IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

Citation: *R. v. Hunt*, 2016 NLCA 61
Date: November 4, 2016
Docket: 201501H0014

BETWEEN:

HER MAJESTY THE QUEEN — APPELLANT

AND:

HUBERT HUNT
WILLIAM PARSONS
GARY HILLYARD
JOHN KING — RESPONDENTS

Coram: Welsh, Rowe and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201301G3482
2015 NLTD(G) 15

Appeal Heard: March 9, 2016
Judgment Rendered: November 4, 2016

Reasons for Judgment by Welsh J.A.
Concurred in by Rowe J.A.
Dissenting Reasons by Hoegg J.A.

Counsel for the Appellant: Lloyd M. Strickland
Counsel for Hubert Hunt: Derek Hogan
Counsel for William Parsons: Randolph Piercey Q.C.
Counsel for Gary Hillyard: Jonathan E. Noonan
Counsel for John King: John Brooks Q.C.

Welsh J.A.:

[1] Charges of fraud, conspiracy to commit fraud, falsifying books and documents, and circulating a false prospectus were stayed as against the four Respondents on the basis that the lengthy pre-charge delay resulted in a breach of their rights under section 7 of the *Canadian Charter of Rights and Freedoms*. On appeal, the Crown submits that the trial judge erred in his analytical approach and, therefore, in his conclusion.

BACKGROUND

[2] Hubert Hunt, William Parsons, Gary Hillyard and John King (the "Respondents") were jointly charged with sixteen counts of fraud (section 380(1)(a) of the *Criminal Code*), one count of conspiracy to commit fraud (section 465(1)(c) of the *Code*), one count of falsifying books and documents (section 397(1)(a) of the *Code*), and one count of circulating a false prospectus (section 400(1)(b) of the *Code*). The offences were alleged to have been committed between January 1, 1997 and December 31, 2001.

[3] The genesis of the charges was the bankruptcy and insolvency of Hickman Equipment Ltd. (the "Company") where the Respondents held senior management positions. The Crown alleges that the Respondents intended by fraudulent means to conceal business losses. The alleged fraudulent activity involved selling or transferring equipment that had been used to secure loans without informing or paying the creditor ("equipment sold out of trust"), and falsifying documents and the books. As a result of the bankruptcy, losses of about ninety-three million dollars were borne by creditors.

[4] The Respondents were initially charged on an information filed on November 5, 2012. On July 12, 2013, after election to be tried in the Supreme Court, the Respondents waived a preliminary inquiry. An indictment was filed on July 16, 2013. The first appearance was on September 9, 2013 with a six-month trial scheduled to commence January 13, 2015.

[5] In October 2014, alleging an abuse of process due to pre-charge delay, the Respondents applied for a stay of proceedings based on a breach of their rights under section 7 of the *Charter*. For purposes of the application, the Respondents each filed an affidavit, on which they were cross-examined. In addition, the Crown presented evidence from the police officer in charge of

the investigation and from the two forensic accountants who provided reports as part of the investigation.

[6] In assessing the Crown's appeal, it is necessary to begin with a review of the activities that occurred during the ten years between September 2002 when the investigation began and November 2012 when the charges were laid.

[7] The investigation by the police was begun following receipt of an Investigation Order from the Superintendent of Bankruptcy on September 25, 2002. On November 19, 2002, a search warrant was executed for the purpose of seizing the Company's business records consisting of approximately 850 bankers' boxes. In June 2003, the boxes were transferred to R.C.M.P. headquarters in St. John's where they were stored.

[8] The investigation began with scanning documents into a computerized system. The police officer testified that the contents of approximately ninety of the 850 bankers' boxes were scanned, and that the decision to scan a document depended on its "documentary value", with the majority pertaining to equipment and accounting information. The process of scanning took two years.

[9] The trial judge commented on the limited resources assigned to the investigation (2015 NLTD(G) 15, 361 Nfld. & P.E.I.R. 193):

> [81] Sometime after September 25, 2002 the decision was taken to divide the investigation into Phase I and Phase II.
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> [82] Consequently, the need for the Phase II was concluded in late 2002. Accordingly, the administration has to accept that it chose to engage a two year period of scanning before any investigation of Phase II could be engaged. It was a mechanical process. The engagement of more equipment and personnel would apparently have effected an earlier conclusion and earlier commencement of Phase II.
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> [83] Both Phase I and Phase II were limited to one forensic accountant each. Each accountant had the benefit of effective search engine computer software. Paper documents were also reviewed. Mr. Snow [a forensic accountant], in Phase II felt that with the best possible return in his investigative inquiries to the Royal Canadian Mounted Police, where delays did occur, earlier completion by the Royal Canadian Mounted Police in most events would be advanced by no more than two or three years. He testified that with additional staff the investigation could have been completed earlier, but again, because of delays in the Royal

> Canadian Mounted Police providing the information he requested, it could have been completed earlier but only by two years. Phase I takes 6.5 years.
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> [84] Phase II beginning more than two and one half years after Phase I takes 5.5 years, almost four of those years being concurrent to the work in Phase I. The years 1997-2001 were subject of the investigation in Phase II.
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> [85] Mr. Leeworthy [a forensic accountant], in Phase I, confirmed that his main work was tracking equipment sold out of trust with some tracking of financing of equipment previously sold and no longer owned by the company. The main computer input for this information, as noted, was by the serial numbers of the equipment itself. Mr. Leeworthy also deposed that he was assigned to other major files during the currency of his investigation. He testified he completed three other reports during this time: one included a jury trial in New Brunswick, another a trial in Nova Scotia. He testified that this investigation would have been more efficient if more persons were assigned. His work involved all of the Atlantic provinces.
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> [86] Again, absent other explanation, it would appear that the administrative decision engaged one person to track some 260 pieces of equipment when, with the records substantially secured, all of it was for the most part available at the outset for investigation. Again, this administration has to be taken as being able, from the outset to some extent, and once started to a larger extent, to assess the timeline for anticipated completion. Again, given the mechanical work required of trained personnel, the choice to effect an earlier conclusion was directly impacted by the choice to engage the number of forensic accountants.

[10] Drawing inferences from the nature of the investigation which began with the order under the bankruptcy proceedings, the applications judge was satisfied that, as early as 2002, the possibility of fraudulent conduct, along with persons of interest, would have been identified:

> [89] While the evidence does not allow for an assessment of the detail of the investigation, it would be unlikely that persons of interest were not identified to some extent at the time of the issue of the Superintendent's Investigative Order.
> …

[11] The applications judge then discussed the involvement of the Director of Public Prosecutions in April 2007, and the provision of a disclosure binder to the Crown from the Phase I forensic accountant in January 2008. The judge continued:

> [91] … Mr. Leeworthy testified that on April 2, 2007 he met with [the Director of Public Prosecutions and Crown counsel] and they were going to research the

> "directing mind" issues. At this time, discussions were taking place about the layout of the Court brief. …
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> [92] By this time, the interviews with the accused had begun. Complaints against some accused had occurred as early as 2002. The media had begun providing details publicly in 2002. Persons of interest, these accused, were being made known in the community.
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> [93] The accused were charged November 5, 2012. No explanation was offered as to why these last five years passed without charges being laid. The only concurrent non-completed investigation was Phase II. However, in early to mid-2007, the Crown has to be taken as having the justification in hand to warrant the swearing of an Information.
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> …
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> [95] On the evidence, uncontradicted, the accused say they are known publicly as being understood to be [the] subject of investigation and the probable laying of charges and that by 2006 it was all expected to occur.

[12] When nothing happened for years, the judge accepted that, when the Crown did lay the charges, this came as a shock to the Respondents. In summary, the judge commented:

> [97] On the evidence before me, the Crown had entered upon a slow path of investigation and the administration had reason to proceed in a more expeditious manner to complete this investigation. As well, on the evidence the Crown had the basis to proceed and chose not to do so without any reason being provided.

[13] In 2005, Gary Bishop, who had been the Company's Chief Financial Officer and who had raised questions about fictitious book entries and rental contracts in January 2002, expressed his concern to the police "about his own fading memory on the detail of the circumstances" (decision of the applications judge, at paragraph 98).

[14] The judge summarized his analysis of the delay:

> [99] On the evidence, these accused appear known to the authorities and implicated at the outset. Choice was made in the investigations that affected its speed by those who have the knowledge and the responsibility to ensure section 7 rights are respected. From the outset, the investigation has to be taken as making choices that placed these accused in jeopardy for the concurrent periods of their choice of those delayed timelines. These investigative delays, explained unsatisfactorily as generally "complex", are competing against the security interests of the accused.

> …
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> [101] Unexplained as all of the foregoing is, I am left with no alternative but to conclude the delay as (*sic*) egregious. On the evidence, I have to conclude that the total passage of time would offend against the community's sense of fair dealings; this would have to be taken by the community as an unwarranted and inexcusable exercise of authority and prerogative. In my view, it offends against society's fundamental sense of justice and now undermines the integrity of judicial process. With that view, it falls to an abuse of process. I conclude that the Applicants have established on the balance of probabilities, a breach of their rights under section 7 of the *Charter*.

[15] In the result, the applications judge granted a stay of proceedings pursuant to section 24(1) of the *Charter*.

ISSUES

[16] At issue in this appeal is whether the applications judge erred in his analysis and conclusion in finding that the Respondents' right to security of the person guaranteed by section 7 of the *Charter* was breached and that a stay of proceedings was the appropriate remedy.

ANALYSIS

Section 7 of the *Charter* – Pre-charge Delay

[17] Section 7 of the *Charter* provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[18] The analysis under this provision involves a two-step process. First, the Respondents must establish on a balance of probabilities that their right to security of the person is engaged by the pre-charge delay. If that threshold is passed, the second question is whether they were deprived of that right in a manner that is not in accordance with the principles of fundamental justice.

[19] The focus of the Crown's submissions is that the *Charter* is concerned with post-charge, not pre-charge delay. Indeed, section 11(b) of the *Charter* specifically guarantees a person, after being charged with an offence, the right "to be tried within a reasonable time".

[20] In support of its position, the Crown points to *R. v. Kalanj*, [1989] 1 S.C.R. 1594, in which the Court concluded that the period of pre-charge delay should not be included in assessing the reasonableness of delay for purposes of section 11(b). However, referring to sections 7 to 14 of the *Charter*, McIntyre J., for the majority, commented that section 7 "applies at all stages of the investigatory and judicial process" (page 1608). In determining that pre-charge delay has no role in a section 11(b) analysis, he explained, at pages 1609 to 1610:

> The length of the pre-information or investigatory period is wholly unpredictable. No reasonable assessment of what is, or is not, a reasonable time can be readily made. Circumstances will differ from case to case and much information gathered in an investigation must, by its very nature, be confidential. A court will rarely, if ever, be able to fix in any realistic manner a time limit for the investigation of a given offence. It is notable that the law – save for some limited statutory exceptions – has never recognized a time limitation for the institution of criminal proceedings. Where, however, the investigation reveals evidence which would justify the swearing of an information, then for the first time the assessment of a reasonable period for the conclusion of the matter by trial becomes possible. It is for that reason that s. 11 limits its operation to the post-information period. Prior to the charge, the rights of the accused are protected by general law and guaranteed by ss. 7, 8, 9 and 10 of the *Charter*.
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> …
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> It has been considered that special circumstances could arise which, in the interests of justice, would require some consideration of pre-charge delay because of prejudice which could result from its occurrence. In my view, however, the exceptional cases should be dealt with by reliance on the general rules of law and, where necessary, the other sections of the *Charter*. This approach would take account of and meet the concerns caused by the possibility of pre-charge delays. Delays which occur at the pre-charge stage are not immune from the law outside the scope of s. 11(b). The *Criminal Code* itself in ss. 577(3) and 737(1) protects the right to make full answer and defence should it be prejudiced by pre-charge delay. … As well, the doctrine of abuse of process may be called in aid and as early as 1844 the common law demonstrated that it was capable of dealing with pre-information delays. …
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> (Emphasis added.)

[21] In this case, the applications judge concluded that this was, in fact, one of the special circumstances when pre-charge delay engaged the right guaranteed by section 7 of the *Charter*. This issue is discussed below.

[22] The Crown also relies on the decision in *R. v. L. (W.K.)*, [1991] 1 S.C.R. 1091. This was an historical sexual assault case in which the Court affirmed the proposition that limitation periods do not apply in criminal proceedings "based on the mere passage of time" (page 1100). However, Stevenson J., for the Court, wrote, at page 1099:

> Many of the cases which have considered the issue have held that "mere delay" or "delay in itself" will never result in the denial of an individual's rights. This language is imprecise. Delay can, clearly, be the sole "wrong" upon which an individual rests the claim that his or her rights have been denied. The question is whether an accused can rely solely on the passage of time which is apparent on the face of the indictment as establishing a violation of s. 7 or s. 11(d).

[23] Stevenson J. went on to note that, at common law, to establish abuse of process, delay, without more, would be insufficient.

[24] More recently, again in the context of section 11(b) of the *Charter*, in *R. v. Jordan*, 2016 SCC 27, the Supreme Court of Canada discussed principles relevant to the effect of delay in a criminal prosecution. While different factors may be engaged in the section 11(b) analysis, the rationale underlying concern with delay in the criminal context has overriding application and may be of assistance in conducting an analysis under section 7. One principle that may be gleaned from the discussion is that unexplained or unreasonable delay by the Crown in laying a charge once there is a basis for proceeding to lay an information or indictment may be considered in the section 7 analysis. (See also: *Kalanj*, at page 1609, paragraph 20, above.)

[25] Referring to post-charge delay, Moldaver, Karakatsanis and Brown JJ., for the majority, wrote:

> [20] Trials within a reasonable time are an essential part of our criminal justice system's commitment to treating presumptively innocent accused persons in a manner that protects their interests in liberty, security of the person, and a fair trial. Liberty is engaged because a timely trial means an accused person will spend as little time as possible held in pre-trial custody or living in the community under release conditions. Security of the person is impacted because a long-delayed trial means prolonging the stress, anxiety, and stigma an accused may suffer. Fair trial interests are affected because the longer a trial is delayed, the more likely it is that some accused will be prejudiced in mounting a defence, owing to faded memories, unavailability of witnesses, or lost or degraded evidence.

…

> [24] Timely trials allow victims and witnesses to make the best possible contribution to the trial, and minimize the "worry and frustration [they experience] until they have given their testimony" (*Askov*, [[1990] 2 S.C.R. 1199], at p. 1220). Repeated delays interrupt their personal, employment or business activities, creating inconvenience that may present a disincentive to their participation.
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> [25] Last but certainly not least, timely trials are important to maintaining overall public confidence in the administration of justice. As McLachlin J. (as she then was) put it in *Morin* [[1992] 1 S.C.R. 771], "delays are of consequence not only to the accused, but may affect the public interest in the prompt and fair administration of justice" (p. 810). Crime is of serious concern to all members of the community. Unreasonable delay leaves the innocent in limbo and the guilty unpunished, thereby offending the community's sense of justice (see *Askov*, at p. 1220). Failure "to deal fairly, quickly and efficiently with criminal trials inevitably leads to the community's frustration with the judicial system and eventually to a feeling of contempt for court procedures" (p. 1221).

[26] Depending on the circumstances, the above rationale may also apply in the context of pre-charge delay. I would distinguish cases such as *R. v. L. (W.K.)*, *supra*, where the pre-charge delay, as discussed in the decision, was explained by the nature of the offence, a sexual assault on the accused's daughters who, for understandable reasons, delayed coming forward to make a complaint. However, where a complaint has been made to the police and an investigation undertaken, to apply the underlying principles enunciated in *Jordan* in an assessment under section 7 of the *Charter* is consistent with the comments in *Kalanj* and *L. (W.K.)* regarding the application of provisions of the *Charter*, other than section 11(b).

[27] In this case, relying on the evidence adduced for purposes of the application, the judge found that there was a basis for charging the Respondents at least by January 2008. He also found that the subsequent delay of almost five years before charges were laid in November 2012 was unexplained and, in the absence of explanation, was unreasonable. The Crown submits that it was an error for the judge to use January 2008 as a marker in this way because a determination of when to lay a charge is within prosecutorial discretion and outside the purview of the courts.

[28] In *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, the Court discussed the question of prosecutorial discretion. Moldaver J., for the Court, began with the proposition:

> [44] … As this Court has repeatedly noted, "[p]rosecutorial discretion refers to the discretion exercised by the Attorney-General in matters within his authority in relation to the prosecution of criminal offences"… . All pertain to the nature and extent of the prosecution. As can be seen, many stem from the provisions of the *Code* itself, including the decision in this case to tender the Notice. [Underlining in original.]
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> [45] In sum, prosecutorial discretion applies to a wide range of prosecutorial decision making. That said, care must be taken to distinguish matters of prosecutorial discretion from constitutional obligations. The distinction between prosecutorial discretion and the constitutional obligation of the Crown was made in *Krieger* [2002 SCC 65, [2002] 3 S.C.R. 372], where the prosecutor's duty to disclose relevant evidence to the accused was at issue:
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> > In *Stinchcombe*, *supra*, the Court held that the Crown has an obligation to disclose all relevant information to the defence. While the Crown Attorney retains the discretion not to disclose irrelevant information, disclosure of relevant evidence is not, therefore, a matter of prosecutorial discretion but, rather, is a prosecutorial duty. [Emphasis added; para. 54.]
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> Manifestly, the Crown possesses no discretion to breach the *Charter* rights of an accused. In other words, prosecutorial discretion provides no shield as to a Crown prosecutor who has failed to fulfill his or her constitutional obligations such as the duty to provide proper disclosure to the defence.

[29] As applied to this case, the decision to lay a charge would fall within prosecutorial discretion. However, the exercise of that authority is subject to the rights guaranteed by the *Charter*, including section 7. In *Anderson*, Moldaver J. went on to explain that prosecutorial discretion is not "immune from all judicial oversight", and, in fact, is "reviewable for abuse of process" (paragraph 48). In discussing parameters of abuse of process, he explained:

> [49] … In *Krieger*, this Court used the term "flagrant impropriety" (para. 49). In *Nixon* [2011 SCC 34, [2011] 2 S.C.R. 566], the Court held that the abuse of process doctrine is available where there is evidence that the Crown's decision "undermines the integrity of the judicial process" or "results in trial unfairness" (para. 64). The Court also referred to "improper motive[s]" and "bad faith" in its discussion (para. 68).
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> [50] Regardless of the precise language used, the key point is this: abuse of process refers to Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system. …

[30] Moldaver J.'s statement of principles provides a framework to assist in the analysis in this case. However, it is not the discretion to lay charges

that is at issue here. The applications judge did not conclude that the Crown was required to lay charges against the Respondents in January 2008 or that the failure to lay charges at that time amounted to an abuse of process.

[31] Rather, he used the information in the hands of the Crown when assessing the length of time taken for the investigation and its effect on the integrity or repute of the justice system. In *Kalanj*, McIntyre J. referred to the point at which "the investigation reveals evidence which would justify the swearing of an information" (page 1609, paragraph 20, above). The focus of the applications judge's concern in this case was the passage of several years of unexplained delay occurring after January 2008; delay that, in the absence of explanation, the judge concluded was unreasonable.

[32] In considering the integrity and repute of the justice system, particularly in light of the underlying principles discussed in *Jordan*, it is relevant to take account of the fact that a person under investigation, prior to a charge being laid, has no control over the process. He or she is at the mercy of the system. In general, this is an unavoidable aspect in the assessment of criminal allegations. However, a reasonable explanation is called for when delay caused by an investigation is unusually lengthy, where the person being investigated remains under a cloud in the community and for purposes of employment prospects, and is in the position of being unable to clear his name.

[33] In assessing the delay in the particular circumstances of this case, the applications judge properly took account of the bankruptcy of the Company which led to early concern regarding possible fraudulent conduct, the identification of the Respondents, and questions as to their possible involvement in criminal activity. The judge was satisfied that, in the result, in 2002, the Respondents had been identified as persons of interest. There was significant notoriety in the media.

[34] In finding that the Respondents' security of the person had been infringed, the applications judge relied on the effect the delay had on their lives and the possible implications of lost evidence. While some stress and an effect on employment prospects could be expected regardless of any delay, the judge was satisfied that the length of the pre-charge delay here exacerbated that effect so as to engage section 7 of the *Charter* and satisfy the first prong of the analysis.

[35] He accepted the uncontradicted evidence of the Respondents that their employment opportunities were limited and negatively affected by the cloud that hung over them, despite the presumption of innocence. This continued over the years. The applications judge found:

> [56] As well, I have no difficulty concluding that each of these accused have suffered specific personal loss in their lives which has to have been exacerbated by the passage of time.
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> [57] Finally, the emotional personal stress evidenced by these accused is accepted by me. Indeed, I anticipate that one has very little true understanding of the profound impairment to security and wellbeing that the notoriety in the community with its negative implications to which these accused have been subjected. Each has described understandable aspects of it. I am satisfied that the wellbeing and security of each of these accused has been compromised. Again, the delay has to have served to exacerbate and make more likely intolerable the effect of that compromise.
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> (Emphasis added.)

[36] Regarding the loss of potential defence witnesses, the judge concluded:

> [60] The effect of the deaths of these persons on the ability to support the defence is, at best, speculative at this stage. All one could conclude at this early stage and in the absence of hearing the evidence at trial, is that the accused and their counsel will have lost the opportunity to consider its relevance and the potential for its use.

[37] The applications judge provided sufficient reasons, based on factual determinations, for concluding that the Respondents' right to security of the person was infringed as a result of the lengthy pre-charge delay which caused continuing stress, anxiety and stigma. No error has been shown.

[38] The second stage of the inquiry is to determine whether the judge erred in concluding that the deprivation of the Respondents' security of the person was not in accordance with the principles of fundamental justice. The question is whether the pre-charge delay resulted in an abuse of process as discussed above.

[39] For convenience of reference, I repeat the description of abuse of process as set out in *Anderson* (paragraph 29, above):

> [49] … the abuse of process doctrine is available where there is evidence that the Crown's decision "undermines the integrity of the judicial process" or "results in trial unfairness" (para. 64 [in *Nixon*]). …
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> [50] Regardless of the precise language used, the key point is this: abuse of process refers to Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system. …
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> (Emphasis added.)

[40] In concluding that the pre-charge delay amounted to egregious conduct by the Crown and an abuse of process, the applications judge explained that, based on the evidence, the delay "would offend against the community's sense of fair dealings", and be seen as an "unwarranted and inexcusable exercise of authority and prerogative" which would offend "society's fundamental sense of justice" (paragraph 14, above). As discussed above, the judge considered the manner in which the investigation was undertaken as well as the effect on the Respondents and the public's perception of the administration of justice.

[41] Regarding the length of the delay, the evidence of the forensic accountants suggests a cavalier attitude to the passage of years at a time. As noted above, Mr. Snow indicated that the matter would have been advanced by "no more than two or three years" (paragraph 9, above). He also testified that additional staff would have advanced the investigation "but only by two years" (paragraph 9, above). As well, as the applications judge noted, it is difficult to accept as reasonable that the scanning of documents should have taken two years.

[42] Crown counsel also submits that the investigation was delayed by the complexity of the matter. The applications judge questioned this submission. The nature of the charges, "selling equipment out of trust" and altering the account books, would suggest that proof would be found in the business records. These had been seized shortly after the bankruptcy investigation order. I accept the Respondents' submission that, in the absence of an explanation by the Crown, the applications judge did not err in inferring that, while the investigation involved a volume of documents and some intricacies in tracing items, the matter was not particularly complex.

[43] I would note that there is no suggestion of bad faith or improper motive by the Crown. However, that is not a necessary precondition to finding an abuse of process. It is the effect of the delay on the

administration of justice and integrity of the system that must be assessed. The underlying principles regarding delay set out in *Jordan* provide assistance in the analysis and support the applications judge's determination.

[44] In his decision, the judge provided ample basis for concluding that the pre-charge delay that occurred in this case amounted to an abuse of process. There is no basis on which to conclude that he erred in determining that the Respondents' rights under section 7 of the *Charter* were breached. No submissions were made regarding section 1 of the *Charter*. It is necessary, then, to consider an appropriate remedy.

Section 24(1) of the *Charter* – An Appropriate Remedy

[45] Section 24(1) of the *Charter* provides for a remedy consequent upon a breach of a guaranteed right:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[46] In this case, the applications judge ordered a stay of proceedings. The test for whether a stay of proceedings is an appropriate remedy where the court has found an abuse of process is discussed in *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309. Moldaver J., for the majority, began with a categorization of cases:

> [31] … These cases generally fall into two categories: (1) where state conduct compromises the fairness of an accused's trial (the "main" category); and (2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the "residual"category) … .

[47] It is appropriate to analyze this case under the residual category, although it cannot be said that the pre-charge delay resulting from state conduct created "no" threat to trial fairness. (See decision of the applications judge, at paragraph 60, paragraph 36, above.) The first prong of the test relates to the integrity of the justice system:

> [35] By contrast, when the residual category is invoked, the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. …

> [37] Two points of interest arise from this description. First, while it is generally true that the residual category will be invoked as a result of state *misconduct*, this will not always be so. Circumstances may arise where the integrity of the justice system is implicated in the absence of misconduct. … [Italics in the original.]
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> [38] Second, in a residual category case, regardless of the type of conduct complained of, the question to be answered at the first stage of the test is the same: whether proceeding in light of the impugned conduct would do further harm to the integrity of the justice system. …
>
> [39] At the second stage of the test, the question is whether any other remedy short of a stay is capable of redressing the prejudice. Different remedies may apply depending on whether the prejudice relates to the accused's right to a fair trial (the main category) or whether it relates to the integrity of the justice system (the residual category). … Where the residual category is invoked, however, and the prejudice complained of is prejudice to the integrity of the justice system, remedies must be directed towards that harm. It must be remembered that for those cases which fall solely within the residual category, the goal is not to provide redress to an accused for a wrong that has been done to him or her in the past. Instead, the focus is on whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward.
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> [40] Finally, the balancing of interests that occurs at the third stage of the test takes on added significance when the residual category is invoked. …
>
> [41] … Where prejudice to the integrity of the justice system is alleged, the court is asked to decide which of two options better protects the integrity of the system: staying the proceedings, or having a trial despite the impugned conduct. This inquiry necessarily demands balancing. … When the conduct in question shocks the community's conscience and/or offends its sense of fair play and decency, it becomes less likely that society's interest in a full trial on the merits will prevail in the balancing process. But in residual category cases, balance must always be considered. …

[48] The applications judge in this case referred to judicial decisions pre-dating *Babos*. In the result, he did not proceed with the analysis following the three-stage test as outlined and discussed in that decision. However, the summary of his reasons for granting the stay indicates that he turned his attention to the relevant considerations:

> [114] I have noted the features of the delay in demonstrating real prejudice to the integrity of the administration of justice. The prejudice is aggravated in the details described by the notoriety in the community of allegations and the unusual delay in leaving those allegations outstanding without a timely trial to effect

> recognition of both the accuseds' and society's interests in having charges laid so that a timely trial might take place. To continue to undermine the security of the person as guaranteed by the *Charter* will be to continue to damage the integrity of the judicial system. Consequently, in this case, the delay, characterized as egregious, calls the integrity of the justice system into question and to further prejudice to that integrity by the continuation of this trial. Insofar as this form of abuse has been determined as having occurred and as continuing, the remedy has to be directed to the prejudice to the integrity of the administration of justice in this delay by this continuance.

[49] Applying the analytical approach set out in *Babos* results in the same conclusion. Under the first stage of the test, the question is whether the pre-charge delay in this case "is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of [the Crown's] conduct would be harmful to the integrity of the justice system" (*Babos*, at paragraph 35). It is clear from the above paragraph that the applications judge addressed this question. There is no basis on which to conclude that he erred. The first stage of the *Babos* test is satisfied.

[50] The second stage of the test focuses on whether there is an alternate remedy, short of a stay of proceedings, that "will adequately dissociate the justice system from the impugned state conduct" (*Babos*, at paragraph 39). Again, the applications judge considered this factor and concluded that, in these particular circumstances, no alternate remedy would address the damage to the integrity of the judicial system. In his submissions on appeal, Crown counsel did not propose an alternate remedy.

[51] In *Babos*, Moldaver J. emphasized the significance of the third stage of the test in the analysis of the residual category of cases; that is, balancing society's interest in a trial on the merits as against its interest in maintaining the integrity of the administration of justice where the conduct in question offends society's sense of fair play and decency. The latter factor, when engaged, is more likely to prevail in the balancing process (*Babos*, at paragraph 41).

[52] In this case, the applications judge undertook the necessary balancing of interests, though he did not characterize it in those words. In determining that a stay was the only appropriate remedy for the breach of the Respondents' section 7 rights he considered whether a trial should proceed despite the effect on the integrity of the justice system.

[53] In the result, while the applications judge did not conduct the analysis using the *Babos* three-stage approach, he, in fact, applied the necessary elements of the test. There is no basis on which to conclude that he erred in determining that a stay of proceedings was the appropriate remedy on the facts of this case.

SUMMARY AND DISPOSITION

[54] In summary, the applications judge did not err in concluding that the Respondents' right to security of the person guaranteed by section 7 of the *Charter* was breached by the lengthy pre-charge delay, and that a stay of proceedings was the appropriate remedy.

[55] Accordingly, I would dismiss the appeal.

_____

B. G. Welsh J.A.

I Concur: _____

M. H. Rowe J.A.

Dissenting Reasons by Hoegg J.A.

INTRODUCTION

[56] In my view the Judge erred in finding that the Respondents' section 7 *Charter* rights were breached and in staying their charges.

[57] The Respondents were jointly charged with 16 counts of fraud, one count of conspiracy to commit fraud, one count of falsifying books and documents, and one count of circulating a false prospectus. The charges arose from a complaint to the police by the Superintendent of Bankruptcy concerning the bankruptcy and insolvency of Hickman Equipment Limited (HE) and losses to creditors of approximately ninety three million dollars.

The investigation was long and complex, and the Respondents were not charged until ten years after the complaint was made. Simply put, the Judge stayed the charges because in his view the authorities took too long to investigate the complaints and lay the charges, thereby abusing the process of the court and breaching the Respondents' section 7 *Charter* rights.

[58] The Judge summarized his reasons for decision at paragraphs 99-101:

> [99] On the evidence, these accused appear known to the authorities and implicated at the outset. Choice was made in the investigations that affected its speed by those who have the knowledge and the responsibility to ensure section 7 rights are respected. From the outset, the investigation has to be taken as making choices that placed these accused in jeopardy for the concurrent periods of their choice of those delayed timelines. These investigative delays, explained unsatisfactory [sic] as generally "complex", are competing against the security interests of the accused.
>
> [100] The unexplained decision evident on the record as residing there at least in part in the Crown office not proceeding in 2007, has to be taken as knowingly at variance with the prospective accuseds' section 7 rights.
>
> [101] Unexplained as all of the foregoing is, I am left with no alternative but to conclude the delay as (*sic*) egregious. On the evidence, I have to conclude that the total passage of time would offend against the community's sense of fair dealings; this would have to be taken by the community as an unwarranted and inexcusable exercise of authority and prerogative. In my view, it offends against society's fundamental sense of justice and now undermines the integrity of judicial process. With that view, it falls to an abuse of process. I conclude that the Applicants have established on the balance of probabilities, a breach of their rights under section 7 of the *Charter*.

THE APPEAL

[59] The Crown argues that the Judge erred in law by (1) finding abuse of process without identifying any "malfeasance or offensive conduct" on the part of the Crown, (2) embarking on an "assessment of the operation and the efficiency" of the investigation, and (3) assessing when the Crown ought to have laid charges against the Respondents. The Crown also argues that the Judge erred in fact by finding that the Crown was in a position to charge the Respondents in 2007.

[60] I am in substantial agreement with the submissions of the Crown on these issues.

DISCUSSION

Section 7 of the *Charter*

[61] *The Canadian Charter of Rights and Freedoms* governs the relationship between Canadian governments and the people. Section 7 of the *Charter* provides that governments (the state) cannot deny people the rights to life, liberty, and security of the person unless the denials are in accordance with the principles of fundamental justice. The analytical framework for determining breaches of section 7 rights involves determining whether a person's section 7 right has been engaged and deprived by the state, and if so, whether the deprivation was in accordance with the principles of fundamental justice. If the deprivation was not in accordance with the principles of fundamental justice, a breach of section 7 is established and a remedy under section 24(2) may follow.

[62] In criminal law cases, it is the section 7 right to liberty which is most often engaged. This is because accused persons are facing possible incarceration and/or other restrictions on their liberty. The liberty right only becomes engaged once a person is charged with an offence, because until then, the person's liberty is not in jeopardy (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 515).

[63] The section 7 right to security of the person can also be engaged in criminal cases (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 at paragraphs 58-92). This right generally protects the psychological and bodily integrity of a person. It is engaged if there is a "sufficient causal connection" between state action and prejudice suffered by the claimant (*Bedford* at paragraph 75).

[64] In this case the Judge referred to the Respondents' section 7 rights throughout his decision. At paragraphs 57 and 99 he referred to their security interests being engaged, and concluded at paragraph 101 that their section 7 rights were breached. The Judge's explanation of how the Respondents' security interests or section 7 rights were engaged or deprived was grounded in his view that the passage of time had exacerbated the stress and prejudice they suffered. The Judge went on to conclude that the pre-charge delay, which he described as egregious, constituted abuse of process and that the Respondents' section 7 rights were thereby breached.

THE JURISPRUDENCE

Pre-charge Delay

[65] In *Mills v. The Queen*, [1986] 1 S.C.R. 863, the Supreme Court was considering delay under section 11(b) of the *Charter*. In the context of his dissent on the section 11(b) issue, Lamer J. (as he then was) discussed the relevance of pre-charge delay to section 7 of the *Charter*, and explained how pre-charge delay engages the section 7 right:

> Pre-charge delay is relevant under ss. 7 and 11 (*d*) because it is not the length of the delay which matters but rather the effect of that delay upon the fairness of the trial. Pre-charge delay is as relevant as any other form of pre-charge or post-charge conduct which has a bearing upon the fairness of the trial. In other words, pre-charge delay is relevant to those interests which are protected by the right to a fair trial whereas it is irrelevant to those which are protected by s. 11 (*b*). Similarly, pre-charge delay may be a relevant consideration under the doctrine of abuse of process in the same manner as any other conduct by the police or the Crown which may be held to constitute an abuse of process.
>
> (at 945)

[66] The same view was expressed in *Kalanj*, where the court was considering whether pre-charge delay could be considered in a section 11(b) analysis. In ruling that it could not, McIntyre J. stated that special circumstances would justify consideration of pre-charge delay under the broad wording of section 7 (at 1611).

[67] The Supreme Court considered pre-charge delay in relation to section 7 *Charter* rights in *R. v. L.(W.K.)*, [1991] 1 S.C.R. 1091. In ruling it was not open to a trial judge to stay proceedings based on lengthy pre-charge delay on the face of an indictment, Stevenson J. stated: "the fairness of a trial is not automatically undermined by even a lengthy pre-charge delay which may actually operate to the advantage of an accused" (page 1100). Justice Stevenson went on to endorse Lamer J.'s reasoning in *Mills* which was that it is the effect of delay, not its length, that matters to the fairness of a trial. The Ontario Court of Appeal applied this ruling in *R. v. Cunningham*, [1992] O.J. No. 2754, which held that the mere possibility of prejudice is insufficient to ground a finding that delay by the authorities

prejudiced an accused's right to make full answer and defence or constituted abuse of process.

[68] The effect of investigatory delay under section 7 of the *Charter* was considered in *Blencoe v. British Columbia (Human Rights Commission*, 2000 SCC 44, 2 S.C.R. 307, which involved a complaint of sexual harassment to the British Columbia Human Rights Commission. The *Blencoe* Court cautioned that the prejudice a litigant suffers is relevant to such a section 7 analysis only when it is directly attributable to delay caused by the state. Prejudice that flows from the circumstances leading to charges or complaints, or the charges or complaints themselves, is not attributable to state delay:

> 59 Stress, anxiety and stigma may arise from any criminal trial, human rights allegation, or even a civil action, regardless of whether the trial or process occurs within a reasonable time. We are therefore not concerned in this case with all such prejudice but only that impairment which can be said to flow from the delay in the human rights process. It would be inappropriate to hold government accountable for harms that are brought about by third parties who are not in any sense acting as agents of the state.
>
> 60 While it is incontrovertible that the respondent has suffered serious prejudice in connection with the allegations of sexual harassment against him, there must be a sufficient causal connection between the state-caused delay and the prejudice suffered by the respondent for s. 7 to be triggered. …

[69] The *Blencoe* Court also noted that Mr. Blencoe's psychological harm was primarily the result of publicity surrounding the events leading to his dismissal from the provincial cabinet and his party's caucus, and from the dismissals themselves (at paragraphs 61 and 65), and observed that the stigma associated with Mr. Blencoe's alleged behaviour would not necessarily come to an end after the Human Rights Tribunal's decision "no matter the content of that decision" (at paragraph 66).

[70] While the *Blencoe* court acknowledged that there could be a sufficient nexus between the state-caused delay and the prejudice Mr. Blencoe suffered to engage section 7, it concluded that because the investigatory delay did not seriously increase the damage already done to Mr. Blencoe's reputation, he had not been deprived of his section 7 right to security of the person (at paragraphs 96-97).

Judicial Review of Police Investigations

[71] In *R. v. Rourke*, [1978] 1 S.C.R. 1021, the Supreme Court held that courts are not authorized to supervise the operation and efficiency of police investigations. Laskin C.J., agreed, although he dissented on other issues, saying there remained a judicial discretion to stay a proceeding on the basis of abuse of process if the Crown were improperly motivated by an ulterior purpose in carrying out an investigation (at 1040-1041). In *R. v. Young* (1984), 46 O.R. (2d) 520 (Ont. C.A.), Dubin J.A. similarly reasoned, saying that "courts cannot undertake the supervision of the operation or the efficiency of police departments and to be asked to determine whether the police proceeded as expeditiously as they should have in any given case". Furthermore, he stated that to compel the police or Crown counsel to institute proceedings before they have reason to believe they will be able to establish the accused's guilt beyond a reasonable doubt "would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself."

[72] As noted above, *Kalanj* concerned the relevance of pre-charge delay to an analysis under section 11(b) of the *Charter*. In deciding that pre-charge delay concerned section 7 rather than section 11(b), McIntyre J. said that assessment of a reasonable time for conclusion of a trial under section 11(b) begins when an Information is sworn. The Court's ruling stipulates that the time period to be considered in a section 11(b) analysis is after a charge is laid up to the conclusion of trial. *Kalanj* does not stand for the proposition that the courts are authorized to assess the efficiency of a police investigation or determine when the Crown was in a position to lay charges. Neither does it set out a method of evaluating conduct involved in pre-charge delay.

Abuse of Process

[73] The common law doctrine of abuse of process is well known to Canadian jurisprudence. In *R. v. Jewitt*, [1985] 2. S.C.R. 128, the Supreme Court ruled that a trial judge had the discretion to stay proceedings for abuse of process "where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the community's sense of fair play and decency through oppressive or vexatious proceedings" (at 136-137).

[74] In *R. v. Keyowski*, [1988] 1 S.C.R. 657, the Court was considering whether the third prosecution of a charge of criminal negligence causing death (after two hung juries) was oppressive so as to constitute abuse of process or a breach of the accused's section 7 rights. Wilson J. wrote for the Court. After concluding that prosecutional misconduct or improper motive are not necessary to establish abuse of process, she discussed whether "oppressive" proceedings could constitute abuse of process:

> To define "oppressive" as requiring misconduct or an improper motive would, in my view, unduly restrict the operation of the doctrine. In this case, for example, where there is no suggestion of misconduct, such a definition would prevent any limit being placed on the number of trials that could take place. Prosecutorial misconduct 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 to relay the indictment amounts to an abuse of process.
>
> (at 659)

Justice Wilson concluded that the third prosecution could proceed, saying:

> … The appellant has, in my view, failed to demonstrate that this is one of those "clearest of cases" which would justify a stay. The charge is a serious one. The proceedings have not occupied an undue amount of time. The accused has not been held in custody, and, while he has undoubtedly suffered substantial trauma and stigma from the proceedings and the attendant publicity, he is probably not distinguishable in this respect from the vast majority of accused. A third trial may, indeed, stretch the limits of the community's sense of fair play but does not of itself exceed them. In these circumstances, and having regard to the seriousness of the charge, I think that the administration of justice is best served by allowing the Crown to proceed with the new trial.
>
> (at 659-660)

[75] In *R. v. Conway*, [1989] 1 S.C.R. 1659, L'Hereux Dubé J. described abuse of process as "an unfair or oppressive act which disentitles the Crown to carry on with a prosecution because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court" (at 1667).

[76] In *R. v. O'Connor*, [1995] 4 S.C.R. 411 the Court identified two categories of abuse of process, saying the first category is characterized by Crown conduct which affects the fairness of an accused's trial, and the second, or residual, category is characterized by Crown conduct which undermines the integrity of the judicial system. In writing for the Court,

Justice L'Hereux-Dubé described residual category abuse of process as "conducting a prosecution in a manner that contravenes the community's basic sense of decency and fair play and thereby calls into question the integrity of the system", and said that such situations are an affront of constitutional magnitude to the rights of the individual accused" (paragraph 63). The *O'Connor* Court went on to merge the common law doctrine of abuse of process with section 7 of the *Charter* (while still preserving the common law doctrine when the *Charter* does not apply) saying that when abuse of process is established, a person's section 7 right is breached because abuse of process, by definition, is not in accordance with the principles of fundamental justice (paragraph 63).

[77] The *Blencoe* Court also considered investigatory delay in relation to the doctrine of abuse of process. A paragraph 116, Bastarache J. explained that "abuse of process is … invoked principally to stay proceedings when to allow them to continue would be oppressive", and stated that delay *per se* does not constitute abuse of process. Rather, the delay must be demonstrated to be "so oppressive as to taint the proceedings" (at paragraph 121). Justice Bastarache went on to say that "stress and stigma resulting from inordinate delay may contribute to an abuse of process", and said that whether delay is inordinate "depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay, or waived the delay, and other circumstances of the case" (at paragraph 122). The Court concluded that abuse of process as a result of the delay in investigating the human rights complaint had not been established because the state-caused prejudice was not of a magnitude that offended the public's sense of decency and fairness. Accordingly, the Court determined that Mr. Blencoe's section 7 *Charter* right had not been breached.

[78] In *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566, the Court referred to residual category abuse at paragraph 41:

> Under the residual category of cases, prejudice to the accused's interests, although relevant, is not determinative. Of course, in most cases, the accused will need to demonstrate that he or she was prejudiced by the prosecutorial conduct in some significant way to successfully make out an abuse of process claim. But prejudice under the residual category of cases is better conceptualized as an act tending to undermine society's expectations of fairness in the administration of justice. …

The issue in *Nixon* was whether the Crown's repudiation of a plea agreement constituted abuse of process. The Court addressed oppression in framing the question to be decided as "was the Crown's repudiation conduct so unfair or oppressive to Ms. Nixon, or so tainted by bad faith or improper motive, that to allow the Crown to now proceed … would tarnish the integrity of the judicial system?" (at paragraph 59). The Court concluded that the Crown's repudiation was not oppressive, and that abuse of process had not been established.

[79] In *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167 the Supreme Court summarized the test to establish abuse of process at paragraphs 49 and 50:

> The jurisprudence pertaining to the review of prosecutorial discretion has employed a range of terminology to describe the type of prosecutorial conduct that constitutes abuse of process. In *Krieger*, this Court used the term "flagrant impropriety" (para. 49). In *Nixon*, the Court held that the abuse of process doctrine is available where there is evidence that the Crown's decision "undermines the integrity of the judicial process" or "results in trial unfairness" (para. 64). The Court also referred to "improper motive[s]" and "bad faith" in its discussion (para. 68).
>
> Regardless of the precise language used, the key point is this: abuse of process refers to Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system. …

[80] In summary, in order to meet the test for residual category abuse of process, egregious Crown conduct – distinct from, although including misconduct – which tarnishes the integrity of the judicial system must be demonstrated.

Time Limitations on the Laying of Criminal Charges

[81] Subject to a few specific exceptions, the laying of indictable criminal charges is not subject to limitation periods (*Rourke*). (See also *R. v. Finta*, [1994] 1 S.C.R. 701.) Limitation periods in criminal law are the province of parliament, subject to judicial scrutiny only for constitutional compliance and the ability of courts to control their own processes to protect accused persons through the doctrine of abuse of process. The invocation of section 7 of the C*harter* to assist an accused person whose regularly constituted charges involve significant pre-charge delay has been carefully confined to

few and unusual circumstances where demonstrated prejudice to his or her fair trial rights or abuse of process is found.

ANALYSIS

Abuse of Process

[82] In this case the Judge did not find that the Respondents' fair trial interests were affected by the investigational delay. He rejected the argument that their rights to make full answer and defence had been compromised by the deaths of persons they asserted would be helpful to them, saying that "[t]he effect of the deaths of these persons on the ability to support the defence is, at best, speculative at this stage" (at paragraph 60). I agree with the Judge in this respect. Accordingly, no abuse of process based on prejudice to fair trial rights was established.

[83] The Judge's conclusion that abuse of process was established appears to have been based on his view that the investigatory delay was egregious and that the delay between 2007 and 2012 was "explained unsatisfactory [sic] as generally complex" (at paragraph 99), which together offended the community's sense of fair dealings and society's sense of justice, thus undermining "the integrity of the judicial process" (at paragraph 101). He supported this view by finding that the Crown had been in a position to lay charges in 2007 but had neither done so nor explained why it had not done so (at paragraphs 93-99). The Judge also found that the Respondents suffered personal prejudice which compromised their well-being and security (at paragraphs 55-57).

[84] I do not dispute that ten years is a long time to be investigating a complaint of criminal conduct. However, determining that investigatory or pre-charge delay constitutes abuse of process requires more than conclusive statements that the pre-charge delay was egregious and that the Respondents suffered an exacerbation of personal prejudice due to the passage of time. I would also note that egregiousness involved in residual category abuse of process relates to Crown conduct (*Anderson*, at paragraph 50). The Judge's use of the word to describe the pre-charge delay in this case makes a certain point, but not the point required to be made. What is required to make out abuse of process is egregious Crown conduct in the handling of the investigation. It is the Crown conduct that is in issue, not the length of the delay.

[85] A determination of abuse of process cannot be made in a vacuum and must be found in the factual background of the particular case. Accordingly, to properly review the determination, resort must be had to the evidence tendered on the Respondents' application.

[86] *Viva voce* evidence was received on the Respondents' *Charter* application from Respondents William Parsons and Hubert Hunt, R.C.M.P. investigator Sgt. J.L. Doyle, and forensic accountants Gregory G. Leeworthy and Gary Snow. Respondents William Hillyard and John King provided affidavit evidence but did not testify.

[87] Sgt. Doyle laid out the basis of the Superintendent's complaint, the time line of the investigation, and summarized the work undertaken by the police and forensic auditors. He testified that 18 R.C.M.P. officers participated in the investigation (the documentary evidence filed by Mr. Parsons suggests 28) and that in addition, police officers from the Royal Newfoundland Constabulary, the Federal Bureau of Investigation and various American municipal forces assisted in the investigation.

[88] The investigation was described at paragraph 46 of the Crown factum:

> The major case management unit hired six people to scan documents into their electronic database. The eventual electronic disclosure package would include the full contents of approximately 100 of the 850 boxes of H.E. business records, all documents seized at 306 search sites and 250 witness statements as well as all reports, documentation and notes of the investigators. Altogether there were over 734 000 documents including 170 000 exhibits scanned into the database which eventually became the electronic disclosure package. That disclosure is contained in 500 gigabyte hard drives.

[89] Some of the documentary evidence collected was located in St. John's at HE offices, but much was located at many other locations – 305 other locations to be precise. Much of it had to be obtained through the execution of search warrants or production orders, which first had to be judicially obtained. Between two hundred and fifty and three hundred witnesses from various places in Newfoundland and Labrador, other parts of Canada and the United States were interviewed. The electronic disclosure package included 734,000 documents contained in 500 gigabyte hard drives.

[90] Mr. Greg Leeworthy did the forensic analysis on Phase I of the investigation, which pertained to equipment "sold out of trust". Nearly 300 pieces of equipment were involved, and police were required to identify

them and each of their third party purchasers and respective financing institutions, and then collect the relevant evidence by warrant or production order before turning it over to the accountants for forensic analysis. Mr. Leeworthy began work in 2004 and finished his Phase I report in July 2009. He recorded 5,200 hours on the investigation, of which a small number was used to assist Mr. Gary Snow with Phase 2 of the forensic investigation.

[91] According to the Crown factum, Phase 2 concerned a forensic accounting analysis of HE's financial records in order to determine the reasons for the bankruptcy, the magnitude of and reasons for the losses to creditors, and whether and how those losses had been misstated in HE's accounting records. Mr. Snow began work on Phase 2 in June 2005 and completed his report in late April 2011. He recorded 6,395 hours on the investigation.

[92] The investigation involved many transactions, many people, many locations and much time. In short, it was both complex and massive. To describe it as less would be disingenuous.

[93] The evidence discloses no suggestion of improper conduct, wrongdoing, bad faith, improper motivation, or vexatiousness in the Crown's conduct of the investigation. The Respondents maintain, however, that oppression is the basis on which abuse of process is established, and they rely on Wilson J.'s words in *Keyowski* to support their argument.

[94] I agree with the Respondents that oppression does not have to involve Crown "malfeasance or misconduct". However, I am of the view that there must be some Crown conduct which can be fairly described as offensive, even if not made in bad faith or for an ulterior purpose, in order to constitute oppression so as to support a determination of abuse of process.

[95] Such conduct must rest on some positive action on the part of the oppressor and be rooted in the facts and circumstances of the Crown's conduct of the case. I am also of the view that the oppressive action must be apparent so as to permit an objective evaluation of it, and that it involve an element of injustice or unfairness, or at least result in injustice or unfairness to an accused.

[96] In this case the Judge stated that choices were made by the investigators that placed the Respondents in jeopardy "for the concurrent periods of their choice of those delayed timelines" (at paragraph 99). He

identified places in the investigation where he felt efficiencies could be gained (at paragraphs 78 to 86), but did not identify any conduct that could be described as oppressive. As well, I am unable to identify any choices made by the investigators that could be regarded as unjust or unfair or cause injustice or unfairness to the Respondents. The investigation was conducted in a professional manner with appropriate forensic and legal consultation. The length of time it took speaks to its enormity. Accordingly, I do not accept that the Crown oppressed the Respondents by virtue of its lengthy investigation. I note that even if there were Crown conduct which could be regarded as oppressive, it would have to be of magnitude that would tarnish the integrity of the justice system (*Nixon*, at paragraph 59) or seriously compromise its integrity (*Anderson*, at paragraph 50). This issue was at play in *R. v. Clarke*, 2015 NSSC 224, 363 N.S.R. (2d) 337, where the court found that the choices made by the investigatory team did not amount to abuse of process in the nine-year investigation of fraud relating to unlawfully affecting the public market price of an incorporated company, despite findings of mistake in the conduct of the investigation and that the investigation was significantly under resourced. The court refused to stay the charges.

[97] In this regard I acknowledge that it could be argued that proceeding with a criminal prosecution after a 10-year investigation is *per se* oppressive. Like Justice Wilson in *Keyowski*, I cannot say that there would never be a case where the exercise of Crown discretion to lay a criminal charge after a lengthy investigation would constitute abuse of process. However, such a finding, again, would have to be rooted in the facts and circumstances of the particular case, and would also involve consideration of what is involved in the integrity of the justice system and what it takes to undermine it.

[98] In addition to not seeing oppression in this case, I am also of the view that the lengthy pre-charge delay in this case does not undermine the integrity of the justice system.

[99] The notion that delay, in the absence of jeopardy to fair trial rights, Crown misconduct, or oppressive Crown conduct, can result in the staying of serious criminal charges, is very disturbing to me. It effectively means that charges laid after a lengthy investigation cannot be prosecuted on their merits, regardless of their complexity and volume. Complexity and volume involve time. It follows that the more complicated and voluminous the offence, the more likely that charges arising from it will be stayed. Such a result rewards sophisticated criminal conduct, and effectively imposes a

judicially determined limitation period on charges which take a long time to investigate simply because it is too difficult, time consuming, and/or expensive to do so.

[100] Complicated commercial crime is most often committed by persons in positions of power and influence and blessed with financial resources. Staying criminal charges in such cases translates into a pass for perpetrators of these crimes and could even be understood to widen the gap between the haves and have nots in our society and affect the perception that everyone is entitled to be treated equally before and under the law. Upholding the Judge's decision in this case amounts to an advance declaration that the most complicated, sophisticated crimes will not be prosecuted. To my mind, this result tarnishes and seriously compromises the integrity of the justice system, and accordingly would not establish abuse of process.

[101] The Judge also found that the Respondents suffered prejudice due to investigative delay. If established, such prejudice could result in a finding that the Respondents were deprived of their section 7 rights to security of the person, and could result in a breach if the deprivations were not in accordance with the fundamental principles of justice.

[102] Mr. Parsons and Mr. Hunt testified that they suffered stress and health problems due to being known in the community as having been involved in the HE bankruptcy and the media coverage of it. They also say that they had difficulty finding employment. They do not suggest that they were publically named. Neither is there any suggestion that the state was fueling media coverage of the bankruptcy or community gossip, or communicating with the Respondents' subsequent employers.

[103] I do not doubt that the Respondents were distressed by the media and community attention to the bankruptcy or that they suffered prejudice as a result. And I do not doubt that they had difficulties finding work after HE's bankruptcy. HE's bankruptcy and the surrounding circumstances were a big story in this small province. However, the state did not cause the bankruptcy or create the media and community attention to it, and neither did delay in the investigation create the publicity or gossip. In this regard, I note from the Judge's decision that Mr. Parsons suffered damage to his reputation in 2002 and lost his new job in 2004. The loss of his reputation and employment at these early points in the investigation can hardly be attributed to investigatory delay. Like the prejudice in *Blencoe*, this prejudice clearly resulted from the Respondents' association with HE, HE's bankruptcy and

media and public attention to it. While I agree that the Respondents' suspicions that they were subjects in the ongoing investigation caused them stress and anxiety, I do not accept that this stress anxiety has "a sufficient causal connection" (*Bedford*) to actions of the state, or is of a magnitude so as to result in a deprivation of their security of the person (*Blencoe*). Neither could I say that any exacerbation of their stress as a result of delay was not in accordance with the principles of fundamental justice. The delay was due to the massive and complex investigation legitimately carried out.

Review of the Investigation

[104] The Judge's remarks about when the Crown ought to have laid charges against the Respondents show that he engaged in a review of the efficiency of the Crown's investigation. While some review of Crown conduct in an investigation is required if abuse of process is alleged, judicial scrutinizing of an investigation for efficiency is, in my view, neither required nor appropriate. In my opinion, it is not part of the judicial role, as *Rourke*, *Mills*, *L.(W.K.)* and *Young* make clear. The reason why it is not the Judge's role to scrutinize an investigation for efficiency is because doing so conflates the roles of the judicial and executive branches of government.

[105] The Supreme Court discussed the roles of the executive, legislative and judicial branches of government in our constitutional democracy in *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, where the issue was whether the courts could use their inherent jurisdiction to set compensation rates for court-appointed *amicus curiae*. In ruling that they could not, McLachlin C.J. explained:

> [27] This Court has long recognized that our constitutional framework prescribes different roles for the executive, legislative and judicial branches (see *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 469-70). The content of these various constitutional roles has been shaped by the history and evolution of our constitutional order (see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 49-52).
>
> [28] … The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial adjudication of

> references and disputes, and protects the fundamental liberties and freedoms guaranteed under the Charter.
>
> [29] All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy. However, each branch will be unable to fulfill its role if it is unduly interfered with by the others. In *New Brunswick Broadcasting Co. v. Nova Scotia* (*Speaker of the House of Assembly*), [1993] 1 S.C.R. 319, McLachlin J. affirmed the importance of respecting the separate roles and institutional capacities of Canada's branches of government for our constitutional order, holding that "[i]t is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other" (p. 389).[3]

[106] Quite aside from whether the Judge ought to have engaged in a review of the investigation to determine when charges could have been laid, his conclusion that the Crown was in a position to charge the Appellants in 2007 or before is not supported by the evidence.

[107] The Judge found that the Crown ought to have laid charges against the Respondents in 2007, saying:

> "the Crown has to be taken as having the justification in hand to warrant the swearing of an Information"
>
> (at paragraph 93)

His following statements speak to his rationale:

(1) "there is no evidence by which I can conclude that these Phase I and II investigations would not be identifying persons effecting transactions as possible suspects" (at paragraph 88);

(2) "it would be unlikely that persons of interest were not identified to some extent at the time of the issue of the Superintendent's Investigative Order" and "presumably [the] victims could and did later in the Phase I and after Phase II investigation provide information identifying persons who would be responsible" (at paragraph 89);

(3) "… no explanation offered as to why these last five years passed without charges being laid," (at paragraph 93); and

(4) "there is no explanation given as to why it was not appropriate to proceed in 2007 or earlier prior to or as the investigation of Phases I and II proceeded" (paragraph 94).

[108] I note that the Judge's statements and conclusion are at odds with his statement at paragraph 90 of his decision that he could not determine when the Crown was in a position to lay charges against the Respondents "in the absence of the detail of such investigation".

[109] The evidentiary record shows that much investigatory work took place between 2007 until the charges were laid in 2012. Work on both forensic reports was ongoing during this period – the Phase I report was released to the RCMP on October 29, 2009 and the Phase II report was not released until April 20, 2011. While the majority of witness interviews took place between 2003 and 2007, seventeen witnesses were interviewed during 2008 and 2009. Police also met with Department of Justice officials during this period. In 2007 they sought legal advice on "the directing mind issue" and in 2011, upon their submission of the forensic reports to the Department of Justice, they sought advice respecting what charges ought to be laid.

[110] The Judge did not refer to any evidence on which he based his conclusion that the Crown could have laid charges against the Respondents in 2007. That is because there is none. Sgt. Doyle testified that in 2006 police were aware that the Respondents were implicated in many of the transactions, but at no time did he provide evidence from which the Judge could infer that there was basis to proceed with charges against them at an earlier point in time. The Judge's statements referred to in paragraph 42 above, show that he effectively placed the burden on the Crown to justify why charges had not been laid earlier. I know of no authority requiring the Crown to discharge such a burden. Moreover, the Crown witnesses were not asked if and when charges could have been laid earlier. On the other hand, there was evidence that in 2006 it had not been determined who would be charged, and that it had not been determined what charges would be laid in July, 2011 when police provided the fruits of the investigation to Department of Justice officials.

[111] Further comment respecting the Judge's conclusion that charges could have been laid in 2007 or earlier is required. The laying of criminal charges involves far more than identifying possible persons of interest or suspects. The administration of justice requires that criminal charges be laid in

compliance with certain investigatory standards. This is for everyone's protection, as Dubin J.A. observed in *Young*:

> …to compel the police or Crown counsel to institute proceedings before they have reason to believe that they will be able to establish the accused's guilt beyond a reasonable doubt would … have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself.

[112] The laying of criminal charges on notions of wrongdoing or incomplete evidence and before consideration has been given to the likelihood of conviction cannot enjoy the support of our criminal justice system. The Judge's conclusion demonstrates a failure to appreciate the necessity for police to respect and adhere to changing standards and protocols.

[113] My colleagues say that the investigatory delay has robbed the Respondents of the early chance to clear their names. I agree that a more timely trial would have given the Respondents an earlier opportunity for judicial determination of their charges. However, I do not agree that such a determination would necessarily restore their repute, make them employable, or clear their names (*Blencoe*, at paragraph 66). Moreover, I know of no authority that permits an individual to have him or herself charged on request for any reason, including for the early opportunity to be adjudged on charges laid.

[114] I also make the following observation, in response to the Judge's view that the Crown should have allocated more resources to this investigation. The record shows that significant resources were allocated to this investigation. While additional resources might have resulted in a small reduction in the time it took to investigate this complaint, as Sgt. Doyle acknowledged, there is nothing to suggest that the resources allocated were inordinately low. Commercial fraud allegations of this nature and scale are rare in this jurisdiction, and the province cannot be expected to maintain a standing army of expert investigators at the ready to attend only to a single investigation of this sort. Despite the challenges, the provincial justice system managed to marshal a large team dedicated to this investigation. Its slow pace demonstrates its massive scale.

[115] In the result, I would find no deprivation of the Respondents' section 7 rights to the security of their persons, and no abuse of process. Accordingly, I would not uphold the Judge's decision to stay the charges

against the Respondents. I would allow the Crown's appeal and remit the matter to the Supreme Court Trial Division for trial.

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L. R. Hoegg J.A.