

# “Jackpot:” the Hang-Up Holding back the Residual Category of Abuse of Process<sup>\*</sup>

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## ABSTRACT

The abuse of process doctrine allows courts to stay criminal proceedings where state misconduct compromises trial fairness or causes ongoing prejudice to the integrity of the justice system (the “residual category”). The Supreme Court revisited the residual category in the 2014 case *R v Babos*. In *Babos*, the Supreme Court provided a three-stage test for determining whether an abuse of process in the residual category warrants a stay of proceedings.

This article critically examines *Babos* and its progeny. Notwithstanding the Supreme Court’s insistence that the focus of the residual category is societal, all three stages of the test remain disconcertingly preoccupied with the circumstances of the individual accused. Courts’ reluctance to give undeserving accused the “jackpot” remedy of a stay has prevented the court from dissociating itself from state misconduct. Instead, courts have imposed remedies which inappropriately redress wrongs done to the accused. This paper suggests four ways for courts to better advance the societal aim of the residual category. First, a cumulative approach should be taken to multiple instances of state misconduct rather than an individualistic one. Second, courts ought to canvass creative remedies in considering whether an alternative remedy can adequately dissociate the justice system from the

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<sup>\*</sup> This paper was written in a personal capacity and does not in any way reflect the views of the Ontario Superior Court of Justice or the Ministry of the Attorney General.

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misconduct. Third, courts should avoid using terms like “unwarranted windfall” and “jackpot” to describe the remedy of a stay of proceedings. Finally, courts need not be so hesitant to stay proceedings. Properly applied, the abuse of process analysis carries minimal risk of “unwarranted windfalls.”

**Keywords:** *Abuse of process – residual category – prejudice – integrity of the justice system – ss. 7, 24(1), Canadian Charter of Rights and Freedoms – remedies – stay of proceedings – exclusion of evidence – sentence reduction – restorative justice – proactive remedies.*

## I. INTRODUCTION

The abuse of process doctrine allows courts to stay criminal proceedings in two circumstances: (1) where state misconduct compromises trial fairness (the “main category”) or (2) where state misconduct does not affect trial fairness but “impinges on the integrity of the justice system” (the “residual category”).<sup>1</sup> The Supreme Court revisited the residual category in the 2014 case *R v Babos*. Writing for the majority, Moldaver J reaffirmed that the remedial goal in such cases is “not to provide redress to an accused for a wrong that has been done to him or her in the past.”<sup>2</sup> Rather, “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.”<sup>3</sup> Moldaver J clarified that the test used for determining whether state misconduct warrants a stay of proceedings is the same for both categories. It consists of three requirements:

1. There must be prejudice to the integrity of the justice system which will be perpetuated by the conduct of a trial or its outcome;
2. There must be no alternative remedy capable of redressing the prejudice;
3. Where uncertainty remains after the first two stages, the court balances the need to denounce misconduct and preserve the integrity of the justice system against society’s interest in adjudicating the case on its merits.<sup>4</sup>

<sup>1</sup> *R v Babos*, 2014 SCC 16 at para 1, [2014] 1 SCR 309 [*Babos*].

<sup>2</sup> *Ibid* at para 39.

<sup>3</sup> *Ibid*.

<sup>4</sup> *Ibid*.

This article critically examines each stage of the abuse of process analysis as articulated and applied in *Babos* and its progeny. While *Babos* did not alter the first two stages of the abuse of process analysis *per se*, the majority applied those stages of the abuse of process test in ways which have important ramifications for future abuse of process cases. With respect to prejudice caused to the integrity of the justice system, the first stage, the majority assessed each instance of state misconduct individually rather than cumulatively. Moreover, the majority considered the passage of time since the misconduct and defence counsel’s delay in bringing an abuse of process application as mitigating factors. The majority did not consider alternative remedies short of a stay, skipping the second stage of the abuse of process test.

*Babos*’ key innovation was to make the third stage of the test in the residual category mandatory. Prior to *Babos*, courts only balanced the need to dissociate the court from state misconduct against society’s interest in adjudicating the case on its merits when uncertainty persisted after the court determined the only remedy capable of redressing prejudice was a stay of proceedings. Under the new framework, however, balance “must always be considered.”<sup>5</sup>

The central argument of this article is that, notwithstanding the Supreme Court’s insistence on the residual category’s societal focus in *Babos*, all three stages of the test used to determine whether a stay of proceedings is warranted remain disconcertingly preoccupied with the circumstances of the individual accused. The unspoken concern animating courts’ application of the residual category is that a stay of proceedings may give the accused more than they deserve. Quite apart from whether society’s interest in adjudicating the trial on its merits outweighs the need to dissociate the justice system from state misconduct, courts distort the analysis in order not to give undeserving accused the “jackpot” remedy of a stay of proceedings.<sup>6</sup>

Courts’ reluctance to give the accused more than they deserve has held back the residual category of abuse of process in at least two ways. First, it has narrowed access to the remedy of a stay of proceedings. The Supreme Court has long maintained that stays are reserved for the “clearest of cases.”<sup>7</sup>

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<sup>5</sup> *Babos*, *supra* note 1 at para 41.

<sup>6</sup> *R v Muthuthamby*, 2010 ONCJ 435 at para 33, 79 CR (6th) 64 [*Muthuthamby*]. O’Donnell J uses the word “jackpot” to describe a stay of proceedings.

<sup>7</sup> *R v O’Connor*, [1995] 4 SCR 411 at para 82, 103 CCC (3d) 1.

However, where the need to dissociate the court from misconduct outweighs society's interest in adjudication of the case on its merits and the court nevertheless permits the trial to continue because of extraneous factors like whether the accused deserves a stay, the court unjustifiably implicates itself in state misconduct. Second, the reluctance to award an accused the "jackpot" of a stay of proceedings has influenced courts to grant remedies which inappropriately redress wrongs done to the accused, rather than dissociate the justice system from the misconduct.

If courts are serious about dissociating the justice system from conduct which offends society's sense of fair play and decency, then they must legitimately engage with the purpose of the residual category. This article suggests four ways in which courts may do so. First, a cumulative approach should be taken to multiple instances of misconduct rather than an individualistic one. Second, courts ought to canvass creative remedies in considering whether an alternative remedy can adequately dissociate the justice system from the misconduct. Third, although it would be preferable to abandon the third stage entirely, to the extent that courts are bound to apply it, courts should avoid considering the particular circumstances of the accused, except insofar as they are relevant to the need to denounce misconduct. The language of "unwarranted windfalls" and "jackpots" is particularly unhelpful and its use ought to be avoided.<sup>8</sup> Finally, courts need not be so hesitant to stay proceedings. Having concluded that state misconduct impinges on the integrity of the justice system and that the only remedy capable of adequately dissociating the justice system from that misconduct is a stay of proceedings, a court may safely conclude that a stay of proceedings is warranted.

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<sup>8</sup> For "jackpot" see *Muthuthamby*, *supra* note 6 at para 33. For "windfall" see *Babos*, *supra* note 1 at para 43; *R v Zarinchang*, 2010 ONCA 286 at para 60, 99 OR (3d) 721; *R v Regan*, 2002 SCC 12 at para 211, [2002] 1 SCR 297 [Regan]; *R v B(A)*, 2015 ONSC 5541 at para 74, 24 CR (7th) 191; *R v Spagnoli*, 2011 ONSC 4843 at para 60, 284 CCC (3d) 24; *R v Smith*, 2014 ONCJ 756 at paras 67 and 68, [2014] OJ No 5240 [Smith]; *R v Russo*, 2016 ONCJ 762 at para 96, 136 WCB (2d) 132 [Russo]; *R v Haevischer*, 2014 BCSC 2172 at para 152, 118 WCB (2d) 253; *R v Gonsalves*, 2016 ONCJ 768 at para 42, 136 WCB (2d) 375 [Gonsalves]; *R v Noel*, 2015 ONSC 2140 at para 53, 120 WCB (2d) 443. See also Kent Roach, *Constitutional Remedies in Canada*, 2<sup>nd</sup> ed (Toronto: Canada Law Book, 2013) at 9.350 [Roach, *Constitutional Remedies*].

## II. R V BABOS: ABUSE OF PROCESS REVISITED

### A. Facts

The abuse of process claim in *Babos* arose from long and complicated proceedings. On February 17, 2006, police officers, believing Mr. Babos was transporting guns in his vehicle, pulled Mr. Babos over. The officers searched the trunk of Mr. Babos’ car, found a semi-automatic firearm and arrested Mr. Babos.<sup>9</sup> Mr. Piccirilli was arrested on June 21, 2006.<sup>10</sup> Mr. Babos and his co-accused Mr. Piccirilli were charged with firearms related offences and drug trafficking offences.<sup>11</sup>

The first instances of misconduct occurred before the trial began. The appellants accused the provincial Crown initially assigned to the case of threatening Mr. Piccirilli on three separate occasions, between June 2006 and February 2007, with additional charges if he did not plead guilty.<sup>12</sup> Specifically, the appellants alleged the Crown uttered the following threats:

1. The Crown told Mr. Piccirilli’s former lawyer, in the presence of Mr. Piccirilli that “if your client doesn't settle, he's gonna be hit by a train.”
2. Mr. Piccirilli stated that the Crown said to him, “if you proceed, we’ll bring other charges against you” and that she would “use section 577 [of the *Criminal Code*]” to go “straight to trial.”
3. Another of Mr. Piccirilli’s counsel stated that the Crown told her that if Mr. Piccirilli did not plead guilty, she would charge Mr. Piccirilli with money laundering and organized crime offences.<sup>13</sup>

Although there was no evidence that the Crown had threatened Mr. Babos directly, the Supreme Court inferred that the threats conveyed to Mr. Piccirilli would have “come to [Mr. Babos’] attention.”<sup>14</sup> Although these threats occurred well before the trial began in April 2008, the threats only came to light in October 2008 when Mr. Babos’ former counsel testified at Mr. Babos’ s. 11(b) application.

Before the appellants’ trial began, the provincial Crown was removed from the file for health reasons and replaced by a federal Crown. The federal Crown joined the charges against the appellants in a single indictment and,

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<sup>9</sup> *Supra* note 1 at para 7.

<sup>10</sup> *Ibid* at para 8.

<sup>11</sup> *Ibid*.

<sup>12</sup> *Ibid* at para 10.

<sup>13</sup> *Ibid*.

<sup>14</sup> *Ibid*.

based on evidence led at the preliminary hearings, charged them with “four additional offences related to organized crime, firearms, and drug trafficking.”<sup>15</sup>

The second instance of misconduct occurred at the outset of the trial, which began in April 2008. Counsel for Mr. Babos brought a motion to exclude the firearm seized from the trunk of Mr. Babos’ car.<sup>16</sup> A key issue at the hearing was whether the officer had opened the trunk or Mr. Babos had opened the trunk and thereby consented to the search.<sup>17</sup> One of the officers testified that Mr. Babos opened the trunk, despite having testified at the preliminary inquiry that he had opened the trunk himself.<sup>18</sup> When confronted with the inconsistency, the officer testified that the other officer had “convinced” him that the new version of events was the truth.<sup>19</sup> The trial judge found that the officers had “colluded for the purpose of misleading the court,” concluded that the trunk had been illegally searched and excluded the evidence under s. 24(2).<sup>20</sup>

In June 2008, the federal Crown sought to adduce the same firearm against Mr. Piccirilli, taking the position that Mr. Piccirilli lacked standing to claim a s. 8 violation because the car belonged to Mr. Babos.<sup>21</sup> The trial judge provisionally ruled in favour of the Crown.<sup>22</sup> In October, Mr. Babos brought a motion to stay the charges for unreasonable delay.<sup>23</sup> Shortly thereafter, Mr. Piccirilli had a heart attack and the trial was adjourned.<sup>24</sup> Mr. Piccirilli applied for bail on the basis that the detention centre where he was being held lacked capacity to care for his health.<sup>25</sup> Mr. Piccirilli undertook to provide the court with his medical report and list of medications.

The third instance of misconduct occurred before Mr. Piccirilli’s bail application was heard. The federal Crown contacted the detention centre directly and spoke to Mr. Piccirilli’s doctor, who, without Mr. Piccirilli’s

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<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid* at para 12.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid* at para 13.

<sup>21</sup> *Ibid* at para 14.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid* at para 15.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

consent, provided the federal Crown with Mr. Piccirilli’s medical documents.<sup>26</sup> The federal Crown provided those documents to Mr. Piccirilli’s counsel.<sup>27</sup> Although the federal Crown initially refused to disclose the source of those documents, she subsequently did so by affidavit.<sup>28</sup>

Mr. Babos’ s. 11(b) application resumed in late October.<sup>29</sup> During these proceedings, the provincial Crown’s threatening conduct “came to light for the first time.”<sup>30</sup> The federal Crown declined to call the provincial Crown to give evidence because the provincial Crown’s health precluded her from testifying.<sup>31</sup> The federal Crown did not admit the threats.<sup>32</sup>

Mr. Babos and Mr. Piccirilli subsequently brought an application to stay the proceedings for abuse of process.<sup>33</sup> The trial judge granted the appellants’ request on November 14, 2008.<sup>34</sup> The trial judge stayed the proceedings on the basis of the provincial Crown’s threats, the police officers’ collusion to mislead the court and the federal Crown’s “improper conduct in securing Mr. Piccirilli’s medical records.”<sup>35</sup>

## B. Moldaver J’s Majority Judgment

### 1. *The Test for Abuse of Process*

Writing for the majority, Moldaver J revisited the test for abuse of process established in *R v Regan*.<sup>36</sup> As indicated above, abuse of process claims in the criminal context fall into two categories of cases: (1) where state misconduct “compromises the fairness of an accused’s trial; and (2) where state misconduct “risks undermining the integrity of the judicial process” but does not affect trial fairness.<sup>37</sup> In either category, a stay of proceedings will only be warranted in the “clearest of cases.”<sup>38</sup>

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<sup>26</sup> *Ibid* at para 16.

<sup>27</sup> *Ibid*.

<sup>28</sup> *Ibid*.

<sup>29</sup> *Ibid* at para 17.

<sup>30</sup> *Ibid*.

<sup>31</sup> *Ibid*.

<sup>32</sup> *Ibid*.

<sup>33</sup> *Ibid* at para 18.

<sup>34</sup> *Ibid*.

<sup>35</sup> *Ibid* at para 19.

<sup>36</sup> *Ibid* at para 32; *Regan*, *supra* note 8 at paras 54-57.

<sup>37</sup> *Babos*, *supra* note 1 at para 31.

<sup>38</sup> *Ibid*.

Whether a stay of proceedings is warranted is determined by the applying same test for both categories.<sup>39</sup> The test has three requirements:

- (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome";
- (2) There must be no alternative remedy capable of redressing the prejudice; and
- (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits".<sup>40</sup>

Moldaver J stressed that state misconduct is not a necessary condition to establish an abuse of process.<sup>41</sup> "Circumstances may arise", he emphasized, "where the integrity of the justice system is implicated in the absence of misconduct."<sup>42</sup>

In the residual category, the question at the first stage of the test is whether the state "has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system."<sup>43</sup> Moldaver J downplayed the distinction between ongoing and past misconduct, maintaining that the question to be answered at the first stage remained "whether proceeding in light of the impugned conduct would do further harm to the integrity of the justice system."<sup>44</sup>

At the second stage, the question is "whether any other remedy short of a stay is capable of redressing the prejudice."<sup>45</sup> Different remedies apply to the trial fairness category as compared to the residual category. Because in the former category "the focus is on restoring an accused's right to a fair trial," procedural remedies such as ordering a new trial are more appropriate.<sup>46</sup> In the residual category, the concern is prejudice to the integrity of the justice system.<sup>47</sup> Importantly, Moldaver J stressed that remedies in the residual category are designed not to compensate the

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<sup>39</sup> *Ibid* at para 32.

<sup>40</sup> *Ibid*. Citations omitted.

<sup>41</sup> *Ibid* at para 37.

<sup>42</sup> *Ibid*.

<sup>43</sup> *Ibid* at para 35.

<sup>44</sup> *Ibid* at para 38.

<sup>45</sup> *Ibid* at para 39.

<sup>46</sup> *Ibid*.

<sup>47</sup> *Ibid*.



accused for wrongs; rather, “the focus is on whether an alternate remedy short of a stay of proceeding will adequately dissociate the justice system from the impugned state conduct going forward.”<sup>48</sup>

As indicated above, *Babos*’ key change to the abuse of process test in the residual category pertains to the third stage. At the third stage, Moldaver J emphasized that the balancing of interests “takes on added significance when the residual category is invoked.”<sup>49</sup> The court must consider whether the integrity of the justice system is better protected by staying the proceedings or having a trial despite the misconduct.<sup>50</sup> The seriousness of the misconduct, whether the conduct is systemic or isolated, the circumstances of the accused, “the charges he or she faces,” and the interests of society in adjudicating the case on its merits are all relevant considerations to this balancing exercise.<sup>51</sup> Breaking with past jurisprudence which required balancing only in uncertain cases, Moldaver J concluded that balance must always be considered in the residual category.<sup>52</sup>

**2. Application to the Facts**

According to Moldaver J, the facts of *Babos* lent the abuse of process analysis to an individualistic approach because each instance of misconduct was committed at different times by different players.<sup>53</sup> However, Moldaver J acknowledged that a cumulative approach may be warranted in other cases.<sup>54</sup>

**Accessing Medical Records without Consent**

Moldaver J found the federal Crown’s conduct in accessing Mr. Piccirilli’s medical records “occasioned no prejudice to the integrity of the justice system.”<sup>55</sup> First, the federal Crown had asked only for an affidavit; the medical records were forwarded on the doctor’s own initiative.<sup>56</sup> Second, the federal Crown disclosed the source of the information within

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<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid* at para 40.

<sup>50</sup> *Ibid* at para 41.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid* at para 73.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid* at para 52.

<sup>56</sup> *Ibid* at para 51

days of receiving it.<sup>57</sup> Third, Mr. Piccirilli had put his health in issue and had undertaken to provide the court with his medical records.<sup>58</sup> Proceeding in light of this misconduct – if there was any – did not prejudice the integrity of the justice system.

#### **Police Collusion to Mislead the Courts**

Moldaver J found the appellants failed at the second stage with respect to the police collusion.<sup>59</sup> The appropriate remedy, according to Moldaver J, was to exclude the evidence of the firearm against Mr. Piccirilli, even though he lacked standing to challenge its admissibility.<sup>60</sup> Exclusion of the evidence would “serve to dissociate the court from the officers’ collusion and the Crown’s misguided attempt...to introduce the firearm against Mr. Piccirilli,” both of which were intended to achieve the admission of the firearm into evidence.<sup>61</sup>

#### **Threatening Conduct**

Moldaver J found the Crown’s threatening comments to Mr. Piccirilli and his counsel caused prejudice to the integrity of the justice system.<sup>62</sup> Moldaver J notably did not consider whether a remedy short of a stay of proceedings was adequate because, in his view, the third stage was dispositive.<sup>63</sup> Moldaver J found that a stay of proceedings would not respect society’s interest in adjudicating the case on its merits.<sup>64</sup> Of particular significance was the fact that the threats were made more than a year before the trial began.<sup>65</sup> According to Moldaver J, counsels’ eighteen month silence indicated they did not take the threats seriously.<sup>66</sup> At this stage, Moldaver J found that the serious nature of the charges weighed against “threats uttered more than a year before trial by a Crown no longer on the case” favoured a trial notwithstanding the misconduct.<sup>67</sup>

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<sup>57</sup> *Ibid* at para 52.

<sup>58</sup> *Ibid* at para 51

<sup>59</sup> *Ibid* at para 56.

<sup>60</sup> *Ibid* at para 57.

<sup>61</sup> *Ibid*.

<sup>62</sup> *Ibid* at para 66.

<sup>63</sup> *Ibid* at para 67.

<sup>64</sup> *Ibid* at para 69.

<sup>65</sup> *Ibid* at para 65.

<sup>66</sup> *Ibid* at para 63.

<sup>67</sup> *Ibid* at para 69.

### III. ANALYSIS

#### A. Unwarranted Windfalls and Jackpots

In *R v Mack*, Lamer J (as he then was) recognized that the “issuance of the stay obviously benefits the accused but the court is primarily concerned with the larger issue: the maintenance of the public confidence in the legal and judicial process.”<sup>68</sup> Regrettably, the recurrence of the language of “unwarranted windfalls” and “jackpots” in judgments demonstrates that the concern that an undeserving accused will benefit from a stay continues to influence courts.<sup>69</sup> In *R v Muthuthamby*, for example, O’Donnell J opined, “[t]he stay is the cudgel of judicial intervention. It is the blunt force trauma of constitutional remedies. It lacks subtlety. It risks being devoid of balance. It reflects no middle ground. It is the jackpot of judicial remedies.”<sup>70</sup> In *R v Smith*, Loignon J refused to stay the proceedings, concluding that a “stay would be an unjustified windfall to the accused.”<sup>71</sup> Yet, under the residual category, it is not the fact that an accused benefits from a stay that is relevant to abuse of process. Rather, it is whether the charges are so serious that the integrity of the justice system is better protected by proceeding with a trial in spite of the misconduct.<sup>72</sup> As I will argue in the subsequent sections, this “hang-up” with “jackpots” and “unwarranted windfalls” has caused courts to distort each stage of the abuse of process test. It has held back the residual category because it has prevented the courts from redressing prejudice to the integrity of the justice system.

#### B. The First Stage: Prejudice to the Integrity of the Justice System

At the first stage, the court is supposed to ask whether the impugned state conduct causes prejudice to the integrity of the justice system. In the face of multiple instances of misconduct, however, the Supreme Court has sanctioned the assessment of each form of misconduct individually, a practice that I will argue is inconsistent with the societal focus of the residual category. Moreover, the passage of time since the abuse of process and the tactics of defence counsel are not appropriate considerations in assessing

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<sup>68</sup> *R v Mack*, [1988] 2 SCR 903 at para 81, 44 CCC (3d) 513.

<sup>69</sup> For examples see *supra* note 8.

<sup>70</sup> *Supra* note 6 at para 33.

<sup>71</sup> *Supra* note 8 at para 68.

<sup>72</sup> *Babos*, *supra* note 1 at para 41.

the prejudice to the integrity of the justice system. I argue that it is more consistent with the purpose of the residual category for courts to stay tainted counts but allow untainted counts to proceed to trial.

### *1. Cumulative vs Individual Misconduct*

H. Archibald Kaiser has argued that the “atomized study” of the three instances of misconduct in *Babos* “seems out of place when the final obligation is to render a qualitative judgment on what the effects are on ‘the integrity of the justice system’ whether the ‘abuse will continue to plague the judicial process’ or cause a ‘taint of the justice system.’”<sup>73</sup> The individualistic approach is also out of step with recent Supreme Court jurisprudence on s. 24(2) applications, which have similar underlying policy considerations. The Supreme Court has preferred a cumulative approach to the question of whether admission of evidence would bring the administration of justice into disrepute.<sup>74</sup>

The facts of *Babos* itself illustrate why an individualistic approach to misconduct is inappropriate. Although Moldaver J is correct to say that the three forms of misconduct were perpetrated at different times and by different actors, he overlooks the fact that misconduct permeated virtually every stage of the justice process. The appellants’ introduction to the justice system began with an illegal car search. The provincial Crown threatened Mr. Piccirilli on three separate occasions before the trial began. Police collusion marred the s 24(2) hearing. During the trial, the Crown inappropriately accessed Mr. Piccirilli’s medical records without his consent. Looking at the case as a whole, it is difficult to identify a stage in the proceedings untainted by misconduct. Moreover, it makes little sense to distinguish between the federal and provincial Crowns as different state actors when both are “quasi-judicial officers” who ultimately represent her Majesty.<sup>75</sup>

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<sup>73</sup> H Archibald Kaiser, “*Babos*: Further Narrowing Access to a Stay of Proceedings Where the Integrity of the Judicial Process is Implicated” (2014) 8 CR (7th) 59 (WL) [Kaiser].

<sup>74</sup> *Ibid.* See also Kent Roach, “The Evolving Test for Stays of Proceedings” (1997-1998) 40 Crim LQ 400 at 404 and 407 for some of the differences between s 24(1) jurisprudence and s 24(2) jurisprudence. Roach goes a step further and argues that the “main category” and the “residual category” should not be considered watertight compartments. Cumulative prejudice to both the accused’s right to a fair trial and the integrity of the justice system may justify a stay, in his view.

<sup>75</sup> *Babos*, *supra* note 1 at para 61.

To be clear, narrative clarity may require separate discussion of separate instances of misconduct. In addition, there may be circumstances where different instances of misconduct suggest distinct alternative remedies, requiring a discrete analysis of each particular instance of misconduct. The argument here is not that courts must forego separate analyses of misconduct. Rather, when courts assess prejudice at the first stage of the abuse of process analysis, they must consider the overall prejudice to the integrity of the justice system. To compartmentalize and attack each instance of misconduct on the basis that different actors acted improperly at different times is to ignore the accretive effect of multiple instances of misconduct.<sup>76</sup> When misconduct has permeated multiple stages of the justice process, the integrity of the justice system suffers more prejudice than the mere sum of the individual instances of misconduct.

## *2. Passage of Time and the Tactics of Defence Counsel*

In dissent, Abella J rightly criticized the majority’s reliance on the passage of time between the threats and the abuse of process motion to “attenuate what was unpardonable conduct.”<sup>77</sup> Abella J forcefully argued that “time is not a legal remedy for a fundamental breach of the Crown’s role, and cannot retroactively cure intolerable state conduct.”<sup>78</sup> When the concern is the integrity of the justice system, what matters is not how much time has elapsed since the misconduct but rather that the misconduct happened at all. Moreover, it should not matter how seriously the defence perceived the threats. As Nathan Gorham has argued, the absence of prejudice to the individual is simply not relevant to the residual category.<sup>79</sup> What matters is whether the threats offend the community’s sense of fair play and decency. Focusing on the passage of time and the tactics of defence counsel at the first stage inappropriately shifts the analysis onto the accused and away from the prejudice to the integrity of the justice system.

An alternative explanation for the majority’s focus on timing and tactics is that the majority is worried about the tactics of opportunistic defence counsel. Defence counsel may resort to an abuse of process application as a

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<sup>76</sup> Kaiser, *supra* note 73.

<sup>77</sup> Babos, *supra* note 1 at para 82.

<sup>78</sup> *Ibid.*

<sup>79</sup> Nathan Gorham, “Regan: The Residual Category of Abuse of Process” (2002) 49 CR (5th) 87 (WL).

last resort after all other attempts to avoid trial have been exhausted, complicating the proceedings and wasting resources. “Had [the threats] been taken seriously,” Moldaver J wrote, “one might have expected counsel to respond immediately.”<sup>80</sup> Yet, if the abuse is to come before the court, then it makes little difference from society’s perspective when the motion is brought, provided it is brought before trial.<sup>81</sup>

The majority may also be worried that defence counsel will wait until abuses have accumulated in order to bring a stronger abuse of process claim, rather than bringing the abuses to the court’s attention immediately. This concern is likely unfounded, however. If the justice system is functioning properly, abuses will be rare, and multiple abuses by different state actors which have no impact on the fairness of the trial will be even rarer.<sup>82</sup>

Moreover, restricting access to the remedy of abuse of process is surely not the solution to this tactic. When an accused experiences multiple instances of state misconduct in the judicial process, it suggests there is a systemic problem. This is precisely the kind of situation in which a stay of proceedings is required to send the message that the justice system does not condone misconduct by state actors.<sup>83</sup>

### 3. *Charges Untainted by Misconduct*

All of this is not to suggest that courts are required to stay all counts when confronted with multiple instances of state misconduct. On the contrary, it is appropriate for courts to stay only those counts tainted by the misconduct, while leaving untainted counts intact.<sup>84</sup> Because the prejudice to the integrity of the justice system arises not from the misconduct itself

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<sup>80</sup> *Babos*, *supra* note 1 at para 63.

<sup>81</sup> This generally describes the approach taken in the United Kingdom. See Andrew L-T Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* 2<sup>nd</sup> ed (Oxford: Oxford University Press, 2008) at 168. With respect to timing, the Supreme Court of Canada has said only that stay applications in the trial fairness category should be brought at the end of trial. See *R v La*, [1997] 2 SCR 680 at paras 27-28, 148 DLR (4<sup>th</sup>) 608. It does make sense, however, for residual category abuses of process applications to be brought before trial. See Roach, *Constitutional Remedies*, *supra* note 7 at 9.470.

<sup>82</sup> *Canada (Minister of Citizenship & Immigration) v Tobiass*, [1997] 3 SCR 391 at para 91, 10 CR (5<sup>th</sup>) 163.

<sup>83</sup> *Babos*, *supra* note 1 at para 41.

<sup>84</sup> In *Regan*, *supra* note 8 at para 108, the trial judge stayed 9 out of 18 charges. Although the stay was reversed, the Court did not comment unfavourably on the severance of tainted from untainted counts. See also *R v Munro*, [1992] 97 Cr App R 183.

but rather from the court's association with the misconduct, staying the tainted counts necessarily precludes the court's association with the misconduct. Staying the tainted counts thus adequately dissociates the justice system from the misconduct.

Staying untainted counts, on the other hand, does nothing to further to dissociate the justice system from the misconduct because there is no prejudice left to remove. Furthermore, there is a strong societal interest in adjudicating the untainted counts on their merits. In *Babos*, for instance, some of the counts were added by the federal Crown following the preliminary inquiry.<sup>85</sup> As Moldaver J found that the federal Crown's accessing of the medical records did not prejudice the integrity of the justice system, it was arguably open to Moldaver J to find that the new counts were untainted by the provincial Crown's threatening conduct.

As a practical matter, the distinction between tainted and untainted counts may not always be easy to make. For example, where an improper investigation into one set of charges occurs simultaneously with a proper investigation into a different set of charges, it will likely not be clear whether all of the counts are tainted.<sup>86</sup> Where untainted counts can be surgically severed from tainted counts, however, there is a strong societal interest in adjudicating the untainted counts on their merits.

### C. The Second Stage: Alternate Remedies for Abuse of Process

At the second stage, the court determines whether a remedy short of a stay of proceedings would adequately dissociate the court from the impugned state conduct. *Babos* itself offers limited guidance as to what remedies short of a stay of proceedings would redress prejudice to the integrity to the justice system. In fact, with regards to the threatening conduct the majority never even considers alternative remedies. I argue in this section that the failure to properly apply the second stage is indefensible because it deprives the court of the opportunity to dissociate the justice system from misconduct while respecting society's interest in adjudicating the case on its merits.

The failure to consider alternative remedies is particularly unfortunate because, as I demonstrate in this section, a wide range of alternative

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<sup>85</sup> *Supra* note 1 at para 11.

<sup>86</sup> For more examples where drawing the line between tainted and untainted charges is difficult: see Peter M Brauti & Candice Welsch, "Illegal Police Conduct in the Course of a Bona Fide Investigation" (1999-2000) 43 Crim LQ 64 at 74-75.

remedies exist, including but not limited to exclusion of evidence, sentence reduction, denunciation, costs, and orders for restorative justice. The remedy for each case will depend on the particular circumstances of the case but trial judges enjoy considerable discretion in determining an appropriate remedy. As the Ontario Court of Appeal recently held in *R v Gowdy*, a trial judge's remedial choice for an abuse of process "unless encumbered by legal error, a reviewable error of fact or a decision that is so clearly wrong as to amount to an injustice, is entitled to deference."<sup>87</sup> The remedy should, however, avoid redressing a wrong done to the accused and instead focus on dissociating the court from the misconduct. This limits the applicability of certain remedies like exclusion of evidence and sentence reduction. As a practical matter, Crowns may also unilaterally withdraw charges as a proactive remedy for abuses, or enter into joint agreements with defence counsel to remedy abuses of process.

### *1. The Second Stage must be Applied*

In *Babos*, Moldaver J essentially "leaped over" the second stage by deciding the matter at the third stage:<sup>88</sup>

Turning to the second stage of the test, as no argument was made that there was an alternate remedy capable of redressing the particular harm caused to the integrity of the justice system by the threats, I need not finally decide whether such a remedy was available. Instead, I turn to the third stage of the test, namely, whether Ms. Tremblay's conduct was sufficiently egregious to warrant a stay of proceedings.<sup>89</sup>

Prior to *Babos*, skipping the second stage would have been conceptually indefensible because the third stage was reserved for uncertain cases. How can it be said that it is uncertain whether a stay is required if no alternative remedies have been considered? Moldaver J circumvents this requirement by making the third stage mandatory. Since "balance must always be considered," Moldaver J simply decides the matter at the third stage.<sup>90</sup>

This cannot be the correct approach. First, skipping over the second stage deprives the court of the opportunity to redress the prejudice to the integrity of the justice system without staying the proceedings. This means that there will either be no remedy, in which case the integrity of the justice

<sup>87</sup> *R v Gowdy*, 2016 ONCA 989 at para 72, 135 WCB (2d) 573 [Gowdy].

<sup>88</sup> Tim Quigley, "Babos: Balancing Test Unnecessarily Restricts Residual Category for Stay as Abuse of Process" (2014) 8 CR (7th) 55 (WL) [Quigley].

<sup>89</sup> *Babos*, *supra* note 1 at para 67.

<sup>90</sup> *Ibid* at para 41.



system is prejudiced, or there will be a stay, which frustrates society’s interest in adjudication of the case on its merits. Yet, if an alternative remedy is available, then both of those interests can be satisfied. In *Gonsalves* and *Russo*, for instance, the accused were charged with driving while intoxicated and subsequently arbitrarily detained for seven hours and four and a half hours, respectively.<sup>91</sup> In both cases, the courts proceeded straight to the balancing stage without considering alternative remedies, predictably concluding that the serious charges favoured adjudication of the case on its merits. However, the remedy of denunciation, considered below, arguably would have allowed these cases to proceed while also dissociating the court from misconduct. Skipping the second stage deprives the court of an important opportunity to address the very interests considered at the third stage.

Second, it is intellectually misleading to weigh the seriousness of the misconduct against the societal interest in having a trial without acknowledging that a stay is the only remedy capable of redressing the prejudicing integrity to the justice system. Tim Quigley argues that in leaping over the second stage, Moldaver J essentially conceded that no remedy short of a stay of proceedings could adequately redress the prejudice to the integrity of the justice system.<sup>92</sup> If the only remedy capable of dissociating the justice system from the misconduct is a stay of proceedings, then that should provide the context for the balancing stage which follows. Stays are warranted in cases of misconduct not simply because the misconduct is egregious. They are warranted because a stay is the only remedy capable of redressing the prejudice to the integrity of the justice system. Balancing the prejudice to the integrity of the justice system against society’s interest in adjudication of the case on its merits without acknowledging the singular ability of a stay to remedy the prejudice removes from consideration one of the strongest arguments in favour of staying the proceedings. By skipping the second stage, the court sets the applicant up for failure at the third stage.

## 2. *Alternative Remedies*

### Exclusion of Evidence

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<sup>91</sup> *Gonsalves*, *supra* note 7; *Russo*, *supra* note 7.

<sup>92</sup> *Supra* note 86.

Exclusion of evidence may be an appropriate remedy where there is some link between the misconduct and the evidence short of the “obtained in a manner” threshold for s. 24(2) applications. In *Babos*, for example, Moldaver J faulted the trial judge for failing to consider the alternative remedy of exclusion of the firearm evidence against Mr. Piccirilli notwithstanding Mr. Piccirilli’s lack of standing to challenge admission of the evidence under s. 24(2).<sup>93</sup> The trial judge had already excluded the evidence against Mr. Babos under s. 24(2).<sup>94</sup> It was during the s. 24(2) application that the police collusion came to light. This linked the officers’ misconduct to the firearm evidence. Evidence was also excluded as a remedy under s. 24(1) in *R v Smith*. In that case, police used excessive force in removing the accused from his car and then administered an intoxilyzer test two hours later.<sup>95</sup> Although the intoxilyzer reading was not obtained in a manner that breached the accused’s *Charter* rights, there was a temporal link between the excessive force and the reading that justified the exclusion of evidence as an alternative remedy under s. 24(1).<sup>96</sup>

Unfortunately, in many cases falling under the residual category, there will be no link between the evidence and the misconduct. For example, in many drinking and driving cases, the *Charter* breach occurs after all the evidence is obtained. As the Ontario Court of Appeal concluded in *R v Iseler*, there is no causal or temporal nexus between the breach and the obtaining of the evidence in such cases.<sup>97</sup> It is difficult to imagine how evidence could be excluded in a principled manner where there is no causal or temporal connection with the state misconduct. This was the conclusion Hackett J reached in *R v Young*:

...the police misconduct in this case began after the discovery of the marijuana and continued into this trial. In my view, the exclusion of the marijuana would not

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<sup>93</sup> *Supra* note 1 at paras 56-57.

<sup>94</sup> *Ibid* at para 13.

<sup>95</sup> *Supra* note 8 at para 65.

<sup>96</sup> *Ibid*.

<sup>97</sup> *R v Iseler* (2004), 190 CCC (3d) 11 at para 31, 191 OAC 80 (Ont CA), citing *R v Sapusak*, [1998] OJ No 4148 at para 1 (CA), 40 WCB (2d) 191. Similarly, in *R v Dawson*, 2016 ONSC 3461 at para 58, 356 CRR (2d) 193 [*Dawson*], Mew J commented that exclusion of evidence was not appropriate because the misconduct was not related to any evidentiary issues that might arise at trial.

reflect the nature and the extent of this misconduct in a manner that would redress the injury to the integrity of justice in this case.<sup>98</sup>

The arbitrary selection of a piece of evidence to exclude is more likely to redress the wrong done to the accused than dissociate the justice system from the state misconduct.

The utility of exclusion of evidence as a remedy is also undermined by the fact that in many cases, an exclusion of evidence would have the same effect as a stay of proceedings.<sup>99</sup> As a practical matter, courts appear more willing to entertain the remedy of exclusion of evidence where it would not result in the dismissal of all charges against the accused.<sup>100</sup>

### Sentence Reduction

Drinking and driving cases have engaged the residual category of abuse of process perhaps more than in any other context.<sup>101</sup> In these cases, police officers typically administer an intoxilyzer test properly and obtain a reading of “over 80.” The police then transport the accused to a police station and place them in a holding cell, ostensibly to allow them time to sober up. The problems start in the holding cell. In some cases, accused have been held for over ten hours, well in excess of the time the human body requires to eliminate alcohol from the bloodstream.<sup>102</sup> Because there is no reason to detain the accused this long, the police violate the accused’s s. 9 right to freedom from arbitrary detention. Since there is no link between the evidence and the *Charter* breach, exclusion of evidence is not available under s. 24(2) and, as discussed above, inappropriate under s. 24(1).

Trial judges have preferred the remedy of a sentence reduction in these cases. Yet, there are two problems with the remedy of a sentence reduction. The first problem is that it sends the wrong message to the public. As noted by Moldaver J, the point of a remedy for an abuse of process is *not* to redress

<sup>98</sup> *R v Young*, 2014 ONCJ 171 at para 20, 113 WCB (2d) 418.

<sup>99</sup> For example see *R v Basi*, 2009 BCSC 1685 at para 41, 85 WCB (2d) 717; *R v Tweedly*, 2013 BCSC 910 at para 151, 107 WCB (2d) 555.

<sup>100</sup> For example see *Smith*, *supra* note 8.

<sup>101</sup> For sentence reductions in other contexts see *R v Carter*, 2016 ONSC 2832 at para 40, 130 WCB (2d) 150; *R v Adams*, 2016 ABQB 648, [2017] 4 WWR 741; *Gowdy*, *supra* note 87.

<sup>102</sup> *R v Sathymoorthy*, 2014 ONCJ 318 at para 18, 315 CRR (2d) 76. In this case the accused was not provided with replacement clothing after soiling himself.

wrongs to the accused.<sup>103</sup> The point is to send the message that courts do not condone state misconduct.<sup>104</sup> A sentence reduction essentially treats state misconduct as a mitigating factor in sentencing. The message it communicates to the public is that an accused who suffers misconduct will have their sentence adjusted accordingly. This is perhaps why Lebel J in *R v Nasogaluak* cautioned courts that “it is neither necessary nor useful to invoke s. 24(1) of the *Charter* to effect an appropriate reduction of sentence to account for any harm flowing from unconstitutional acts of state agents consequent to the offence charged.”<sup>105</sup>

Mandatory minimum sentences present a second problem to the remedy of a sentence reduction. Without ruling on whether sentence reductions outside the statutory minimums were valid, Lebel J in *Nasogaluak* commented that they should be “exceptional” and reserved for “particularly egregious... misconduct by state agents.”<sup>106</sup> Although in *R v Nur*, Moldaver J would have used sentence reduction below the mandatory minimum as a remedy for abuses of process which lead to grossly disproportionate sentences, he was in dissent on this point.<sup>107</sup> While some lower courts have refused to grant a sentence reduction below mandatory minimums,<sup>108</sup> others routinely use exceptional remedy to avoid staying the proceedings.<sup>109</sup> In fact, recourse to the remedy has become so routine, that a judge recently declared “[t]here is ample authority for applying s. 24(1) of the *Charter* to suspend the constitutional minimum of a \$1000 fine.”<sup>110</sup> Not only does this dilute the remedy of a sentence reduction outside the statutory limits, it also subverts Parliament’s clear intention to circumscribe judicial discretion in sentencing.

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<sup>103</sup> *Babos*, *supra* note 1 at para 39.

<sup>104</sup> *Ibid.*

<sup>105</sup> *R v Nasogaluak*, 2010 SCC 6 at para 5, [2010] 1 SCR 206.

<sup>106</sup> *Ibid* at para 64. Lebel J preferred to use the broad discretion under s 718 and 718.2 to craft a fit sentence.

<sup>107</sup> *R v Nur*, 2015 SCC 15 at paras 162-172, [2015] 1 SCR 773.

<sup>108</sup> *R v Silvester*, 2016 ABPC 62 at para 42, [2016] AWLD 1753; *R v Ralph*, [2016] AJ No 727 at para 22, 2016 CarswellAlta 1290 [*Ralph*].

<sup>109</sup> See for example, *R v Evong*, 2014 ONCJ 745 at para 93, [2014] OJ No 6435; *R v Kristoffersen*, 2014 ONCJ 137 at para 45, [2014] OJ No 1411; *Muthuthamby*, *supra* note 6 at para 38; *Smith*, *supra* note 8 at para 68; *R v Sytsma*, 2015 ONCJ 462 at para 34, [2015] OJ No 4435 [*Sytsma*].

<sup>110</sup> *Sytsma*, *supra* note 109.

### Denunciation

Denunciation is a controversial remedy. In *R v Corbasson*, for example, Schwarzl J rejected the Crown’s submission that denunciation was a sufficient remedy, declaring that it amounted to “no immediate or directly meaningful remedy at all.”<sup>111</sup> While likely insufficient for cases involving serious misconduct, denunciation may be an effective remedy in cases involving relatively minor misconduct. Denunciation is an attractive remedy because it is aimed squarely at dissociating the court from misconduct, consistent with the purpose of the residual category. In *R v Dawson*, for instance, the police failed to bring the accused before a Justice of the Peace without unreasonable delay in violation of s. 503(1) of the *Criminal Code*. Mew J held that denunciation, along with a sentence reduction, was an appropriate remedy, and admonished the officers responsible for the misconduct.<sup>112</sup> In *R v Gowdy*, the police issued a media release unnecessarily disclosing that the accused was HIV-positive, causing the accused psychological stress. The trial judge rebuked the police for the practice and granted the accused a sentence reduction. The Ontario Court of Appeal upheld the trial judge’s selection of remedy.<sup>113</sup>

While the remedy may be effective for relatively minor misconduct, overreliance on this remedy may lead to the perception that the remedy is hollow, particularly where the misconduct recurs after it has already been the subject of a judicial rebuke. As indicated above, courts have already rebuked police for the problem of overholding. The remedy of denunciation in this context will increasingly offer diminishing returns in terms of dissociating the courts from this misconduct, such that costs or a stay may be warranted when the court is presented with evidence that state actors responsible for the misconduct are not addressing the problem.

### Restitution, Damages, and Costs

In terms of creative remedies, a restitution order or an order to pay damages are both plainly inconsistent with the purpose of remedies under the residual category of abuse of process, since both remedies are designed

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<sup>111</sup> *R v Corbasson*, 2015 ONCJ 563, at para 32, [2015] OJ No 5298.

<sup>112</sup> *Dawson*, *supra* note 97 at para 66.

<sup>113</sup> *Supra* note 87. While upholding the remedy of a sentence reduction as appropriate, the Court of Appeal found the trial judge erred in reducing the sentence below the mandatory minimum.

to compensate an individual for wrongs done to them.<sup>114</sup> Costs, on the other hand, may be an appropriate remedy in cases where it is the Crown whose conduct is impugned and the Crown's conduct demonstrated "a marked and unacceptable departure from the reasonable standards expected of the prosecution."<sup>115</sup> Where, for example, the Crown threatens the accused, costs send the message that courts do not condone threatening conduct by imposing a financial penalty on the Attorney General.<sup>116</sup> If costs are awarded only for the abuse of process motion itself, then the order does not compensate the accused for the wrong done to them, since the accused is in no better position than they were in before the motion. Rather, costs compensate the accused for bringing serious state misconduct to light, even if that misconduct was not quite serious enough to warrant a stay of proceedings.

#### Order for Restorative Justice

Nick Kaschuk suggests that an order for "some sort of restorative justice process" may be appropriate in some circumstances.<sup>117</sup> The restorative justice order Kaschuk has in mind is a meeting between the accused and the officer whose conduct the accused has impugned. Such a meeting would provide the officer with an opportunity to understand the harm caused not just to the accused but also to the justice system as a whole; conversely, the accused may better understand the pressures that led the officer to such misconduct.<sup>118</sup> Moreover, such a process counters the "cynical conclusion that the administration of justice is either unwilling, unable, or indifferent to policing their police."<sup>119</sup> While it is unclear whether judges have jurisdiction to compel police officers or other state actors to participate in such a process, judges ought nevertheless to consider an order for restorative justice as a creative alternative remedy for redressing prejudice to the justice system.

<sup>114</sup> Nick Kaschuk, "Additional Creative 24(1) Remedies in Drinking and Driving and Other Charter Cases" (2015) 19:2 Can Crim L Rev 275 at 278 [Kaschuk]. See also *Ralph*, *supra* note 108 at para 22.

<sup>115</sup> Kaschuk, *supra* note 114 at 280-281; *R v Singh*, 2016 ONCA 108 at para 38, 129 OR (3d) 24 [Singh] 1; *R v R (DC)*, 2017 BCPC 80 at para 153, [2017] BCWLD 2704.

<sup>116</sup> Kaschuk, *supra* note 114. EG. *Singh*, *supra* note 115.

<sup>117</sup> Kaschuk, *supra* note 114 at 286.

<sup>118</sup> *Ibid* at 288.

<sup>119</sup> *Ibid* at 286.

### Proactive Remedies

In *R v Vader*, the Crown stayed proceedings after becoming aware of disclosure problems, and subsequently recommenced proceedings.<sup>120</sup> Thomas J commented there was “nothing wrong in considering the use of a stay as one of the tools in the toolkit.”<sup>121</sup> Thus it is open to Crowns who recognize that an abuse of process has occurred to “self-medicate” by withdrawing charges unilaterally, or by jointly agreeing with defence counsel on an appropriate remedy. The Crown attempted to employ the former tactic in *R v Rutigliano* in order to avoid court-ordered disclosure of privileged information.<sup>122</sup> The Ontario Court of Appeal reversed the judge’s privilege order, but the Crown argued that it had remedied the abuse of process because it had withdrawn all of the counts tainted by the abuse of process.<sup>123</sup> Only untainted counts remained. This remedy ought to be available to Crowns. Society’s interest in adjudication of untainted charges surely outweighs the need to dissociate the justice system from misconduct when that misconduct has no relation to the charges in question.

In applying this remedy, Crowns risk the possibility that defence counsel will nevertheless argue that the abuse of process taints the remaining charges. For example, where an improper investigation occurs simultaneously with a proper investigation, it may be impossible to separate the two investigations. Where an improper investigation into one set of charges caused a proper investigation into another set of charges, or where an improper investigation preceded a proper investigation, courts may simply conclude that the abuse of process tainted all the charges. Therefore, it is a remedy that should be applied with caution. The clearest case in which such a remedy may be considered is where a proper and completed investigation precedes an improper investigation into separate crimes.

A joint agreement between the Crown and defence counsel on a remedy is another proactive way to deal with abuse of process. Crowns and defence counsel could agree, for example, to withdraw certain charges, or to engage in a restorative justice process. The benefit of joint agreements is that they remedy the prejudice to the integrity of the justice system before the misconduct can taint the court. It would obviously be preferable for such

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<sup>120</sup> *R v Vader*, 2016 ABQB 55, [2016] AJ No 69. Thomas J ultimately found no abuse of process, as there was no evidence of a bad faith basis for staying the proceedings.

<sup>121</sup> *Ibid* at para 38.

<sup>122</sup> *R v Rutigliano*, 2013 ONSC 6589 at para 74, 302 CCC (3d) 228.

<sup>123</sup> *R v Rutigliano*, 2015 ONCA 452, 126 OR (3d) 161.

agreements to be subject to court approval, or at least to be made public, in order to bring the state misconduct to light but the option is presently available without these requirements.

#### **D. The Third Stage: The Balancing Inquiry**

At the third stage of the test for abuse of process, the court asks whether, notwithstanding prejudice to the justice system for which no remedy short of a stay of proceedings can provide redress, the case should nevertheless proceed to trial in order to protect society's interest in adjudication of the trial on its merits.<sup>124</sup> In this section, I argue that the test is analytically redundant. By making the balancing stage mandatory in the residual category, the Supreme Court has arguably opened the door to allowing courts to deny a stay on the basis that the accused does not deserve one.

##### ***1. The Balancing Stage is Analytically Redundant***

Abella J questioned the third stage of the abuse of process test in her dissent. "When a trial judge has found that the conduct cannot be condoned because it is such an exceptional assault on the public's sense of justice," she pointed out, "it seems to me to be conceptually inconsistent to nonetheless ask the court to undermine its own conclusion by re-weighing the half of the scale that contains the public's interest in trials on the merits."<sup>125</sup> Several commentators have picked up on Abella J's criticism of the balancing stage of abuse of process. Quigley has pronounced the balancing stage "unnecessary" and "illogical," while Kaiser has described its application a "strained" result of "faulty reasoning."<sup>126</sup> The criticism is that once a judge has concluded the prejudice to the justice system is so serious that only the exceptional remedy of a stay of proceedings can adequately dissociate the justice system from the misconduct, it makes no sense to then reweigh that conclusion against society's interest in adjudication of the case on its merits.<sup>127</sup> Society's interest in adjudication of the case on its merits, it is argued, has necessarily been considered in determining that a stay is necessary to redress the prejudice to the justice system.<sup>128</sup> In light of the

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<sup>124</sup> Babos, *supra* note 1 at para 32.

<sup>125</sup> *Ibid* at para 84.

<sup>126</sup> Quigley, *supra* note 88; Kaiser, *supra* note 73.

<sup>127</sup> Quigley, *supra* note 88.

<sup>128</sup> *Ibid*.



conclusion that the misconduct cannot be condoned, it is not necessary to reweigh society’s interest in adjudication of the case.

Indeed, several post-*Babos* cases cast doubt on whether the third stage is truly necessary. In *R v Hunt*, for instance, the trial judge, who granted a stay of proceedings, referred to decisions pre-dating *Babos* and, as a result, failed to apply the third stage of the abuse of process analysis.<sup>129</sup> The Newfoundland Court of Appeal dismissed the Crown’s appeal, observing:

In this case, the applications judge undertook the necessary balancing of interests, though he did not characterize it in those words. **In determining that a stay was the only appropriate remedy for the breach of the Respondents’ section 7 rights he considered whether a trial should proceed despite the effect on the integrity of the justice system.** [Emphasis added]<sup>130</sup>

Plainly, the Newfoundland Court of Appeal was satisfied that the balancing of interests was implicit in the trial judge’s finding that no remedy short of a stay was sufficient to dissociate the justice system from the misconduct.

A decision of the Ontario Court of Appeal also casts doubt on whether application of the third stage is required. In *R v Kift*, the trial judge determined that the remedies of exclusion of evidence and sentence reduction adequately dissociated the justice system such that a stay was not warranted.<sup>131</sup> The accused appealed, arguing that the trial judge was obligated to proceed to the third stage of the abuse of process analysis and balance the need for a stay against society’s interest in adjudication of the case on its merits.<sup>132</sup> The Ontario Court of Appeal disagreed, holding that the third step is not necessary where the trial judge has concluded a remedy short of a stay is sufficient.<sup>133</sup> By the same token, where the court is certain that the only remedy capable of redressing the prejudice to the justice system is a stay, then there seems little point in carrying on to the third stage of the abuse of process analysis.

Prior to *Babos*, the balancing stage was only applied where there was still uncertainty after the second stage.<sup>134</sup> In uncertain cases, courts do not reweigh the interests so much as they make the balancing exercise explicit. To

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<sup>129</sup> *R v Hunt*, 2016 NLCA 61 at para 48, 33 CR (7th) 321, leave to appeal filed 2016 CarswellNfld 494.

<sup>130</sup> *Ibid* at para 52.

<sup>131</sup> *R v Kift*, 2016 ONCA 374 at para 5, [2016] OJ No 2626.

<sup>132</sup> *Ibid* at para 2.

<sup>133</sup> *Ibid* at paras 7-8.

<sup>134</sup> *Regan*, *supra* note 8 at para 57.

require balancing in cases where a stay is clearly warranted, however, is analytically redundant because the interests have already been weighed.

***2. The Balancing Stage May Allow the Court to do Indirectly what it cannot do Directly***

Turning to the balancing stage when there is no uncertainty may also allow the courts to do indirectly what they cannot do directly: deny undeserving accused the “jackpot” remedy of a stay of proceedings. In *Babos*, Moldaver J’s judgment strayed dangerously close to this territory. For example, at the third stage, Moldaver J wrote that society’s interest in a full trial was “profound,” given the “very serious nature of the charges.”<sup>135</sup> Moldaver J weighed this interest against misconduct he characterized as “threats uttered more than a year before trial by a Crown no longer on the case.”<sup>136</sup> Yet, Moldaver J had already acknowledged that the “bullying tactics” of the Crown were “reprehensible and unworthy of the dignity of her office,” even if they were not “an abuse of the worst kind,” as concluded by the trial judge.<sup>137</sup> In effect, at the balancing stage, Moldaver J weighed the seriousness of the offences against the mitigating factors of the state misconduct. The implicit message in *Babos* is that the accused do not deserve a stay because they did not take the threats seriously and waited too long to bring their abuse of process application.

*R v Grenier* illustrates mandatory balancing’s disturbing potential.<sup>138</sup> In that case, the trial judge refused to grant a stay of proceedings to an accused who had been arbitrarily detained for 81 days following the completion of his sentence for breaching bail conditions, misconduct the trial judge concluded society would “not tolerate.”<sup>139</sup> The trial judge noted that the applicant had been charged with sexual assault, a serious charge which militates against a stay of proceedings.<sup>140</sup> Yet in the balancing stage, the trial judge primarily focused on the accused’s personal circumstances, a factor the majority in *Babos* referenced obliquely and without any explanation.<sup>141</sup>

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<sup>135</sup> *Supra* note 1 at para 69.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid* at paras 61 and 66.

<sup>138</sup> *R v Grenier*, 2014 NBQB 68, 418 NBR (2d) 167 [*Grenier*].

<sup>139</sup> *Ibid* at para 73.

<sup>140</sup> *Ibid* at para 71.

<sup>141</sup> See also *R v Waisanen*, 2015 ONSC 5823 at para 37, [2015] OJ No 4835. In that case, Campbell J considered the seriousness of the drinking and driving charges. Yet under

For example, the trial judge noted that before the trial, “[t]he applicant was not working, was living a difficult lifestyle tainted by drug use, and by his own admission, “not doing much” at the time this charge was laid. The applicant had been involved with the criminal justice system since he was approximately 15 years old.”<sup>142</sup> The trial judge also faulted the applicant for contributing to the “confusion” that led to his over-incarceration.<sup>143</sup> It is difficult to understand how society’s interest in adjudication of the case on its merits is bolstered by the fact that the applicant was a drug user, or that the misconduct was in any way mitigated by the applicant’s contribution to the confusion that led to his over-incarceration, when the applicant had no legal training. Yet, that is precisely what *Babos*’ mandatory balancing exercise permits.

The trial judge placed significant emphasis on the fact that in other cases involving serious misconduct, including *Babos*, a stay was not held to be the appropriate remedy. The trial judge thus concluded that the applicant “would benefit from a ‘windfall’ in the present situation were the stay of proceedings to be granted.”<sup>144</sup> By requiring judges to reweigh seriousness of the misconduct against society’s interest in proceeding with a trial, *Babos* appears to have opened the door for Courts to decline a stay of proceeding simply because an accused does not deserve one.

#### IV. CONCLUSION

The concern that undeserving accused may realize an unwarranted windfall from the “jackpot” remedy of a stay of proceedings has held back the residual category of abuse of process. It has narrowed access to the remedy at the first stage by sanctioning an individualistic approach to multiple instances of misconduct and by allowing irrelevant considerations like the passage of time and the tactics of defence counsel to mitigate state misconduct. Judges have come to rely on the inappropriate remedy of sentence reduction, even outside the statutory limits, in order to avoid the drastic remedy of a stay. Worse yet, in making the balancing stage

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the heading of “circumstances of the accused,” Campbell J commented that the accused was “clearly driving his motor vehicle impaired by alcohol,” essentially double-counting the seriousness of the charges in favour of adjudication of the case on its merits.

<sup>142</sup> *Grenier*, *supra* note 138 at para 70.

<sup>143</sup> *Ibid* at para 69.

<sup>144</sup> *Ibid* at para 75 (Emphasis in original). Somewhat incongruously, the trial judge believed that a stay of proceedings would be “correcting ‘the past wrong.’”

mandatory, the Supreme Court in *Babos* has made it possible for a judge to refuse a stay when it is clear that a stay is the only remedy capable of redressing prejudice to the justice system. Indeed, the Supreme Court has opened the door for judges to skip the alternative remedy step and use the balancing stage to deny undeserving accused the remedy of a stay.

Narrowing access to the remedy of a stay of proceedings risks associating the justice system with egregious misconduct. Yet, if the test is properly applied, the risk of “unwarranted windfalls” is low. First, the seriousness of offences for which the accused has been charged mitigates the prejudice to the integrity to the prejudice of the justice system that would be caused by having a trial on its merits. Second, trial judges must consider a wide range of creative s. 24(1) remedies to redress the prejudice to the integrity of the justice system, including exclusion of evidence in appropriate cases, costs, or even an order for restorative justice. Finally, courts need not be so hesitant to stay proceedings when it is justified. As Kent Roach has argued, stays “remain the best and most decisive means by which a court can dissociate itself from abusive prosecutions and send a loud and clear message that it will not condone or be tainted by such unacceptable behaviour.”<sup>145</sup> Having concluded that the exceptional remedy of a stay is the only remedy capable of redressing the prejudice to the integrity of the justice system, judges may rest assured that any “windfall” inuring to the accused is worth the price of dissociating the justice system from the misconduct.

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<sup>145</sup> Roach, *Constitutional Remedies*, *supra* note 7 at 9.360.