



**SUPREME COURT OF CANADA**

**CITATION:** R. v. Brunelle, 2024  
SCC 3

**APPEAL HEARD:** February 8, 2023  
**JUDGMENT RENDERED:** January  
26, 2024  
**DOCKET:** 39917

**BETWEEN:**

**Daniel Brunelle, Siobol Chounlamountry, Simon Girard, Frédéric Thompson,  
Jonathan Verret-Casaubon, Jérémie Béliveau-Laliberté, Bernard Mailhot,  
Alexandre Bouchard, Yves Fernand Buonora, Denis Bilodeau, Carl Chevarie,  
Terrence Willard, Keven Faucher, Guillaume Fleurent, Éric Guerrier, Danny  
Guilbeault, Tammy Lamontagne, Olivier Lamothe, André Lauzier, Ambrose  
Mahoney, Yannick Manseau-Dufresne, Maxime Ménard, Louis-Philippe Noël,  
Éric Normandin, Robin Roy, Gail Denise Caron, Jérôme Fleury, Henry  
Bergeron, Alexandre Livernois-Grenier, Laurent Michel and Shanny Plante**  
Appellants

and

**His Majesty The King**  
Respondent

- and -

**Director of Public Prosecutions, Attorney General of Ontario, Attorney  
General of Quebec, Attorney General of British Columbia, Attorney General  
of Alberta, Criminal Lawyers' Association (Ontario), Association québécoise  
des avocats et avocates de la défense and Association des avocats de la défense  
de Montréal-Laval-Longueuil**  
Intervenors

**OFFICIAL ENGLISH TRANSLATION:** Reasons of O'Bonsawin J.

**CORAM:** Wagner C.J. and Karakatsanis, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

**REASONS FOR JUDGMENT:** O'Bonsawin J. (Wagner C.J. and Karakatsanis, Martin, Kasirer and Jamal JJ. concurring)  
(paras. 1 to 124)

**CONCURRING REASONS:** Rowe J.  
(paras. 125 to 130)

**NOTE:** This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

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Henry Bergeron, Alexandre Livernois-Grenier,  
Laurent Michel and Shanny Plante**

*Appellants*

v.

**His Majesty The King**

*Respondent*

and

**Director of Public Prosecutions,  
Attorney General of Ontario,  
Attorney General of Quebec,  
Attorney General of British Columbia,  
Attorney General of Alberta,  
Criminal Lawyers' Association (Ontario),  
Association québécoise des avocats et avocates de la défense and  
Association des avocats de la défense de Montréal-Laval-Longueuil**

*Intervenors*

**Indexed as: R. v. Brunelle**

**2024 SCC 3**

File No.: 39917.

2023: February 8; 2024: January 26.

Present: Wagner C.J. and Karakatsanis, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Constitutional law — Charter of Rights — Remedy — Stay of proceedings — Abuse of process — Residual category — Standing — Some 30 persons arrested during large-scale police operation — Accused persons filing motion for stay of proceedings on basis that police investigation and operation were vitiated by abuse of process in residual category resulting from accumulation of infringements of their constitutional rights, even though several of them were not victims of any of these infringements — First instance judge granting stay of proceedings but Court of Appeal setting it aside — Whether all accused had standing to seek stay of proceedings — Whether first instance judge erred in finding abuse of process in residual category and in entering stay of proceedings for all accused — Analytical framework that applies where allegation of abuse of process in residual category is based on infringement of other constitutional rights — Canadian Charter of Rights and Freedoms, ss. 7, 24(1).*

During a large-scale police operation arising out of an investigation into allegations of organized narcotics trafficking, 31 persons were arrested. They were divided into four different groups for separate trials. The accused in group 1, who were to be tried first, filed a motion for a stay of proceedings under s. 24(1) of the *Charter*

on the basis that the police investigation and operation that led to the court proceedings against them were vitiated by an abuse of process. Specifically, they alleged that an accumulation of infringements of their constitutional rights under ss. 8 and 10(b) of the *Charter* met the threshold for establishing an abuse of process in the residual category for all of them, even though several of them were not the victims of any of these infringements. The accused in groups 2, 3 and 4 filed motions similar to the one filed by group 1.

The first instance judge entered a stay of proceedings for all of the accused in group 1. He held that the police practice of postponing the exercise by the accused of the right to retain and instruct counsel without delay until they were taken to the police station infringed the right of all of the accused in that group under s. 10(b) of the *Charter*. Relying on the cumulative effect of these infringements, which he considered to be the most serious ones, and other infringements and violations of the prescribed procedures, the judge held that there had been an abuse of process in the residual category. Groups 2, 3 and 4 and the Crown agreed that the decision rendered with respect to group 1 was applicable to those groups, and a stay of proceedings was also entered for them. The Court of Appeal allowed the Crown's appeals, set aside the two judgments and ordered that a new trial be held, including a new hearing on the motion, on the ground that some of the accused did not have standing to obtain a stay of proceedings and that the first instance judge had failed to determine whether each accused's s. 10(b) right had been infringed before finding an abuse of process under s. 7. The accused appeal to the Court.

*Held:* The appeal should be dismissed.

*Per* Wagner C.J. and Karakatsanis, Martin, Kasirer, Jamal and **O'Bonsawin JJ.:** It is appropriate to hold a new trial for group 1 and for groups 2, 3 and 4, including new hearings on the motions for a stay of proceedings. All of the accused had standing to apply for a stay of proceedings under s. 24(1) of the *Charter* even though some of them were not the victims of any of the infringements constituting the alleged abuse of process or of any breach of trial fairness. However, the first instance judge erred in failing to determine whether each accused's right under s. 10(b) of the *Charter* had been infringed, a determination that had to be made in order to decide whether the allegation of abuse of process in the residual category was well founded. The first instance judge also erred in entering a stay of proceedings for all of the accused without first considering whether there were less drastic remedies that could have fully redressed the prejudice to the integrity of the justice system that he thought he had identified.

Two types of state conduct meet the threshold for establishing abuse of process: conduct that compromises trial fairness ("main category") and conduct that, without necessarily threatening the fairness of the accused's trial, nevertheless undermines the integrity of the justice system ("residual category"). Abuse of process in the main category engages the *Charter* provisions aimed at protecting trial fairness for accused persons, namely ss. 8 to 14 of the *Charter*, as well as the principles of fundamental justice set out in s. 7. Abuse of process in the residual category, on the

other hand, engages only the principles of fundamental justice in s. 7 of the *Charter*, which protect accused persons from any state conduct that is unfair or vexatious to such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the justice system, regardless of the impact of the conduct on the accused's other constitutional rights or on the fairness of their trial. When abuse of process is found in either category and a *Charter* guarantee has been infringed, s. 24(1) of the *Charter* gives a court of competent jurisdiction the power to grant such remedy as it considers appropriate and just in the circumstances. A stay of proceedings will be ordered only where the situation meets the high threshold of being one of the clearest of cases. This requires three conditions to be met: (1) there must be prejudice to the accused's right to a fair trial or 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) there must be no alternative remedy capable of redressing the prejudice; (3) where there is still uncertainty over whether a stay of proceedings is warranted after steps 1 and 2, the court is required to balance the interests in favour of granting a stay against the interest that society has in having a final decision on the merits.

An accused has standing to apply for a remedy under s. 24(1), including a stay of proceedings, where the accused's allegations set out the essential elements that will have to be shown in order to establish that one of their *Charter* rights has been infringed. The existence of directly personal prejudice is not one of the essential elements that must be shown to establish an infringement of the s. 7 right on the basis of an abuse of process in the residual category. Impairment of the accused's other rights

or of the fairness of their trial, although relevant, is not determinative, because the type of prejudice addressed by the principles of fundamental justice in s. 7 goes well beyond personal prejudice; all that must be found is that there is state conduct with repercussions on a larger scale, that is, conduct that causes prejudice to the integrity of the justice system in the eyes of society.

However, for a court to find that an accused's s. 7 right has been infringed as a result of an abuse of process in the residual category, there must be a sufficient causal connection between the abusive conduct and the proceedings against the accused. This connection will be considered sufficient where the criminal proceedings against the accused are tainted by the abusive conduct, which will be the case where abusive conduct occurred in the course of the investigation or police operation targeting the accused or the criminal proceedings against them. This requirement is consistent with the purpose of the doctrine of abuse of process in the residual category, which is to enable courts to protect the integrity of the justice system by dissociating themselves from state conduct that constitutes an abuse of the judicial process. It is also consistent with the applicable framework for granting a stay of proceedings under s. 24(1), whose three cumulative conditions allow for the screening of applications for stays of proceedings to ensure that this remedy is available only in the clearest of cases, which excludes cases in which the proceedings against the accused are not already tainted by abusive conduct.

When an infringement of s. 7 of the *Charter* is alleged together with an infringement of one or more procedural guarantees, the order of priority that a court should follow will depend on the factual record, on the nature of the *Charter* rights at play and on how they intersect. In the abuse of process context, both s. 7 and the specific procedural guarantees in ss. 8 to 14 of the *Charter* are intended to protect individuals from conduct that is vexatious to such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the justice system. Section 7 plays a role complementary to that of ss. 8 to 14 by providing residual protection against abuse of process that goes beyond the protection offered by the specific guarantees in ss. 8 to 14. It is therefore not uncommon for s. 7 of the *Charter* to be invoked at the same time as one or more other procedural guarantees. Indeed, abusive state conduct may take all sorts of forms, and abuse of process in the residual category can be based on an accumulation of incidents or state misconduct. Furthermore, there is no reason why such incidents or misconduct cannot take the form of infringements of a procedural *Charter* guarantee and, consequently, why the alleged abuse of process cannot result from an accumulation of infringements of one or more guarantees. It follows that the frameworks for analyzing s. 7 and ss. 8 to 14 can coexist, and it is entirely appropriate to use the framework developed for the purposes of s. 7 to analyze any accumulation of infringements of one or more procedural guarantees in order to determine whether the infringements as a whole meet the threshold for establishing abuse of process, that is, prejudice to the integrity of the justice system. Of course, the framework applicable to each of these guarantees will remain relevant in determining whether the infringements making up the accumulation of infringements

actually occurred. In fact, this determination will logically have to be made before the court decides whether there has been an abuse of process in the residual category.

In this case, each of the accused has standing to apply for a remedy under s. 24(1) of the *Charter*, since all of them assert that they were directly targeted by the police investigation and operation that resulted in the alleged abusive conduct. The abuse of process alleged by the accused results from an accumulation of infringements of rights guaranteed by ss. 8 and 10(b) of the *Charter* that reflects a situation of blatant disregard for their rights by the police. In these circumstances, the framework developed for the purposes of s. 7 of the *Charter* for analyzing abuse of process in the residual category should be adopted to determine whether the alleged infringements as a whole meet the threshold for establishing abuse of process. However, this exercise makes it necessary to apply the framework for each of the provisions at issue, ss. 8 and 10(b), to determine whether the allegations of infringements are well founded. Once each of the alleged infringements has been examined, it will then be possible to determine whether all of the infringements, considered together, amount to conduct that is vexatious to such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the justice system.

The first instance judge in this case erred in law in finding that the allegations that the s. 10(b) right to retain and instruct counsel without delay had been infringed were well founded with respect to all of the accused in group 1 solely on the basis of the police practice of systematically postponing the exercise of this right

without first considering the particular circumstances of each arrest. The first instance judge had to correctly apply the s. 10(b) framework in relation to each of the accused and draw the necessary conclusions, which he did not do. This error on its own justifies holding a new hearing on the motion for a stay of proceedings for group 1, because the first instance judge's conclusion that the right of the accused to retain and instruct counsel without delay had been infringed was an essential underpinning of his ultimate conclusion that the s. 7 right of the accused in group 1 had been infringed as a result of an abuse of process in the residual category. Since the fate of the accused in groups 2, 3 and 4 depends on the fate of those in group 1, new hearings must also be held on the motion for a stay of proceedings for groups 2, 3 and 4.

Lastly, the first instance judge erred in entering a stay of proceedings for all of the accused without considering less drastic remedies for each of them. The three conditions that must be met for a stay of proceedings to be granted are cumulative, and none of them is optional. The judge failed to ensure that the second condition was met in this case.

*Per Rowe J.:* There is agreement with the majority as to the result and in large measure as to its statement of the law and its application of the law in the instant case. However, greater clarity is warranted with respect to the methodology to be used when an accused seeks a stay of proceedings under s. 24(1) of the *Charter* for alleged infringements of their rights protected under ss. 8 to 14 and also seeks a stay under s. 24(1) for abuse of process under s. 7. Courts should apply a consistent approach to

the analysis where s. 7 and ss. 8 to 14 of the *Charter* are relied on by an accused in order to obtain a stay of proceedings. The appropriate order of operations is as follows: where a right under ss. 8 to 14 is relied on, along with s. 7, reviewing courts should address the specific right first, including (if necessary) under s. 1; and if there is no infringement of the specific right, or if the infringement is justified under s. 1, only then should reviewing courts have regard to s. 7, and, if necessary, s. 1 once again.

### **Cases Cited**

By O'Bonsawin J.

**Considered:** *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Castro*, 2001 BCCA 507, 47 C.R. (5th) 391; *R. v. Taylor*, 2014 SCC 50, [2014] 2 S.C.R. 495; **referred to:** *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566; *Brind'Amour v. R.*, 2014 QCCA 33; *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236; *Brunette v. Legault Joly Thiffault, s.e.n.c.r.l.*, 2018 SCC 55, [2018] 3 S.C.R. 481; *R. v. Albashir*, 2021 SCC 48; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *R. v. Edwards*, [1996] 1 S.C.R. 128; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R.L. Crain Inc. v. Couture* (1983), 6 D.L.R. (4th) 478; *R. v. Scott*, [1990] 3 S.C.R. 979; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *R. v.*

*Conway*, [1989] 1 S.C.R. 1659; *R. v. J.J.*, 2022 SCC 28; *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443; *R. v. White*, [1999] 2 S.C.R. 417; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Pearson*, [1992] 3 S.C.R. 665; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *R. v. Herrer*, [1995] 3 S.C.R. 562; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. McColman*, 2023 SCC 8; *R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651; *R. v. Bartle*, [1994] 3 S.C.R. 173; *R. v. Manninen*, [1987] 1 S.C.R. 1233; *R. v. Evans*, [1991] 1 S.C.R. 869; *R. v. Brydges*, [1990] 1 S.C.R. 190; *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460; *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689; *R. v. Strachan*, [1988] 2 S.C.R. 980; *R. v. Martel*, C.Q. Trois-Rivières, Nos. 400-01-064968-118, 400-01-064969-116, 400-01-064970-114, January 27, 2016; *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579.

By Rowe J.

**Referred to:** *R. v. J.J.*, 2022 SCC 28; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392; *R. v. Herrer*, [1995] 3 S.C.R. 562; *R. v. Généreux*, [1992] 1 S.C.R. 259; *R. v. Pearson*, [1992] 3 S.C.R. 665; *R. v. Pan*, 2001 SCC 42, [2001] 2 S.C.R. 344; *R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983; *R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187; *R. v. Babos*, 2014 SCC 16,

[2014] 1 S.C.R. 309; *R. v. MacDonnell*, [1997] 1 S.C.R. 305.

### **Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 1, 7, 8 to 14, 24.

*Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 487(2) [repl. c. 25, s. 191], 487.01.

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Cromwell, Thomas A. *Locus Standi: A Commentary on the Law of Standing in Canada*. Toronto: Carswell, 1986.

Paciocco, David M. “The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept” (1991), 15 *Crim. L.J.* 315.

Roach, Kent. *Constitutional Remedies in Canada*, 2nd ed. Toronto: Canada Law Book, 2013 (loose-leaf updated October 2023, release 2).

APPEAL from a judgment of the Quebec Court of Appeal (Thibault, Hogue and Beaupré JJ.A.), 2021 QCCA 1317, 75 C.R. (7th) 74, [2021] AZ-51792396, [2021] J.Q. n° 10437 (Lexis), 2021 CarswellQue 13674 (WL), setting aside the stays of proceedings entered by Dumas J., 2019 QCCS 6006, [2019] AZ-51792549, [2019] J.Q. n° 28228 (Lexis), 2019 CarswellQue 18981 (WL), and 2018 QCCS 6155, [2018] AZ-51792548, [2018] J.Q. n° 23911 (Lexis), 2018 CarswellQue 20267 (WL), and ordering a new trial. Appeal dismissed.

*Tristan Desjardins* and *Michel Lebrun*, for the appellants.

*Nicolas Abran*, *Pauline Lachance*, *Benoit Larouche* and *Julien Beauchamp-Laliberté*, for the respondent.

*Mathieu Stanton* and *Éric Marcoux*, for the intervener the Director of Public Prosecutions.

*Holly Loubert* and *Vallery Bayly*, for the intervener the Attorney General of Ontario.

*François Hénault* and *Catheryne Bélanger*, for the intervener Attorney General of Quebec.

*Micah B. Rankin* and *Rome Carot*, for the intervener Attorney General of British Columbia.

*Andrew Barg*, for the intervener Attorney General of Alberta.

*Andrew Burgess*, for the intervener the Criminal Lawyers' Association (Ontario).

*Ariane Gagnon-Rocque* and *Maude Cloutier*, for the intervener Association québécoise des avocats et avocates de la défense.

*Molly Krishtalka, Alexandra Belley-McKinnon and Geoffroy Huet*, for the intervener Association des avocats de la défense de Montréal-Laval-Longueuil.

English version of the judgment of Wagner C.J. and Karakatsanis, Martin, Kasirer, Jamal and O’Bonsawin JJ. delivered by

O’BONSAWIN J. —

I. Overview

[1] The courts have a duty to protect the integrity of the justice system by dissociating themselves from state conduct that constitutes an abuse of the judicial process. This type of abusive conduct may take all sorts of forms. In this case, the alleged abuse of process is unusual in that it results from an accumulation of infringements of the rights guaranteed by ss. 8 and 10(b) of the *Canadian Charter of Rights and Freedoms*, infringements of which several but not all of the 31 appellants were the victims. These infringements allegedly occurred in the course of a large-scale police investigation and operation known as [TRANSLATION] “Project Nandou” that led to the arrest of the 31 appellants.

[2] The unusual nature of the alleged abuse of process raises two main questions. The first relates to the standing of the appellants who, for one reason or another, were not the victims of any of the infringements constituting the abuse or of any breach of trial fairness. In the absence of any personal prejudice, it must be asked

whether these appellants were entitled to apply for a remedy under s. 24(1) of the *Charter*.

[3] The Superior Court answered this question in the affirmative and, after finding that there had been an abuse of process in the residual category under s. 7 of the *Charter*, entered a stay of proceedings for all of the appellants under s. 24(1). On appeal, the Quebec Court of Appeal ordered a new trial for all of the appellants on the ground that the Superior Court had failed to ascertain whether each of them had standing to obtain a stay of proceedings. The Court of Appeal was of the view that if the Superior Court had done so, it would have concluded that some appellants did not have standing to obtain a remedy under s. 24(1).

[4] The Court of Appeal was also of the view that ascertaining the appellants' standing required the Superior Court to determine whether each appellant's right under s. 10(b) of the *Charter* had been infringed, which it had not done. Moreover, standing had to be ascertained before the Superior Court considered whether there had been an abuse of process in the residual category under s. 7. This layering of analytical frameworks raises the second main question in this appeal: What approach should a court take in determining whether there has been an abuse of process in the residual category that, while falling under s. 7 of the *Charter*, nonetheless results from an accumulation of infringements of other *Charter* rights? Indeed, what needs to be considered is how to reconcile the relevant frameworks, that is, the s. 7 framework and the frameworks for ss. 8 and 10(b) of the *Charter*.

[5] For the reasons that follow, I would dismiss the appeal, partly for the reasons given by the Court of Appeal. Unlike that court, I am of the view that all of the appellants have standing to apply for a remedy under s. 24(1) of the *Charter* even though some of them were not the victims of any of the infringements constituting the alleged abuse of process or of any breach of trial fairness. However, I agree with the Court of Appeal that the Superior Court had to determine whether each appellant's right under s. 10(b) of the *Charter* had been infringed and that it failed to do so, thereby committing a reviewable error. In light of the appellants' arguments, that determination had to be made in order to decide whether the infringements as a whole met the threshold for abuse of process in the residual category. This is therefore a situation in which the frameworks for ss. 8 and 10(b) of the *Charter* are complementary to the s. 7 framework. Finally, I am of the view that the Superior Court also erred in entering a stay of proceedings for all of the appellants without first considering less drastic remedies that could have fully redressed the prejudice to the integrity of the justice system that it thought it had identified. These errors justify holding new trials, including new hearings on the appellants' motion for a stay of proceedings and for the exclusion of evidence.

## II. Factual Background

[6] The police operation at the centre of this appeal arose out of an investigation known as "Project Nandou" that began in November 2014 in the districts

of Trois-Rivières, Québec and Chicoutimi. The investigation concerned allegations of organized trafficking in narcotics, mainly cannabis.

[7] At the end of the investigation, on March 29, 2016, a first information was laid against the majority of the appellants. It charged them with having committed various indictable offences related to production of and trafficking in narcotics. Some of the appellants were also charged with criminal organization offences. After the information was laid, a number of arrest and search warrants were issued.

[8] A large-scale police operation was planned. More than 250 police officers were to take part in it. A preparatory meeting, led by Detective Toussaint, was organized to arrange how the operation would unfold. During that meeting, the detective reiterated the importance of respecting the right of those arrested to retain and instruct counsel without delay as guaranteed by s. 10(b) of the *Charter*. However, he gave no indication of when the exercise of that right should be facilitated. He said he had assumed that the arresting officers knew the rules and would know when to do so.

[9] The operation got under way the morning of March 31, 2016, shortly before 7:00 a.m. The 31 appellants were almost all arrested at their residences in the first few minutes of the operation. The others were arrested at various locations later the same day or during the days that followed.

[10] All of the appellants acknowledge that they were informed of their right to retain and instruct counsel without delay at the time they were arrested. However, the

evidence shows that they did not all respond in the same way: many indicated a desire to exercise their right as soon as they were informed of it, some did not ask to exercise their right until they were at the police station, and the others said that they did not wish to retain and instruct counsel or that they had already done so.

[11] In the end, out of the appellants who were arrested the morning of March 31, 2016, and who indicated a desire to immediately exercise their right to retain and instruct counsel without delay, only one was given an opportunity to do so while in the police vehicle. The others had to wait until they arrived at the police station. The time between being arrested and being given an opportunity to contact counsel ranged from 23 minutes to 1 hour and 6 minutes, depending on the case. No one was questioned during that time. It should also be noted that one of the appellants arrested later in the day or during the days that followed surrendered himself to the authorities at the courthouse while accompanied by his lawyer and that another of them was arrested at the airport, where he retained and instructed counsel.

[12] In the course of the Project Nandou investigation, the police obtained a number of warrants under the *Criminal Code*, R.S.C. 1985, c. C-46, and the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. Most of the warrants were authorized in the district of Trois-Rivières, but some were executed in another judicial district without being endorsed in that district.

[13] Forty-four of the warrants obtained were general warrants authorized under s. 487.01 of the *Criminal Code*, and 40 of them required the police to give notice of a

covert search to the persons concerned before the date specified in the warrant. Twenty of those warrants were executed, but no notice was given for any of them by the specified date.

[14] Following a preliminary inquiry, the 31 appellants were ordered to stand trial and later divided into 4 different groups for separate trials. On March 16, 2018, the seven appellants in group 1, who were to be tried first, filed a motion for a stay of proceedings and for the exclusion of evidence with the Superior Court. The motion contained several allegations relating to the police investigation and operation that had led to them being arrested and charged, three of which remain relevant in this appeal:

- (i) failure to facilitate the requested access to counsel at the first reasonably available opportunity during the police operation on March 31, 2016, which allegedly resulted in the infringement of the right to retain and instruct counsel without delay guaranteed by s. 10(b) of the *Charter*;
- (ii) failure to give notice of a covert search within the allotted time, which allegedly resulted in the infringement of the right to be secure against unreasonable search or seizure guaranteed by s. 8 of the *Charter*;
- (iii) execution of search warrants outside the judicial district of the authorizing justices without the warrants being endorsed within the

meaning of the former s. 487(2) of the *Criminal Code*, which also allegedly resulted in the infringement of the right to be secure against unreasonable search or seizure guaranteed by s. 8 of the *Charter*.

[15] During the hearing on their motion, the appellants in group 1 alleged that the accumulation of these infringements, some of them planned and intended by the police, reflected a situation of blatant disregard for their rights, met the threshold for establishing abuse of process and left the court with no choice but to stay the proceedings against each of them. That being said, the appellants did not focus on the breaches of trial fairness which would have resulted from the infringements, and they acknowledged that some of the infringements affected only part of the group and could not justify a stay of proceedings on their own.

### III. Judicial History

#### A. *Quebec Superior Court, 2018 QCCS 6155 (Dumas J.)*

[16] On August 27, 2018, the Superior Court judge granted the motion brought by the appellants in group 1 and stayed the proceedings against them. Dealing with the right to retain and instruct counsel without delay, the Superior Court judge found from the evidence that when an appellant indicated a desire to contact counsel, [TRANSLATION] “the systematic reply was that this would be done later” at the police station (para. 75 (CanLII)), even though there was no evidence that the police had examined the situation before postponing the exercise of the right to counsel. In the

judge's view, that practice infringed the right of all of the appellants in group 1 to retain and instruct counsel without delay because it [TRANSLATION] "amounts to a reverse onus" (para. 84; see also para. 196): the police officers should have assessed whether the immediate exercise of the appellants' right to counsel was feasible as soon as the appellants asked to exercise it, and not only when they insisted on exercising it at the scene.

[17] He added that while police officers do not have to allow a person under arrest to use a seized telephone and are not required to provide their own cell phones, there is no reason why they cannot be equipped with inexpensive cell phones to lend to such persons.

[18] The Superior Court judge then considered the failure by the police to give notice of a covert search within the allotted time. He rejected the Crown's argument that the disclosure of evidence could substitute for the notice of a covert search required in the warrants, finding rather that this position amounted to saying that [TRANSLATION] "despite a specific order by a justice, no notice of a covert search will be given if the search does not yield concrete results and the person is not charged" (para. 131). In his view, this position arose from [TRANSLATION] "institutional laxity" (para. 131).

[19] With regard to the warrants authorized in the judicial district of Trois-Rivières and executed in other districts, the Superior Court judge held that they should have been endorsed in those other judicial districts before being executed. If this had been the only infringement shown, he would have found that it was an error

made in good faith, but in the circumstances it had to be added to the other breaches already identified.

[20] Relying on the cumulative effect of these infringements and violations of the prescribed procedures, the most serious of which were the infringements relating to the right to retain and instruct counsel without delay, the Superior Court judge held that there had been an abuse of process in the residual category. He found that the case involved a [TRANSLATION] “systemic and persistent problem” and infringements that could bring the administration of justice into disrepute (paras. 216 and 219), which were so extreme that they justified entering a stay of proceedings for the seven appellants in group 1. In his opinion, continuing the proceedings would perpetuate the prejudice to the integrity of the justice system caused by the abuse and would encourage the police to carry on acting as they had in this case.

B. *Quebec Superior Court, 2019 QCCS 6006 (Dumas J.)*

[21] On September 5 and 6, 2018, the other three groups of appellants (groups 2, 3 and 4) filed motions similar to the one filed by group 1. After conferring with one another, the appellants in groups 2, 3 and 4 and the Crown consented to the evidence and arguments on group 1’s motion being entered for the hearing on the motions brought by groups 2, 3 and 4. Without waiving their right to appeal, those parties also agreed that the decision regarding group 1 was applicable to groups 2, 3 and 4.

[22] For the reasons given in the judgment rendered with respect to group 1 on August 27, 2018, and in light of the admissions made by the parties at the hearing, the Superior Court judge stayed the proceedings against the appellants in groups 2, 3 and 4 on May 7, 2019.

C. *Quebec Court of Appeal, 2021 QCCA 1317, 75 C.R. (7th) 74 (Thibault, Hogue and Beaupré J.J.A.)*

[23] On September 3, 2021, the Court of Appeal allowed the appeals, set aside the two judgments rendered by the Superior Court and ordered that a new trial be held, including a new hearing on the motion for a stay of proceedings and for the exclusion of evidence, before a different judge. In its analysis, the Court of Appeal began by noting that because the rules on standing (it used the French term “*qualité pour agir*”) (para. 55) provide that a remedy can be granted only to a person whose own constitutional rights have been infringed, it was therefore necessary to assess the situation of each appellant on a case-by-case basis. The Court of Appeal found that the Superior Court judge had erred in adopting an approach that led him to enter a stay of proceedings for all of the appellants without first assessing whether the right to retain and instruct counsel without delay guaranteed to each of them by s. 10(b) of the *Charter* had been infringed. It also noted that some of the appellants had said that they did not wish to speak to counsel after being informed of their right, while others had had an opportunity to do so immediately after being arrested.

[24] The Court of Appeal also identified several errors of law in the analysis of the “implementational” component of the right to retain and instruct counsel without delay and held that the Superior Court judge had erred by imposing a more onerous duty on the police than the law imposed on them.

[25] Finally, turning to the remedy granted, the Court of Appeal held that the Superior Court judge had erred in failing to consider less drastic remedies that could have sufficed to redress the abuse of process he had found in this case.

#### IV. Issues

[26] The resolution of the appeal requires an answer to the following four questions:

- A. Did the appellants all have standing to apply for a remedy under s. 24(1) of the *Charter*?
- B. Did the Superior Court judge err in finding that there had been an abuse of process in the residual category?
- C. Did the Superior Court judge err in entering a stay of proceedings for all of the appellants?

D. Could the Crown raise, before the Court of Appeal, the Superior Court judge's failure to consider the particular circumstances of the arrest of each appellant in groups 2, 3 and 4 after consenting to judgment?

In my view, the four questions must be answered in the affirmative.

## V. Analysis

[27] The law on abuse of process is well settled. The “key point” is that abuse of process “refers to Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system” (*R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 50). As the preceding passage suggests, two types of state conduct meet the threshold for establishing abuse of process: conduct that compromises trial fairness (“main category”) and conduct that, without necessarily threatening the fairness of the accused’s trial, nevertheless undermines the integrity of the justice system (“residual category”) (*Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 89; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 55; *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566, at para. 36; *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at para. 31; see also *Brind’Amour v. R.*, 2014 QCCA 33, at para. 53).

[28] While there is no actual “right against abuse of process” in the *Charter*, different guarantees will be engaged depending on the circumstances (*R. v. O’Connor*,

[1995] 4 S.C.R. 411, at para. 73). Abuse of process in the main category engages the *Charter* provisions aimed primarily at protecting trial fairness for accused persons, namely ss. 8 to 14, as well as the principles of fundamental justice set out in s. 7. Abuse of process in the residual category, on the other hand, engages only the principles of fundamental justice in s. 7, which protect accused persons from any state conduct that, while not caught by ss. 8 to 14, is nevertheless unfair or vexatious to such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the justice system (*O'Connor*, at para. 73; *Tobiass*, at para. 89; *Regan*, at para. 50; *Nixon*, at para. 41; *Babos*, at para. 31).

[29] When abuse of process is found in either category and a *Charter* guarantee has been infringed, s. 24(1) of the *Charter* gives a court of competent jurisdiction the power to grant “such remedy as [it] considers appropriate and just in the circumstances”. A wide range of remedies is available to the court (see, e.g., *O'Connor*, at para. 77). However, a stay of proceedings is by far the remedy most sought by victims of abuse of process. Since it has been characterized as the “ultimate remedy” (*Tobiass*, at para. 86), a stay of proceedings will be ordered only where the situation meets the high threshold of being one of the “clearest of cases” (*O'Connor*, at para. 69). This requires three conditions to be met:

- (1) there must be prejudice to the accused’s right to a fair trial or to the integrity of the justice system that “will be manifested, perpetuated or

aggravated through the conduct of the trial, or by its outcome” (*Regan*, at para. 54; *Babos*, at para. 32);

(2) there must be no alternative remedy capable of redressing the prejudice (*Regan*, at para. 54; *Babos*, at para. 32);

(3) where there is still uncertainty over whether a stay of proceedings 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” (*Regan*, at para. 57; *Babos*, at para. 32).

[30] This legal framework has been refined by this Court over a period of several decades and has been applied in a variety of circumstances. Even so, this is the first time an appeal to the Court has raised the question of how the law on abuse of process in the residual category applies to a group of accused persons, all of whom apply for a stay of proceedings on the ground that an accumulation of infringements of *Charter* rights, of which several but not all of them were the victims, causes prejudice to the integrity of the justice system.

[31] Indeed, all of the appellants applied for a stay of proceedings under s. 24(1) of the *Charter* on the basis that the police investigation and operation that led to the court proceedings against them were vitiated by an abuse of process in the residual

category. Specifically, they alleged that an accumulation of infringements of their constitutional rights under ss. 8 and 10(b) of the *Charter* met the threshold for establishing an abuse of process in the residual category for all of them, even though several of them were not the victims of any of these infringements or of any breach of trial fairness. This type of allegation raises two main questions.

[32] The first question, focused on by the Crown and the Court of Appeal, relates to the standing of the appellants whose rights under ss. 8 and 10(b) of the *Charter* were not infringed and who were not the victims of any breach of trial fairness. In the absence of any personal prejudice, it must be asked whether these persons have standing to apply for a remedy under s. 24(1) of the *Charter*.

[33] The second question relates to the analytical framework that the Superior Court judge had to apply in determining whether there had been an abuse of process in the residual category that, while falling under s. 7 of the *Charter*, nonetheless resulted from an accumulation of infringements of ss. 8 and 10(b). When several provisions of the *Charter* are invoked together, what needs to be considered is how to reconcile the relevant frameworks, that is, the s. 7 framework and the frameworks for ss. 8 and 10(b) of the *Charter*. After this question has been answered, it will then have to be determined whether the Superior Court judge correctly applied the proper framework before finding that there had been an abuse of process in the residual category.

[34] In addition to these two main questions, the Crown argues that the Superior Court judge erred in entering a stay of proceedings for all of the appellants without

considering less drastic remedies for each of them, and the appellants argue that the Crown was precluded from raising, on appeal, the Superior Court judge's failure to consider the particular circumstances of the arrest of each appellant in groups 2, 3 and 4 after agreeing that the decision rendered with respect to group 1 was applicable to them.

[35] The following sections address these four questions, beginning with standing.

A. *Did the Appellants All Have Standing to Apply for a Remedy Under Section 24(1) of the Charter?*

[36] The appellants submit that they all have standing to apply for a remedy under s. 24(1) of the *Charter* because an accused does not need to have suffered a [TRANSLATION] "directly personal" infringement of a constitutional right in order for their right under s. 7 of the *Charter* to be infringed as a result of an abuse of process in the residual category (A.F., at para. 27). According to them, this category concerns [TRANSLATION] "the prejudice caused to the integrity of the justice system and address[es] the situation in which an accused, without being directly targeted by the abusive conduct or affected by the prejudice resulting from it, is nonetheless the subject of a prosecution involving such conduct" (para. 53). In other words, an accused can in some cases [TRANSLATION] "make an abuse of process claim without having to show that the conduct in question directly affects them" (para. 56). For the purposes of standing, s. 24(1) of the *Charter* requires only [TRANSLATION] "that a person be

charged, or that their right to life, liberty and security of the person otherwise be jeopardized, in a context where oppressive or vexatious state conduct related to the investigation or court proceedings concerning the person impinges on the integrity of the justice system to such a degree that s. 7 of the Charter is infringed” (para. 72).

[37] The Crown, for its part, argues that in order to have standing to apply for a remedy under s. 24(1), an accused must allege a personal infringement of one of their *Charter* rights. An accused who applies for a stay of proceedings on the basis of an abuse of process in the residual category must allege an infringement of their s. 7 right. To be able to do so, the accused does not need to have been personally targeted by the abusive state conduct but must be able to show that the conduct in question had a [TRANSLATION] “sufficient impact” on them (R.F., at para. 72). According to the Crown, the Court of Appeal was therefore correct in stating that the Superior Court judge had erred in failing to look at the situation of each appellant individually, especially with regard to the “implementational” component of the right to counsel. That was the only way to determine whether the abusive conduct had had a sufficient impact on each of them for the purposes of s. 7.

[38] For the reasons that follow, I conclude that all of the appellants had standing to apply for a stay of proceedings under s. 24(1). An accused has standing to apply for a remedy under s. 24(1) where they allege that one of their *Charter* rights has been infringed. The s. 7 right is one of these rights. It protects accused persons from abuse of process in the residual category. This type of abuse of process occurs where

state conduct is unfair or vexatious to such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the justice system, regardless of its impact on the accused's other constitutional rights or on the fairness of their trial.

[39] However, this does not mean that every accused will have standing to apply for a remedy under s. 24(1) of the *Charter* on the basis of any abusive state conduct, no matter what the causal connection between that conduct and the proceedings against them. To have standing, the accused must allege that the abusive conduct tainted the police investigation or operation targeting them or the court proceedings against them. In this case, each of the appellants meets this requirement, since all of them assert that they were directly targeted by the police investigation and operation that resulted in the alleged abusive conduct.

[40] Each of these elements is explained further in the paragraphs that follow. Before discussing them, however, I believe it is important to clear up some terminological confusion.

(1) Confusion Between “*Intérêt Pour Agir*” and “*Qualité Pour Agir*”

[41] In their respective factums, the Crown and the appellants use the French legal terms “*intérêt pour agir*” and “*qualité pour agir*” interchangeably (R.F., at paras. 16-17 and 53-54; A.F., at paras. 67-68). The Court of Appeal seems to have done the same (paras. 45 and 55). It is true that this Court has sometimes used these two terms, or their derivatives, in the same judgment to refer to the same idea, that is, to

what in English is called “standing” or “*locus standi*” (see, e.g., *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, at pp. 615-18; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, at p. 243; *Brunette v. Legault Joly Thiffault, s.e.n.c.r.l.*, 2018 SCC 55, [2018] 3 S.C.R. 481, at paras. 10-11).

[42] In this case, it is the appellants’ “*intérêt pour agir*” (standing) that is being challenged by the Crown, not the “*qualité*” (capacity) in which they are acting, because each of them is acting in their own name and not in a particular “capacity” for one or more other persons (see, e.g., *Brunette*, at para. 2). Indeed, the Crown is disputing the appellants’ right to “seek particular relief” from a court, namely a stay of proceedings under s. 24(1) of the *Charter*, and to obtain a judgment on the merits of their application seeking this relief (*Finlay*, at p. 635; T. A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (1986), at pp. 7 and 9). This right is generally reserved to those who have a “sufficient interest” in obtaining the relief sought (*Brunette*, at para. 12). As will be explained more fully below, the “interest” or standing of an accused is considered sufficient for the purposes of an application under s. 24(1) where the accused is alleging an infringement of any of their *Charter* rights.

- (2) Standing Under Section 24(1) of the *Charter* Is Accorded to Accused Persons Alleging That Their Own Rights Have Been Infringed

[43] The starting point in determining whether a person has standing to apply for a remedy under s. 24(1) of the *Charter* is the text of this provision, which reads as follows:

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

[44] The Court has interpreted this text and has found it to mean that a person has standing to apply for a remedy under s. 24(1) where the person is “alleging a violation of their own constitutional rights” (*R. v. Albashir*, 2021 SCC 48, at para. 33; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 61; see also *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 55; *R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 619; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 313). In other words, a person’s standing will be considered sufficient only if they are alleging an infringement of any of their *Charter* rights.

[45] Some decisions have suggested, on the basis of a literal interpretation of the text of s. 24, that an accused has standing to apply for a remedy under this provision and to obtain a judgment on the merits of the application only if the accused *establishes* that one of their *Charter* rights has been infringed (see, e.g., *Edwards*, at para. 45(1.) and (3.)). That interpretation conflates standing to bring proceedings with the merits of a claim (Cromwell, at p. 2; F. Bachand, “Le droit d’agir en justice” (2020), 66 *McGill L.J.* 109, at pp. 110-11; K. Roach, *Constitutional Remedies in Canada* (2nd ed.

(loose-leaf)), at § 5:10). In *Finlay*, this Court stated that it is essential to distinguish between standing, or the right to seek particular relief, and the entitlement to such relief (p. 635). This distinction was eloquently clarified by Scheibel J. in *R.L. Crain Inc. v. Couture* (1983), 6 D.L.R. (4th) 478 (Sask. Q.B.):

. . . the establishment of a violation of rights is prerequisite to the obtaining of a remedy. It is not a prerequisite to the commencing of a s. 24(1) application. There should be no doubt that in order to bring a s. 24(1) application it is necessary only that the applicant allege that his rights have been infringed or denied. [Emphasis added; p. 517.]

[46] Indeed, the focus when it comes to standing is on the allegations made by the person seeking a remedy under s. 24(1) of the *Charter*. These allegations must set out the essential elements that will have to be shown in order to establish an infringement of at least one of the applicant's *Charter* rights. If they do so, the applicant will have standing to apply for a remedy under s. 24(1).

[47] The Court of Appeal found that standing could be accorded only to the appellants who were alleging an infringement of their own right to retain and instruct counsel without delay or, although the court did not expressly refer to it, their own right to be secure against unreasonable search or seizure (paras. 55 and 59). In other words, it held that the appellants who did not allege that at least one of their rights under s. 8 or 10(b) of the *Charter* had been infringed did not have standing to apply for a stay of proceedings under s. 24(1) (paras. 58-59). With respect, I cannot agree with that position, because it disregards the allegation of abuse of process in the residual category.

[48] All of the appellants alleged an infringement of their right under s. 7 of the *Charter* on the basis of an abuse of process in the residual category (A.R., vol. XI, at pp. 101-2). It is true that they argued that the abuse resulted from an accumulation of infringements of the right to be secure against unreasonable search or seizure and the right to retain and instruct counsel without delay (A.R., vol. I, at pp. 150, 154-55 and 158; see also A.R., vol. X, at pp. 55-56). It is also true that, on the face of the record, some of the appellants could not reasonably allege that they had been the victims of either of these infringements, or possibly even both. However, this did not prevent any appellant from having standing to apply to a court for a stay of proceedings under s. 24(1) of the *Charter* and to obtain a judgment from the court on the merits of their application if they had duly alleged all the essential elements that had to be shown in order to establish an infringement of their s. 7 right on the basis of an abuse of process in the residual category.

[49] I agree with the appellants that the existence of directly personal prejudice is not one of these essential elements. As will be explained more fully below, this Court has repeatedly recognized that an infringement of s. 7 of the *Charter* may result solely from the fact that state conduct causes prejudice to the integrity of the justice system, irrespective of whether the conduct had an impact on the other rights of the person alleging it or on the fairness of their trial.

- (3) Section 7 of the *Charter* Protects Accused Persons From State Conduct That Undermines the Integrity of the Justice System, Regardless of Whether There Is Personal Prejudice

[50] Indeed, under the residual category of abuse of process, “prejudice . . . is better conceptualized as an act tending to undermine society’s expectations of fairness in the administration of justice” (*Nixon*, at para. 41). As L’Heureux-Dubé J. noted in *O’Connor*, the residual category of abuse of process

does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process. [para. 73]

[51] In other words, impairment of the accused’s other rights or of the fairness of their trial, “although relevant, is not determinative” (*Nixon*, at para. 41), because the type of prejudice addressed by the principles of fundamental justice in s. 7 goes well beyond personal prejudice (*O’Connor*, at para. 64). All that must be found is that there is state conduct with repercussions on a larger scale, that is, conduct that causes prejudice to the integrity of the justice system in the eyes of society.

[52] Of course, the personal prejudice resulting from an alleged abuse of process in the residual category will not be without significance when it comes time to determine whether the abuse in question occurred. In fact, breaches of the fairness of an accused’s trial are often inseparable from and in addition to prejudice to the integrity of the justice system (*O’Connor*, at para. 64; see also *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007).

[53] However, the fact remains that an accused's s. 7 right may be infringed as a result of state conduct that meets the threshold for establishing an abuse of process in the residual category without the accused having suffered any personal prejudice, such as another of their constitutional rights being impaired or the fairness of their trial being compromised.

[54] This does not mean that every accused will have standing to apply for a remedy under s. 24(1) on the basis of any state conduct that undermines the integrity of the justice system, regardless of the causal connection between the abusive conduct and the proceedings against them. For a court to find that an accused's right under s. 7 of the *Charter* has been infringed as a result of an abuse of process in the residual category, there must be a "sufficient causal connection" between the abusive conduct and the proceedings against the accused (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paras. 75-78). It is this connection to which I now turn.

(4) The Proceedings Against the Accused Must Have Been Tainted by the Abusive State Conduct

[55] In my opinion, the causal connection between, on the one hand, the state conduct that undermines the integrity of the justice system and, on the other, the engagement of the accused's interests protected by s. 7 of the *Charter*, that is, life, liberty and security of the person, will be considered sufficient where the criminal

proceedings against the accused are “tainted” (in French, *entachées*) by the abusive conduct (see *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667).

[56] The proceedings against an accused will be regarded as tainted where abusive conduct occurred in the course of the proceedings or in the course of a police investigation or operation that targeted the accused or otherwise served to gather evidence to prove that the accused was guilty of the charge or charges laid against them. Obviously, the abusive conduct need not have had an impact on the accused’s other *Charter* rights or on the fairness of their trial in order to meet this requirement. It need only have occurred in the course of the investigation or police operation targeting the accused or the criminal proceedings against them. In the absence of this connection, I have difficulty seeing how the accused’s life, liberty and security of the person are engaged by the abusive conduct.

[57] This requirement is consistent with the purpose of the doctrine of abuse of process in the residual category, which is to enable courts to protect the integrity of the justice system by dissociating themselves from state conduct that constitutes an abuse of the judicial process (D. M. Paciocco, “The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept” (1991), 15 *Crim. L.J.* 315, at p. 338). When there is no connection between the abusive conduct and the proceedings against the accused, the fact that the court dissociates itself from the conduct will not have the effect of preserving the integrity of the justice system.

[58] This requirement is also consistent with the applicable framework for granting a stay of proceedings under s. 24(1) of the *Charter*. This framework, which involves three cumulative conditions, is used to screen applications for stays of proceedings to ensure that this remedy is available only in the “clearest of cases”, which excludes cases in which the proceedings against the accused are not already tainted by abusive conduct.

[59] This can be confirmed simply by looking at the first condition, which reflects the fact that a stay of proceedings is a prospective remedy (*Tobiass*, at para. 91; *Regan*, at para. 54). This condition is aimed at preventing the perpetuation of prejudice to the integrity of the justice system that, if left alone, will continue to trouble the parties and the community as a whole in the future (*O’Connor*, at para. 75; *Tobiass*, at para. 91; *Regan*, at para. 54; *Nixon*, at para. 42; *Babos*, at para. 35). To this end, the court must ask whether “proceeding in light of the impugned conduct would do further harm to the integrity of the justice system” (*Babos*, at para. 38). This question cannot be divorced from the specific context of the court proceedings against each accused, since those are the proceedings for which a stay is sought (*Paciocco*, at p. 341). In other words, to meet the first condition for establishing that a stay of proceedings is an appropriate remedy, the accused must satisfy the court that carrying on with the proceedings against *them* would in itself do further harm to the integrity of the justice system.

[60] But it is only where the proceedings against an accused are tainted by abusive conduct that the accused can argue that refusing to stay the proceedings will manifest, perpetuate or aggravate prejudice to the integrity of the justice system, as required by s. 24(1) of the *Charter*. Conversely, where the proceedings against the accused are not first tainted by abusive state conduct, the accused's application for a stay of proceedings under s. 24(1) on the basis of the abuse will have no chance of success. For this reason, it is entirely logical and desirable that such an accused not have standing to apply for a stay of proceedings under s. 24(1) on the basis of that conduct.

[61] Finally, the condition requiring that the proceedings be tainted by abusive conduct is consistent with the case law. In *R. v. Castro*, 2001 BCCA 507, 47 C.R. (5th) 391, the British Columbia Court of Appeal had to determine whether the accused Mr. Castro and his co-accused had standing to apply for a stay of proceedings on the basis of an abuse of process in the residual category in a context where there was only an indirect connection between the abusive conduct and the court proceedings against them. The case concerned two related investigations: Project Escudo and Project Eye Spy. The latter was an undercover operation targeted at money laundering and drug trafficking. It led to Mr. Castro being identified as a possible drug trafficker. Project Escudo was then put in place to target Mr. Castro directly and was conducted in parallel with Project Eye Spy. The Crown argued that the accused, including Mr. Castro, did not have standing to assert the illegality of the transactions conducted as part of Project Eye Spy because Mr. Castro and his co-accused were not alleging that they had

participated in those transactions (para. 26). The Court of Appeal rejected that argument on the ground that the proceedings against Mr. Castro and his co-accused were tainted by the abusive police conduct associated with Project Eye Spy:

In summary, the appellants have standing to argue the illegality of the police conduct in Project Eye Spy because it was intended to produce and in fact produced evidence directly leading to the appellants' prosecution. The conduct formed a sufficiently close link with the prosecution that it can be reasonably argued that the prosecution is tainted with illegality. Whether this amounts to an abuse of process requiring a stay will be for the judge who hears the matter to decide in light of all the circumstances, including the legal opinions. [Emphasis added; para. 39.]

[62] *Babos* provides another illustration. In that case, one of the three forms of misconduct that Mr. Babos alleged against the Crown in support of his application for a stay of proceedings under s. 24(1) of the *Charter* for abuse of process in the residual category was a Crown attorney's use of improper means to obtain the medical records of his co-accused, Mr. Piccirilli, from the detention centre where the latter was being held pending trial. Even though that conduct was not directed at Mr. Babos and did not affect the proceedings against him in any way, it occurred during his criminal proceedings, and no one questioned the fact that, like Mr. Piccirilli, he had standing to allege it in support of his application for a stay of proceedings.

[63] It follows that one of the essential elements that must be shown for an accused to establish that their right under s. 7 of the *Charter* has been infringed as a result of an abuse of process in the residual category is that the abusive conduct tainted the proceedings against them. An accused who does not allege expressly or implicitly

that the abusive state conduct tainted the proceedings against them will therefore not have standing to apply for a remedy under s. 24(1) on the basis of such conduct.

(5) Application to the Facts

[64] In this case, all of the appellants alleged that the police conduct they characterized as abusive had tainted the proceedings against them. Indeed, all of the misconduct alleged by each of them — (i) failure to facilitate the requested access to counsel at the first reasonably available opportunity during the police operation on March 31, 2016, (ii) failure to give notice to the persons against whom a covert search warrant was executed, contrary to the terms of the warrant, and (iii) failure to have the warrants endorsed before they were executed outside the district of Trois-Rivières — took place in the course of the police investigation and operation known as Project Nandou, which directly targeted all of the appellants and served to gather evidence to prove their guilt.

[65] That being said, having standing is only the first step in an application under s. 24(1) of the *Charter*. Whether there was an abuse of process in the residual category remains an open question. However, before addressing this question, I believe it will be useful to clarify the analytical framework that applies where the existence of an abuse of process in the residual category contrary to s. 7 is based on allegations that there has been an accumulation of infringements of other *Charter* rights, in this case the rights guaranteed by ss. 8 and 10(b).

B. *Did the Superior Court Judge Err in Finding That There Had Been an Abuse of Process in the Residual Category?*

(1) The Analytical Framework That Applies Where Abuse of Process in the Residual Category Results From the Infringement of Other Charter Rights

[66] In *O'Connor*, this Court stated that both s. 7 of the *Charter* and the specific procedural guarantees set out in ss. 8 to 14 are intended to protect the individual interest of accused persons in a fair trial as well as the integrity of the justice system as a whole (paras. 64 and 73). In doing so, the Court did not recognize any “right against abuse of process” in the *Charter*. It preferred to state that, “[d]epending on the circumstances, different *Charter* guarantees may be engaged” (para. 73).

[67] Sometimes, the *Charter*’s specific procedural guarantees will be the best fit for remedying abuse of process. For example, where an accused alleges that misconduct by the Crown has prejudiced their ability to have a trial within a reasonable time, the application should be dealt with by applying the framework for s. 11(b) of the *Charter* (*O'Connor*, at para. 73).

[68] Where none of the specific procedural guarantees addresses the alleged misconduct, this Court has established that s. 7 of the *Charter* acts as a safeguard and provides accused persons with additional protection from state conduct that affects trial fairness in other ways and from “residual” conduct that otherwise undermines the integrity of the justice system (*Nixon*, at para. 36). In this sense, s. 7 plays a role complementary to that of ss. 8 to 14 by providing residual protection against abuse of

process that goes beyond the protection offered by the specific guarantees in ss. 8 to 14. This role has also been recognized many times by the Court outside the abuse of process context (*R. v. J.J.*, 2022 SCC 28, at para. 113; *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443, at para. 24; *R. v. White*, [1999] 2 S.C.R. 417, at para. 44; *R. v. Mills*, [1999] 3 S.C.R. 668, at paras. 72 and 76; *R. v. Pearson*, [1992] 3 S.C.R. 665, at p. 688; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 603; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at pp. 537-38).

[69] It is therefore not uncommon for s. 7 of the *Charter* to be invoked at the same time as one or more other procedural guarantees. This will be the case, for example, where alleged abusive state conduct involves more than just the infringement of a procedural guarantee set out in ss. 8 to 14. Indeed, abusive state conduct may take all sorts of forms. This Court has also specifically recognized that there may be cases in which “the nature and number of incidents, though individually unworthy of a stay, will require one when considered together” (*Babos*, at para. 73). This statement applies equally at the stage of determining whether abuse of process has occurred. Abuse of process in the residual category can thus result from an accumulation of incidents or state misconduct. Furthermore, there is no reason why such incidents or misconduct cannot take the form of infringements of a procedural *Charter* guarantee and, consequently, why the alleged abuse of process cannot result from an accumulation of infringements of one or more guarantees.

[70] In these circumstances, how are the relevant analytical frameworks to be reconciled? This Court has attempted in the past to establish the order of priority it should follow when an infringement of s. 7 of the *Charter* is alleged together with an infringement of one or more procedural guarantees (*R. v. Harrer*, [1995] 3 S.C.R. 562, at para. 13; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, at para. 76; *J.J.*, at paras. 213 and 327), but because these provisions are “inextricably” intertwined (*Seaboyer*, at p. 603; *Mills*, at para. 69; *J.J.*, at para. 114) and complementary, the Court preferred to find as follows:

The appropriate methodology for assessing multiple *Charter* breaches alleged by the accused may depend on the factual record, the nature of the *Charter* rights at play, and how they intersect. This Court has repeatedly affirmed that the methodology for assessing multiple alleged *Charter* breaches is highly context- and fact-specific . . . .

(*J.J.*, at para. 115)

[71] It bears repeating that, in the abuse of process context, both s. 7 and ss. 8 to 14 of the *Charter* are intended to protect individuals from conduct that is unfair or vexatious to such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the justice system (*O'Connor*, at paras. 64 and 73). It follows that the frameworks for analyzing these provisions can coexist. Indeed, it is entirely appropriate to use the framework for abuse of process in the residual category developed for the purposes of s. 7 to analyze any accumulation of infringements of one or more procedural guarantees in order to determine whether the infringements as a whole meet the threshold for establishing abuse of process, that is, prejudice to the integrity of the justice system.

[72] Of course, the framework applicable to each of these procedural guarantees will remain relevant in determining whether the infringements making up the accumulation of infringements actually occurred. In fact, this determination will logically have to be made before the court decides whether there has been an abuse of process in the residual category. In this way, the frameworks coexist, those for the procedural guarantees being intertwined with the s. 7 framework.

[73] Before turning to the framework applicable in this case, I want to reiterate that proof of one or more infringements is not necessary to establish an abuse of process in the residual category, because the focus with this type of abuse is on *conduct* that undermines the integrity of the justice system, regardless of whether it breaches other *Charter* rights.

(2) The Framework Applicable in This Case

[74] In this case, the abuse of process alleged by the appellants results from an accumulation of infringements of *Charter* rights, specifically the right to be secure against unreasonable search or seizure and the right to retain and instruct counsel without delay, that reflects a situation of blatant disregard for their rights by the police (A.R., vol. X, at pp. 55-56; A.R., vol. XI, at pp. 15, 70-71 and 108-9). The appellants do not focus on any breach of trial fairness resulting from these infringements. Further, they acknowledge that the infringements in question, considered individually, cannot justify the remedy they seek, namely a stay of the proceedings against them (Sup. Ct. reasons (2018), at paras. 5, 133 and 150). Rather, they allege that the accumulation of

infringements and the police disregard for their rights that it reflects caused prejudice to the integrity of the justice system.

[75] In these circumstances, the framework developed for the purposes of s. 7 of the *Charter* for analyzing abuse of process in the residual category should be adopted to determine whether the alleged infringements as a whole meet the threshold for establishing abuse of process. However, this exercise makes it necessary to apply the framework for each of the provisions at issue, ss. 8 and 10(b), to determine whether the allegations of infringements are well founded. Only once each of the alleged infringements has been examined will it then be possible to determine whether all of the infringements, considered together, amount to conduct that is vexatious to such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the justice system.

[76] I pause here for a moment. The appellants argue that certain infringements were [TRANSLATION] “planned and intended” and that the accumulation of these infringements reflects “blatant disregard” for their rights (A.R., vol. I, at p. 96). The appellants also describe the alleged infringements of the right to retain and instruct counsel without delay as being [TRANSLATION] “systematic” (p. 92). Needless to say, the deliberate and widespread nature of one or more infringements of *Charter* rights is relevant in determining whether the threshold for establishing abuse of process in the residual category is met.

[77] Indeed, the Court has previously recognized the relevance of these two factors under the framework for s. 24(2) of the *Charter* at the stage of determining the seriousness of the *Charter*-infringing conduct (*R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at paras. 22 and 25; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 75; *R. v. McColman*, 2023 SCC 8, at para. 58). It is true that s. 24(2) is analytically distinct from ss. 8 and 10(b) in the sense that it comes into play only at the remedy stage, after an infringement has been found. However, the fact remains that the primary concern under s. 24(2), namely public confidence in the administration of justice (*Grant*, at paras. 67-68), intersects with the interest protected by s. 7 when it comes to abuse of process in the residual category, namely the integrity of the justice system (*O'Connor*, at para. 61).

(3) Application to the Facts

[78] The Superior Court judge held that the police had committed an accumulation of infringements of the rights of the appellants in group 1 under ss. 8 and 10(b) of the *Charter* and that, when considered together and in their entire context, these infringements revealed a “systemic and persistent problem” (Sup. Ct. reasons (2018), at para. 216) that was extremely serious and met the threshold for establishing abuse of process in the residual category and warranting a stay of proceedings (paras. 210, 217 and 219-20, quoting *Brind'Amour*, at para. 93). In the paragraphs that follow, I will consider whether the Superior Court judge erred in arriving at that conclusion. For this purpose, I will apply the analytical framework for each of the rights

relied upon, starting — as the Superior Court and the Court of Appeal did — with the right to retain and instruct counsel without delay. Once all the allegations of infringements have been examined, I will be able to assess whether the identified infringements as a whole meet the threshold for abuse of process in the residual category under s. 7 of the *Charter*.

[79] Before I begin, I think it is helpful to reiterate that “[a]ppellate 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’” (*Babos*, at para. 48, quoting *R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509, at para. 19; *Regan*, at para. 117; *Tobiass*, at para. 87; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at paras. 15 and 51).

(a) *Right to Retain and Instruct Counsel Without Delay*

(i) Applicable Law

[80] Section 10(b) of the *Charter* provides that everyone has the right on arrest or detention “to retain and instruct counsel without delay and to be informed of that right”. In *R. v. Bartle*, [1994] 3 S.C.R. 173, Lamer C.J. summarized the three duties that this provision imposes on the police:

- (1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel;

- (2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and
- (3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).

(p. 192, citing *R. v. Manninen*, [1987] 1 S.C.R. 1233, at pp. 1241-42; *R. v. Evans*, [1991] 1 S.C.R. 869, at p. 890; *R. v. Brydges*, [1990] 1 S.C.R. 190, at pp. 203-4.)

[81] The purpose of these three duties is to protect any person whose detention puts them in a situation of vulnerability relative to the state (*R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, at paras. 2 and 40-41). While under the control of the police, the person suffers a deprivation of liberty and is at risk of involuntary self-incrimination (*R. v. Taylor*, 2014 SCC 50, [2014] 2 S.C.R. 495, at para. 22, citing *Bartle*, at p. 191).

[82] Although the first duty is triggered immediately upon detention (*Suberu*, at para. 41), the second and third duties arise only if the detainee indicates a desire to exercise their right to counsel. Where this is the case, the police are under a constitutional obligation to facilitate access to counsel at the first reasonably available opportunity and to refrain from eliciting evidence from the detainee until that time (*Manninen*, at pp. 1241-42; *Taylor*, at paras. 24 and 26).

[83] Whether the delay between the time a detainee indicates a desire to exercise their right and the time the detainee exercises it is reasonable is a factual and highly contextual inquiry (*Taylor*, at para. 24). Barriers to access or “exceptional circumstances” that justify briefly suspending the exercise of the right cannot be

assumed; they must be proved (para. 33; *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 74; *R. v. Strachan*, [1988] 2 S.C.R. 980, at pp. 998-99). The burden is always on the Crown to prove the circumstances, exceptional or not, that make the delay reasonable (*Taylor*, at para. 24).

[84] Before applying these principles to the facts, I think it necessary to reiterate that the law does not as yet impose a specific duty on police officers to provide their own telephones to detainees or to have inexpensive devices on hand so that detainees can exercise their right to retain and instruct counsel without delay (*Taylor*, at paras. 27-28).

(ii) Application to the Facts

[85] The Superior Court judge held [TRANSLATION] “that the right to counsel and the right to be informed of that right were infringed” (Sup. Ct. reasons (2018), at para. 85) for all of the appellants in group 1 because the evidence revealed a “systematic” police practice of postponing the exercise by these persons of their right to retain and instruct counsel without delay until they were taken to the police station, without first considering the particular circumstances of each arrest (para. 75).

[86] The Crown argues that the Court of Appeal properly identified errors of law in the analysis that led the Superior Court judge to that conclusion. The Crown submits that the judge erred as regards the scope of the police duties and that his finding of a “systematic” infringement flowed directly from that error.

[87] The appellants, on the other hand, argue that the Superior Court judge made no reviewable error and that it was rather the Court of Appeal that erred by interfering with his findings of mixed fact and law in the absence of palpable and overriding errors.

[88] For the reasons that follow, I am of the view that the Superior Court judge erred in law in finding that the right to retain and instruct counsel without delay of all of the appellants in group 1 had been infringed.

[89] My conclusion is deferential to the findings of fact made by the Superior Court judge. He found that four of the seven appellants in group 1 expressed a desire to immediately exercise their right to retain and instruct counsel without delay but were told that the right would be exercised at the police station, even though the police did not first consider whether, in the circumstances, the right could be exercised immediately (Sup. Ct. reasons (2018), at paras. 49-54, 58-59 and 68). When asked why one of the appellants was not given an opportunity to retain and instruct counsel at the scene, the arresting officer replied as follows:

[TRANSLATION] . . . that's not the normal practice. That's not the way it's normally done. Normally, we go directly to headquarters and then have the person contact counsel within, you know, a reasonable time, and directly at headquarters, not at the scene with everyone who's around, as a matter of confidentiality too. [Emphasis added.]

(A.R., vol. IV, at p. 29; see also Sup. Ct. reasons (2018), at paras. 54 and 57.)

[90] In addition, as the Superior Court judge noted, the detective in charge of the “arrest” component during the preparatory meeting for the officers who were to take part in the police operation on March 31, 2016, had in fact been involved approximately two months earlier in an arrest in respect of which his colleague had been criticized for replying [TRANSLATION] “in a somewhat automatic manner”, to a detainee who had expressed his intention to exercise his right to retain and instruct counsel without delay, that the right would be exercised at the police station (para. 70, quoting *R. v. Martel*, C.Q. Trois-Rivières, Nos. 400-01-064968-118, 400-01-064969-116, 400-01-064970-114, January 27, 2016, reproduced in A.R., vol. III, at p. 1).

[91] In these circumstances, the Superior Court judge could find that there was a police practice amounting to a “reverse onus” (Sup. Ct. reasons (2018), at para. 84) whereby the police officers refused to consider the immediate exercise of the right to counsel unless the detainee specifically requested it. That finding resulted from the Superior Court judge’s exclusive assessment of the facts and is entitled to deference.

[92] However, I am of the view that the existence of that practice, without more, did not permit the Superior Court judge to infer, as he did, that the right of the seven appellants in group 1 to retain and instruct counsel without delay had been infringed.

[93] First of all, one of the seven appellants in group 1, Mr. Chounlamountry, was given an opportunity to exercise his right to counsel at the scene and declined to do so (Sup. Ct. reasons (2018), at para. 55), while two others, Mr. Girard and

Mr. Mailhot, did not ask to exercise this right at the scene (paras. 56 and 62). In the case of Mr. Girard, the Superior Court judge found from the evidence that he had said he [TRANSLATION] “would want” to exercise his right to counsel later (para. 56). It can therefore be seen simply from reading the Superior Court judge’s findings that the duty to implement the right to counsel was not even triggered for at least three of the appellants in group 1.

[94] Moreover, although I agree with the Superior Court judge that the practice he identified is improper, this does not mean that it results in an automatic breach of any of the three duties arising from the right to counsel guaranteed by s. 10(b) of the *Charter*.

[95] This Court has already recognized that, as a general rule, the police may not assume in advance that it will be impracticable for them to facilitate access to counsel. On the contrary, they must be mindful of the particular circumstances of the detention and take proactive steps to turn the right to counsel into access to counsel (*Taylor*, at para. 33). This is the case because the detainee’s ability to exercise their right depends entirely on the police (para. 25).

[96] That being said, the fact that a police officer assumes in advance that it will be reasonable to delay the implementation of the right to counsel, without regard to the circumstances of the detention, will not in itself entail an infringement of this right. After all, the central question remains whether the delay was reasonable having regard to all of the circumstances, whether those circumstances were considered by the police

or not. However, the fact that the police assume the delay will be reasonable will make it much more difficult for the Crown to show that it was in fact reasonable.

[97] *Taylor* provides an illustration of this principle. In that case, this Court had to determine whether the failure of two police officers to facilitate Mr. Taylor's access to counsel during the 20 to 30 minutes between his admission to hospital and the time a first set of blood samples was taken was an infringement of his right to retain and instruct counsel without delay. Both officers had completely forgotten about their duty to ensure that Mr. Taylor could exercise his right at the first reasonably available opportunity. Far from concluding that the oversight was in itself an infringement of s. 10(b) of the *Charter*, this Court focused instead on how the oversight affected the determination of the reasonableness of the failure:

The result of the officers' failure to even turn their minds that night to the obligation to provide this access, meant that there was virtually no evidence about whether a private phone call would have been possible, and therefore no basis for assessing the reasonableness of the failure to facilitate access. [para. 35]

[98] Yet one officer had testified that because of the hospital setting Mr. Taylor was in, there was "absolutely no way" that he could have contacted counsel in a confidential manner (para. 30). However, the Court gave little weight to her testimony, for the following reason:

. . . this retrospective imputation of impracticability is of limited relevance given her acknowledgement that she was only there to track the blood

samples and whether such access was possible was not part of her duties there. As a result, she too made no inquiries of the hospital staff. [para. 30]

[99] Since there was no evidence justifying the failure, this Court came to the conclusion that Mr. Taylor's right to counsel under s. 10(b) of the *Charter* had been infringed before the first set of blood samples was taken (para. 37).

[100] It follows from the foregoing that the fact that the police postpone the exercise of a detainee's right to retain and instruct counsel without delay until the detainee has been taken to the police station, without first considering the particular circumstances of the arrest, does not in itself entail an infringement of the right guaranteed by s. 10(b) of the *Charter*. The central question remains whether the delay in facilitating access to counsel (in *Taylor*, it was a failure to facilitate such access (para. 35)) was reasonable in the circumstances. This is a question of fact that must be decided on the basis of the evidence in the record (paras. 24 and 32-33).

[101] In this case, as the Court of Appeal properly noted, the Superior Court judge did not, with all due respect, analyze the reasonableness of the delay between the time the appellants in group 1 indicated a desire to exercise their right to counsel and the time they were able to exercise it. His reasons dealing with the right to retain and instruct counsel without delay of the four appellants in group 1 who expressed their intention to exercise it immediately after being informed of it make no mention of the time that three of them had to wait before being able to call their counsel (Sup. Ct. reasons (2018), at paras. 49-54, 58-61 and 68).

[102] In addition, the Superior Court judge's reasons make only a passing reference to certain circumstances that were relevant to assessing the reasonableness of the delay, such as the fact that a search was in progress, the proximity of the police station, the police officers' safety, the presence of a telephone at the scene and issues relating to the confidentiality of any call made, without ever analyzing how these circumstances affected the reasonableness of the delay. In the case of one of the four appellants in question, the reasons do not even refer to any of these circumstances (para. 68). I will add that nowhere in the reasons is any account taken of the fact that accomplices were arrested at the same time.

[103] It is true that the Superior Court judge wrote the following at para. 77 of his reasons:

[TRANSLATION] In contrast to the situation encountered in *R. v. Strachan*, which had to be stabilized before the accused could exercise his constitutional right, there is no evidence of such a situation in this case. No effort was made to enable the accused to contact counsel.

[104] With respect, that paragraph does not decide the issue of the reasonableness of the time waited by the four appellants in group 1 who expressed their intention to exercise their right to counsel immediately. While the need to stabilize the scene of the arrest is one of the exceptional circumstances that justify briefly postponing the exercise of this right (*Strachan*, at pp. 998-99), it is not the only factor to be considered in assessing the reasonableness of delay.

[105] In light of the foregoing, I conclude that the Superior Court judge erred in law in finding that the allegations that the right to retain and instruct counsel without delay had been infringed were well founded with respect to all of the appellants in group 1 solely on the basis of the police practice of systematically postponing the exercise of this right without first considering the particular circumstances of each arrest. This error explains why the Superior Court judge held that the right of three appellants to retain and instruct counsel without delay had been infringed even though they had either already exercised their right or deferred its exercise after being duly informed of it. This error also explains why the judge failed to analyze the reasonableness of the delay between the time the other four appellants in group 1 indicated a desire to exercise their right to counsel and the time they were able to exercise it.

[106] Since the appellants decided to base their abuse of process claim on an accumulation of infringements, including the infringement of the right to retain and instruct counsel without delay, the Superior Court judge had to correctly apply the s. 10(b) framework in relation to each of them and draw the necessary conclusions, which he did not do.

[107] Of course, the improper police practice identified earlier itself constitutes state misconduct that is relevant in determining whether there was an abuse of process in the residual category. However, at this stage, it is impossible to say whether the Superior Court judge considered the mere existence of this misconduct to be as serious

as the accumulation of infringements of the right to retain and instruct counsel without delay that he thought he had identified. After all, the time between being arrested and being given an opportunity to contact counsel ranged from 23 minutes to 1 hour and 6 minutes, depending on the case, and the impact of the police practice on trial fairness was uncertain at best (Sup. Ct. reasons (2018), at paras. 189-91). In these circumstances, a case-by-case determination of whether the right guaranteed by s. 10(b) of the *Charter* had been infringed took on greater importance in ascertaining the seriousness of the improper police practice and, ultimately, the existence of an abuse of process in the residual category.

[108] The error of law made by the Superior Court judge dictates the outcome of the appeal for the appellants in group 1, because the judge was of the view that the infringements of the right to retain and instruct counsel without delay were the most serious infringements (Sup. Ct. reasons (2018), at para. 184). In contrast, he characterized the failure to have the warrants executed outside the district of Trois-Rivières endorsed as an [TRANSLATION] “error made in good faith” (para. 152) and specified that the failure to give notice of a covert search within the allotted time “would not on its own have made it possible to stay the proceedings” (para. 133). In these circumstances, it is unnecessary to consider the Superior Court judge’s findings with respect to these infringements of the right to be secure against unreasonable search or seizure. As the Court of Appeal recognized, the Superior Court judge’s failure to assess the reasonableness of the delay before each appellant in group 1 was given an opportunity to contact counsel justifies, [TRANSLATION] “on its own”, holding a new

hearing on the motion for a stay of proceedings and for the exclusion of evidence for group 1 (para. 56). This is because the Superior Court judge's conclusion that the right of the appellants in group 1 to retain and instruct counsel without delay had been infringed was an essential underpinning of his ultimate conclusion that their right under s. 7 of the *Charter* had been infringed as a result of an abuse of process in the residual category. Setting aside the first conclusion therefore amounts to setting aside the second.

(b) *Conclusion*

[109] In light of the reasons set out above, I conclude, as the Court of Appeal did, that the Superior Court judge erred in holding that the right of all of the appellants in group 1 to retain and instruct counsel without delay had been infringed. Because the infringements of this right were, in his view, the most serious ones, his conclusion that the appellants in group 1 were the victims of an abuse of process in the residual category must be set aside.

[110] Since the Superior Court judge did not carry out the individualized analysis required by s. 10(b) of the *Charter* to determine whether the right of the appellants in group 1 to retain and instruct counsel without delay had been infringed, this Court is faced with the choice of affirming the Court of Appeal's judgment ordering a new hearing on their motion or taking on the role of trier of fact. Given the highly circumstantial nature of the analysis, I am of the view that it is in the interests of justice for there to be a new hearing on the motion brought by the appellants in group 1.

[111] The question of whether the same holds true for the motion brought by the appellants in groups 2, 3 and 4 will be discussed below. Before answering this question, I consider it necessary to point out another error made by the Superior Court judge at the stage of determining the appropriate remedy for the appellants in group 1, in case it is held again, after the new hearing on the motion, that the threshold for establishing abuse of process in the residual category is met.

C. *Did the Superior Court Judge Err in Entering a Stay of Proceedings for All of the Appellants?*

[112] A stay of proceedings has been characterized as the “ultimate remedy” (*Tobiass*, at para. 86) because of its finality:

It is ultimate in the sense that it is final. Charges that are stayed may never be prosecuted; an alleged victim will never get his or her day in court; society will never have the matter resolved by a trier of fact.

(*Regan*, at para. 53)

[113] For these reasons, and as I noted above, this drastic remedy will be granted only where the situation meets the high threshold of being one of the “clearest of cases” (*O’Connor*, at para. 69). This requires the following three conditions to be met:

- (1) there must be prejudice to the accused’s right to a fair trial or to the integrity of the justice system that “will be manifested, perpetuated or

aggravated through the conduct of the trial, or by its outcome” (*Regan*, at para. 54; *Babos*, at para. 32);

(2) there must be no alternative remedy capable of redressing the prejudice (*Regan*, at para. 54; *Babos*, at para. 32);

(3) where there is still uncertainty over whether a stay of proceedings 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” (*Regan*, at para. 57; *Babos*, at para. 32).

[114] These conditions are cumulative, and none of them is optional. With respect, I am of the view that the Superior Court judge failed to ensure that the second condition was met in this case.

[115] The motion brought by the appellants in group 1 specifically sought an order excluding an entire list of evidence if a stay of proceedings was not obtained for all of them (A.R., vol. I, at pp. 158-59; A.R., vol. XI, at p. 169; A.R., vol. XII, at p. 1; see also A.R., vol. XX, at pp. 18-20).

[116] Yet the Superior Court judge never mentioned this alternative to a stay of proceedings in his analysis at the stage of determining the appropriate remedy (Sup.

Ct. reasons (2018), at paras. 178-222). He simply stated that [TRANSLATION] “a stay of proceedings is the appropriate remedy in this case” (para. 217).

[117] This may have been so, but it still had to be explained why a remedy short of a stay of proceedings could not redress the prejudice to the integrity of the justice system that the judge thought he had identified (see, e.g., *Brind’Amour*, at paras. 102-3).

[118] I would add that this failure to consider lesser remedies is especially significant in a context where several accused persons apply for a remedy under s. 24(1) of the *Charter* on the basis of the same abuse of process that affected them in different ways. In such circumstances, the court may very well conclude that the remedy that would fully redress the prejudice to the integrity of the justice system caused by the abuse involves individualized orders. After all, it is important to remember that

the *Charter* has now put into judges’ hands a scalpel instead of an axe — a tool that may fashion, more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system.

(*O’Connor*, at para. 69)

D. *Could the Crown Raise, Before the Court of Appeal, the Superior Court Judge’s Failure to Consider the Particular Circumstances of the Arrest of Each Appellant in Groups 2, 3 and 4 After Consenting to Judgment?*

[119] Lastly, the appellants maintain that the outcome of the appeal of those in groups 2, 3 and 4 is independent of the outcome of the appeal of those in group 1. Indeed, they argued before us that the Crown should not have been permitted to make, with respect to the judgment entering a stay of proceedings for the appellants in groups 2, 3 and 4, the same arguments it made in relation to the judgment entering a stay of proceedings for the appellants in group 1. More specifically, they contend that the Crown should have been precluded from raising the Superior Court judge's failure to consider the particular circumstances of the arrest of each appellant in groups 2, 3 and 4 in determining whether their right to retain and instruct counsel without delay had been infringed. Since the Crown explicitly [TRANSLATION] "invited" the Superior Court judge to decide the motions brought by those groups "without further formalities", the appellants submit that it could not be permitted to take a new position on appeal and to criticize the judge for not conducting a case-by-case analysis (A.F., at para. 92). They say that this change of position on appeal is contrary to the principle of fairness and to the guarantee against double jeopardy in s. 11(h) of the *Charter*.

[120] In support of their argument, the appellants rely on *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, which sets out the Crown's duty not to advance a new theory of liability on appeal for reasons of procedural fairness. In *Barton*, Moldaver J., writing for the majority, stated the following at para. 47:

Out of concerns over fairness to the accused and in particular the principle against double jeopardy, which is enshrined in s. 11(h) of the *Canadian Charter of Rights and Freedoms*, the Crown is barred from securing a new trial by advancing a new theory of liability for the first time

on appeal (see *Wexler v. The King*, [1939] S.C.R. 350; *Savard v. The King*, [1946] S.C.R. 20, at pp. 33-34, 37 and 49; *R. v. Penno*, [1990] 2 S.C.R. 865, at pp. 895-96; *R. v. Egger*, [1993] 2 S.C.R. 451, at p. 481). Moreover, as Doherty J.A. explained in *Varga*, “[d]ouble jeopardy principles suffer even greater harm where the arguments advanced on appeal contradict positions taken by the Crown at trial” (p. 793). In short, “[a] Crown appeal cannot be the means whereby the Crown puts forward a different case than the one it chose to advance at trial” (*ibid.*).

[121] In response, the Crown argues that it did not change its position on appeal or invite the Superior Court judge to decide the motion of groups 2, 3 and 4 without further formalities. I agree with the Crown. According to the transcript of the hearing on May 7, 2019, both the appellants and the Crown agreed that the decision rendered for group 1, that is, the stay of proceedings, was applicable to groups 2, 3 and 4, after first consenting to the evidence and arguments from the hearing on group 1’s motion being entered in the record for the motion brought by groups 2, 3 and 4. In doing so, the parties were not inviting the judge to decide the motion without further formalities. Rather, they were recognizing the fact that identical evidence and arguments would lead to an identical judgment. It seems that this approach involved an efficient use of judicial resources.

[122] Above all, not only did the Crown never waive its right to appeal, but it can be seen from the exchanges between the parties and the Superior Court judge during the hearing on May 7, 2019, that everyone knew the Crown would appeal the judgment to be rendered for groups 2, 3 and 4 and that the appeal would be joined to the appeal from the first judgment concerning group 1, which had already been commenced through the filing of a notice of appeal (A.R., vol. XII, at pp. 199-200; see also A.R.,

vol. II, at p. 55, para. 32, reproducing the Crown's brief before the Court of Appeal dated August 22, 2019, stating that the initial brief with respect to the appellants in group 1 had been filed on March 25, 2019, or a little more than a month before the hearing on May 7, 2019). The appellants were therefore neither taken by surprise nor prejudiced.

[123] I therefore dismiss this ground of appeal. The Crown was permitted to raise the Superior Court judge's failure to consider the particular circumstances of the arrest of each appellant in groups 2, 3 and 4. For the reasons given above, I conclude that the Superior Court judge erred in law in holding that the allegations that the right to retain and instruct counsel without delay had been infringed were well founded with respect to the appellants in groups 2, 3 and 4. This error is also determinative of the outcome of the appeal filed by the appellants in groups 2, 3 and 4, and it requires that one or more new hearings be held on their motion for a stay of proceedings and for the exclusion of evidence.

## VI. Conclusion

[124] For the foregoing reasons, I would dismiss the appeal. It is appropriate to hold new trials before a different judge, including new hearings on the motions for a stay of proceedings and for the exclusion of evidence.

The following are the reasons delivered by

ROWE J. —

[125] I am in agreement with the reasons of Justice O’Bonsawin as to the result and in large measure as to her statement of the law and its application in the circumstances of this case. However, to the extent that this case provides guidance as to the methodology to be used when an accused seeks a stay of proceedings under s. 24(1) of the *Canadian Charter of Rights and Freedoms* for alleged infringements of their rights protected under ss. 8 to 14 (in this instance, under s. 10(b)), and also seeks a stay under s. 24(1) for abuse of process under s. 7, I am concerned that greater clarity is warranted. It is for this purpose that I set out the brief reasons that follow.

[126] The Court has not been consistent in its approach to how the legal analysis should be sequenced when an accused seeks a stay under s. 7 and under ss. 8 to 14 (*R. v. J.J.*, 2022 SCC 28, at para. 115). In some cases, the Court has stated that where one of the “Legal Rights” under ss. 8 to 14 are relied on, as well as the broader right under s. 7, the specific right should be addressed first (*Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, at para. 76; see also *R. v. Harrer*, [1995] 3 S.C.R. 562, at para. 13; *R. v. Généreux*, [1992] 1 S.C.R. 259, at p. 310; *R. v. Pearson*, [1992] 3 S.C.R. 665, at p. 688). In other cases, the Court dealt with s. 7 first. For example, in *R. v. Pan*, 2001 SCC 42, [2001] 2 S.C.R. 344, Justice Arbour, writing for the Court, stated that “it is unnecessary in the present case to address the appellants’ arguments concerning ss. 11(d) and 11(f) of the *Charter*. I agree with the Court of Appeal that the alleged *Charter* violations in the present appeals are more properly dealt with under

s. 7 of the *Charter* and that nothing would be gained by also analysing the alleged violations under ss. 11(d) or 11(f)” (para. 79; see also *R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983, at para. 35). Sometimes, the Court’s approach varies within the same case. For example, in *R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187, Cromwell J.’s reasons, dissenting in part, dealt with some claims under s. 7 and some claims under s. 11 on the basis that the challenged provisions in that case “most directly engage[d]” one section or the other (para. 125).

[127] This lack of a settled methodology can generate further issues, notably by importing factors that are relevant to one section into the consideration of another section where such factors (arguably) are not relevant. It is unclear whether and, if so, to what extent this is so in the present case (see my colleague’s reasons, at paras. 66-77, 80-84, 94-108 and 109-10). I do not suggest that my colleague is in error in her analysis; rather I am saying that it is unclear as to what “drives” the analysis.

[128] This is not an isolated instance. Rather, in this Court’s jurisprudence it has not always been clear on *which basis* courts conclude there is an infringement. For example, in *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, the alleged abuse of process was based on ss. 7, 8 and 11(d). The trial judge concluded that all these rights were infringed without conducting an analysis of each; no guidance was offered by this Court as its analysis dealt only with remedy. See also *R. v. MacDonnell*, [1997] 1 S.C.R. 305.

[129] Courts should apply a consistent approach to the analysis where s. 7 and ss. 8 to 14 of the *Charter* are relied on by an accused in order to obtain a stay of proceedings. In my view, the following sequence reflects the appropriate order of operations:

- (a) Where a right under ss. 8 to 14 is relied on, along with s. 7, the specific right should be addressed first, including (if necessary) under s. 1;
- (b) If there is no infringement of the specific right, or if the infringement is justified under s. 1, only then should reviewing courts have regard to s. 7 and, if necessary, s. 1 once again.

[130] The reasons of Justice O'Bonsawin can be read as consistent with the foregoing, but are also capable of being understood as applying a "blended" analysis under ss. 10(b) and 7. It is this uncertainty as to methodology that I have sought to address in these brief reasons.

*Appeal dismissed.*

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