CA016527
Vancouver Registry

Court of Appeal for British Columbia

BETWEEN:

REGINA

APPELLANT

AND:

HUBERT PATRICK O'CONNOR

RESPONDENT

AND:

ATTORNEY GENERAL OF CANADA;
CANADIAN MENTAL HEALTH ASSOCIATION; and
ABORIGINAL WOMEN'S COUNCIL
CANADIAN ASSOCIATION OF SEXUAL ASSAULT CENTRES
DAWN CANADA (Disabled Women's Network Canada), and
WOMEN'S LEGAL EDUCATION AND ACTION FUND

INTERVENORS

Before: The Honourable Mr. Justice Taylor
The Honourable Mr. Justice Wood
The Honourable Mr. Justice Hollinrake
The Honourable Madam Justice Rowles
The Honourable Madam Justice Prowse

M.D. Macaulay, Q.C. K.M. Trimmer	Counsel for the Crown (Appellant)
C.M. Considine D.R. McDonagh	Counsel for the Respondent
J.A. Van Iperen, Q.C. and M. Hewitt	Counsel for the Intervenor The Attorney General of Canada

F.M. Kelly	Counsel for the Intervenor Canadian Mental Health Association
F.M. Watters and G. M. Dickson	Counsel for the Intervenors Aboriginal Women's Council, Canadian Association of Sexual Assault Centres, DAWN Canada (Disabled Women's Network Canada), and Women's Legal Education and Action Fund
Place and Dates of Hearing:	Vancouver, British Columbia September 15, 16 and 17, 1993
Place and Date of Judgment:	Vancouver, British Columbia March 30, 1994

Written Reasons by the Court:

No. CA016527
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Regina

- v. -

Hubert Patrick O'Connor

- and -

Attorney General of Canada;
Canadian Mental Health Association; and
Aboriginal Women's Council
Canadian Association of Sexual Assault Centres
DAWN Canada (Disabled Women's Network Canada), and
Women's Legal Education and Action Fund

REASONS FOR JUDGMENT OF THE COURT

I

INTRODUCTION

1 The Crown appeals from a judicial stay of proceedings ordered with respect to all counts on an indictment against Hubert Patrick O'Connor alleging that:

> COUNT 1: between January 1st, 1964 and November 1st, 1967, at or near the City of Williams Lake, in the Province of British Columbia, [he] did have sexual intercourse with [PB], a female person who was not his wife, without her consent, **CONTRARY TO**...

COUNT 2: between December 1st, 1965 and September 30th, 1966, at or near the City of Williams Lake, in the Province of British Columbia, [he] did have sexual intercourse with [MAJ], a female person who was not his wife, without her consent, **CONTRARY TO**...

COUNT 3: between July 1st, 1965 and July 1st, 1967 at or near the City of Williams Lake, in the Province of British Columbia, [he] did indecently assault [RMD], a female person, **CONTRARY TO**...

COUNT 4: between August 1st, 1965 and December 31st, 1966, at or near the City of Williams Lake, in the Province of British Columbia, [he] did indecently assault [AEH], a female person, **CONTRARY TO**...

2 The stay of proceedings, which was ordered on the morning of the fourth day of O'Connor's trial before a Supreme Court judge sitting without a jury, resulted from the trial judge's conclusion that the Crown had failed in its legal obligation to make timely disclosure to the accused of information, including prior statements made to Crown counsel by several of the complainants, and because even then Crown counsel could not provide an assurance to the court that full disclosure of all such information had been made.

3 In reaching his decision to order the stay, the trial judge relied heavily on what he described as "an aura" which he found had pervaded and "now destroyed this case," as a result of an earlier failure by the Crown to comply in a timely way with a pre-trial disclosure order made by Campbell A.C.J. in June of 1992.

That order required the complainants, *inter alia*, to authorize all therapists, counsellors, psychologists or psychiatrists from whom they had received treatment or assistance to produce the complete content of their medical files to the Crown for ultimate delivery to the accused.

4 The Crown argues that this pre-trial disclosure order was made without grounds or jurisdiction. It is also argued that the trial judge erred in concluding that the Crown had not complied fully with its legal obligation to disclose, that in any event there was no prejudice or no substantial prejudice to the accused from any failure to disclose that may have occurred, and that the trial judge erred in failing to consider alternative remedies to a judicial stay of proceedings.

5 In support of these arguments, the Crown sought leave to adduce fresh evidence at the hearing of the appeal in the form of three affidavits, one by each of the Crown counsel at trial and one by a senior Ministry official who became involved in the problems associated with this case as those problems began to take on serious proportions. As is the usual practice in this court, we reserved on the fresh evidence application after hearing from counsel, but we indicated at that time that we did not consider the documents attached as exhibits to the affidavits, which

purported to contain both the disclosed and the non-disclosed information, to be "fresh evidence."

6 The grounds of appeal raise important issues with respect to a number of matters including the nature and extent of the Crown's legal obligation to make disclosure in a criminal case, and the obligation of the court when faced with the conflict which must inevitably arise between the right of an accused to make full answer and defence and the privacy interest which third parties may have in information which is said to be required for that purpose.

7 Because our judgment in connection with these two questions may have consequences far beyond the scope of this case, it was decided that five judges would sit and we permitted the intervention of several organizations which demonstrated a special interest in these issues, and whose views the court felt could be helpful. Our judgment in respect of the intervenor applications, handed down on 30 June 1993, is now reported: ***Re Regina and O'Connor*** (1993), 82 C.C.C. (3d) 495.

II

THE BACKGROUND FACTS

8 On 4 February 1991 a six count information was sworn alleging that between 1964 and 1967 Hubert Patrick O'Connor had committed two acts of rape, three indecent assaults, and one act of gross indecency against several young women. At the time of the alleged offences, O'Connor was a priest of the Roman Catholic Church, serving as principal of St. Joseph's Mission School, an Indian residential school located near William's Lake, British Columbia. Each of the complainants were former students employed by the school and under O'Connor's direct supervision.

9 After a three-day preliminary inquiry in July of 1991, during which one count of indecent assault was stayed by the Crown, the Provincial Court judge discharged O'Connor on the charge of gross indecency and committed him to stand trial on the remaining four charges.

10 On 3 September 1991 a trial date was set for 13 January 1992 in Williams Lake. The trial was scheduled to last two weeks. But on 23 December 1991 Mr. Considine appeared before Hutchison J. to request an adjournment on the ground that he simply had not had enough time to prepare. Many witnesses had yet to be interviewed, he said, and much investigation completed before the accused would be in a position properly to defend himself against these very old charges. The Crown, represented at this point by Mr. Jones of the Williams Lake Crown office, opposed the adjournment, although that

opposition faded when Mr. Considine agreed to "waive any Askov argument" in respect of the resulting delay in trial. It was pointed out to Hutchison J. that if the trial was adjourned the earliest new date available would be 15 June 1992, in Vancouver. The Crown did not oppose a change of venue. Accordingly, Hutchison J. ordered that the trial be adjourned to that date in Vancouver. He also ordered that the "Askov period" be waived for the period 13 January through 15 June.

11 On 27 April 1992 Mr. Considine wrote to Mr. Jones in Williams Lake asking, *inter alia*, for the medical records of the complainants when they were at St. Joseph's Mission School, their employment and academic records for the same period, and the medical records "with respect to any counselling or emotional therapy the complainants had undergone in the past three years." Compliance with this demand was requested by 1 May. On 30 April Ms. Harvey, a Vancouver based prosecutor who acted throughout as junior Crown counsel, requested information as to the existence and location of such records and suggested that since most of them were not within the possession of the Crown, the principles governing the Crown's obligation to disclose, as set out in ***R. v. Stinchcombe***, [1991] 3 S.C.R. 326, might not apply. A further response "setting out our position forthwith" was promised "within the next week" after counsel had considered their position.

12 When no further response was received from the Crown by 19 May, Mr Considine wrote again:

> Further to our recent correspondence, we would like you to provide us with a copy of any and all therapy records, documentation, reports, notes, etc. in relation to each of the complainants in this matter. Obviously, this is of extreme importance since recent medical evidence has indicated that much of the regression therapy which takes place is in fact not valid and false. We obviously would like to see this material forthwith.

13 It should be noted that while cross-examination at the preliminary inquiry had revealed that at least two of the complainants were then undergoing psychological therapy, it has not at any time been suggested that their allegations against O'Connor were the result of "regression therapy."

14 On 25 May 1992 Mr. Considine received a letter dated 11 May 1992, signed by Ms. Harvey, in which there was a brief, one-sentence description of the evidence of each of the fourteen witnesses the Crown expected to call at the forthcoming trial. Eleven of these witnesses had not been called at the preliminary inquiry. In response to the request for medical records, Ms. Harvey indicated she had received consent to disclose records relating to a heart attack suffered by one of the complainants, and that she would forward same when they were received. There was no mention of, and no response to, Mr. Considine's demand for the therapy records of the complainants.

15 This exchange of correspondence led Mr. Considine to bring on two motions simultaneously, both of which were heard before Campbell A.C.J. on 4 June 1992. The first sought an order in the following terms:

> 1)Crown to produce names, addresses and telephone numbers of therapists, counsellors, psychologists or psychiatrists whom [sic] have treated any of the complainants with respect to allegations of sexual assault or sexual abuse;
>
> 2)The complainants authorize all therapists, counsellors, psychologists and psychiatrist whom [sic] have treated any of them with respect to allegations of sexual assault or sexual abuse, to produce to the Crown copies of their complete file contents and any other related material including all documents, notes, records, reports, tape recordings and videotapes, and the Crown to provide copies of all this material to counsel for the accused forthwith;
>
> 3)The complainants authorize the Crown to obtain all school and employment records while they were in attendance at St. Joseph's Mission School and that the Crown provide those records to counsel for the accused forthwith;
>
> 4)The complainants authorize the production of all medical records from the period of time when they were resident at St. Joseph's Mission School as either students or employees.

16 The second application was for an adjournment of the trial, then set to begin in eleven days. The basis for this application was twofold. Firstly, there was the late disclosure by the Crown of the long list of "new" witnesses and the "inadequate" disclosure of the anticipated content of their evidence, which

required the defence to "investigate" the matter further. Secondly, there was the failure of the Crown to comply with the request of 27 April to provide the information described in the motion as set out above. It was suggested that if the order sought in that connection were granted, it would be impossible for the Crown to comply with it, or for counsel to review the information provided, before the trial date then set.

17 In support of the order relating to the therapy records, Mr. Considine argued:

> My lord, the importance of psychiatric and psychological counselling records with respect to accused person's ability to help defend themselves is evident -- self-evident. It is for the purpose of testing the credibility of the complainants, determining issues such as recent complaint, corroboration, contradictory statements, et cetera.

18 Referring vaguely to what he described as a "very, very large policy issue," Mr. Jones pointed out that the therapy records described in paragraph 2 of the motion were not then in the possession of the Crown and that in his view they could not be produced without the consent of the complainant/patient. No such consent would be forthcoming, he said. Furthermore, in connection with the complainant named in count 2, who now resides in Alberta, the court could not compel the production of such records which were outside the jurisdiction of the court. Mr. Jones also questioned the relevance of therapy records, and he raised the

rhetorical question of what would happen to the complainants if they chose to disregard any such order that the court might make.

19 With respect to the records described in paragraphs 3 and 4 of the motion, Mr. Jones pointed out that they too were not then in the possession of the Crown, and he suggested that if the Crown was required to obtain them, they would simply have to turn to the Oblates of St. Mary Immaculate, the order of which O'Connor was a member and which ran St. Joseph's Mission School during the relevant period of time. He also questioned the relevance of these records, but in the end made no strong opposition to the orders sought in those two paragraphs. He did not oppose the order sought in paragraph 1 of the motion.

20 As for the adjournment, Mr. Jones made reference to the untimely nature of the sudden eleventh hour flurry of demands for disclosure of specific information, the existence of which would have been known to Mr. Considine since at least the end of the preliminary inquiry. He also pointed out that most of the "new" witnesses had little of consequence to say, and in any event their evidence was well known to the accused. But he conceded that the witness list contained in Ms. Harvey's letter of 11 May had been drawn in preparation for the January trial date and that, by some

oversight, had not then been sent to defence counsel. In the end he did not strenuously oppose the adjournment.

21 On the conclusion of submissions, Campbell A.C.J. made a disclosure order in the terms set out in paragraphs 1 to 4 of the motion. He also adjourned the trial generally with instructions to counsel to consult with the trial co-ordinator. On 15 June a new trial date of 30 November 1992 was set by Oppal J.

22 The next event of significance was the appearance of counsel before Low J. on 9 July, at which time both Mr. Jones and Ms. Harvey were present for the Crown. Mr. Jones advised the court that the Crown was seeking "a direction." The complainants, he said, were refusing to comply with the provision of the order of Campbell A.C.J. which required them to authorize their therapists to turn over their complete file to the Crown for ultimate delivery to the defence. He asked Low J. to appoint a trial judge so that the Crown could bring on an application for a declaration that the content of the therapy files was covered by "a public privilege," and was "not admissible in evidence." He described the issue to be resolved as "a very large public policy issue" going

> to the very root of what is necessary to ensure a fair trial for an accused balanced against the privacy rights of the complainants

and he expressed the Crown's desire to achieve an early resolution of the issue. Mr. Justice Low, who reminded counsel that he had no authority to appoint a trial judge, indicated that he would do what could be done to expedite that step in the proceedings.

23 The matter next came on before Oppal J. on 21 September, at which time the Crown sought an order changing the venue of the trial back to Williams Lake. During the course of argument on that application Mr. Considine complained that there still had not been compliance with the order of 4 June relating to the complainants' therapy files. Mr. Jones, who again appeared with Ms. Harvey, expressed the opinion that the Associate Chief Justice had no jurisdiction to make the order he did because he was not the trial judge. He also reiterated the Crown's position that "as a matter of public policy" therapists' notes and files ought not to be disclosed. Mr. Justice Oppal expressed surprise at the Crown's position, which seemed to him to be that an order of the court could be ignored if counsel did not agree with it. Mr. Jones replied that an appeal of the order "would not be appropriate," and that the only other "avenue" was a "writ of supersedeas" which he did not think would apply to a criminal proceeding. The application for a change of venue was dismissed.

24 On 16 October Thackray J., who by then had been appointed the trial judge, heard two applications. The first was yet another

application by the Crown for directions. Acknowledging that what he should have done initially was to have gone back before Campbell A.C.J. to seek a variation of the order of 4 June, Mr. Jones' position with respect to that order had changed. He no longer took the position that it could be disregarded. At that point he had in his possession copies of notes from the clinical file of a psychologist who had been acting as therapist to the complainant named in count 1 of the indictment. He simply suggested that they should be reviewed by the trial judge for relevance, before being turned over to defence counsel. That was done. The trial judge concluded that there was nothing of an embarrassing or sensitive nature in the records. At the same time he could see nothing that was "clearly irrelevant." He therefore ordered that they be produced to the defence. During the luncheon recess on that date Mr. Jones spoke by telephone to the complainant named in count 2 of the indictment, following which he advised the court that she agreed to instruct her therapists to release the content of her files to the court.

25 The second application heard by the trial judge on 16 October was for a stay of proceedings. Although the written motion filed by Mr. Considine alleged violations of O'Connor's rights under ss. 11(b), 11(d), and 7 of the *Charter*, the argument advanced was based on the common law doctrine of abuse of process. The essence of that argument was that the lengthy delay in the laying of charges

made it impossible for O'Connor to defend himself adequately. Employment and medical files from the school were no longer in existence, potential witnesses had died, others were no longer competent to give evidence, and the memory of everyone, including the complainants, had been so adversely affected by the passage of time as to destroy the credit of their evidence. In light of the developments that morning, and at the trial judge's suggestion, Mr. Considine did not argue that the failure of the Crown to comply with the order of Campbell A.C.J. could justify a stay of proceedings, either on its own footing or as an aggravating feature of the other circumstances on which the stay application was based.

26 On 22 October, the trial judge delivered written reasons in which he rejected the argument that the accused could not receive a fair trial because of the length of time which had elapsed before the charges were laid.

27 The next motion by Mr. Considine, on 30 October, was in the form of a petition under the ***Judicial Review Procedure Act***, seeking an order in the nature of *certiorari*, quashing the committal for trial on count 4 of the indictment on the grounds that there was no evidence of an indecent assault. Again the trial judge reserved decision and on 5 November he gave written reasons dismissing the petition.

28 When argument concluded on 30 October, Mr. Jones gave the trial judge a set of therapist's notes relating to the complainant named in count 2 of the indictment. At that time he indicated that Ms. Harvey wished to make an application with respect to the notes, but that she was unable to be there that day. He asked that the trial judge not release the notes to defence counsel until he had heard from Ms. Harvey.

29 On 19 November Mr. Considine made another motion, this time seeking an order quashing all counts on the ground that, contrary to s. 581(3) of the ***Criminal Code***, they did not contain sufficient detail of the circumstances of the alleged offence to give the accused reasonable information with respect to the act or omission to be proved against him. Again, after reserving judgment, the trial judge delivered written reasons on 24 November dismissing the motion.

30 At the conclusion of the s. 581(3) argument on 19 November, the trial judge heard further submissions from Mr. Jones on the therapist's records which had been given to him on 30 October. He concluded that he could not say they were irrelevant, and he ordered them disclosed to Mr. Considine and the accused, on the understanding that they would not be released "to the public."

31 Mr. Considine then raised a new matter, relating to a personal diary which had been kept by the complainant named in count 3 of the indictment. The existence of this diary had been revealed during cross-examination of the witness at the preliminary inquiry. Ms. Harvey had provided a summary of those portions of the diary which she believed to be relevant. Mr. Considine wanted the whole diary in order to make that determination for himself. Mr. Jones opposed that demand. The trial judge indicated Mr. Considine would have to bring on an application as there was no time to deal with the matter that day. In anticipation that such an application would be made, he was given a copy of the diary so that he could familiarize himself with its content.

32 That application was made on 26 November 1992, the Thursday before the Monday on which the trial was to commence. It continued throughout that day and into Friday, 27 November. In a motion filed on 23 November, Mr. Considine had sought full and unrestricted access to the complete diary of the complainant named in count 3 of the indictment. He also sought more medical or therapist records and the complete R.C.M.P. file in connection with the case. The motion also indicated that an application would be made for a stay of proceedings based on the doctrine of abuse of process. By the time the application came on for argument, however, a new series of problems had arisen.

33 Mr. Considine advised the trial judge that in the previous two or three days he had discovered that the complete medical and therapy records of the complaints had not in fact been produced in accordance with either the order of 4 June or his understanding of Crown counsel's assurances at the close of proceedings on 19 November. Instead, it was then apparent that in letters sent on 16 June 1992, Ms. Harvey had instructed all therapists that only those portions of their records relating directly to the incidents involving the accused need be sent. It had also come to light, through a letter which she wrote on 8 July to the complainant named in count 1 of the indictment, that Ms. Harvey intended to take no action in respect of the order of Campbell A.C.J. until she had asked "the Justice" for further directions. As is by now obvious, at no time was any application brought before the Associate Chief Justice to have the terms of his order varied.

34 From Mr. Considine's submissions, which were not disputed by the Crown in this regard, it was apparent that the vast bulk of the records of a total of six therapists, which were covered by the terms of the order of 4 June, had not been produced, even to the Crown, as of 26 November. On the record before us, it would appear that this must inevitably have been the result of Ms. Harvey's letters of 16 June, since when contacted later in the day on 26 November all complainants and therapists readily complied

with the order. Over the course of the next few days all such records found their way into the hands of the defence.

35 Returning to the events of 26 November, Mr. Considine went on to describe as well that as late as the previous day, and only as a result of his insistence that Mr. Jones produce Ms. Harvey's entire file to him, he had been given what appeared to be two partial transcripts of interviews conducted in December of 1991 by Ms. Harvey, one with the complainant named in count 2 and the other with that person's aunt. The former, he said, contained statements by the complainant which were materially different from both her prior statements and her evidence at the preliminary inquiry. The latter was said to contain statements which contradicted the evidence of her niece in some material respect.

36 Mr. Considine stated that he had lost all confidence in the willingness or the ability of the Crown to make full disclosure to him as required by law, and he argued that a stay of proceedings was justified under the common law doctrine of abuse of process.

37 Ms. Harvey responded to the motion. As to the partial transcripts of the interviews with the two witnesses in December of 1991, Ms. Harvey explained that her practice with respect to such interviews was to record them and have those portions she thought relevant transcribed. She had been of the understanding

that she had provided copies to Mr. Considine and when it became apparent to her that she had not, she could only suggest that her "recollection" of a having done so must have been the product of a dream. In her submission, the failure to disclose these partial transcripts was an oversight.

38 On the subject of the diary, Ms. Harvey indicated that while the complainant named in count 3 of the indictment still did not want to release it to the defence, she had gone through it again and removed those pages which contained what she described as purely personal matters of no relevance to the trial and she was prepared to turn the balance over to Mr. Considine.

39 Ms. Harvey defended her reluctance to comply with the order of the Associate Chief Justice on the ground that she did not think the order was enforceable as against the individuals who were outside the jurisdiction of the court and that it was, in any event, too broad in its scope with the result that it did not adequately protect the privacy interests of the complainants. In a long, rambling submission that was sometimes difficult to follow, she made the point that to expose the complainants to the ordeal of having their private communications with their therapists exposed to public view would be, in effect, to re-victimize them, and that if such practice were to be followed it would ultimately inhibit many victims of sexual assault from

reporting such crimes or following through with their prosecution.

40 At one point in her submissions, Ms. Harvey made comments suggesting that the order made by the Associate Chief Justice was prompted or motivated by gender-bias, and that those who sought to enforce the order, specifically Mr. Considine, were likewise influenced. At that point the trial judge warned her that he would hear no more of such suggestions. When Ms. Harvey persisted with those suggestions, he briefly adjourned court. When proceedings resumed, Ms. Harvey's submissions continued without further incident.

41 The trial judge gave lengthy and carefully considered oral reasons later on 27 November, in which he dismissed the motion for a stay. He refused to order production of the balance of the diary of the complainant named in count 3. In his view Ms. Harvey's summary together with the portions which had been released were sufficient to meet the needs of the defence at that time. He accepted that the Crown's failures to disclose that which ought to have been disclosed were the combined result of oversight and a breakdown in communications resulting from the fact that the two Crown counsel were operating out of different offices, but he termed these excuses "limp" in the circumstances. He characterized as "totally unacceptable" the conduct of Ms.

Harvey in limiting the scope of the order of 4 June when issuing instructions to the therapists, but rejected the suggestion that her conduct was the manifestation of a "grand design." He characterized as "bordering on the embarrassing" Ms. Harvey's excuse that she relied on what must have been a dream in thinking that she had disclosed the transcribed interviews from December of 1991, but he could see no prejudice to the accused from their late delivery. In concluding his reasons, the trial judge said this:

> Mr. Considine has good reason to be annoyed. He has been put to needless effort and expense because of the dilly-dallying of Crown counsel. He eloquently advanced submissions for a stay of proceedings. While I am critical of Crown counsel, I must peel away the annoyance of Mr. Considine, consider but not overreact to the conduct of Ms. Harvey, and then consider the substance of the motions.
>
> In total the submissions are disturbing. ***However, I do not believe there was a deliberate plan to subvert justice***. I do not believe that the Crown's conduct would lead the public to hold the system of justice in disrepute. My findings are a reflection upon the quality of legal services delivered in this case by the Crown.
>
> The applications are dismissed. (emphasis added)

42 The trial judge then went on to comment specifically on Ms. Harvey's suggestion that the order of the Associate Chief Justice, as well as Mr. Considine's efforts to enforce it, were the product of gender bias. He characterized her conduct as "unacceptable." In his view she had

> graphically demonstrated that in this case she is incapable of distinguishing between her personal objectives and her professional responsibilities.

43 The trial judge then adjourned the trial to start on Tuesday, 1 December, rather than on the Monday, in the hope that all medical records and other information that remained to be disclosed could be turned over to the defence over the weekend. The plan was for counsel to appear before the court on Monday morning in a pre-trial conference to see what progress had by then been made.

44 On Monday morning Mr. Considine announced that he had just received four large binders of material from the Crown, each one relating to a count on the indictment. He had not yet had a chance to review that material and he sought a further adjournment of one day. His request was granted and the trial was then set to begin on Wednesday, 2 December.

45 When the trial began on Wednesday morning, the trial judge first heard and then dismissed an application for particulars. The first witness for the Crown was an expert anthropologist who gave evidence of misunderstandings in communications between people that occur because of cultural differences, evidence said to be relevant to the issue of consent on counts 1 and 2. The next witness was a woman who attended St. Joseph's Mission School as a student in the 1950s and early 1960s. She gave evidence of the general layout of the school and the daily routine followed by

children and staff. As she attended the school for a total of thirteen years, she was there when O'Connor arrived and took over as principal. She knew each of the complainants, who were also at the school when she was there.

46 The third witness for the Crown was the complainant named in count 1 of the indictment. After some background evidence, she was led to the point where she was ready to describe the incident which formed the substance of that charge. Ms. Harvey asked her if there was some way in which she would like to "tell" what happened that would be "easier" for her. The witness indicated that she would like to draw a picture. Mr. Considine objected that he had not been told about this, and he surmised that the witness must previously have discussed this technique of giving evidence, and probably would have drawn pictures as part of that discussion. If that were so, he suggested it might completely change his whole approach to the case.

47 After a brief adjournment, it was revealed that there was, indeed, "a drawing" which the witness had previously made and that a copy of it would shortly be provided to the defence. After a further adjournment Mr. Considine advised the trial judge that he had now seen the drawing and that what the witness was "saying" on the drawing was different from what she had said at the preliminary inquiry. Mr. Jones disagreed with that assessment.

The trial judge ruled that the witness would give her evidence in the ordinary way, without the use of any drawings. The witness then resumed the stand and described the events giving rise to the charge in count 1 of the indictment. When she was asked whether such incidents occurred again, there was an objection and, in light of the hour, proceedings were adjourned for the day.

48 When court resumed the next morning, Mr. Considine rose to object that he had not been given notice or copies of the drawings made by the witness who was then on the stand, which drawings apparently contained notations by Ms. Harvey. He further stated that after court adjourned the previous afternoon he was given eight more sets of drawings, prepared apparently by other witnesses. As well, he complained again about all of the disclosure problems he had encountered.

49 The trial judge noted that Ms. Harvey was not in the court room and asked if she should be present. Mr. Jones said that she should and he asked for an adjournment. He was either unable or unwilling to explain to the court where Ms. Harvey was. At Mr. Jones' request the matter was adjourned until 11:00 a.m.

50 When proceedings resumed Ms. Harvey was still not present. Mr. Considine announced his intention to make a further motion for a judicial stay of proceedings based on the common law doctrine of

abuse of process. He announced that Mr. Jones had just told him "that he cannot assure me that I have received full disclosure by the Crown."

51 When the trial judge again expressed his concern over the absence of Ms. Harvey, Mr. Jones stated that it would not be appropriate for the motion to be heard in her absence:

> I would ask the Court not to hear the motion in Ms. Harvey's absence. I can tell the Court that there is a serious question concerning me personally as to whether I feel that I ought to argue that particular motion. As I said earlier, my lord, I would ask not to be pressed on this point, but --
>
> ...
>
> I'm in the position of having to, at the very least, seek further instructions. It is a highly sensitive issue, my lord. That I would simply beg the Court's indulgence to put this over till two o'clock until some very serious issues can be resolved one way or the other as to how this matter is going to be pursued by the Crown.

52 After further argument, and some reflection, the trial judge granted the Crown's request for an adjournment.

53 When court resumed at 2:00 p.m., Ms. Harvey was present, however she did not speak. Mr. Jones began by advising the court that on the previous weekend, he and senior personnel from the Ministry had met with Mr. Considine and agreed to waive any privilege and to disclose all information that existed on the Crown's files at that time. Staff were instructed to strip all

the files and to prepare separate binders for the information and material relating to each count. That had been done, and the binders had been delivered to Mr. Considine on Monday morning. However, in stripping the files, the staff had overlooked Ms. Harvey's computer files, and it appeared that the binders were not complete. He had just delivered to Mr. Considine some further materials from Ms. Harvey's computer files. One of the documents appeared to be a complete version of the partial transcript of the December 1991 interview with the complainant named in count 1 of the indictment, a partial transcript of which had been disclosed to the defence for the first time on 25 November. As well there were some other "notes" of Ms. Harvey which he had just given to Mr. Considine.

54 Mr. Jones made the point that neither he nor Mr. Considine had yet had a chance to determine whether the new "information" which had come to light was relevant in the sense that it presented any statements by the witness which were materially different from her previous testimony. He asked for, and was granted, a brief adjournment in order to review it. When court resumed, he took the position that there was nothing new in that "new" information. He stated that without thoroughly searching through the materials which his staff were at that very moment in the process of down-loading from the Ms. Harvey's computer files, he was in no position to assure the court that all disclosable

information had been given to the defence. Mr. Considine then pressed on with his motion for a stay of proceedings.

55 The trial judge reserved decision on the motion over the weekend. On Monday morning, 7 December, he delivered reasons for judgment ordering a judicial stay of proceedings.

III

GROUNDS OF APPEAL

56

The appellant's factum sets out four grounds of appeal;

1. The learned Associate Chief Justice erred in ordering the Complainants to consent to the release of certain information, which Order was made without grounds and without jurisdiction.

2. The learned Trial Judge erred in concluding that the Crown had not complied fully with its legal obligations with respect to the disclosure to the Defence of all relevant information within its possession.

3. The learned Trial Judge erred in determining that any prejudice or, in the alternative, any substantial prejudice flowed to the Accused from any failure to disclose on the part of the Crown.

4. The learned Trial judge erred in not appropriately considering alternative remedies to a judicial stay for any breach of the respondent's rights.

57 Grounds 2 through 4 can conveniently be dealt with together, as they are intertwined with the same principles and evidence. With that adjustment we will deal with the grounds of alleged error in the order set out above. It is first necessary, however, to dispose of the Crown's application to adduce fresh evidence on the appeal.

IV

THE APPLICATION TO ADDUCE FRESH EVIDENCE

58 The fresh evidence took the form of three affidavits, one each from Mr. Jones and Ms. Harvey, and one from Ernest James Quantz, Director of Operations in the Criminal Justice Branch of the Attorney General's Ministry. A purpose common to all three affidavits is to demonstrate the lengths to which the Crown went in an effort to ensure full disclosure to the defence of all available information.

59 A subsidiary purpose of the affidavits of Ms. Harvey and Mr. Quantz is to explain the former's absence from court on the

morning of 4 December 1992 as a result of which the proceedings were twice adjourned.

60 A further purpose of Ms. Harvey's affidavit is to explain how it was that "new" documents came to light as late as 2:00 p.m. on the afternoon of 4 December.

61 The affidavit of Mr. Jones has appended to it as exhibits some ten volumes of "documents," consisting of over 1400 pages, which are said to be the content of the "computer files" which the staff were in the process of down-loading at the time when he was responding to Mr. Considine's final motion for a stay of proceedings.

62 The basis upon which this court may accept and act upon fresh evidence is not in doubt. In ***Palmer v. The Queen***, [1980] 1 S.C.R. 759, McIntyre J. set out the governing principles:

> Parliament has given the Court of Appeal a broad discretion in s. 610(1)(d) [now s. 683(1)(d)]. The overriding consideration must be in the words of the enactment "the interests of justice".... Applications of this nature have been frequent and courts of appeal in various provinces have pronounced upon them - see for example ***Regina v. Stewart***; ***Regina v. Foster***; ***Regina v. McDonald; Regina v. Demeter***. From these and other cases, many of which are referred to in the above authorities, the following principles have emerged:
>
> (1)The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be

> applied as strictly in a criminal case as in civil cases: see ***McMartin v. The Queen*** .
>
> (2)The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3)The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4)It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. (p. 775; citations omitted)

63 Applying these principles to this case, we would not admit the fresh evidence. To begin with, both Mr. Jones and Ms. Harvey had every opportunity to make whatever explanations they felt appropriate at the time when the events in question were unfolding before the court. The trial judge adjourned proceedings twice on the morning of 4 December to permit either Ms. Harvey to come before him for that purpose, or Mr. Jones to take the "instructions" he spoke about during the course of his submissions, which instructions presumably would have enabled him to make the explanations in the absence of Ms. Harvey. When he adjourned court that afternoon, the trial judge advised counsel that he would consider and decide the motion for a stay on the basis of the situation as it existed at that time, and that if either counsel felt it would be incorrect to do so, or if there were further developments over the weekend, he would hear further from counsel on Monday morning. When court convened on the

Monday, no one rose to speak. While the "due diligence" requirement will be relaxed in those circumstances where failure to satisfy it is "overborne by the other factors", this is not such a case: ***Regina v. McAnespie***, [1993] 4 S.C.R. 501.

64 Furthermore, the gist of Crown counsel's efforts to make disclosure, and in particular the exceptional step which was taken when all privilege was waived and their "files" were thrown open to defence counsel, was put before the court below, albeit inarticulately, during the course of Mr. Jones' submissions on 4 December. Thus, while the explanations proffered are relevant in that they have the potential to bear upon a decisive or potentially decisive issue in the case, their admission would add nothing to what is already there. In that sense they could not be expected to affect the outcome of the appeal.

65 As for the explanation of Ms. Harvey's absence from court on the morning of 4 December, the trial judge made it very clear that he did not take any offence on that account. In any event, it is not at all apparent from reading his reasons for judgment that his decision to grant the stay of proceedings was in any way influenced by her absence.

66 If we are wrong in this respect, we feel compelled to say the two paragraphs, one each in the affidavits of Ms. Harvey and Mr.

Quantz, are of no assistance whatsoever in understanding why Ms. Harvey was not in court on the morning in question. For while the two paragraphs, which bear a striking similarity in their wording, are obviously intended to give the appearance of an explanation, they provide none. They do no more than perpetuate the mystery which surrounded the unwillingness of both Mr. Jones and Mr. Considine to tell the trial judge what they both obviously knew.

V

THE ORDER OF ASSOCIATE CHIEF JUSTICE CAMPBELL WAS MADE WITHOUT GROUNDS AND WITHOUT JURISDICTION

67 The short answer to this ground of appeal is to be found in the decision of this court in ***Canadian Transport (U.K.) v. Alsbury et al., Tony Poje and 14 Others and Attorney-General of British Columbia*** (1952), 105 C.C.C. 20; aff'd [1953] 1 S.C.R. 516.

68 That was a case of contempt of court arising from continued picketing by members of a labour union in the face of an injunction enjoining such conduct. On appeal to this court from

conviction, it was argued that the injunction order was a nullity.

In answer to that submission, Sidney-Smith J.A. noted:

> To this the general answer is made that the order of a Superior Court is ***never*** a nullity; but however wrong or irregular, still binds, cannot be questioned collaterally, and has full force until reversed on appeal. This seems to be established by the authorities cited by counsel for the Attorney-general, *viz*., ***Scott v. Bennett*** (1871), 5 H.L. 234 at p. 245; ***Revell v. Blake*** (1873), L.R. 8 C.P. 533 at p. 544; ***Scotia Construction Co. v. Halifax***, [1935] 1 D.L.R. 316, S.C.R. 124;... (p. 44)

69 The same view was expressed by Bird J.A. After reviewing the various arguments advanced in support of the assertion that the injunction in question was a nullity, he noted:

> None of the questions raised in these submissions in my opinion go to the jurisdiction of a Court which is a superior Court of Record, *i.e.*, of general jurisdiction. Each of the grounds relied upon no doubt is proper matter for consideration upon an appeal from such an order when an Appellate Court, because of one or more of the alleged defects, might determine that the order could not be sustained; but that is far from saying that a party to an action or one acting in his interest, while the order stands unchallenged, may with impunity disobey or ignore that order because he or they consider it to be invalid.
>
> The order under review is that of a Superior Court of Record, ***and is binding and conclusive on all the world until it is set aside, or varied on appeal. No such order may be treated as a nullity.*** (p. 57; emphasis added)

70 This was the point which both Ms. Harvey and Mr. Jones failed to grasp. Once made, the order of the Associate Chief Justice bound the Crown until it was either varied or set aside on appeal.

Appeal to this court was not only "not appropriate" as Mr. Jones suggested to Oppal J. on 21 September, but entirely unauthorized by the ***Criminal Code***.

71 What was not beyond the ingenuity of counsel, however, was an application to the Associate Chief Justice to vary the terms of the order. Such an application, had it been made, would obviously have solved one aspect of the Crown's disclosure problems before it even got started, because, whether or not a sufficient basis for production of the documents to the court had in law been established, once the trial judge adopted a procedure for *in camera* examination of the records for relevance, as Mr. Jones advised the court, the complainants withdrew their opposition to the order of 4 June, 1992.

72 It is important to note here that there are legitimate concerns to be raised with respect to the procedure by which the order of 4 June was sought and obtained.

73 Those problems included: (i) the fact that neither the complainants, who clearly had a privacy interest in the records, nor the therapists, who had at least a property interest in them, were given notice of the application; and (ii) the fact that nothing designed to minimize the intrusion into third party privacy interests was incorporated into the order. In short,

there was no proper representation of the interests of the complainants and the therapists before the Associate Chief Justice. Furthermore, there was no inquiry into the potential relevance or materiality of the records. These problems were recognized by the trial judge when he came to consider the matter on 16 October, and with the concurrence of the Associate Chief Justice he immediately took steps to remedy them to the extent that then was possible.

74 In that respect, it must be said that the judges of this province, no matter in which court they sit, are faced with ever-increasing workloads and less and less time for reflection. In these circumstances, they must of necessity, and are at all times entitled to, rely on counsel to ensure that all proper considerations are placed before them. The Associate Chief Justice did not receive the assistance of counsel, in this respect, to which he was entitled when the application relating to the therapy records was made before him on 4 June.

75 But none of these concerns can excuse the conduct of Crown counsel in failing either to apply for a variation of, or to give effect to, the order in question. Nor can any such defects as may be seen to exist in the order assist the Crown on this appeal. For it was the conduct of Crown counsel, not the late delivery of

the therapy records, which lay at the heart of the trial judge's decision to enter a stay.

76 The issue as to the regularity of the order is, in any event, moot. The order was complied with before the trial began. There was no part of the order left outstanding at the time the final application for a stay of proceedings was made. Thus, the only aspect of the order which was relevant to the trial judge's decision on the motion for a stay of proceedings, was the conduct of counsel in respect of that order, a consideration which stood to be viewed independently of the regularity of the order itself.

77 In the final part of this judgment, which will be delivered at a later date, we will consider the law and procedures which should be followed when an application such as that which came before the Associate Chief Justice is made. For the moment, we comment on only one aspect of the argument advanced by the Crown under this ground of appeal, namely, the assertion that the Associate Chief Justice had no jurisdiction to make the order in question because he was not the trial judge.

78 It is true that in ***Stinchcombe*** Sopinka J. suggests that an application for a disclosure order should be made to the trial judge, and normally it would be desirable that such a practice be followed. Relevance is likely to be a major issue on contested

disclosure hearings, and wherever possible, rulings on relevance should be left to the trial judge. But preliminary rulings are sometimes necessary before a trial judge has been appointed. Such rulings are not immutable, and no preliminary ruling on the issue of relevance, made in the context of a contested disclosure hearing, can bind the trial judge who is ultimately called upon to make a discrete ruling on that issue during the trial. That being so, there is no impediment, jurisdictional or otherwise, to a judge other than the trial judge making pre-trial disclosure orders when the necessity arises.

79 We would not give effect to this ground of appeal.

VI

DID THE TRIAL JUDGE ERR IN CONCLUDING THAT THE CROWN HAD NOT COMPLIED FULLY WITH ITS LEGAL OBLIGATIONS WITH RESPECT TO DISCLOSURE?

DID THE TRIAL JUDGE ERR IN DETERMINING THAT ANY PREJUDICE OR, ALTERNATIVELY SUBSTANTIAL PREJUDICE FLOWED FROM ANY FAILURE TO DISCLOSE ON THE PART OF THE CROWN?

DID THE TRIAL JUDGE ERR IN NOT CONSIDERING ALTERNATIVE REMEDIES TO A JUDICIAL STAY?

80 As we have indicated, it will be convenient to consider these three grounds of appeal together.

81 The stay application was argued and decided below, as it was argued before us, on the footing that the conduct of Crown counsel, including their failure initially to comply with the order of Campbell A.C.J., and subsequently to disclose what the trial judge described as all "compellable" documents, amounted to a common law abuse of process. The trial judge reached that conclusion, at least in part, because he felt that the prior conduct of Crown counsel had created the "aura" of an improper motive for the non-disclosures in question, and that to allow the trial to proceed would "tarnish the integrity of the Court." In his view this was one of the "clearest of cases", thus justifying the exercise of the court's discretion to stay the prosecution.

82 Counsel for the Crown on the appeal, who was not counsel at trial, argued that this was not one of the clearest of cases. Alternatively he argued that the trial judge erred in not considering "alternative" remedies to a judicial stay. When asked what alternatives would be available in the circumstances, counsel suggested that the order made by the trial judge was "tantamount" to a stay under s. 24(1) of the ***Charter***, and that any number of alternative remedies were therefore constitutionally available.

83 In our view, if the common law doctrine of abuse of process was properly invoked in this case, the only remedy available to the trial judge was a stay of proceedings. Historically, the focus of that doctrine has been on the integrity of the court's process, rather than on providing a "remedy" to the accused. The point was made by L'Heureux-Dubé J. in ***R. v. Conway***, [1989] 1 S.C.R. 1659 at 1667:

> Under the doctrine of abuse of process, the unfair or oppressive treatment of the appellant disentitles the Crown to carry on with the prosecution of the charge. The prosecution is set aside, not on the merits (see ***Jewitt***, *supra*, at p. 23), but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. The doctrine is one of the safeguards designed to ensure "that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society": ***Rothman v. The Queen***, [1981] S.C.R. 640..., per Lamer J. It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings.

84 To put it shortly, where the nature of the proceedings is such that the integrity of the court's process is undermined, the only possible remedy is to bring those proceedings to an end.

85 The focus of the ***Charter***, on the other hand, is on the rights of the individual. Sections 7 through 14 define the

constitutional balance which must be struck between those rights and the legitimate interests of the state in effective law enforcement. While it may be difficult to imagine an abuse of process which would not at the same time involve a breach of one or more of the legal rights guaranteed in ss. 7 through 14 of the ***Charter***, it does not follow that every breach of such a right will necessarily amount to an abuse of process.

86 If the application below had been brought under s. 24(1) of the ***Charter***, as a result of an alleged breach of the respondent's right under s. 7 of the ***Charter*** not to be deprived of his liberty except in accordance with the principles of fundamental justice, the focus of the application would inevitably have been on the rights of the respondent, not on the integrity of the court's process. In that event, had a breach of s. 7 been established, a variety of alternative remedies would have been available to the trial judge under s. 24(1).

87 The argument advanced by the Crown on this aspect of the appeal exemplifies an unresolved problem which has existed ever since the adoption, first by the Ontario Court of Appeal in ***R. v. Young*** (1984), 13 C.C.C. (3d) 1, and then by the Supreme Court of Canada in ***R. v. Jewitt***, [1985] 2 S.C.R. 128, of the modern or amplified doctrine of abuse of process established by the majority speeches in ***Connelly v. D.P.P.***, [1964] A.C. 1254. That problem is how to

rationalize the continued existence and application of the expanded common law doctrine with the application of the constitutionally mandated substantive and procedural legal rights found in the ***Charter***, a problem made no less difficult by the decision to define the former in language which closely parallels that found in s. 7 of the latter.

88 Counsel did not address this problem in their factums, nor did they respond to our invitation to do so in their oral arguments. In light of the specific grounds of appeal raised by the Crown, some consideration of it is unavoidable.

89 In ***R. v. Keyowski***, [1988] 1 S.C.R. 657, Wilson J. declined to accept counsel's agreement that the common law doctrine of abuse of process had been "subsumed" in s. 7 of the ***Charter***, and explicitly reserved that question for another day. That issue has yet to be addressed by the Supreme Court of Canada.

90 In ***R. v. Mack***, [1988] 2 S.C.R. 903, decided some eight months after ***Keyowski***, Lamer J. (as he then was) concluded that the "defence" of entrapment was more appropriately viewed as a specific application of the common law doctrine of abuse of process. In doing so he made the following comments, some of which may be viewed as suggesting that the common law doctrine enjoys an existence separate and apart from s. 7 of the ***Charter***:

It is my view that in criminal law the doctrine of abuse of process draws on the notion that the state is limited in the way it may deal with its citizens. The same may be said of the ***Charter*** which sets out particular limitations on state action and, as noted, in the criminal law context ss. 7 to 14 are especially significant. This court in ***Reference re s. 94(2) of the Motor Vehicle Act***, [1985] 2 S.C.R. 486, commented on the philosophical context in which these ***Charter*** provisions operate (at p. 503):

> Thus, ss. 8 to 14 provide an invaluable key to the meaning of "principles of fundamental justice". Many have been developed over time as presumptions of the common law, others have found expression in the international conventions on human rights. All *have been recognized as essential elements of a system for the administration of justice which is founded upon a belief in "the dignity and worth of the human person"* (preamble to the ***Canadian Bill of Rights***, R.S.C. 1970, App. III) *and on "the rule of law"* (preamble to the ***Canadian Charter of Rights and Freedoms***).
>
> *It is this common thread which, in my view, must guide us in determining the scope and content of "principles of fundamental justice". In other words, the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardians of the justice system*. Such an approach to the interpretation of "principles of fundamental justice" is consistent with the wording and structure of s. 7, the context of the section, *i.e.*, ss. 8 to 14, and the character and larger objects of the ***Charter*** itself. It provides meaningful content for the s. 7 guarantee all the while avoiding adjudication of policy matters.

(emphasis added.)

It is the belief that the administration of justice must be kept free from disrepute that compels recognition of the doctrine of entrapment. In the context of the ***Charter***, this court has stated that disrepute may arise from "judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies": ***Collins v. The Queen***, [1987] 1 S.C.R. 265 at p. 281. The same

> principle applies with respect to the common law doctrine of abuse of process. Conduct which is unacceptable is, in essence, that which violates our notions of "fair play" and "decency" and which shows blatant disregard for the qualities of humanness which all of us share.
>
> ...
>
> It must be stressed, however, that the central issue is not the power of a court to *discipline* police or prosecutorial conduct but, as stated by Estey J. in ***Amato***, *supra* (at p. 461): "the avoidance of the improper invocation by the State of the judicial process and its powers". In the entrapment context, the court's sense of justice is offended by the spectacle of an accused being convicted of an offence which is the work of the state (***Amato***, *supra*, at p. 447). The court is, in effect, saying it cannot condone or be seen to lend a stamp of approval to behaviour which transcends what our society perceives to be acceptable on the part of the state. The stay of the prosecution of the accused is the manifestation of the court's disapproval of the state's conduct. The issuance of the stay obviously benefits the accused but the court is primarily concerned with a larger issue: the maintenance of the public confidence in the legal and judicial process. In this way, the benefit to the accused is really a derivative one. We should affirm the decision of Estey J., in ***Amato***, *supra*, that *the basis upon which entrapment is recognized lies in the need to preserve the purity of the administration of justice*. (pp. 939-942)

91 In ***R. v. W.K.L.*** (1989), 51 C.C.C. (3d) 297, this court set aside a stay of proceedings which had been granted by the trial judge following an application brought under s. 24(1) of the ***Charter***. The application was based upon the alleged infringement of the accused's rights under ss. 7 and 11(d), resulting from pre-charge delay. There is no indication from the report that a common law abuse of process was alleged or argued before either the trial

judge or this court. In giving judgment, Legg J.A. noted (p. 301-2):

> Because it amounts to an acquittal, a judicial stay of proceedings is the most drastic of remedies and is reserved for only the clearest of cases: ***R. v. Jewitt*** (1985), 21 C.C.C. (3d) 7 at p. 14, 20 D.L.R. (4th) 651, [1985] 2 S.C.R. 128 (S.C.C.); ***R. v. Erickson*** (1984), 13 C.C.C. (3d) 269, [1984] 5 W.W.R. 577, 56 B.C.L.R. 247 (B.C.C.A.); ***R. v. Mack*** (1988), 44 C.C.C. (3d) 513 at p. 567, [1988] 2 S.C.R. 903, 67 C.R. (3d) 1 (S.C.C.) and ***R. v. Keyowski*** (1988), 40 C.C.C. (3d) 481 at 482, [1988] 1 S.C.R. 657, 62 C.R. (3d) 349 (S.C.C.).

The application of the burden of proof required to establish an abuse of process, to a claim for a remedy under s. 24(1) of the ***Charter***, would suggest that this court considered the common law doctrine to have been subsumed in s. 7. But from a review of the factums filed in that appeal it does not appear that the issue was addressed in argument, and in the course of dismissing a further appeal to the Supreme Court of Canada, Stevenson J. dealt separately with the issue of pre-charge delay as a potential abuse of process and as a potential violation of the appellant's s. 7 rights: see [1991] 1 S.C.R. 1091.

92 In ***Scott v. The Queen***, [1990] 3 S.C.R. 979, the Crown stayed proceedings to avoid a ruling by the trial judge which would have required a police witness to reveal the identity of an informer. The appellant complained that the immediate reinstitution of proceedings by the Crown before a different judge amounted to an

abuse of process, a ***Charter*** violation or both. An application for a stay on that basis was dismissed by both the trial judge and the Ontario Court of Appeal. In dismissing a further appeal to the Supreme Court of Canada on this ground, Cory J. for the majority noted (at p. 993):

> Neither the stay nor the reinstitution of the proceedings can be said to constitute ***either an abuse of process or an infringement of any Charter rights***. Locke Dist. Ct. J. and German Dist. Ct. J. were correct in their decision to refuse to grant Scott's application to stay the new trial. In my view this was not one of those rare but "clearest of cases" in which a stay of proceedings should be granted. (emphasis added)

While this passage would seem to recognize an abuse of process as something distinct from an infringement of a ***Charter*** right, the "clearest of cases" test is suggested as having application to a stay of proceedings irrespective of which is relied upon for a remedy.

93 In her dissent on this issue in ***Scott***, McLachlin J. expressed the only direct opinion we have been able to find on this question:

> This Court has recognized the doctrine of abuse of process, quite independently of the ***Charter***. (p. 1006)

After reviewing the passage from the judgment of L'Heureux-Dubé J. in ***Conway***, which has been reproduced above, McLachlin J. expressed

the view that the conduct of the Crown raised the spectre of "judge-shopping" which in turn raised concerns for the impartiality of the administration of justice, the dignity of the judiciary and the integrity of the judicial process.

94 Having concluded that the conduct of the Crown amounted to an abuse of process, McLachlin J. found it unnecessary to "consider the position under the *Charter*."

95 The foregoing is a sufficient review of current jurisprudence to indicate that there is presently no settled view on whether the common law doctrine has or has not been subsumed in s. 7 of the *Charter*. That being so, it is not surprising that there are few guidelines to be found in the cases as to what criteria, if any, can be employed to distinguish an infringement of an accused's *Charter* rights on the one hand from a common law abuse of process on the other.

96 It is tempting to conclude, as suggested by this court's decision in *W.K.L.*, that before a stay can be granted as a remedy under s. 24(1) of the *Charter* the infringement of the accused's constitutional rights must be of such magnitude as to threaten the integrity of the court's process.

97 But, if that is so, it would necessarily follow that in 1982 the common law doctrine of abuse of process was subsumed in the *Charter*. There is, in the authorities we have reviewed, a significant indication to the contrary. Furthermore, such a conclusion would be at odds with the entire analysis under s. 11(b) of the *Charter*, which to date has proceeded without any reference either to the threshold test for an abuse of process or, more importantly, to the "clearest of cases" standard: see *R. v. Askov*, [1990] 2 S.C.R. 1199 and *R. v. Morin*, [1992] 1 S.C.R. 771. This is so notwithstanding that the majority in both of these leading cases has held firmly to the view that a subsidiary purpose of s. 11(b) is to preserve society's respect for the administration of justice.

98 Like McLachlin J., we are of the view that the common law doctrine of abuse of process continues to exist quite independently of s. 7 of the *Charter*. As was noted by this court in *R. v. Light* (1993), 78 C.C.C. 221 at 245:

> It is quite true that the breach of an individual's legal rights under the *Charter* will often result in the very sort of prejudice, unfairness, or oppression which will in turn taint the integrity of the court whose process is enlisted in a related prosecution. But simply because both the breach of an individual right and the threat to the integrity of the court may derive from the same mischief, does not mean that the different principles governing the appropriate remedies ought to either be fused or confused.

99 We have already noted the different focus of the common law doctrine on the one hand and the constitutional rights found in ss. 7 through 14 of the ***Charter*** on the other. The different burden of proof applicable to each form of proceeding was noted by Bayda C.J.S. in the Saskatchewan Court of Appeal decision in ***R. v. Keyowski*** (1986), 28 C.C.C. (3d) 553 at 561-2:

> Counsel for the Attorney-General conceded - and rightly so - that if the circumstances of the present case justly give rise to a finding of an abuse of process, they would automatically give rise to a finding of violation of s. 7. The converse should also be true but for the matter of onus. Had this case been decided on the basis of s. 7, it would have been sufficient for the accused to prove ***on a balance of probabilities*** a violation of the 'principles of fundamental justice" as that phrase is used in s. 7.... By deciding the case on the basis of "abuse of process", it would appear necessary to apply the "clearest of cases" onus (the ***Young-Jewitt*** test) in determining whether that same violation of "the principles of fundamental justice" occurred. (emphasis in original)

100 These two circumstances are alone sufficient to persuade us that it is impossible to treat the common law doctrine as though it has been subsumed in s. 7 of the ***Charter***. There may well be a substantial overlap in the circumstances which would justify a remedy under either, but that is an anomaly which results as much from the concurrent language in which they are described as it does from the fact that in our society true respect for the judicial process is directly related to the extent to which that process preserves and protects the substantive and procedural

rights of all persons, including those accused of crimes against the state.

101 What then are the governing principles which will guide a court in an attempt to distinguish which form of remedial action should be taken when, unlike the court below, it is faced with concurrent applications under both the common law doctrine and s. 7 of the ***Charter*** arising from the failure of the Crown to meet its obligation of timely disclosure to an accused? Put another way, what considerations, if any, distinguish the circumstances requiring a stay of proceedings under the common law doctrine of abuse of process in such a case from those which do no more than support a stay (or some other form of relief) which would be justified as under s. 24(1)?

102 Notwithstanding the failure of counsel to bring such concurrent applications in this case, it is necessary to engage this question for two reasons.

103 Firstly, the answer will assist in an understanding of where the line that separates an abuse of process from a ***Charter*** violation is to be drawn in cases of non-disclosure. In the context of the present law relating to the Crown's duty of disclosure in criminal cases, it cannot be that all failures in such duty will result in what the law recognizes as an abuse of process. A determination

of what it is, in a disclosure context, that distinguishes a true abuse of process from a "mere" ***Charter*** violation will assist in a determination of whether the result reached by the trial judge in this case was right as a matter of law.

104 Secondly, if it is concluded that the trial judge erred in his application of the common law doctrine, it will be necessary to consider whether a similar form of relief was otherwise available to the respondent. There would be no point in ordering a new trial in this case if the same result ought to have prevailed under s. 24(1) of the ***Charter***.

105 In the search for a meaningful distinction between non-disclosures which amount to a violation of the accused's rights under s. 7 of the ***Charter***, and those which threaten the integrity of the court's process, it is important to have regard for the scope of the historical common law doctrine. Its origins, which can be traced at least as far back in time as the latter half of the seventeenth century, lay in the efforts of the court of Chancery to control the vexation of multiple actions, a problem the criminal law had partially solved as early as the 14th century with the special pleas of *autre fois acquit* and *autre fois convict*. By the nineteenth century, these early beginnings had developed into a discrete set of principles encompassing what are today recognized as the doctrines of *res judicata* and *issue estoppel*.

106 Prior to the decision in ***Connelly***, the scope of the doctrine was restricted to a limited class of cases. It was invoked to prevent the continuation of proceedings which had been initiated without foundation, or were groundless, so as to be frivolous and vexatious: see ***Metropolitan Bank v. Pooley*** (1885), 10 App. Cas. 210 at 220-21, per Lord Blackburn. There an action brought by an undischarged bankrupt for malicious procurement of bankruptcy was summarily dismissed. It was also invoked to bring to an end proceedings which were without foundation for want of jurisdiction: see ***Re Robert Evan Sproule*** (1886), 12 S.C.R. 140, a case in which the full court quashed a writ of *habeas corpus* issued by a single judge of the court. Finally, it was used to prevent a fundamental misapplication of the court's process: see ***R. v. Leroux*** (1928) 50 C.C.C. 52 (Ont.S.C.App.Div.), where Grant J.A., on behalf of the full court, declared that to enlist the criminal law in the collection of a civil debt amounted to an abuse of process.

107 An example of the application of the pre-***Connelly*** doctrine in the civil context, which offers something of a parallel to the disclosure issues raised by the present case, is that of ***Davey v. Bentick***, [1893] 1 Q.B. 185 (C.A.), where the plaintiff in an action brought for services performed and for libel persistently refused to provide particulars of his claims notwithstanding repeated

orders of the court to do so. In dismissing an appeal from the order of a judge in Chambers, summarily dismissing the action as frivolous and vexatious, Lord Esher reasoned that the repeated failure of the plaintiff to provide the ordered particulars led to the irresistible conclusion that no services had been performed and no libel had been published, and that accordingly there was no cause of action. Hence, the dismissal was, *inter alia*, a proper exercise of the court's inherent jurisdiction to prevent oppression.

108 The exercise of the pre-***Connelly*** jurisdiction to prevent an abuse of the court's process did not require that there be any motivation underlying the questioned proceedings. While unfairness and impropriety often co-existed with proceedings which constituted an abuse of the court's process, such circumstances were neither necessary nor, indeed, sufficient by themselves to make out a case for abuse if the other essential ingredients referred to were absent. The essence of the pre-***Connelly*** abuse of process was the corruption of the process itself, by reason of its facilitation of proceedings which were fundamentally flawed, irrespective of the underlying motivation for those proceedings.

109 The effect of the majority speeches in ***Connelly*** was to extend the application of the doctrine, at least in the criminal field, to include a discretion to stay proceedings in order to prevent

unfairness to the accused. As a result the discretion to stay was no longer dependent on a lack of substance in the proceedings, an absence of jurisdiction or a fundamental misuse of the process. Conduct of the Crown which results in unfairness or oppression to the accused could lead to a stay of proceedings which are otherwise well founded.

110 The initial impact of ***Connelly*** on the Canadian criminal law landscape can be seen from the judgment of Laskin C.J.C. in ***Rourke v. The Queen***, [1978] 1 S.C.R. 1021, where at pp. 1031-34 he reviewed many cases in which proceedings had been stayed as an abuse of process for a variety of disparate reasons. But the uncertainty which had enveloped the doctrine following the decision of the Supreme Court of Canada in ***R. v. Osborn***, [1971] S.C.R. 184, was heightened by the conflicting judgments in ***Rourke***, and it was not until that court's decision in ***Jewitt***, some eight years after ***Rourke***, that the new or modern doctrine of abuse of process became firmly rooted in the law of this country. Thus it is necessary to look to the jurisprudence which has developed since ***Jewitt*** for clues as to the criteria which distinguish a remedy under the new common law doctrine from one which is available to an accused under the ***Charter***.

111 In ***Jewitt*** the specific issue before the court was whether a right of appeal lay in the Crown from a judicial stay of

proceedings. After setting out the history of the proceedings to that point, Dickson C.J.C. posed the threshold question:

> Before considering whether a stay of proceedings is a judgment or verdict of acquittal or tantamount thereto, it is necessary to determine whether, at common law, a discretionary power to stay proceedings in a criminal case for abuse of process exists, in the words of Laskin C.J.C. in ***Rourke v. The Queen***, [1978] 1 S.C.R. 1021, as a means of "controlling prosecution behaviour which operates prejudicially to accused persons". (p. 131)

He then reviewed the uncertain Canadian experience with the doctrine and concluded with the following answer to the question thus posed:

> It seems to me desirable and timely to end the uncertainty which surrounds the availability of a stay of proceedings to remedy abuse of process. Clearly, there is a need for this Court to clarify its position on such a fundamental and wide-reaching doctrine.
>
> Lord Devlin has expressed the rationale supporting the existence of a judicial discretion to enter a stay of proceedings to control prosecutorial behavior prejudicial to accused persons in ***Connelly v. Director of Public Prosecutions***, [1964] A.C. 1254 at p. 1354 (H.L.):

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

> trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings". I would also adopt the caveat added by the court in *Young* that this is a power which can be exercised only in the "clearest of cases". (pp. 136-37)

112 One cannot help but notice that the statement found in *Young*, and adopted by Dickson C.J.C. in *Jewitt*, is lacking in clarity. Is what is there described a double-barrelled discretion to stay proceedings either: (1) where compelling the accused to stand trial would violate those fundamental principles of justice which underlie the communities sense of fair play and decency, or (2) in order to prevent the abuse of a court's process through oppressive or vexatious proceedings? Such an interpretation, which distinguishes a violation of those fundamental principles of justice which underlie the community's sense of fair play and decency from oppressive or vexatious proceedings, would apparently characterize only the latter as an abuse of process, presumably leaving the former to be dealt with under s. 7 of the *Charter*.

113 This, in fact, appears to be the interpretation which the majority in *Conway* put on the *Young/Jewitt* description of the doctrine. There the appellant had moved for a stay on grounds of both abuse of process and unreasonable delay in what was his third trial on a charge of murder. The abuse of process argument was based both on

the fact there had been two prior trials, the first resulting in a conviction for second degree murder which was overturned on appeal, and the second resulting in a mistrial when the jury failed to agree, and on the refusal of the Crown to accept a plea of guilty to a manslaughter charge unless he agreed to a joint submission for a sentence of fifteen years. That argument was rejected by the trial judge, by the Ontario Court of Appeal, and by all of the judges in the Supreme Court of Canada. In concluding her judgment for the majority on this issue, L'Heureux-Dubé J. noted:

> For these reasons, to hold a third trial in the circumstances would not in my view "violate those fundamental principles of justice which underlie the community's sense of fair play and decency" ***nor*** would it constitute an "abuse of a process through oppressive and vexatious proceedings". The present case is not one of the "clearest of cases" to which the Chief Justice referred in ***Jewitt***, *supra*. (pp. 1670-71; emphasis added)

114 In ***Keyowski*** the accused argued that a third trial would constitute an abuse of process after two previous juries had failed to agree on a verdict in respect of the charges he was facing. In describing the common law doctrine of abuse of process, Wilson J. said this:

> The availability of a stay of proceedings to remedy an abuse of process was confirmed by this court in ***R. v. Jewitt***, [1985] 2 S.C.R. 128. On that occasion the court stated that the test for abuse of process was initially formulated by the Ontario Court of Appeal in ***R. v. Young*** (1984), 13 C.C.C. (3d) 1. A stay should be granted

> where "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency", ***or*** where the proceedings are "oppressive or vexatious" ([1985] 2 S.C.R. at pp. 133-37). The Court in ***Jewitt*** also adopted "the caveat added by the Court in ***Young*** that this is a power which can be exercised only in the `clearest of cases' "... (p. 659-59; emphasis added)

This passage suggests two distinct formulations for the doctrine of abuse of process, one based on violations of the fundamental principles of justice which underlie the community's sense of fair play and decency, and the other based on proceedings which by their nature are oppressive or vexatious.

115 With great respect, it does not seem that the state of the law changed very much, if at all, if the statement of the doctrine in ***Young*** and ***Jewitt*** is to be construed as suggested either by L'Heureux-Dubé J. in ***Conway*** or by Wilson J. in ***Keyowski***. To begin with, if the two criteria are viewed disjunctively, there would seem to be little difference between the "fundamental principles of justice which underlie the community's sense of fair play and decency" and the "principles of fundamental justice" by which the deprivation of liberty is constitutionally circumscribed in s. 7 of the ***Charter***. The power to grant a "just and appropriate" remedy for a breach of s. 7 has existed in s. 24(1) of the ***Charter*** since its inception in 1982. There was no reason to think, either then

or in 1985 when *Jewitt* was decided, that such a remedy could not include a stay of proceedings where necessary, and there was thus no need to supplement the Constitution with a revitalized version of a common law doctrine which had been recognized for at least 300 years. Furthermore, as we have pointed out, for at least 300 years the power of the court to stay "oppressive or vexatious" proceedings as an abuse of its process has never been in doubt. Thus, if the disjunctive approach to the doctrine suggested in *Conway* and in *Keyowski* is correct, there was not much that was either startling or new in *Jewitt*, unless it was intended that new meaning be attributed to the words "oppressive" and "vexatious," a suggestion which has so far escaped any mention in the authorities.

116 In her dissenting reasons in *Scott*, McLachlin J. took issue with the construction which Wilson J., in *Keyowski*, put on the statement of the doctrine found in *Jewitt*:

> In summary, abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interests of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair trial and just trial process and the proper administration of justice. I add that I would read these criteria cumulatively. While Wilson J. in *R. v. Keyowski*, ...used the conjunction "or" in relation to the two conditions, both concepts seem to me to be integral to the jurisprudence surrounding the remedy of a stay of proceedings and the considerations discussed

> in ***R. v. Jewitt***, . . . and ***R. v. Conway***, *supra*. ***It is not every example of unfairness or vexatiousness in a trial which gives rise to concerns of abuse of process. Abuse of process connotes unfairness and vexatiousness of such a degree that it contravenes our fundamental notions of justice and thus undermines the integrity of the judicial process***. To borrow the language of ***Conway***, the affront to fair play and decency must be disproportionate to the societal interest in prosecution of criminal cases. (p. 1007; citations omitted; emphasis added)

117 In addition to reading the two criteria conjunctively, rather than disjunctively, McLachlin J. gives primacy to the violation of the principles of fundamental justice which underlie the community's sense of fair play and decency, rather than to the oppressive or vexatious nature of the proceedings, and thus she gives those "principles" an expanded meaning distinct from "the principles of fundamental justice" found in s. 7 of the ***Charter***. That expanded and distinct meaning is demonstrated in the highlighted portion of the excerpt from her reasons. It is only those proceedings which are oppressive or vexatious to the point where our fundamental notions of justice are contravened, and the integrity of the court is undermined, which will amount to an abuse of the court's process.

118 The judgment of McLachlin J. in ***Scott*** was in dissent. However, it is significant that even though the cumulative approach to the criteria which she adopted leads inevitably to a higher threshold test for abuse of process, she found the evidence met that test

whereas in the majority judgment, apparently applying the lesser disjunctive test, Cory J. concluded there was no abuse. This incongruity would seem to result from the different way in which each assessed the conduct of Crown counsel. In rejecting any suggestion of abuse, Cory J. relied heavily on Crown counsel's apparently worthy motivation for staying the original proceedings:

> The actions of the Crown were not abusive. They were aimed solely at protecting the identity of the police informer, a value which has long been recognized as important to society. (p. 992)

Madam Justice McLachlin, on the other hand, relied heavily on what she saw as the improper motivation of the Crown:

> The issue, as I see it, is whether, once an accused has been put in jeopardy by entering a plea to a charge, the Crown may stay that proceeding and institute a new proceeding in order to overcome an unfavourable ruling by the trial judge. (p. 1006)

119 The difference between the majority and minority result on the abuse issue in ***Scott*** would thus seem to be based more on differing characterization of the facts than on any doctrinal view of the law. It does not appear that Cory J. found it necessary even to consider the law, and he certainly did not reject the approach which McLachlin J. took to the ***Young/Jewitt*** statement of the abuse of process doctrine.

120 The state of the authorities is such that we feel free to give effect to our own view on the interaction between the two criteria described in ***Young*** and ***Jewitt***. We would adopt the approach taken by McLachlin J. in ***Scott***. In our view, that approach is consistent with the historical focus and purpose of the common law doctrine. It also serves to highlight the distinction between that doctrine and the constitutional remedies available to an accused person under s. 24(1) of the ***Charter***, a distinction which, for the reasons given earlier, we are of the view must be maintained.

121 We conclude that in order to establish an abuse of process, as opposed to "mere" violation of a ***Charter*** right, an accused must demonstrate conduct on the part of the Crown that is so oppressive, vexatious or unfair as to contravene our fundamental notions of justice and thus to undermine the integrity of the judicial process.

122 The discretion may be exercised only in "the clearest of cases", which means that the trial judge must be convinced that, if allowed to continue, the proceedings would tarnish the integrity of the judicial process. The societal interest in the prosecution of criminal cases is such as to permit no lesser standard. It is only by having due regard for such a standard that the proper balance can be struck between society's right to

the proper administration of justice and the court's need to preserve and protect the integrity of its process.

123 As to the standard of conduct required to contravene our "fundamental notions of justice," Lamer J. in *Mack* suggested that:

> Conduct which is unacceptable is, in essence, that which violates our notions of "fair play" and "decency" and which shows blatant disregard for the qualities of humanness which all of us share.

Of necessity, this is a broad and general categorization of conduct. It may encompass much more than that which is circumscribed by the "principles of fundamental justice" described in s. 7 of the *Charter*. It certainly encompasses no less. It is not possible to design a definition that can, with particularity, encompass all such mischiefs.

124 It is apparent from the foregoing that it is no ordinary breach of the principles of fundamental justice entrenched in s. 7 of the *Charter* which will amount to an abuse of process. A breach of an accused's rights under s. 7 of the *Charter* will almost certainly have resulted in some unfairness. That unfairness can be addressed by means of a remedy under s. 24(1). It may be, in some such cases, that the unfairness can only be remedied by means of a stay. Breaches of the right under s. 11(b) to be tried within a reasonable time are an example. But that does not mean

that the unfairness in question must then amount to an abuse of process. It is only when the unfairness, oppression or vexation reaches the magnitude described above that the consideration of *Charter* remedies is put aside and the court exercises its inherent jurisdiction to preserve the integrity of its process.

125 To the accused who benefits from it, it will be of no consequence whether a stay is granted under s. 24(1) of the *Charter* or as a result of the application of the common law doctrine of abuse of process. But if we are correct in our view that the common law doctrine must be preserved, it is important that the law recognize and maintain the distinction. Given the present state of the law, that can only be done if the courts continue to recognize and give effect to the difference between what Lamer J., in *Mack*, called the secondary or derivative benefit to the accused from the application of the common law doctrine on the one hand, and the primary benefit of a remedy which results from a breach of his or her constitutional rights.

126 It is convenient at this point to review the nature and extent of the Crown's disclosure obligations. We start with the nature of the obligation. In *R. v. Stinchcombe*, Sopinka J. reviewed the various arguments for and against Crown disclosure. He then noted the following:

> This review of the pros and cons with respect to disclosure by the Crown shows that there is no valid practical reason to support the position of the opponents of a broad duty of disclosure. Apart from the practical advantages to which I have referred, there is the overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. This common law right has acquired new vigour by virtue of its inclusion in s. 7 of the ***Canadian Charter of Rights and Freedoms*** as one of the principles of fundamental justice. (See ***Dersch v. Canada (Attorney General)***, [1990] 2 S.C.R. 1505, at p. 1514.) The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted. (p. 336)

127 As to the extent of the Crown's obligation to disclose, Sopinka J. reached the following conclusion:

> With respect to what should be disclosed, the general principle to which I have referred is that all relevant information must be disclosed subject to the reviewable discretion of the Crown. The material must include not only that which the Crown intends to introduce into evidence but also that which it does not. No distinction should be made between inculpatory and exculpatory evidence. (p. 343)

128 He described the obligation to disclose witness statements as follows:

> I am of the opinion that, subject to the discretion to which I have referred above, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses. Where statements are not in existence, other information such as notes should be produced, and, if there are no notes, then in addition to the name, address and occupation of the witness, all information in the possession of the prosecution relating to any relevant evidence that the person could give should be supplied. (pp. 345-6)

129 The Crown's obligation to disclose is qualified by a recognized discretion not to disclose information in certain circumstances. Those circumstances include: (1) where disclosure of the information would breach a solicitor-client privilege, an informer privilege or a public interest immunity; (2) where disclosure sooner rather than later may compromise some legitimate state interest, in which case disclosure may be delayed; and (3) where the information is clearly irrelevant.

130 The exercise by the Crown of the discretion not to disclose is reviewable by the trial judge. When such a review is called for, it is the Crown which must justify its refusal to disclose by bringing itself within an exception to the general rule.

131 In the context of a disputed exercise of the discretion to withhold disclosure on grounds of irrelevance, the Crown is required to err on the side of inclusion. The applicable standard is that information ought not to be withheld if there is a reasonable possibility that such withholding will impair the right to make full answer and defence.

132 A number of conclusions can be drawn from this review of the general principles laid down in ***Stinchcombe***. The first is that the right of an accused to full disclosure by the Crown is an adjunct of the right to make full answer and defence. It is not itself a constitutionally protected right. What this means is that while the Crown has an obligation to disclose, and the accused has a right to all that which the Crown is obligated to disclose, a simple breach of the accused's right to such disclosure does not, in and of itself, constitute a violation of the ***Charter*** such as to entitle a remedy under s. 24(1). This flows from the fact that the non-disclosure of information which ought to have been disclosed because it was relevant, in the sense there was a ***reasonable possibility*** it could assist the accused in making full answer and defence, will not amount to a violation of the accused's s. 7 right not to be deprived of liberty except in accordance with the principles of fundamental justice unless the accused establishes

that the non-disclosure ***has probably*** prejudiced or had an adverse effect on his or her ability to make full answer and defence.

133 It is the distinction between the "reasonable possibility" of impairment of the right to make full answer and defence and the "probable" impairment of that right which marks the difference between a mere breach of the right to relevant disclosure on the one hand and a constitutionally material non-disclosure on the other.

134 Failure by the Crown to disclose relevant information does not result in a breach of the accused's right not to be deprived of liberty except in accordance with the principles of fundamental justice, unless that non-disclosure is material in the sense that it has impaired the ability of the accused to make full answer and defence. An accused who seeks a constitutional remedy for a non-disclosure by the Crown must first establish the probability that the non-disclosure was material in the sense I have described.

135 It follows from the foregoing that mere failure by the Crown to make all relevant disclosure before the trial actually begins, is unlikely, in itself, to result in a constitutional remedy. It is only where the non-disclosure, even at that stage in the proceedings, can be shown to be material to the ability of the

accused to make full answer and defence that a remedy will be available under s. 24(1) of the *Charter*.

136 It also follows that the pre-trial exercise by the Crown of its discretion with respect to disclosure, if reviewed and found to be in error, will only result in a violation of the accused's constitutional rights under s. 7 of the *Charter* in those exceptional cases where the delayed disclosure can be shown to have been material.

137 Finally, it is apparent that the review process itself is not a constitutional inquiry, since the only determination to be made in such a proceeding is whether the accused is entitled to that which the Crown claims is excluded from the general rule that requires disclosure of all relevant information. Disclosure orders by a trial judge are made in the ordinary course of exercising the jurisdiction which all trial judges have to make all orders necessary to the effective management of the court's process and the fair trial of the accused. They are not "remedies" under s. 24(1) of the *Charter*.

138 It is now possible to answer the question which provoked this long analysis of the common law doctrine of abuse of process and the law of disclosure, namely what it is that distinguishes a failure to disclose, which leads to no more than a remedy under

the *Charter*, from that which amounts to an abuse of process. In our view, a material non-disclosure, without more, can never amount to an abuse of process. Such breaches of s. 7 of the *Charter*, whether the result of inadvertence or a determined view that the information in question is subject to the discretion not to disclose, will lead to a remedy under s. 24(1). If the resulting interference with the ability of the accused to make full answer and defence is merely transitory in nature - *i.e.*, curable - the remedy will be something short of a stay of proceedings. If, on the other hand, the adverse effect on the ability of the accused to make full answer and defence cannot be remedied, a stay must be ordered under s. 24(1).

139 In our view, it is only in those cases in which the interference with the right to make full answer and defence results from a non-disclosure that can be said to be motivated by an intention on the part of the Crown to deprive the accused of a fair trial that an abuse of process arises. Such a motivation may be inferred, in the absence of evidence to the contrary, when there is no arguable case to be made for any discretion to withhold disclosure and the relevance of the information withheld is so readily and obviously apparent as to make its materiality a virtual certainty. When a non-disclosure meets those tests, it then becomes clear that the integrity of the court's process is at

risk and the proceedings must be brought to an end. As Lamer J. put it in *Mack*:

> The court is, in effect, saying it cannot condone or be seen to lend a stamp of approval to behavior which transcends what our society perceives to be acceptable on the part of the state. The stay of the prosecution of the accused is the manifestation of the court's disapproval of the state's conduct. The issuance of the stay obviously benefits the accused, but the court is primarily concerned with a larger issue: the maintenance of the public confidence in the legal and judicial process. In this way the benefit to the accused is really a derivative one. (p. 942)

140 This conclusion makes an improper motive on the part of the Crown an essential element of an abuse of process based on the Crown's non-disclosure of material information to the accused in a criminal case. At first blush that approach may seem inconsistent with the declaration of Wilson J. in *Keyowski,* to the effect that such a motive is only one of the factors to be taken into account when considering whether the conduct of the Crown amounts to an abuse of process. But the majority and minority reasons in *Scott* demonstrate that with respect to some categories of conduct, the Crown's motivation may in fact be determinative. Thus, we do not think that the judgment in *Keyowski* can be read as ruling out the conclusion we have reached in this case.

141 It is now possible to examine the decision of the trial judge in this case, with a view to determining whether the conduct of the Crown reached the threshold test we have described as

necessary to establish an abuse of process. The following extracts from his reasons are instructive of the basis for his conclusion to stay proceedings. After reviewing the pre-trial history of the disclosure problems, and summarizing the events of the first two days of trial, he said this:

> When Court resumed on the morning of Friday, December 4, 1992, the witness was not in the stand and Ms. Harvey was not in Court. Mr. Considine brought the fifth motion for a judicial stay. He said that on the previous evening he had been provided with a large number of drawings made by P.B. and that comments written there on by her were yet another version of the alleged events.
>
> Mr. Considine said that on Monday of last week he had been assured by Crown Counsel that he had all of the Crown's documents that were compellable either by any specific Court order or pursuant to Crown's general legal obligation of disclosure. However, of even greater significance was Mr. Considine's statement that he had been told by Mr. Jones on either December 3 or 4 that the Crown could not even then assure him that he had all of the documents to which he was entitled.
>
> I asked Mr. Jones if the motion should be heard in the absence of Ms. Harvey. Mr. Jones said that it should not. However, he declined to give me any reason for her absence and he said that he could not deliver any submission on behalf of the Crown. He asked for an adjournment. I am satisfied from what he did say, and from the concurrence of Mr. Considine, that Mr. Jones' application for an adjournment was not made lightly, that Mr. Jones had good reasons for his position.
>
> When Court resumed one hour later Ms. Harvey was still absent. Mr. Jones was still not in a position to supply reasons for her absence. He said the matter was very sensitive and that the Crown had to determine how to proceed. He asked for an adjournment until the afternoon. This was opposed by Mr. Considine but I granted the further adjournment.

STAY OF PROCEEDINGS MOTION OF DECEMBER 4, 1992

When this was heard in the afternoon Ms. Harvey was present. Neither she nor Mr. Jones offered any explanation as to why she had not attended court in the morning to deal with the motion. Somewhat to my surprise, it was Mr. Jones who then entered into a submission with respect to the issue of disclosure.

Mr. Jones exhibited extreme discomfort and alluded to Mr. Considine's reluctance to accept that even yet Mr. Considine did not have all of the documents. Mr. Jones said that on the previous Saturday he had supplied to defence counsel some binders containing what the Crown apparently thought was the entirety of the producible documents. Mr. Jones did not deny that he had assured Mr. Considine that full disclosure had then been made.

Mr. Jones then informed the court that the binders were "apparently incomplete". He said that Ms. Harvey uses a computer to record and store transcripts of interviews, et cetera. Mr. Jones said that he is not "computer literate". He told the Court that as of that moment "the staff" was reviewing the entire file contents to see if full disclosure had been made.

According to my notes, Mr. Jones then conceded that the defence was "certainly at a disadvantage" with respect to at least one charge in that Mr. Considine had not been supplied with certain information.

I summarized to Mr. Jones what I thought the situation was and he agreed. It was that the assurances given by the Crown to Mr. Considine as to full disclosure had been proven to be incorrect. That some further documents had been located and had been disclosed. That the search for further documents was continuing and as of that moment no assurance could be given by the Crown that all compellable documents had been disclosed.

Mr. Considine replied to Mr. Jones by making the point that no matter what assurances the crown now gives, neither he nor the Court can have confidence that full disclosure has been made. He said that it was always on initiative taken by him that documents were "discovered" by the Crown. He asked the Court to keep the history of the disclosure problems in mind when considering the motion, with particular emphasis on the refusal of Crown Counsel to obey the order of Associate Chief Justice Campbell.

...

JUDGMENT

Defence counsel informed the court that senior members of the office of the Attorney General of British Columbia had become involved in this matter. None of them appeared in Court. ***It was difficult to get Mr. Jones to state the Crown's position on the motion. As best I can understand it, it almost amounted to a concession or an invitation to the court to grant a stay of proceedings.*** Nevertheless, the Crown did not enter a stay of proceedings but rather left it to this Court to make the determination as to whether or not this court should proceed.

All of the previous motions for a judicial stay were brought before the commencement of the trial. In my earlier reasons I often noted that in spite of the failure of Crown Counsel to supply documents, the trial was not yet under way, and the defence was yet able to prepare its defence. The underlying principle is to see that the accused can receive a fair trial. In each case I held that he could.

There is a significant difference in the situation today. The trial is under way. The Crown has called three witnesses. One of those witnesses drew a diagram of the residential school in Williams Lake where the complainants lived, studied and worked. She was a friend of all four complainants and she detailed some of her observations of the night-time activities of one of the complainants which involved the accused. ***Production of documents at this time is simply too late to allow the defence to reconsider its handling of this witness .***

The complainant P.B. gave a dramatic account of the alleged rape committed upon her by Father O'Connor. Subsequent to the majority of her evidence in chief, defence counsel was given diagrams of the alleged crime. These diagrams were prepared by the witness and contain dialogue as to the events. Mr. Considine took the position that this dialogue was yet another "version" of the incident. Mr. Jones did not accept that this was the case.

However, these diagrams might have affected the preparation of the case by the defence. They might change the cross-examination of P.B. While cross-examination has not yet taken place, it is unacceptable that defence counsel was put in the position of preparing it without all of the relevant documents. Good

cross-examination does not just happen. It is, in spite of what may appear from courtroom television dramas, a product of meticulous effort on the part of counsel .

These are but two examples of the prejudice to the accused as a result of the inadequacy of disclosure by the Crown. Mr. Considine has particularized some of the other documents that have come to him only on his urging, and late in the proceedings. The extent of the prejudice suffered by the accused cannot be measured but it cannot be said that the accused has not been prejudiced. ***Mr. Jones even conceded that the defence has been "disadvantaged" .***

The matter of disclosure was not "resolved without intervention of the trial judge" as Mr. Justice Sopinka suggested it should be in his reasons in **Stinchcombe**, supra. Not only was it not resolved without intervention by the trial judge, but the Court became an integral part of the trial preparation process. From the time of Associate Chief Justice Campbell's order on June 4, 1992, the Court became involved in uncovering and ordering production of documents. Mr. Justice Sopinka said this should occur only "infrequently". It should not have occurred here and could have been avoided by reasonable efforts on the part of Crown Counsel.

A most significant factor is that at a time well into the trial, Crown Counsel admitted that no assurances could be given to the Court that full disclosure had been made. ***If there was nothing but this, it would form an almost insurmountable obstacle to this trial continuing .***

For Crown Counsel to assert that the failure to disclose documents or that tardiness of disclosure occurred because one Crown Counsel is computer literate and the other is not is unacceptable. Similarly unacceptable is the assertion that a cause of the problems was that one Crown Counsel had an office in Vancouver and the other had an office in Williams Lake. Add to that the admissions that simple oversights occurred, all of these are nothing but excuses.

I said in my reasons of November 27, 1992, that the order of Associate Chief Justice Campbell was "crystal clear". If that order had been obeyed, as it should have been, this case may never have come to this point.

> ***That conduct created, to use the words of defence counsel "an aura" that has pervaded and has now destroyed this case .***
>
> This is now "one of the clearest of cases". To allow the case to proceed would tarnish the integrity of the Court. The Court is left with no alternative but to order a stay of proceedings on all four counts.
>
> In doing so I recognize that the decision will not be readily acceptable to all segments of our society. It will certainly not be popular with many people. I can only encourage such people or groups to carefully consider the reasons for the decision.
>
> Every citizen is entitled to the protection of the law, and to have the law meticulously observed. The obligation upon the Crown in criminal matters is especially onerous. The Crown has admitted to failing in its legal obligations in this case. Those who will be angered or saddened by the outcome of this case must strive to put themselves in the position of an accused person. They would expect the Crown to fulfil its role to the standard required by law.
>
> A stay of proceedings is hereby ordered. (emphasis added)

142 Two initial observations must be made. The first is with respect to the highlighted portion which suggests the Crown conceded the defence was disadvantaged by the non-disclosures that had most recently come to light. It would seem apparent from the following passages in the transcript of the proceedings that the trial judge may have overlooked Mr. Jones' subsequent explanation of the remark he made to that effect:

> **THE COURT**: Mr. Jones, I'm having difficulty following you. I have it down that Mr. -- this is a quote from you. "Mr. Considine is certainly at a disadvantage re the account involving [PB]."

> **MR. JONES**: No, my lord. I'm sorry. My lord he's at a disadvantage as to saying whether what's contained in those notes that weren't disclosed whether it's material or not because he hasn't had the opportunity to review them or of known of their existence until moments ago. But the Crown's submission is that before your lordship makes a final determination on this issue that we at least have an opportunity to determine whether there is a material difference disclosed therein since the fact is undeniable that they haven't been disclosed up to this point.

143 The second observation is with respect to the trial judge's assertion, also highlighted, that Mr. Jones' position on the motion virtually amounted to a concession or an invitation to the court to grant a stay of proceedings. We have closely examined the entire transcript of the proceedings on December 4th, and are unable to find any concession or invitation to that effect by Crown counsel. Indeed, in the course of the argument before us, Mr. Considine acknowledged that no such concession or invitation was made. It seems possible that this comment by the trial judge was prompted by the fact that Mr. Jones made no clear suggestion as to how else the court might respond to the situation which had come to light.

144 As the foregoing passage from the record of the proceedings suggests, Crown counsel's position in response to the motion for a stay was that before any decision was made, steps ought to be

taken to determine if the non-disclosures then under discussion were material.

145 That position was advanced more forcefully moments later when the trial judge specifically asked for the Crown's position:

> **MR. JONES**: Well, the Crown's position is, my lord, that unless, and not having seen what's in the file, and neither has my friend, the Crown is not in a position to say whether what's not disclosed is -- is material or whether it's something that it's inadvertent and that is not relevant, or something that is not new there. because of the circumstances, the way this matter has been proceeding over a long course of time, regrettably there has been a situation arose where the Crown made an exception and opened -- virtually opened its whole file to the -- to the defence, and even with that it would appear that now I find out about five minutes ago, or at least short minutes ago, that there are other documents. When I came over here I thought I was in a position --
> **THE COURT**: Mr. Jones --
> **MR. JONES**: Yes, my lord.
> **THE COURT**: -- I know that.
> **MR. JONES**: Yes.
> **THE COURT**: I'm wondering if the Crown is going to take a position on this motion or not.
> **MR. JONES**: ***The Crown's position is, my lord -- is that it ought -- there ought not to be a decision until it's determined what the nature of those few pages on [PB] are***. (emphasis added)

146 Mr. Jones then indicated that he would like five minutes to review the information which had just come to light. An adjournment was granted, following which he reported as follows:

> **MR JONES**: My lord, insofar as the [PB] documents are concerned that my friend does not have, there does not appear to be anything in those documents that is of the nature of a prior inconsistent statement or an inconsistency on a material fact. There is a volume of material that is retained on the computer and there is

> no way that the crown can tell the court today that the defence has absolutely everything without thoroughly searching. And that search is in -- has been -- is being carried out at this time.
> **THE COURT**: Okay. Count 2?
> **MR. JONES**: Insofar as Count 2 is concerned, my lord, that would go for every count, that this computer search is being done for the entirety of the Crown file, my lord.

147 The trial judge then asked Mr. Jones specifically about the drawings, the existence of which had been revealed the night before when copies were provided to defence counsel. Mr. Jones replied that they had only come into existence, as a "witness preparation device" between the previous Saturday, when what he believed was the entirety of the Crown's file had been turned over to Mr. Considine, and the commencement of the trial on Wednesday. At that point Mr. Considine interjected and spoke specifically to what he saw as the relevance of the drawings.

148 When Mr. Jones was next given an opportunity to speak, he once again made the point that the materiality, if not the relevance, of anything that had not yet been disclosed was very much an open question:

> **THE COURT**: The principles are not going to change by whether or not Mr. Considine was surprised, are they?
> **MR. JONES**: No, My lord.
> **THE COURT**: It's the principles of disclosure.
> **MR. JONES**: Yes. And insofar as disclosure of evidence is concerned much of what Mr. -- which has been turned over and is proposed to turn over to Mr. Considine if there is anything further in the Crown file is not evidence but is Ms. Harvey's notes of everything you could think

of relating to her conduct of the file, how witnesses are going to get to a particular location and who is going to accompany them, and things of that nature. Those --

THE COURT: Well, let me just ask you about this, because I think earlier, Mr. Jones, you were almost giving the Crown accolades for going beyond where it would ordinarily go or be required to go.

MR. JONES: Yes, my lord.

THE COURT: But just to step back a moment, unless I misunderstand what has occurred and has been occurring, you have acknowledged that there are documents that should have been produced that were not produced. There were documents that should have been produced and were produced in a tardy manner, and that there are yet documents to be produced that should have been produced.

MR. JONES: Well, my lord, I'm not certain that there are -- I can't advise the court whether there are documents that still -- that ought to have been produced. There is what is in the computer, and as far as we can tell Mr. Considine has all that. But in view of what happened today I can't say to the court that there is definitely nothing in there that ought to have been produced.

THE COURT: All right. Thank you.

149 It is apparent from these passages that at no time did Mr. Jones clearly suggest any explicit alternative to a stay, such as adjourning the trial to enable the defence to become acquainted with the new material, recalling witnesses for further cross examination or even declaring a mistrial. However, the gist of the submissions by Mr. Jones was, firstly, that it had not yet been established whether any of the so-called "new" information, that had come to light just moments before court began at 2:00 p.m. on the afternoon of December 4th was, in fact, material, and, secondly, that there was no way of knowing whether any of what still remained to be downloaded from Ms. Harvey's computer was

material, or even relevant. What was therefore needed, before any assessment of the significance of the alleged non-disclosure could be made, was an inquiry into the materiality of the information in question.

150 The fact is that at no time before the stay was entered was there such an enquiry. As his reasons demonstrate, the trial judge went no further than a determination that the information in question was relevant, in the sense that it ***might*** have affected the preparation of cross-examination of the pertinent witnesses. The lack of a positive finding as to the probability that the non-disclosures were material, as opposed to a mere breach of O'Connor's right to full disclosure, is demonstrated by the trial judge's concluding remarks on that aspect of the problem before him, when he observed:

> The extent of the prejudice suffered by the accused cannot be measured but it cannot be said that the accused has not been prejudiced.

151 In the absence of a finding that the non-disclosures were material in the sense described above, namely, that they had probably adversely affected the ability of the accused to make full answer and defence, it could not be said either that a violation of the accused's right not to be deprived of his liberty except in accordance with the principles of fundamental justice

had occurred, nor that the conduct of the Crown amounted to an abuse of process. The lack of such a finding makes it impossible to sustain the decision to enter a judicial stay of proceedings.

152 It is apparent that the trial judge also based his decision to enter a stay, in part, on the inability of Crown counsel to assure defence counsel and the court that full disclosure had even then been made. He noted that if there was nothing else but that, it would prove an almost insurmountable obstacle to the trial continuing. While it is true that the Crown was not in a position to offer the assurance that full disclosure had been made, in our view the proper course of action to have followed at that point would have been to adjourn the proceedings for such time as was reasonable to permit the new material which had come to light to be assessed as to its relevance as well as its potential to be material to the ability of the accused to make full answer and defence. Here again, of course, Crown counsel failed to make any such application.

153 The trial judge was understandably disturbed by the problems which had arisen to that point in time. That well-justified concern had, however, to be balanced against the important interest which society has in the effective prosecution of criminal charges. The charges in this case had been subjected to a preliminary inquiry which resulted in a committal for trial. In

the circumstances there could be no doubt the indictment was properly preferred. The public interest required the continuation of proceedings until such time as it could be demonstrated either that there had been a breach of the accused's rights under the ***Charter***, which could not otherwise be remedied, or that there was a threat to the integrity of the court's process, so as to make that course impossible. From our review of the record, it does not appear that point had been reached in this case.

154 The final consideration which led the trial judge to enter a stay of proceedings was his conclusion that the "aura," created by Ms. Harvey's conduct in narrowing the scope of, and failing to give effect to, the order of Campbell A.C.J., had pervaded and finally destroyed the case. As we have previously noted, Ms. Harvey's conduct in this respect cannot be justified in any legal sense. But was it sufficient to support a reasonable inference that she was motivated by a desire to prevent the accused from having a fair trial? Again from the record, it seems apparent to us that it was not.

155 It is clear Ms. Harvey held the view that the order of the Associate Chief Justice did not adequately protect the privacy interests of the complainants. That is a view with which we agree. From the action which the trial judge took in modifying the effect of the order, and directing that the therapist's files

be turned over to him so that a determination as to relevance could be made, it is apparent that he also recognized that difficulty with the order.

156 Ms. Harvey's conduct, in deciding to limit the scope of the order and to discourage its full implementation rather than to go back before the Associate Chief Justice with an application to vary, was unwarranted and ill advised. But, given her concern about the privacy interests of the complainants, which, as we have noted, was well founded, it was not conduct which could readily support an inference that she was motivated by a desire to prevent the accused from receiving a fair trial.

157 It is particularly to be noted that when giving his reasons dismissing the motion for a stay of proceedings on November 27th, the trial judge rejected the argument of defence counsel that Ms. Harvey's conduct was motivated by a "grand design" to conceal evidence or "to subvert justice."

158 It would seem from the trial judge's final reasons for entering the stay, delivered on 7 December, that the events of 3 and 4 December revived the spectre of such a design in his mind. But in reaching that conclusion, it would seem that he overlooked the fact that on the previous weekend the Crown had tried to rectify the earlier disclosure problems by waiving all privilege

and giving the defence the entire content of their file. Far more in the way of information and documents was turned over to Mr. Considine than could ever be characterized as "compellable" under either the letter or the spirit of *Stinchcombe*. The fact that in doing so, counsel overlooked the possibility that not all of Ms. Harvey's computer files had been reduced to hard copy form and could be found in the file, could not provide a reasonable basis for concluding that any material non-disclosure that may have thus occurred was motivated by an intention to deprive the accused of a fair trial.

159 There was, in fact, no evidence before the trial judge from which it could reasonably be inferred that the Crown's inept handling of the case was motivated by an intention to deprive O'Connor of a fair trial. The only evidence in the entire record before us which might support such an inference is a handwritten comment appearing in what are obviously notes of an interview with the complainant named in count 1, and contained in a document which did not come to light until after the stay had been entered. The notes are dated 4 January, a month before the charges against O'Connor were laid, and almost a year before the decision of the Supreme Court of Canada in *Stinchcombe*. The comment is as follows:

> Decided not to tape interview because transcript might have to be disclosed - did not want to get into the issue of privilege if can be avoided

There is nothing to identify the author of the notes generally or this comment in particular. Without knowing more about the circumstances under which it was created, who authored it or what was intended by the reference to "privilege", we find it impossible to conclude that this statement was motivated by an intention to deprive O'Connor, who had not yet been charged, of a fair trial. It must be pointed out, however, that with the Crown's obligation to disclose now clearly declared in ***Stinchcombe***, any decision to avoid such obligation by deliberately failing to create a record of statements made by witnesses to either investigators or crown counsel would be most improper.

160 We conclude that the trial judge erred when he entered a stay of proceedings on the basis of the common law doctrine of abuse of process.

161 That brings us to the question whether, as the Crown argued on this appeal, an alternative form of remedy ought to have been granted by the trial judge. We hesitate to embark upon a detailed analysis of the alternatives that might have presented themselves to the trial judge in this case, if he had been faced with an application under the ***Charter***, for the simple reason that he was not faced with such an application. Neither was this court, other than by the oblique suggestion that the common law doctrine and the ***Charter*** remedies were "tantamount to the same thing." But for

the reason alluded to earlier, namely that it would be pointless to set aside the stay ordered in this case if one ought to have been ordered under s. 24(1), we propose to comment briefly on what the record suggests ought to have occurred if an application had been made for a remedy under the *Charter*.

162 It follows from the fact that no determination was ever made as to the materiality of the non-disclosed information, that the record before us could not support a stay of proceedings or any other form of remedy under s. 24(1). That said, it does not appear from anything we have heard or read in this case, that it could possibly be argued that any permanent or irremedial damage had been done to the accused's ability to make full answer and defence as a result of any non-disclosures or late disclosures that were in fact material. As a consequence, the accused's right, under s. 7 of the *Charter*, not to be deprived of his liberty except in accordance with the principles of fundamental justice could have been protected by ordering an appropriate adjournment, by recalling the witnesses who had already testified for further cross-examination if this proved necessary, or by declaring a mistrial in the event that an adjournment and further cross-examination would not suffice.

VII

PRE-TRIAL DISCLOSURE OF MEDICAL AND PSYCHOLOGICAL THERAPY FILES

163 We have been asked by counsel for the parties and the intervenors to deal with the law and procedures which ought to be followed when disclosure orders are sought relating to the content of medical and psychotherapy records of witnesses or potential witnesses in cases of this sort.

164 This was asked of us even though it was quite apparent that the outcome of the present appeal could not turn on any such point, the order in this case having been complied with to the extent required by the trial judge prior to the commencement of the trial. We invited and received the assistance of all counsel in dealing with the difficult issues involved both by way of oral submissions at the hearing of the appeal and further written submissions, provided in answer to our request, to deal with the subsequent decision of the Supreme Court of Canada in ***Osolin v. The Queen*** (16 December, 1993, No. 22826).

165 Our views on this aspect of the appeal, which have had to be reconsidered in light of the opinions recently expressed by the

Supreme Court of Canada in that case, have not yet reached a point at which we are able to give a decision. Having in mind that the issues in question have no bearing on the outcome of the appeal itself, we have decided that we ought not further to delay the release of the present decision on that account.

166 We shall provide our decision on the disclosure issues mentioned by separate reasons at a later date.

VIII

DISPOSITION

167 For the reasons given, we would allow the appeal, set aside the order staying proceedings in respect of the indictment against Hubert Patrick O'Connor, and direct that a new trial be held in respect of the charges contained therein.

"The Honourable Mr. Justice Taylor"

"The Honourable Mr. Justice Wood"

"The Honourable Mr. Justice Hollinrake"

"The Honourable Madam Justice Rowles"

"The Honourable Madam Justice Prowse"