an appropriate remedy in this case.

Note 27: (1980) 55 C.C.C. (2d) 1 (Ont. H.C.).

¶ 38 In my view it is helpful in considering any remedy to refer to the Crown Policy Manual which indicates that a Senior Crown may override an undertaking made by another Crown, if fulfilling the undertaking would be unconscionable and if the accused can be placed in his former position. Clearly Crown Policy is not law but it does indicate what the Attorney General views as appropriate behaviour for the Crown. I also note that the Martin Report uses the exact same language in discussing that issue. [See Note 28 below] As indicated above I accept Mr. Berzins statement that he was of the view that to withdraw the charges would be unconscionable.

Note 28: p. 314.

¶ 39 In this case, prior to the breach of undertaking and other failures of the Crown, the accused was facing one Information containing 2 counts. On the evidence before me the Crown is of the view that it has a

substantial case against the accused on at least one of those counts. If the matter was to proceed on that Information, the public's interest in having a serious allegation proceed to trial would be fulfilled while the accused would receive a remedy for the abusive actions of the Crown.

¶ 40 It is also clear, in my view, that the accused is entitled to re-elect his mode of trial, should he choose to do so. As indicated above disclosure which was extremely relevant in this case was not provided to the defence prior to the election and the Crown has conceded that giving him an opportunity to re-elect would be appropriate.

¶ 41 Mr. Paciocco in his argument suggested that a potential remedy in this case would be an Order excluding the evidence obtained as a result of the seizure of the accused's medical records. I note that there is a separate Application before me on which I have not heard argument or evidence requesting to exclude that same evidence. In my view that issue would be more appropriately addressed as part of that Application.

Order

¶ 42 Accordingly I Order that Information in this matter sworn on the 5th of January, 1996 be stayed, and that the accused be allowed to re-elect his mode of trial on the remaining Information if he so chooses.

Additional Issues

¶ 43 A concern was raised during the course of argument on this Application with respect to whether it would be appropriate for Mr. Edelson to act on behalf of the accused at a trial given that he appeared as a witness on the Application. At this point I see no reason why Mr. Edelson could not act for the accused on the trial. However, this issue was not fully argued before me and I would be prepared to hear further argument on the point, if either party wishes to raise the issue.

BIGELOW PROV. J.

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