SCC File No. 39635

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

-and-

MATTHEW JAMES JOHNSTON AND CODY RAE HAEVISCHER

RESPONDENTS

-and-

DIRECTOR OF PUBLIC PROSECUTIONS, ATTORNEY GENERAL OF ONTARIO, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY, CRIMINAL TRIAL LAWYERS' ASSOCIATION (ALBERTA), TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA, AND CANADIAN CIVIL LIBERTIES ASSOCIATION

INTERVENERS

-and-

ANIL KAPOOR AND SARAH N. WEINBERGER

AMICUS CURIAE

FACTUM OF THE INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

MCCARTHY TÉTRAULT LLP
Suite 5300 TD Bank Tower
Box 48, 66 Wellington Street West
Toronto, ON M5K 1E6

Andrew Matheson (amatheson@mccarthy.ca)
Natalie V. Kolos (nkolos@mccarthy.ca)
Tel.: (416) 362-1812 / Fax: (416) 868-0673

Counsel for the Intervener,
Canadian Civil Liberties Association

JURISTES POWER LAW
99 Bank Street
Suite 701
Ottawa, ON K1P 6B9

Darius Bossé (dbosse@juristespower.ca)
Tel: (613) 702-5566
Fax: (613) 702-5566

Ottawa Agent for the Intervener,
Canadian Civil Liberties Association

ORIGINAL TO: **THE REGISTRAR**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

ATTORNEY GENERAL OF BRITISH COLUMBIA
Criminal Appeals & Special Prosecutions
6th Floor, 865 Hornby Street
Vancouver, BC V6Z 2G3

Mark K. Levitz, Q.C.
Geoff Baragar, Q.C.
Mark Wolf
Tel: (604) 660-0460
Fax: (604) 660-1133
Email: mark.levitz@gov.bc.ca

Counsel for the Appellant,
Her Majesty the Queen

GOWLING WLG (CANADA) LLP
Barristers & Solicitors
Suite 2600
160 Elgin Street
Ottawa, ON K1P 1C3

Matthew Estabrooks

Tel: (613) 786-0211
Fax: (613) 788-3573
Email:
matthew.estabrooks@gowlingwlg.com

Ottawa Agent for the Appellant,
Her Majesty the Queen

MARTLAND & SAULNIER
506-815 Hornby St.
Vancouver, BC V6Z 2E6

Brock Martland
Jonathan Desbarats
Daniel J. Song
Elliot Holzman
Tel: (604) 687-6278
Fax: (604) 687-6298
Email: martland@martland.ca

Counsel for the Respondent,
Matthew James Johnston

MICHAEL J. SOBKIN
331 Somerset Street West
Ottawa, ON K2P 0J8

Tel: (613) 282-1712
Fax: (613) 288-2896
Email: msobkin@sympatico.ca

Ottawa Agent for the Respondent,
Matthew James Johnston

BUCK & DLAB LAW
1700 – 808 Nelson Street
Vancouver, BC V6Z 2H2

Simon R. Buck
Roger Thirkell
Dagmar Dlab
Tel: (604) 684-4571
Email: sbuck@buckdlablaw.com

Counsel for the Respondent,
Cody Rae Haevischer

MICHAEL J. SOBKIN
331 Somerset Street West
Ottawa, ON K2P 0J8

Tel: (613) 282-1712
Fax: (613) 288-2896
Email: msobkin@sympatico.ca

Ottawa Agent for the Respondent,
Matthew James Johnston

KAPOOR BARRISTERS
161 Bay Street
Suite 2900
Toronto, ON M5J 2S1

Anil K. Kapoor
Sara N Weinberger
Tel: (416) 363-2700
Fax: (416) 363-2787
Email: akk@kapoorbarristers.com

Amicus Curiae,
Anil K. Kapoor and Sarah N. Weinberger

GOWLING WLG (CANADA) LLP
Barristers & Solicitors
Suite 2600, 160 Elgin Street
Ottawa, ON K1P 1C3

Matthew Estabrooks
Tel: (613) 786-0211
Fax: (613) 788-3573
Email:
matthew.estabrooks@gowlingwlg.com

Ottawa Agent for *Amicus Curiae*,
Anil K. Kapoor and Sarah N. Weinberger

PUBLIC PROSECUTION SERVICE OF CANADA
Suite 1400, Duke Tower
5251 Duke Street
Halifax, NS B3J 1P3

David W. Schermbrucker
Tel: (902) 426-2285
Fax:(902) 426-1351
Email: David.Schermbrucker@ppsc-sppc.gc.ca

Counsel for the Intervener,
Director of Public Prosecutions

PUBLIC PROSECUTION SERVICE OF CANADA
160 Elgin Street
12th Floor
Ottawa, ON K1A 0H8

François Lacasse
Tel: (613) 957-4770
Fax: (613) 941-7865
Email: Francois.Lacasse@ppsc-sppc.gc.ca

Ottawa Agent for the Intervener, Director of Public Prosecutions

ATTORNEY GENERAL OF ONTARIO
Crown Law Office – Criminal
720 Bay Street, 10th Floor
Toronto, ON M7A 2S9

Katie Doherty
Tel: (416) 326-4600
Fax: (416) 326-4656
Email: katie.doherty@ontario.ca

Counsel for the Intervener,
Attorney General of Ontario

HENEIN HUTCHISON LLP
235 King Street East
1st floor
Toronto, ON M5A 1J9

Scott C. Hutchison
Sarah Strban
Tel: (416) 368-5000
Fax: (416) 368-6640
Email: shutchison@hhllp.ca

Counsel for the Intervener,
Criminal Lawyers' Association (Ontario)

SUPREME ADVOCACY LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for the Intervener,
Criminal Lawyers' Association (Ontario)

MN LAW
355 Burrard Street
Suite 1000
Vancouver, BC V6C 2G8

Matthew A. Nathanson
Mika Chow
Tel: (604) 608-6185
Fax: (604) 677-5560
Email: matthew@mnlaw.ca

Counsel for the Intervener,
Independent Criminal Defence Advocacy Society

MICHAEL J. SOBKIN
331 Somerset Street West
Ottawa, ON K2P 0J8

Tel: (613) 282-1712
Fax: (613) 288-2896
Email: msobkin@sympatico.ca

Ottawa Agent for the Intervener, Independent Criminal Defence Advocacy Society

PURSER LAW
#3424, 10180 101st Street
Edmonton, AB T5J 3S4

Stacey M. Purser
Tel: (780) 851-7435
Email: purser@criminalappeals.net

Counsel for the Intervener,
Criminal Trial Lawyers' Association (Alberta)

PECK AND COMPANY
Suite 610
744 Hastings Street
Vancouver, BC V6C 1A5

Tony C. Paisana
Tel: (604) 669-0208
Fax: (604) 669-0616
Email: TPaisana@peckandcompany.ca

Counsel for the Intervener,
Trial Lawyers Association of British Columbia

NORTON ROSE FULBRIGHT CANADA LLP
45 O'Connor Street
Suite 1500
Ottawa, ON K1P 1A4

Matthew Halpin
Tel: (613) 780-8654
Fax: (613) 230-5459
Email:
matthew.halpin@nortonrosefulbright.com

Ottawa Agent for the Intervener, Trial Lawyers Association of British Columbia

TABLE OF CONTENTS

PART I - OVERVIEW **1**

PART II - STATEMENT OF QUESTION IN ISSUE **2**

PART III - STATEMENT OF ARGUMENT **3**

A. Abuse of process and section 7 of the *Charter* are flexible, and must evolve to address diverse, novel and challenging circumstances of serious and systemic abuse 3

B. The test for summary dismissal of an abuse of process / section 7 of the *Charter* claim must serve the interests of fair and reliable adjudication 5

C. To protect fundamental rights and the reputation of the courts, summary dismissal should only occur if an evidentiary hearing cannot assist in achieving fair and reliable adjudication 8

PART IV - SUBMISSIONS ON COSTS **9**

PART V - ORDER SOUGHT **9**

PART VI - TABLE OF AUTHORITIES **10**

PART I - OVERVIEW

1. Even when abuses by state actors are serious and systemic, it is difficult to discover and establish their true nature and extent. As a result, claims about such abuses should be addressed through evidentiary hearings in order to ensure fair and reliable adjudication consistent with access to justice and maintenance of the reputation of the administration of justice.

2. The Canadian Civil Liberties Association ("**CCLA**") submits that an abuse of process / section 7 *Charter* claim should only be summarily dismissed if the Crown has satisfied the Court that an evidentiary hearing *cannot assist* in adjudicating the claim fairly and reliably.

3. This high onus on the Crown is consistent with the right of accused persons to seek remedies and the preservation of the reputation of the administration of justice, while still allowing for the elimination of frivolous claims. In cases where a stay of proceeding is sought, an evidentiary hearing should address all three parts of the *Babos* test, including the third part, in which the seriousness and systemic nature of the abuse weigh in the required balancing. The test for summary dismissal must also fit circumstances where remedies less than a stay of proceedings may be sought and warranted, making evidence relevant to remedial choices important.

4. In determining whether the Crown has established that an evidentiary hearing *cannot assist* in the adjudication of an abuse of process / section 7 *Charter* claim, the relevant factors include:

- the gravity of the alleged abuse;
- the potential systemic nature of the alleged abuse;
- the challenges for the rights claimant in attempting to uncover and effectively present all relevant evidence without an evidentiary hearing, such as:
  - limits on the extent to which disclosure from the Crown reveals the alleged abuse;
  - the usefulness of evidence outside of Crown disclosure, such as expert evidence, to determine issues such as the balancing of interests; and
  - how *vive voce* evidence, including cross-examination, facilitates the discovery of additional relevant evidence and assessments of credibility;
- the novelty or unusualness of the circumstances and resulting claims;
- the remedy sought; and
- whether the alleged misconduct is characterized by the Crown as engaging discretion, in

relation to which there may be limited transparency.

5. The circumstances of this case clearly present an opportunity for this Court to ensure the proper calibration of the summary dismissal test for abuse of process / section 7 *Charter* claims, having regard to the realities and importance associated with such claims. Making summary dismissal too readily available in this context will undermine the critical flexibility and breadth of the abuse of process doctrine and section 7 of the *Charter,* thereby inviting the perpetuation of abuses by state actors.

6. As this Court recognized in *R. v. O'Connor*, it is critical that accused persons have a meaningful opportunity to seek abuse of process / section 7 *Charter* remedies:

> It would violate the principles of fundamental justice to be deprived of one's liberty under circumstances which amount to an abuse of process and, in my view, the individual who is the subject of such treatment is entitled to present arguments under the *Charter* and to request a just and appropriate remedy from a court of competent jurisdiction.[1]

PART II - STATEMENT OF QUESTION IN ISSUE

7. This appeal asks the Court to define the scope of the summary dismissal power, at least in respect of abuse of process / section 7 *Charter* applications. Specifically, the questions are whether: (i) the third component of the *Babos* test should be considered in a *Vukelich* application; and (ii) whether the trial judge is required to accept the truth of facts alleged by a rights claimant.

8. The CCLA submits that an abuse of process application should be summarily dismissed only if the Crown satisfies the Court that an evidentiary hearing *cannot assist* in the determination of the matters in issue. When a stay of proceedings is sought, all three parts of the *Babos* test, including the balancing under the third part, should be addressed through an evidentiary hearing. Under this approach, only claims that are frivolous, even assuming the facts alleged by the rights claimant, can be summarily dismissed.

---

[1] *R. v. O'Connor*, [1995] 4 S.C.R. 411, at ¶63 [***O'Connor***].

PART III - STATEMENT OF ARGUMENT

A. Abuse of process and section 7 of the *Charter* are flexible, and must evolve to address diverse, novel and challenging circumstances of serious and systemic abuse

9. Abuse of process / section 7 *Charter* claims arise in a wide range of different circumstances in criminal cases. The ability to advance such claims protects against abusive state conduct that is not otherwise addressed by other rights and that state actors often seek to underplay or conceal. Too easily dismissing abuse of process claims, without evidentiary hearings, will undermine fair and reliable adjudication and detract from the reputation of the administration of justice.

10. Existing jurisprudence demonstrates the diversity of circumstances that have been found to constitute abuse, such as: (a) an accused being entrapped by police or an *agent provocateur*;[2] (b) provocation, and psychological and physical abuse by a state actor[3], (c) police lying to correctional services and a parole board keeping Crown witnesses out of custody in order to act as police agents;[4] (d) forcibly abducting an accused in a foreign country;[5] (e) attempting to intimidate a newspaper reporter;[6] (f) the Crown breaching an undertaking;[7] or (g) threatening to lay additional charges in the absence of a plea agreement.[8]

11. The need for flexibility and discretion based on factual context are underscored in the jurisprudence on abuse of process and section 7 of the *Charter*. This Court has steadily endorsed the living tree principle as a fundamental tenet of constitutional interpretation.[9] More specifically, sections 7 and 24(1) of the *Charter* are often relied upon to recognize rights and remedies in wide-ranging, previously unexamined, and evolving circumstances.

---

[2] *R. v. Mack*, [1988] 2 S.C.R. 903.

[3] *R. v. Bellusci*, [2012] 2 S.C.R. 509.

[4] *R. v. Brind'Amour*, 2014 QCCA 33.

[5] *R. v. Horseferry Road Magistrates Court*, [1994] 1 A.C. 42 (U.K.H.L.).

[6] *O'Neill v. Canada (Attorney General)* (2006), 213 C.C.C. (3d) 389 (Ont. Sup. Ct.).

[7] *R. v. Rourke*, [1978] 1 S.C.R. 1021 (Laskin C.J.C.).

[8] *R. v. Babos*, 2014 SCC 16.

[9] *R. v. Blais,* 2003 SCC 44, ¶40. The *Charter*'s purpose is to guarantee and protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines by constraining governmental action inconsistent with those rights and freedoms: *Hunter et al. v. Southam Inc.,* [1984] 2 S.C.R. 145, at 156.

12. In *B.C. Motor Vehicle Reference*, Lamer J. held that "those words [fundamental justice] cannot be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of s. 7."[10] This Court has likewise held that it would be "improper" for courts to reduce the broad discretion under section 24(1) by "casting it in a straight jacket of judicially prescribed conditions."[11] In *R. v. Mills*, this Court held "[i]t is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion".[12]

13. The flexibility of sections 7 and 24(1) of the *Charter* is essential: they ensure that rights and remedies are not foreclosed, including in circumstances that are non-routine, obscured from view, or have not been previously litigated - and otherwise may never be adjudicated.

14. The abuse of process doctrine, like sections 7 and 24(1) of the *Charter*, is intended to be flexible. An essential function of the doctrine is to protect the integrity of the court's process by preventing the court from being enlisted in a proceeding that would damage its integrity.[13] Courts have a duty to prevent an abuse of their process based on the need to ensure that "executive agents of the state" do not misuse the coercive enforcement functions of the courts, and thereby "oppress citizens of the state".[14] In turn, it is central to our justice system to maintain its own integrity: "there is a need under the rule of law to ensure that the courts are not co-opted into supporting, or even condoning, abusive practices by state agents."[15]

15. Courts have broad remedial discretion to address abuse of process. While a stay of proceedings may be appropriate in the "clearest of cases",[16] the court may grant lesser remedies for less egregious abuses.[17] Courts have ordered a new trial excluding the evidence tainted by the

---

[10] *Re. B.C. Motor Vehicle Act,* [1985] 2 S.C.R. 486, at 513.

[11] *Ward v. Vancouver*, 2010 SCC 27, ¶18.

[12] *R. v. Mills*, [1986] 1 S.C.R 863, at 965.

[13] *O'Connor*, *supra* note 1, ¶59-73; *R. v. Light* (1993), 78 C.C.C. (3d) 221, at ¶77 (B.C.C.A.); *R. v. Loscerbo* (1994), 89 C.C.C. (3d) 203, at 211-212 (Man. C.A.).

[14] *R. v. Loosely*, [2001] U.K.H.L. 53 ¶1; *R. v. Robson*, 2004 ONCJ 137, ¶35.

[15] You Don't Know What You've Got 'Til It's Gone: The Rule of Law in Canada — Part II, 2015 CanLIIDocs 80.

[16] *R. v. Babos*, 2014 SCC 16, at ¶31.

[17] *R. v. Felderhof*, [2003] O.J. No. 4819, at ¶74 (Ont. C.A.) [***Felderhof***]; *R. v. I.C.*, 2010 ONSC 32, at ¶132, 135 [***I.C.***].

abuse,[18] permitted defence counsel to tender otherwise inadmissible evidence,[19] and considered the reopening of earlier *voir dires* to undo unfairness to the accused.[20]

B. The test for summary dismissal of an abuse of process / section 7 *Charter* claim must serve the interests of fair and reliable adjudication

16. Because abuse of process and related *Charter* claims arise in diverse, unusual, and challenging circumstances in criminal cases, care should be taken to ensure that the test for summary dismissal of such claims does not impair the fairness or reliability of the adjudication of such claims.

17. Access to justice for rights claimants is vital: they are asserting *Charter* protected rights when their ability to adduce evidence as to the true nature and extent of the violations will be limited, unless there is an evidentiary hearing. Furthermore, rights claimants may be hampered by limitations arising from their socio-economic circumstances, incarceration, or mental health challenges, for example. To give effect to the principle that *Charter* jurisprudence "should not and must not be made in a factual vacuum"[21], rights claimants must have a fair opportunity to present and test evidence.

18. Courts have an inherent interest in reliable, evidentiary determinations of abuse of process and related *Charter* applications: lightly dismissing them runs the risk of unfairness in merits hearings and/or damage to the reputation of the administration of justice. The Court of Appeal for Ontario recognized the importance of adjudicating *Charter* claims on their merits, stating "[m]otions that advance constitutional claims *should be addressed on their merits* unless the broader interest of justice *clearly* demand otherwise."[22] Per this Court's *dicta* in *R. v. Imperial Tobacco*, summary dismissal is a tool that "must be used with care" because: "The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed…The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions.[23]

---

[18] *O'Connor*, *supra* note 1, at ¶66 citing *R. v. Xenos*, [1991] J.Q. No. 2200.

[19] *Felderhof*, *supra* note 17, at ¶74 citing *R. v. Williams*, [1985] O.J. No. 2489 (Ont. C.A.).

[20] *I.C.*, *supra* note 17, at ¶151.

[21] *Mackay v. Manitoba*, [1989] 2 S.C.R. 357, at 361.

[22] *R. v. Kazman*, 2020 ONCA 22, ¶15 [emphasis added]. See also *R. v. Chapman*, 2020 ONCJ 144, ¶30; *R. v. Papasotiriou-Lanteigne*, 2017 ONSC 5337, ¶19.

[23] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, ¶19, 21 [emphasis added].

19. The fact that a *Charter* claim is novel does not mean the claim cannot succeed; indeed, it is good reason for an evidentiary hearing.[24] For example, novel *Charter* claims have succeeded in cases involving new technologies at the border,[25] physician assisted dying,[26] and sex work.[27] Evidentiary hearings are important to such novel *Charter* claims.[28] The *Charter*'s growth will be stunted if the summary dismissal power pays no heed to well-established need for flexibility, evidence-based discretion, and openness to novel questions of law, fact, and opinion, such as social science research.

20. In *R. v. McDonald*, the British Columbia Supreme Court cautioned against applying the summary dismissal power too rigorously in abuse of process cases where a novel legal argument is advanced:

> …it must also be recognized that the contours of constitutional rights are settled through the litigation of emerging, unresolved and contentious issues. This process starts in the trial courts. In the result, some considerable care must be taken not to use *Vukelich* to stifle novel, but unsettled and important points of law […] context is important and particular care must be taken not to foreclose the pursuit of legitimate arguments in circumstances where the stakes are high from the perspective of both the public and the accused.[29]

21. Similarly, in *R. v. Cosgrove*, the Newfoundland Supreme Court recognized that "the alleged facts, if proven, would warrant serious consideration of a finding of abuse of process" and "until evidence has been heard and findings of fact made the possibility or appropriateness of particular remedies cannot be determined."[30]

22. The danger of allowing summary dismissal too easily is particularly acute in cases of serious and systemic abuse. Often, the nature and extent of alleged abusive state conduct is not

---

[24] *Ontario (Attorney General) v. Bogaerts*, 2019 ONCA 876, ¶65; *Carter v. Canada (Attorney General)*, 2015 SCC 5 [***Carter***]; *Canada (Attorney General) v. Bedford*, 2013 SCC 72 [***Bedford***]; *R. v. Canfield*, 2020 ABCA 383 [***Canfield***].

[25] *Canfield*, *supra* note 24, ¶28-29, 38.

[26] *Carter, supra* note 24.

[27] *Bedford*, *supra* note 24.

[28] See e.g., *R. v. Mansingani*, 2012 ONSC 6509; *Mathur v. Ontario*, 2020 ONSC 6918; *R. v. Fraser River Pile and Dredge (GP) Inc.*, 2020 BCPC 169.

[29] *R. v. McDonald*, 2013 BCSC 2344, ¶41, 44, 45 [emphasis added].

[30] *R. v. Cosgrove (D.)* (1997), 153 Nfld. & P.E.I.R. 266, ¶22, 27 (N.L. Sup. Ct.).

readily accessible or easily determined unless there has been sufficient disclosure and an evidentiary hearing.

23. This Court in *R. v. Reilly* affirmed a decision of the Provincial Court of Alberta to stay the proceedings on the basis that a breach of section 503 of the *Criminal Code* was an instance of a systemic and ongoing problem. The court at first instance relied on, among other evidence, the *viva voce* evidence presented at trial in determining the systemic and ongoing nature of the breach:

> The evidence before me reflects a systemic and ongoing problem. Since the start of the Crown Bail Project the number of persons accused of offences but not convicted who are held more than 24 hours in breach of section 503(1)(a) of the *Criminal Code* has increased exponentially. […] The ongoing systemic problem that has been reflected by the evidence presented to the Court is the clearest of cases where the appropriate remedy can only be a stay of proceedings of the charges.[31]

24. In *R. v. Sabatini*, a critical aspect of the Ontario Court of Justice's reasoning in granting a stay was "actual evidence of a systemic problem", which was within the police force as it related to understanding the longstanding laws relating to release.[32] The Court, after reviewing the trial evidence on this point, concluded that the systemic prejudice was more concerning than the prejudice to the individual accused:

> I appreciate that Ms. Sabatini's focus is on her individual prejudice, but the prejudice that concerns this court is the evidence that despite it being well established by Parliament what factors the police must consider in determining whether to release someone from the station, many officers are not being taught this.[33]

25. Discovery beyond typical *Stinchcombe* disclosure is commonly required in respect of abuse of process / section 7 *Charter* claims. Undocumented practices, of course, will not be caught by *Stinchcombe* disclosure. To the extent there is documentary evidence relevant to abuse, it may not be included as part of *Stinchcombe* disclosure, if the legal and factual basis for the claim being advanced is challenged.[34]

26. Setting the summary dismissal threshold too high will result in a "catch 22" situation akin to the one recognized by this Court in *O'Connor*[35] - it is unreasonable to require a rights claimant

---

[31] *R. v. Reilly*, 2020 SCC 27, aff'g, 2018 ABPC 85, ¶63, 68 [emphasis added].

[32] *R. v. Sabatini*, 2015 ONCJ 282, ¶56 [***Sabatini***] [emphasis added].

[33] *Sabatini*, *supra* note 32, ¶59 [emphasis added].

[34] *R. v. Ahmad*, [2008] O.J. No. 5915, ¶42, 58, 60, 62 (Ont. Sup. Ct.).

[35] *O'Connor, supra* note 1, ¶25.

to establish the full strength of the evidence that has not yet been revealed, or fully revealed, to the rights claimant.

C. To protect fundamental rights and the reputation of the courts, summary dismissal should only occur if an evidentiary hearing cannot assist in achieving fair and reliable adjudication

27. For the reasons above, the CCLA favours a test that would only permit summary dismissal if a court is satisfied that an evidentiary hearing (or further evidentiary hearing) would *not* assist in the determination of the matters at issue, which, in the context of an application for a stay for abuse of process, means all three parts of the *Babos* test.

28. The third aspect of the *Babos* test is essential in some cases and should not be shut out of the analysis. As the Ontario Court of Appeal held in *R. v. Howley*, "where there is still uncertainty over whether a stay is warranted after steps (1) and (2), *the court is required to balance the interests in favour of granting a stay*, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits"".[36] In *"Jackpot:" the Hang-Up Holding back the Residual Category of Abuse of Process*, the author states:

> *Babos*' key innovation was to make the third stage of the test in the residual category mandatory. Prior to *Babos*, courts only balanced the need to dissociate the court from state misconduct against society's interest in adjudicating the case on its merits when uncertainty persisted after the court determined the only remedy capable of redressing prejudice was a stay of proceedings. Under the new framework, however, balance "must always be considered."[37]

29. In determining whether the Crown has established that an evidentiary hearing would not assist in determining the matters at issue, the court should have regard to all relevant considerations, which, in an abuse of process / section 7 *Charter* application, includes those set out at paragraph 4 of this Factum. The factors set out at paragraph 4 are sensitive to the particular context of abuse of process and section 7 *Charter* claims, especially the challenges facing rights claimants and the need for factual context for fair and reliable adjudication of their claims.

30. The test for summary dismissal must not forestall informed consideration of novel and challenging situations, nor deny proper consideration of remedial options when remedies less than

---

[36] *R. v. Howley*, 2021 ONCA 386, ¶51 [emphasis added].

[37] Jeffery Couse, "Jackpot:" the Hang-Up Holding back the Residual Category of Abuse of Process, 2017 40-3 Manitoba Law Journal 165, 2017 CanLIIDocs 369.

a stay may be appropriate.[38] Evidence relating to remedy may be critical.[39] As the Court held in *O'Connor* "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 justice system."[40]

31. The true nature and extent of abuses by state actors are generally only uncovered and proven with the benefit of an evidentiary hearing. The difficult and important issues arising in abuse of process and section 7 of the *Charter* cases generally warrant an evidentiary hearing, though such a hearing can take many forms with the guidance of case management. What is essential - to maintain the vitality of abuse of process and section 7 of the *Charter* - is that claims are not summarily dismissed, unless they are evidently frivolous.

PART IV - SUBMISSIONS ON COSTS

32. The CCLA requests that no costs be awarded either for or against it.

PART V - ORDER SOUGHT

33. Further to the Order of Rowe J., dated April 12, 2022, the CCLA requests five minutes to present oral argument at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of May, 2022.

ANDREW MATHESON
NATALIE V. KOLOS
Counsel for the Intervener,
Canadian Civil Liberties Association

[38] *O'Connor*, *supra* note 1, ¶68-69; Steve Coughlan, Threading Together Abuse of Process and Exclusion of Evidence: How it Became Possible to Rebuke Mr. Big, 2015 CanLIIDocs 5176 [emphasis added].

[39] Indeed, courts have sometimes deferred determination of the appropriate remedy pending further submissions, even after a full evidentiary hearing of the *Charter* claim: *R. v. Wong*, 2017 BCSC 1171, at ¶61.

[40] *O'Connor*, *supra* note 1, ¶69.

PART VI - TABLE OF AUTHORITIES

Authority	**Paragraphs of Memorandum**
Legislation	
N/A	
Case Law	
Canada (Attorney General) v. Bedford, 2013 SCC 72	19
Carter v. Canada (Attorney General), 2015 SCC 5	19
Hunter et al. v. Southam Inc., [1984] 2 S.C.R. 145	11
Mackay v. Manitoba, [1989] 2 S.C.R. 357	17
Mathur v. Ontario, 2020 ONSC 6918	19
O'Neill v. Canada (Attorney General) (2006), 213 C.C.C. (3d) 389 (Ont. Sup. Ct.)	10
Ontario (Attorney General) v. Bogaerts, 2019 ONCA 876	19
R. v. Ahmad, [2008] O.J. No. 5915	25
R. v. Babos, 2014 SCC 16	3, 7-8, 10, 15, 27-28
R. v. Bellusci, [2012] 2 S.C.R. 509	10
R. v. Blais, 2003 SCC 44	11
R. v. Brind'Amour, 2014 QCCA 33	10
R. v. Canfield, 2020 ABCA	19
R. v. Chapman, 2020 ONCJ 144	18
R. v. Cosgrove (D.) (1997), 153 Nfld. & P.E.I.R. 266	21
R. v. Felderhof, [2003] O.J. No. 4819 (Ont. C.A.)	15
R. v. Fraser River Pile and Dredge (GP) Inc., 2020 BCPC 169	19
R. v. Horseferry Road Magistrates Court, [1994] 1 A.C. 42 (U.K.H.L.)	10
R. v. Howley, 2021 ONCA 386	28
R. v. I.C., 2010 ONSC 32	15
R. v. Imperial Tobacco Canada Ltd., 2011 SCC 42	18
R. v. Kazman, 2020 ONCA 22	18
R. v. Light (1993), 78 C.C.C. (3d) 221 (B.C.C.A.)	14

Authority	Paragraphs of Memorandum
R. v. Loosely, [2001] U.K.H.L. 53	14
R. v. Loscerbo (1994), 89 C.C.C. (3d) 203 (Man. C.A.)	14
R. v. Mack, [1988] 2 S.C.R. 903	10
R. v. Mansingani, 2012 ONSC 6509	19
R. v. McDonald, 2013 BCSC 2344	20
R. v. Mills, [1986] 1 S.C.R 863	12
R. v. O'Connor, [1995] 4 S.C.R. 411	6, 14-15, 26, 30
R. v. Papasotiriou-Lanteigne, 2017 ONSC 5337	18
R. v. Reilly, 2020 SCC 27, aff'g, 2018 ABPC 85	23
R. v. Robson, 2004 ONCJ 137	14
R. v. Rourke, [1978] 1 S.C.R. 1021	10
R. v. Sabatini, 2015 ONCJ 282	24
R. v. Williams, [1985] O.J. No. 2489 (Ont. C.A.)	15
R. v. Wong, 2017 BCSC 1171	30
R. v. Xenos, [1991] J.Q. No. 2200	15
Re. B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486	12
Ward v. Vancouver, 2010 SCC 27	12
Other Authorities	
Jeffery Couse, "Jackpot:" the Hang-Up Holding back the Residual Category of Abuse of Process, 2017 40-3 Manitoba Law Journal 165, 2017 CanLIIDocs 369	28
Steve Coughlan, Threading Together Abuse of Process and Exclusion of Evidence: How it Became Possible to Rebuke Mr. Big, 2015 CanLIIDocs 5176	30
You Don't Know What You've Got 'Til It's Gone: The Rule of Law in Canada — Part II, 2015 CanLIIDocs 80	14