COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Bacon*,
2020 BCCA 140
ABBREVIATED

Date: 20200612

Docket: CA44953

Between:

Regina

Appellant

And

James Kyle Bacon

Respondent

Restriction on Publication: A publication ban has been mandatorily imposed under s. 517(1) of the *Criminal Code* restricting the publication, broadcasting or transmission in any way of the evidence taken, the information given, or the representations made and the reasons, if any, given or to be given by the justice presiding over the application for judicial interim release (bail).

Restriction on Publication: A publication ban has been imposed under s. 486.5 of the *Criminal Code* restricting the publication, broadcasting or transmission in any way of evidence that could identify a witness/undercover officer. This publication ban applies indefinitely unless otherwise ordered.

APPEAL FILE SEALED

A copy of the Statement made by a single justice on May 21, 2020 pronouncing judgment pursuant to s. 21(3) of the *Court of Appeal Act* is attached as Appendix A.

Before: The Honourable Madam Justice Saunders

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia,
dated December 1, 2017 (*R. v. Bacon*, Vancouver Registry 26150).

Counsel for the Appellant:	M.K. Levitz, Q.C., J.M. Gordon, Q.C., C.G. Baragar, Q.C., C. Lusk, and M.J. Wolf
Counsel for the Respondent:	F.R. Addario, K.M. Eldred, and J.G. Foy
Amici Curiae:	A. Kapoor and V. Cichalewska
Place and Date of Hearing:	Vancouver, British Columbia December 2, 3, 4, 5 & 6, 2019
Place and Date of Judgment:	Vancouver, British Columbia May 21, 2020

Written Reasons of the Court released

in Abbreviated Version on June 12, 2020

Table of Contents

Summary:

James Bacon is charged with one count of first degree murder and one count of conspiracy to commit murder for allegedly ordering the killing of a rival. The Crown alleges the order led to the widely-known Surrey Six murders. A stay of proceedings was entered on these charges as a remedy for abuses of process in the course of the police investigation. The judge found that the abuses of process contravened fundamental notions of justice and undermined the integrity of the justice system. The Crown challenges the order of the stay on the basis that the judge erred in identifying certain conduct as serious misconduct amounting to abuse of process, in finding no remedies will redress prejudice to the system created by established serious misconduct, and in concluding that the interests served by a stay outweigh the interest of society in having a final decision on the merits. The Crown says even absent error by the judge in identifying certain conduct as an abuse of process, the judge's conclusion failed to consider the available remedies, and failed to give full effect to the gravity of the charges and the interest of the community in having a trial.

Held: Appeal allowed. While certain police conduct amounted to abuse of process, the judge erred in principle in finding other conduct amounted to abuse of process. It is therefore open to the court, applying the law applicable to discretionary decisions, to interfere with the result. The balance favours a full trial of the charges on their merits, where Mr. Bacon will be found not guilty or guilty. The community has "a profound interest" in seeing guilt or innocence of these charges alleged against Mr. Bacon determined on the merits. The other concerns that led the judge to enter a stay of proceedings, absent the matters in respect to which there is an error in principle, do not, on their own, support an entry of a stay of proceedings. The stay of proceedings is set aside and the matter is remitted to the Supreme Court of British Columbia for trial.

Abbreviated Reasons for Judgment of the Court:

INTRODUCTION

[1] James Kyle Bacon was charged with one count of first degree murder and one count of conspiracy to commit murder. The judge stayed the proceedings as a remedy for abuses of process in the course of the police investigation. The Crown appealed.

[2] The judge's reasons are sealed. As she explained in her publicly released reasons entitled "Abbreviated Ruling re Entry of Judicial Stay of Proceedings" (2017 BCSC 2207) (the "Abbreviated Ruling"), in order to protect the Crown's claims of privilege, the evidence adduced, the materials filed, and her reasons for entering the stay of proceedings must remain sealed.

[3] Similar constraints require our reasons to be sealed. As we noted at the outset of the hearing, in response to an application to have the appeal heard *in camera,* in reasons indexed at 2019 BCCA 458, there are rare cases that demand protection of privileged and confidential information to the degree that the courtroom must be closed and reasons sealed to allow the issues engaged to be adjudicated. This is such a case.

[4] This step is not taken lightly. The open-court principle is vital to the community's confidence in the administration of justice. The circumstances of this case, however, are such that the open-court principle must give way and our full reasons must remain sealed.

[5] These abbreviated reasons set out the background to the case and explain, in as much detail as we are allowed, the legal issues raised in the appeal and the resolution of those issues.

BACKGROUND

1. Overview

[6] This is a Crown appeal from a stay of proceedings entered on one count of first degree murder and one count of conspiracy to commit murder, charged by direct indictment against James Bacon. The charges arise from the investigation into six homicides in Surrey, British Columbia, committed October 19, 2007, widely known as the Surrey Six murders. The Crown alleges that James Bacon ordered the murder of Corey Lal and put into motion the events that led to the execution-style fatal shootings of the other five victims.

[7] The stay of proceedings issued on December 1, 2017, after four-and-one-half years of pre-trial proceedings, as a remedy for abuses of process in the course of the police investigation. The judge found the abuses of process did not compromise the fairness of the trial but that police conduct during the investigation contravened fundamental notions of justice and undermined the integrity of the justice system to the degree she could not permit the case to be tried. The decisive question asked by the judge in her reasons for judgment was whether, given the misconduct found by her, the harm to the integrity of the justice system from trying James Bacon for murder and conspiracy to commit murder outweighed the harm to the justice system in having no trial on the charges. She answered this in the affirmative.

[8] The Crown does not dispute that egregious misconduct amounting to abuse of process occurred during the investigation, but says nonetheless the judge erred in staying the proceedings. It contends the judge erred by identifying certain other of the impugned conduct as serious misconduct amounting to abuse of process, in finding no remedies will redress the prejudice to the justice system created by the serious misconduct that is established, and in concluding that the interests served by a stay outweigh the interests of society in having a final decision on the merits of the charges. The Crown says that even absent error by the judge in identifying certain conduct as an abuse of process, the judge's conclusions both failed to give full effect to the gravity of the charges and the interests of the community in having the charges resolved by a verdict, and failed to consider the available remedies, even if only partial, when performing the balancing required by the jurisprudence. The balance even more strongly favours a trial, says the Crown, when conduct it argues was erroneously identified as an abuse of process is properly recognized as not rising to that level, thereby removing some weight from the "no trial" side of the question.

[9] James Bacon opposes the Crown's appeal. He says the judge made no errors in her analysis.

2. The Circumstances of the Murders

[10] We need only refer to the alleged circumstances of the murders in short form. We recognize that the facts in this description have not been proved at trial. We take them from the Crown's summary, in turn taken from the reasons given by Madam Justice Wedge on the convictions for murder and conspiracy to commit murder of two co-accused, Cody Haevischer and Matthew Johnston.

[11] The Crown alleges that at the time of the murders, the Red Scorpions, a gang engaged in serious criminal activity, was led by Mr. Bacon and Michael Le. It says that Corey Lal belonged to a different and rival criminal organization when a dispute arose between him on one side and the Red Scorpions on the other, over a drug line coveted by the Red Scorpions but run by Corey Lal for his organization. The Crown alleges that when Corey Lal failed to pay a "tax" imposed by Mr. Bacon for failing to hand over control of the coveted line, Mr. Bacon directed that Corey Lal be killed.

[12] The Crown alleges that on October 19, 2007, Matthew Johnston, Cody Haevischer, and a person known (by order of Justice Wedge) as Person X, all members of the Red Scorpions, went to the apartment building in Surrey inhabited by Corey Lal. The Crown says that with the help of Sophon Sek, who they met in the apartment building, the men gained entry to Corey Lal's suite. There they found not only Corey Lal, but also gasfitter Ed Schellenberg who was performing maintenance on the fireplace, Ryan Bartolomeo, and Corey Lal's brother, Michael. Eddie Narong arrived at the suite after the Red Scorpion henchmen entered it. A youth named Christopher Mohan who lived with his parents in their apartment next door to Corey Lal, was by chance close by and was brought into the suite. Ed Schellenberg, Christopher Mohan, Eddie Narong, Ryan Bartolomeo, Michael Lal, and Corey Lal were all forced to lie on the floor and each was shot fatally in the back of the head.

3. The Investigation

[13] The murders occurred at a time when police services were heavily engaged in investigating and laying charges with respect to drug trade activity, crimes of violence, and other gang conflict in the Lower Mainland of British Columbia. Much of that police work was channeled through the Integrated Homicide Investigation Team known as IHIT. IHIT is cross-jurisdictional. It is made up of police officers from various police services, both those organized as municipal police services and the Royal Canadian Mounted Police filling its role as the provincial police service and the contract police service for certain municipalities. IHIT is within the operational aegis of the RCMP. We are advised by counsel that police officers seconded from their local police services to IHIT commit to RCMP supervision and RCMP administrative standards when they transfer to IHIT.

[14] In October 2007, when the Surrey Six murders occurred, IHIT was experiencing its busiest workload since its founding. Given the identity of some of the victims in the Surrey Six murders and the context of the murders, the murders were assigned to IHIT for investigation.

[15] The investigation of the murders was assigned the individual name within IHIT, Project E-Peseta. The judge referred to the evidence of Supt. Robin, the officer in charge of IHIT as of June 2008 and the team commander of E-Peseta as of January 2009, describing the investigation as one of the largest and most complex investigations ever undertaken in the province. By November 2012, the

investigation had involved over 900 officers and by November 2016, had involved approximately 1,300 officers. It had approximately 80 police informers. It is apparent, and the judge acknowledged, that the investigation into the six murders was “exceedingly complicated with numerous resourcing, technical and witness challenges.” The judge found that the difficulties faced by investigators included reluctant witnesses and a disciplined organization that used tactics to defeat police techniques, and that “it was necessary for E-Peseta investigators to ‘think outside the box’ and adapt regular investigative techniques to address these and other challenges”.

[16] At the same time that IHIT was engaged in its task of investigating homicides, another integrated unit comprised of officers from various police services named the Integrated Gang Task Force, and referred to as IGTF, was investigating organized criminal activity including gun offences and drug trade offences.

4. The Charges and Dispositions

[17] Mr. Bacon and six other persons were charged with crimes in the six murders. Four persons, Matthew Johnston, Cody Haevischer, Michael Le, and Mr. Bacon were charged by direct indictment with first degree murder of Corey Lal and conspiracy to murder Corey Lal. Matthew Johnston and Cody Haevischer were also charged by direct indictment with first degree murder of the other five victims. Two other persons, Sophon Sek and Justin Haevischer (younger brother of Cody Haevischer), were charged with and pleaded guilty to breaking and entering with intent in respect to gaining entry to Corey Lal’s suite, and obstructing justice in destroying evidence of the crimes, respectively. Person X was also charged with the murders and pleaded guilty to three counts of second degree murder and one count of conspiracy to commit murder.

[18] Michael Le subsequently pleaded guilty to one count of conspiracy to commit the murder of Corey Lal and agreed to testify for the Crown against his former co-accused. Cody Haevischer and Matthew Johnston, who were tried separately from Mr. Bacon, were found guilty on all counts after a trial before Justice Wedge. Their appeal from conviction is set to be heard in 2020.

[19] Thus, of the seven persons facing charges from the Surrey Six murders, the only person whose charges have not progressed to a verdict is James Bacon.

5. The Pre-Trial Proceedings and Ruling

[20] The pre-trial proceedings were lengthy. The judge determined that certain matters concerning the investigation, and certain privileges, required her to conduct large portions of the hearings on pre-trial applications *in camera*. *Amici curiae* were appointed to protect the court process by providing an adversarial context when Mr. Bacon was absent during those hearings. *Amici*, of course, did not have a client relationship with Mr. Bacon. Further, we are advised that some proceedings occurred without appearing on the court’s daily docket. The file in the Supreme Court of British Columbia is sealed.

[21] The hearing of this appeal, too, was conducted *in camera* and our file, too, is sealed.

[22] The pre-trial proceedings addressed numerous applications and resulted in numerous rulings. The applications were complicated by the interrelationship of this case with the trial of Cody Haevischer and Matthew Johnston; rulings in that matter addressing privileges as they applied in those cases and issues of disclosure in those cases, were relevant to the applications in this case. All of these procedural challenges are lucidly described by the judge in her sealed comprehensive reasons for judgment.

[23] The hearing on the application for a stay of proceedings occupied seven months. The body of the judge's reasons for ordering the proceedings stayed is 885 paragraphs long, to which is attached appendices A through E listing other relevant rulings, replicating portions of Crown counsel's submissions, and replicating the Amended Notice of Application for a Stay of Proceedings. In her reasons for judgment, the judge referred to and adopted certain of her earlier rulings.

[24] In addition to her sealed reasons, the judge publicly released the Abbreviated Ruling recording the fact she had issued a stay of proceedings. In the Abbreviated Ruling, the judge referred to applications that had been heard. She referred in general terms to the position of Mr. Bacon's counsel that they "had come into possession of privileged information that they cannot use in his defence which impacts upon Mr. Bacon's fair trial rights" arising in part "from the manner in which the police handled aspects of privileged and confidential information." The judge described briefly the law of solicitor-client privilege, litigation privilege, the privilege that attaches to informers, and public interest privilege. She concluded:

[11] In order to protect both the various claims of privilege advanced by the Crown and the fair trial rights of Mr. Bacon, the Court has had to take a number of significant procedural measures in this case. Because of the confidential nature of the information in question, much of the proceedings were conducted in closed court. Since Mr. Bacon's counsel were in possession of privileged information, they were permitted to attend certain *in camera* hearings: *R. v. X & Y*, 2012 BCSC 325. *Amici Curiae* were appointed to assist the Court by providing an adversarial context where the Court proceeded in the absence of the defence.

[12] Most applications were concerned with the disclosure, protection, and retrieval of privileged information. My full written rulings are under seal in order to protect the Crown's claims of privilege, which I have upheld.

…

[14] During the course of this protracted litigation, I also heard an application for a stay of proceedings brought by Mr. Bacon. I have granted that application and ordered that both counts on the Indictment against Mr. Bacon be stayed. In order to protect the Crown's claims of privilege, which I have upheld, the evidence adduced, the materials filed and my reasons for entering the stay of proceedings must remain sealed.

LEGAL FRAMEWORK

[25] This case turns on abuse of process, the modern expression of which was provided by Chief Justice Dickson in *R. v. Jewitt*, [1985] 2 S.C.R. 128, for the court. He held at 136–137, quoting from *R. v. Young* (1989), 40 C.R. (3d) 289 (Ont. C.A.), that a judge retained a "residual discretion … 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". The remedy is to be rare, and only exercised in the "clearest of cases".

[26] Justice L'Heureux-Dubé, in *R. v. O'Connor*, [1995] 4 S.C.R. 411, relied upon the *Jewitt* description. Using it as the framework, she reconciled the common law doctrine of abuse of process with the *Charter*, setting out a single approach to abuse of process and the remedy of a stay of proceedings. She observed, as in *Jewitt*, that a stay is reserved for the clearest of cases, whether technically a common law remedy or a remedy under s. 24(1) of the *Charter*.

[27] The leading case on abuse of process is *R. v. Babos*, 2014 SCC 16. *Babos* solidified the structure of the required analysis. Justice Moldaver, for the court, first referred to *R. v. Regan*, 2002 SCC 12, in describing the essential contest, calling a stay "the most drastic remedy a criminal court can order" because by permanently halting the prosecution, "the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits". He recognized nonetheless that there are the "clearest of cases" when a stay of proceedings is warranted. Justice Moldaver observed that cases generally fall into two categories: those in which the fair trial rights of the accused are compromised; and those in which the conduct undermines the integrity of the judicial process. The latter is described as the "residual category" and is the one engaged in this appeal. Justice Moldaver, at para. 32, then set out the three requirements for a stay in the residual category:

> (1) prejudice to the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome";
>
> (2) a deficiency of an alternative remedy capable of redressing the prejudice; and

(3) the interests served by a stay, such as denouncing misconduct and preserving the integrity of the justice system, outweigh the interest that society has in having a final decision on the merits.

[28] Justice Moldaver observed, at para. 41, that when the case is in the residual category, the balancing of interests must always be considered. In that regard he said:

[41] However, when the residual category is invoked, the balancing stage takes on added importance. Where prejudice to the integrity of the justice system is alleged, the court is asked to decide which of two options better protects the integrity of the system: staying the proceedings, or

having a trial despite the impugned conduct. This inquiry necessarily demands balancing. The court must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits. [footnote omitted] Clearly, the more egregious the state conduct, the greater the need for the court to dissociate itself from it. When the conduct in question shocks the community's conscience and/or offends its sense of fair play and decency, it becomes less likely that society's interest in a full trial on the merits will prevail in the balancing process. But in residual category cases, balance must always be considered.

REASONS FOR JUDGMENT

[29] The full sealed reasons for judgment on the stay application reveal many complaints by Mr. Bacon as to the police conduct of the investigation and conduct of the Crown. For the purposes of efficient submissions, the Crown had organized the points of contention into four groups referred to as Silo A through Silo D. Silos B, C, and D were sub-divided into "Categories", with Silos B and C each having three Categories A through C. The judge found that the events referred to in Silo A amounted to abuse of process, as did most of the events collected in Silo B, Category A, the events in Silo B, Category B, and the events collected in Silo C, Categories A and B. She found none of the complaints collected in Silo B, Category C; Silo C, Category C; or in Silo D amounted to abuse of process.

[30] Many of the conclusions of the judge are not challenged on appeal, and, with limited exceptions, the judge's findings of fact are not impugned by either party.

[31] In her reasons for granting the stay of proceedings, the judge discussed the leading jurisprudence as it relates to abuse of process. She observed that since *O'Connor*, the common law doctrine of abuse of process and the approach to rights under s. 7 of the *Canadian Charter of Rights and Freedoms* have dovetailed. She described the test to apply on the application in these words:

[78] … this application will be decided under the common law doctrine of abuse of process. Should an abuse be found, the question of whether this is that "clearest of cases" that warrants a stay of proceedings will be determined in accordance with *R. v. Babos*, 2014 SCC 16, …

[32] The judge referred, in particular, to *O'Connor*, *Regan*, *Babos*, and *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, as establishing, broadly, two categories of abuse of process: those that cause prejudice to the accused's right to a fair trial and those that cause harm to the integrity of the justice system. The second category is referred to as the "residual category".

[33] The judge rejected Mr. Bacon's contention that the faults identified came within the first category of abuse of process as prejudicing his right to a fair trial, and held that only the residual category was engaged by the circumstances before her.

[34] The judge observed that under *Babos*, a stay of proceedings to redress abuse of process in the residual category engages these questions:

1. whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would do further harm to the integrity of the justice system;

2. whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward; and

3. in the words of Justice Moldaver, at para. 41, "which of two options better protects the integrity of the justice system: staying the proceedings, or having a trial despite the impugned conduct".

[35] Having resolved which behaviours and actions in her view amounted to abuse of process (Stage One of *Babos*) and having placed those faults in the residual category, the judge then considered whether a remedy could be or had been provided that would adequately address the harm to the integrity of the justice system caused by the abusive conduct (Stage Two of *Babos*).

[36] In her conclusions on Stage Two of *Babos,* the judge found that "proceeding with the prosecution would lend judicial condonation of [the] impugned conduct" and that "it would be an abdication of the Court's duties and responsibilities to grant any remedy short of [a] stay of proceedings in the circumstances of this case".

[37] With this conclusion, the judge moved to the third question presented by *Babos*: balancing the harm to the integrity of the justice system by proceeding to trial, and the harm from declining to try the charges, should the charges be stayed? While the judge acknowledged that there were "extremely compelling reasons" not to stay the proceedings, she found "that the totality of the state misconduct" was "so detrimental to the proper administration of justice" that it warranted the most severe form of judicial intervention. She concluded that "as regrettable as this outcome is, society's interest in a full trial on the merits cannot, in this instance, prevail in the balancing process." She ordered a stay of proceedings.

GROUNDS OF APPEAL

[38] The Crown advances three grounds of appeal. It contends the judge erred:

1. in law and fact at Stage One of *Babos*, in characterizing certain instances as serious misconduct amounting to abuses of process.

2. at Stage Two of *Babos*, in concluding that there is no alternative remedy to adequately disassociate the justice system from the impugned police misconduct; and

3. at Stage Three of *Babos*, in reaching a decision so clearly wrong as to amount to an injustice by finding that this is the clearest of cases warranting the most extreme remedy of a stay of proceedings in order to better protect the integrity of the justice system.

STANDARDS OF REVIEW

[39] The appeal challenges a limited number of facts, certain conclusions of law, and the judge's exercise of judicial discretion. Each of these types of alleged error requires a different approach, recognizing that we are a court of error and may not embark on a fresh enquiry.

[40] On questions of fact and inferences of fact, we must ask whether there is a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33. Madam Justice Bennett explained this standard as it applies in the criminal law in *R. v. Nuttall*, 2018 BCCA 479:

[269] To state it simply, a palpable and overriding error is an obvious error that erodes the result.

[270] In *H.L. v. Canada*, 2005 SCC 25, Justice Fish discussed alternative formulations of the "palpable and overriding error" standard. He explained that such an error is "clearly wrong" in that the appellate court can plainly identify the imputed error and show how it affected the result: at para. 55. He wrote that the test is also met when the findings of fact are "unreasonable or unsupported by the evidence": at para. 56. That language is more familiar to the criminal law …

[41] This same standard applies to findings of credibility (*R. v. Gagnon*, 2006 SCC 17 at para. 10). That means that a finding of fact based on acceptance by the judge of a witness's testimony may only be interfered with if the trial judge made an error that, as noted by Justice Moldaver in dissent in *R. v. Le*, 2019 SCC 34 at para. 206, is "plainly seen" (*Housen* at para. 6), and is "shown to have affected the result" (*H.L.* at para. 55).

[42] Questions of law, on the other hand, are reviewed on a standard of correctness. This standard applies to an absence of evidence to support a finding of fact because such an absence is not a question of fact but a question of law alone (*Nuttall* at para. 272).

[43] The standard of review on the third type of putative error, one involving the exercise of discretion, is deferential. In *Babos*, Justice Moldaver described this deferential standard in the context of a remedy ordered under s. 24(1) of the *Charter* for abuse of process coming within the residual (that is, not affecting trial fairness) category:

[48] The standard of review for a remedy ordered under s. 24(1) of the *Charter* is well established. Appellate intervention is warranted only where a trial judge misdirects him or herself in law, commits a reviewable error of fact, or renders a decision that is "so clearly wrong as to amount to an injustice" [*R. v. Bellusci*, 2012 SCC 44] at para. 19; *Regan* at para. 117; [*Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391] at para. 87; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at paras. 15 and 51).

DISCUSSION

1. Stage One of *Babos* – Conduct as Abuse of Process

[44] The first stage of *Babos* requires the judge to determine whether the impugned conduct amounts to an abuse of process. To amount to an abuse of process it must be shown that the conduct was prejudicial to the integrity of the justice system: *Babos* at para. 50. Whether the conduct amounts to an abuse of process is a question of law (*R. v. Derbyshire*, 2016 NSCA 67, leave to appeal ref'd [2016] 1 S.C.R. xvi).

[45] While we agree with the judge that certain police conduct amounted to an abuse of process, we have found that she erred in finding that other conduct amounted to an abuse of process and further erred in considering this additional conduct in her Stage Two and Three analyses. We conclude that these errors were based, in part, on her application of an overly expansive view that the court has an oversight role with respect to both police compliance with police policy and police file storage and management, absent effects arising from non-compliance or mismanagement of files that impair the integrity of the justice system.

a) The Role of Police and Police Policy

[46] Police have a distinct role and position of independence in the justice system, separate from other arms of the justice system such as the Crown or the court. We observe that although ambiguity exists in jurisprudential understanding of the various models of policing used by differing police services, and that jurisprudence often "steps over" implications of the differing models for accountability and breadth of police independence, the jurisprudence clearly establishes that police officers and police services are afforded independent discretion to adapt to individual circumstances presented.

[47] Three cases in particular serve to affirm this independence: *R. v. Campbell*, [1999] 1 S.C.R. 565, *Regan*, and *R. v. Beaudry*, 2007 SCC 5. In *Campbell*, Justice Binnie, for the court, explained the independence of police from the executive, and identified the individual responsibility of a police officer:

> 27. … A police officer investigating a crime is not acting as a government functionary or as an agent of anybody. He or she occupies a public office initially defined by the common law and subsequently set out in various statutes. In the case of the RCMP, one of the relevant statutes is now the *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10.
>
> …
>
> 29. … In this appeal, however, we are concerned only with the status of an RCMP officer in the course of a criminal investigation, and in that regard the police are independent of the control of the executive government. The importance of this principle, which itself underpins the rule of law, was recognized by this Court in relation to municipal forces as long ago as *McCleave v. City of Moncton* (1902), 32 S.C.R. 106. …

…

33. While for certain purposes the Commissioner of the RCMP reports to the Solicitor General, the Commissioner is not to be considered a servant or agent of the government while engaged in a criminal investigation. The Commissioner is not subject to political direction. Like every other police officer similarly engaged, he is answerable to the law and, no doubt, to his conscience. …

[48] In *Regan*, Justice LeBel explained the independence of police from Crown prosecutors:

66. The need for a separation between police and Crown functions has been reiterated in reports inquiring into miscarriages of justice which have sent innocent men to jail in Canada. The *Royal Commission on the Donald Marshall, Jr., Prosecution*, vol. 1, *Findings and Recommendations* (1989) … emphasizes that [the Crown's] role must remain distinct from (while still cooperative with) that of the police (at p. 232):

We recognize that cooperative and effective consultation between the police and the Crown is also essential to the proper administration of justice. But under our system, the policing function – that of investigation and law enforcement – is distinct from the prosecuting function. We believe the maintenance of a distinct line between these two functions is essential to the proper administration of justice.

[49] And in *Beaudry*, the import of police discretion to the functioning of the justice system was explained by Justice Charron, writing for the majority, with Justice Fish writing in dissent for the minority, but not on this point:

35. There is no question that police officers have a duty to enforce the law and investigate crimes. The principle that the police have a duty to enforce the criminal law is well established at common law: *R. v. Metropolitan Police Commissioner*, [1968] 1 All E.R. 763 (C.A.), *per* Lord Denning, M.R., at p. 769; *Hill v. Chief Constable of West Yorkshire*, [1988] 2 All E.R. 238 (H.L.), *per* Lord Keith of Kinkel; P. Ceyssens, *Legal Aspects of Policing* (loose-leaf ed.), vol. 1, at pp. 2-22 *et seq.*

…

37. Nevertheless, it should not be concluded automatically, or without distinction, that this duty is applicable in every situation. Applying the letter of the law to the practical, real-life situations faced by police officers in performing their everyday duties requires that certain adjustments be made. Although these adjustments may sometimes appear to deviate from the letter of the law, they are crucial and are part of the very essence of the proper administration of the criminal justice system, or to use the words of s. 139(2) [of the *Criminal Code*], are perfectly consistent with the "course of justice". The ability – indeed the duty – to use one's judgment to adapt the process of law enforcement to individual circumstances and to the real-life demands of justice is in fact the basis of police discretion. What La Forest J. said in *R. v. Beare*, [1988] 2 S.C.R. 387, at p. 410, is directly on point here:

> Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid.

…

48. … In my opinion, the proper functioning of the criminal justice system requires that all actors involved be able to exercise their judgment in performing their respective duties, even though one person's discretion may overlap with that of another person. The police have a particular role to play in the criminal justice system, one that was initially founded in the common law, and it is important that they remain independent of the executive branch: [*Campbell*] at paras. 27 to 36, and [*Regan*]. …

[Emphasis added.]

[50] The police and Crown, while able to exercise discretion independently, must exercise this discretion in accordance with the law. Application of this approach is found in *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, as well as the more recent decisions of *R. v. Anderson*, 2014 SCC 41, and *Kosoian v. Société de transport de Montréal*, 2019 SCC 59.

[51] The degree of discretion police officers have in performing their duties relates to the effect of police policy. While policies and police manuals may often be considered as expressing best practices, or at least good practices, unless they bear the imprimatur of law through the statutory processes of subordinate legislation, jurisprudence consistently declines to give them binding force.

[52] An example of the application of this approach is *R. v. Jageshur* (2002), 169 C.C.C. (3d) 225 (Ont. C.A.). In *Jageshur*, the Ontario Court of Appeal considered the effect of police policy on the legality of investigative conduct, being a reverse sting operation that led to charges against the accused. In passages approved in *Beaudry*, Justice Doherty, for the court, distinguished police responsibilities defined in regulations under the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, from RCMP policies:

[50] An officer's duties and hence his or her responsibilities cannot be equated with instructions as to how those duties and responsibilities should be carried out. Police policies speak to the manner in which police should carry out their responsibilities, but do not define or limit those responsibilities.

…

[52] My conclusion that the officers' responsibilities were not circumscribed by the RCMP policy concerning major drug operations and reverse stings is fortified by a consideration of the nature of these policies. Section 21(1)(b) of the *Royal Canadian Mounted Police Act* authorizes the Governor in Council to make regulations for the conduct and performance of duties by members of the RCMP. Section 21(2)(b) authorizes the Commissioner of the RCMP to make rules (standing orders) for the conduct and performance of duties by members of the RCMP. Section 38 of the same *Act* authorizes the Governor in Council to make regulations governing the conduct of members (Code of Conduct). The policies in issue on this appeal did not spring from any of these statutory sources.

[53] In *Beaudry*, Justice Charron stated, clearly, that police manuals and directives do not have the force of law:

45. … It should be pointed out that these [administrative directives set out in the police practices manual] do not have the force of law…

[54] This is not to say, however, that non-compliance with policy has no relevance in the review of conduct. In the context of reviewing the exercise of prosecutorial discretion, Justice Moldaver explained in *Anderson* at para. 56:

... I note that the content of a Crown policy or guideline may be relevant when a court is considering a challenge to the exercise of prosecutorial discretion. Policy statements or guidelines are capable of informing the debate as to whether a Crown prosecutor's conduct was appropriate in the particular circumstances. … as the intervener the Director of Public Prosecutions of Canada submits, Crown policies and guidelines do not have the force of law, and cannot themselves be subjected to *Charter* scrutiny in the abstract: see [*Beaudry*] at para. 45 (discussing police practices manuals).

b) The Judge Erred in Identifying Certain Conduct as Contributing to Abuses of Process

[55] We conclude that the judge erred in identifying certain police conduct as serious misconduct or gross negligence that amounted to abuses of process, but we do not consider that the judge erred in including limited events in Silo C, Category A, in the basket of faults amounting to an abuse of process.

[56] We have arrived at these conclusions, in part, because: the judge relied on non-compliance with police policy that she said was prejudicial to the integrity of the justice system, to find that certain police conduct was serious misconduct or gross negligence, despite an absence of consequences arising from the non-compliance that would tarnish the integrity of the justice system; and because she applied an overly expansive view of the court's role in overseeing police operational standards when the police conduct she reviewed did not effect consequences that would impugn the integrity of the justice system.

[57] With respect to her application of police policies, the judge, in our view, misinterpreted her role in considering them and their import on the legality of police behaviours.

[58] In respect of the overly expansive role she adopted, we consider that her enquiry into certain administrative matters was akin to a police audit to explore and improve performance of the police service, and similar to the sort of enquiry made for the purposes of an internal investigation. In our view, this is outside the role of the court where, as here, faults did not cause an event that was prejudicial to the integrity of the justice system. Such a broad search and report on police internal error intrudes upon the institutional independence of police, in much the same way it would be wrongly intrusive if the target were the Crown's internal administration or discretionary decisions (*Anderson*), or the court's systems and procedures. Here the judge veered impermissibly from the search for conduct related to the trial that would "violate those fundamental principles of justice which underlie the community's sense of fair play and decency": *Jewitt* at 136–137.

[59] These are errors of law that fatally undermine the judge's conclusions about certain police conduct. We consider that the conduct in question would not shock the conscience of Canadians.

2. Stage Two of *Babos* – Alternative Remedies

[60] The second stage of a *Babos* analysis asks whether any remedy short of a stay is capable of redressing the prejudice caused by the abuse of process identified at Stage One of the test. Because the abuse of process identified here is in the residual category, what is considered is a remedy sufficient to dissociate the justice system from the impugned conduct going forward. Justice Moldaver explained:

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

[Emphasis added.]

[61] In our view, the judge erred in some respects in considering the steps already taken, and that could be taken, to remedy the abuse of process. However, even accounting for those errors, and eliminating the categories of conduct we find should not be counted as abuse of process, we agree with the judge that those steps are not a full answer to the abuses of process that infect the case. The character of the misconduct engages the integrity of the justice system and requires a balancing analysis under Stage Three of *Babos* where all considerations may be brought to bear on the question of staying the proceeding.

3. Stage Three of *Babos* – Balancing

[62] In a residual category case, as this is, the balancing stage must be considered. Justice Moldaver comprehensively explained in *Babos*:

[36] In [*Tobiass*], this Court described the residual category in the following way:

> For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. Ordinarily, the latter condition will not be met unless the former is as well – society will not take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare. [para. 91]

…

[40] Finally, the balancing of interests that occurs at the third stage of the test takes on added significance when the residual category is invoked. This Court has stated that the balancing need only be undertaken where there is still uncertainty as to whether a stay is appropriate after the first two parts of the test have been completed (*Tobiass*, at para. 92). …

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

…

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

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

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

[44] Undoubtedly, the balancing of societal interests that must take place and the "clearest of cases" threshold presents an accused who seeks a stay under the residual category with an onerous burden. Indeed, in the residual category, cases warranting a stay of proceedings will be "exceptional" and "very rare" (*Tobiass*, at para. 91). But this is as it should be. It is only where the "affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases" that a stay of proceedings will be warranted (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667).

[Emphasis added.]

[63] The judge concluded that the balancing exercise favoured granting a stay. Considering all four categories of misconduct that she found met the test for abuse of process, she addressed the factors referred to in *Babos*, sorting them into factors favouring a trial and factors favouring a stay.

[64] We have concluded that two of the four areas of conduct found by the judge to be abuses of process did not amount to abuses of process. As we have concluded that the judge erred in principle in

finding these two aspects of the investigation demonstrated abuses of process, it is open to us, applying the standard of review applicable to discretionary decisions, to interfere with the result.

[65] We find the balance favours a full trial of the charges on their merits, where Mr. Bacon will be found not guilty or guilty. The charges against him allege he was at the head of a terrible conspiracy, a conspiracy that led to the execution-style murders of the target and five other persons, all for expansion of business in the illicit drug trade. Murder has been recognized as the most heinous of peace time crimes (*R. v. Martineau*, [1990] 2 S.C.R. 633 at 646) and the seriousness of conspiracy to commit murder is of the highest order. The community has "a profound interest" in seeing guilt or innocence of these charges alleged against Mr. Bacon determined on the merits.

[66] In our view, the other concerns that led the judge to enter a stay of proceedings, absent the matters in respect to which we find an error in principle, do not, on their own, support an entry of a stay of proceedings.

[67] We conclude that the stay of proceedings should be set aside and the matter remitted to the Supreme Court of British Columbia for trial.

OBSERVATIONS ON OFF-THE-DOCKET PROCEEDINGS

[68] We have had the opportunity to review the record in detail and recognize that certain portions of the evidence raise concerns of extraordinary seriousness, and require the highest level of confidentiality. For that reason, high security levels were employed in this Court, and the entire hearing was held *in camera*.

[69] Nonetheless, we are disquieted by learning that some of the pre-trial proceedings proceeded off-docket, and so were not made known to the community. Closing a court room is a serious and rare step. It is even more serious to hide the fact a hearing is ongoing.

[70] Such secrecy in the court process is an anathema. A court should not hide the fact a hearing is proceeding. Listing a case as an *in camera* proceeding provides slim information to the public but it is not nothing. In the minimum, doing so informs the public that the court, which is their court, is grappling with the case listed. It allows the public to keep track of the closed proceedings and it allows for applications to the court in respect of the closure: e.g., *Dagenais v. Canadian Broadcasting Corp*., [1994] 3 S.C.R. 835. In our respectful view, proceedings that do not allow for that minimal degree of oversight should not occur.

CONCLUSION

[71] The pre-appeal proceedings were exceedingly long and the logistics of this appeal were significant. We would express our thanks to all counsel for their assistance and the professional manner that they displayed throughout the appeal. Some recognition for the efficient presentation should also be accorded to Mr. Justice Frankel as appeal management justice.

[72] We wish to also express our appreciation to the judge. She was faced with a Herculean task of almost unprecedented complexity. The pre-trial proceedings lasted some four-and-one-half years. She was called upon to address numerous applications and make numerous rulings. The pre-trial proceedings culminated in the stay application which in itself spanned some 68 court days over 7 months and resulted in a ruling which is 885 paragraphs long. While we have ultimately reversed the judge's decision to grant a stay, we would be remiss if we did not note that the overwhelming majority of her many findings and rulings were not challenged by either side. Our task was made easier by the clarity of her thoughtful and precise reasons.

[73] For the reasons above, we conclude that the judge made errors in identifying certain conduct as an abuse of process, in considering steps taken to remedy, at least in part, the misconduct at the heart of the appeal, and in balancing the serious misconduct we agree is abuse of process with the importance of trying this case on the merits.

[74] The appeal is allowed. The order staying the trial against Mr. Bacon on the charges is set aside, and the matter is remitted to the Supreme Court of British Columbia for trial.

"The Honourable Madam Justice Saunders"

"The Honourable Mr. Justice Goepel"

"The Honourable Mr. Justice Hunter"

APPENDIX A
COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Bacon*, 2020 BCCA 140

Date: 20200521

Docket: CA44953

Between:

Regina

Appellant

And

James Kyle Bacon

Respondent

STATEMENT CONCERNING THIS APPEAL AS READ BY A SINGLE JUDGE PRONOUNCING JUDGMENT PURSUANT TO S. 21(3) OF THE *COURT OF APPEAL ACT*

This is a statement that will be posted on the Court's website concerning this appeal until abbreviated reasons for judgment, as now explained, are posted.

James Kyle Bacon was charged by direct indictment on one count of first degree murder and one count of conspiracy to commit murder. The charges arise from the investigation into six homicides in Surrey, British Columbia, committed October 19, 2007.

On December 1, 2017, after lengthy pre-trial proceedings, the judge stayed the proceedings.

The Crown appealed that order. The appeal is allowed and the charges are remitted to the trial court for trial.

The reasons for judgment are of the Court, and are signed. However, as a consequence of issues of various privileges and confidential information, the British Columbia Supreme Court judgment is sealed and the hearing of the appeal was *in camera*. The multiple issues of confidentiality means that

our full reasons for judgment must be sealed and only an abbreviated version complying with the obligations of confidentiality may be released to the public.

The division is presently consulting with counsel to canvass the text of the abbreviated reasons so as to allow for public release of reasons for judgment that comply with the requirements of confidentiality.

The final abbreviated version of the reasons for judgment will be released in chambers and made available to the public. In the meantime, this statement will be posted under the judgment number, on our website.

The Court acknowledges the cooperation of all counsel in handling the mechanics of the delivery of judgment in this manner.