SUPREME COURT OF CANADA

CITATION: R. *v.* Varennes, 2025 SCC 22

APPEAL HEARD: December 6, 2024
JUDGMENT RENDERED: July 11, 2025
DOCKET: 40662

BETWEEN:

Pascal Varennes
Appellant

and

His Majesty The King
Respondent

- and -

Attorney General of Ontario,
Attorney General of British Columbia and
Attorney General of Alberta
Interveners

CORAM: Karakatsanis, Côté, Rowe, Martin, Kasirer, O'Bonsawin and Moreau JJ.

REASONS FOR JUDGMENT: (paras. 1 to 116)

Karakatsanis J. (Côté, Martin, O'Bonsawin and Moreau JJ. concurring)

CONCURRING REASONS: (paras. 117 to 183)	Rowe J. (Kasirer J. concurring)

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Pascal Varennes *Appellant*

v.

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Present: Karakatsanis, Côté, Rowe, Martin, Kasirer, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law — Appeals — Right of Attorney General to appeal — Interlocutory order — Trial without jury — Trial judge granting order requested by

accused for murder trial to be held without jury despite Crown's refusal to consent — Accused acquitted of second degree murder but convicted of manslaughter — Crown appealing acquittal and challenging order for trial without jury — Whether Court of Appeal had jurisdiction to hear Crown's appeal of trial judge's order for trial without jury within Crown's appeal of acquittal — Criminal Code, R.S.C. 1985, c. C-46, s. 676(1)(a).

Criminal law — Courts — Jurisdiction — Review of prosecutorial decisions — Remedy — Trial without jury — Accused charged with second degree murder — Crown refusing to consent to accused's request for trial without jury — Trial judge ordering trial without jury on basis that Crown's refusal to consent was unfair or unreasonable in circumstances of COVID-19 pandemic — Court of Appeal holding that trial judge erred in standard applied to review decision of Crown to refuse to consent and ordering new trial — Whether trial judge could order trial without jury despite Crown's refusal to consent — Canadian Charter of Rights and Freedoms, ss. 11(b), 24(1) — Criminal Code, R.S.C. 1985, c. C-46, s. 473(1).

V was charged with second degree murder, an indictable offence listed in s. 469 of the *Criminal Code*. Under s. 471 of the *Criminal Code*, all trials for offences listed in s. 469 must take place in a superior court before a judge and jury, unless, as set out in s. 473(1), the accused and the Attorney General consent to a trial by judge alone. V, whose trial was scheduled for September 2020 during the COVID-19

pandemic, requested a judge-alone trial, but the Crown refused to consent. V therefore filed a motion seeking an order for the trial to proceed by judge alone.

Concerned that pandemic-related restrictions would delay the trial, the trial judge found that the Crown's refusal to consent was a tactical decision that was unfair or unreasonable in the circumstances and she ordered a judge-alone trial. V was subsequently acquitted of second degree murder but convicted of manslaughter. The Crown appealed the acquittal under s. 676(1)(a) of the *Criminal Code*, arguing among other grounds that the trial judge applied the wrong standard in overriding the Crown's refusal to consent to a judge-alone trial. The Court of Appeal concluded that the decision of the Crown to consent or not to a judge-alone trial under s. 473(1) constitutes core prosecutorial discretion reviewable only for abuse of process. Finding that this high threshold was not met, the court declared the judge-alone trial a nullity and ordered a new trial. V appeals to the Court, arguing that the Crown could not challenge an order relating to the mode of trial in an appeal against acquittal under s. 676(1)(a) and that the Court of Appeal erred by requiring proof of abuse of process to order a judge-alone trial.

Held: The appeal should be allowed, the judgment of the Court of Appeal set aside and the matter remanded to the Court of Appeal for determination of the outstanding grounds of appeal.

Per **Karakatsanis**, Côté, Martin, O'Bonsawin and Moreau JJ.: The Court of Appeal had jurisdiction to hear the Crown's appeal of the trial judge's decision to

hold a judge-alone trial. However, the Court of Appeal erred by requiring proof of an abuse of process and in ordering a new trial. The Crown's decision whether to consent to a judge-alone trial under s. 473(1) of the *Criminal Code* does not fall within core prosecutorial discretion and could be reviewed by the trial judge under inherent jurisdiction on a standard lower than abuse of process. It is not necessary, however, to decide the precise standard given that remedial jurisdiction under s. 24(1) of the *Charter* also applies in the instant case as a legal route through which the trial judge could override the prosecutorial decision. Since the trial judge found that a jury trial would likely breach V's right to be tried within a reasonable time under s. 11(b) of the *Charter*, she had jurisdiction to order a judge-alone trial as a s. 24(1) *Charter* remedy.

Section 676(1)(a) of the *Criminal Code* allows the Crown to appeal "against a judgment or verdict of acquittal . . . on any ground of appeal that involves a question of law alone". Interlocutory appeals in criminal matters are generally not allowed in order to avoid fragmenting proceedings. The Court's precedents make clear that a party can challenge an order relating to the mode of trial within an appeal against a verdict entered after trial. The Court has held that verdicts rendered in the context of a legal error that results in a loss of jurisdiction can be appealed post-trial; it follows that the Crown can appeal acquittals under s. 676(1)(a) by arguing a loss of jurisdiction due to errors made in pretrial rulings.

There are two distinct routes for courts to review prosecutorial decisions, such as a refusal to consent under s. 473(1). Under the first route, superior courts have

inherent jurisdiction to review any prosecutorial decision for abuse of process, and may be able to review decisions falling outside of core prosecutorial discretion on a wider basis. The doctrine of core prosecutorial discretion derives from the Attorney General's constitutional role as Chief Law Officer of the Crown. The Attorney General has exclusive constitutional responsibility to determine whether to bring the weight of the state to bear in criminal prosecutions. Crown prosecutors serve as agents of the Attorney General and bear the delegated role of the Chief Law Officer in individual prosecutions. To respect the separation of powers and prerogatives of the Attorney General, courts must adopt a posture of deference whenever reviewing a decision by a prosecutor or considering making an order that would have the effect of overriding a prosecutor's decision.

Decisions of the Attorney General or their agents that directly affect the nature and extent of the criminal jeopardy a person may face — that is, decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for — fall within core prosecutorial discretion and a superior court may not interfere under its inherent jurisdiction except to remedy an abuse of process. Decisions that do not directly change the criminal jeopardy an accused may face, including those relating to tactics or conduct before the court, do not attract the same separation of powers imperative as core prosecutorial discretion, since they do not tread on the core of the constitutional role of the Chief Law Officer. While courts may review or override decisions of non-core prosecutorial discretion on a less demanding standard than an abuse of process, deference will generally still be

warranted. Because non-core prosecutorial decisions cover a broad range, the standard for a judge to override them will vary with the circumstances and depend on the nature of the prosecutor's conduct, the presence or absence of statutory authority, the impact on trial fairness, and any other relevant interest. The fact that a non-core prosecutorial decision is made pursuant to statutory authority will require that deference feature prominently in the analysis.

The Attorney General's decision whether to consent to a judge-alone trial under s. 473(1) does not engage the core, inherent constitutional role as Chief Law Officer of the Crown and therefore can be reviewed on a standard less than abuse of process. A decision under s. 473(1) affects the identity of the fact finder and the mode of trial, but does not impact the nature and extent of the criminal jeopardy facing the accused. It relates to how the proceedings will be conducted and not to whether a prosecution will be brought, or what the prosecution will be for. However, the decision is made pursuant to statute, which engages the separation of powers imperative of parliamentary sovereignty. Courts must be respectful of Parliament's legislative decision to vest these responsibilities in prosecutors and the accused rather than the courts, but courts also have a constitutional duty to review the executive's exercise of delegated authority for legality and compliance with the Constitution.

Under the second route, courts can always review a prosecutor's decision for compliance with the *Charter*. Judges have a constitutional duty to grant meaningful remedies in response to the violation of *Charter* rights. To obtain relief under s. 24(1)

of the *Charter*, a claimant must first prove a *Charter* infringement or a probable future *Charter* infringement. There is only one standard of proof for establishing prior, ongoing, and future *Charter* breaches: the balance of probabilities.

Once a claimant establishes an expected *Charter* breach, the court's inquiry turns to what specific remedy is appropriate and just in the circumstances. Such a remedy will: (i) vindicate the claimant's rights and freedoms; (ii) ensure future state compliance with the *Charter*; and (iii) compensate the claimant for the loss caused by any infringements. The court must also consider countervailing factors that would make a specific remedy inappropriate in the circumstances. A section 24(1) remedy should therefore also: (i) respect the separation of powers; (ii) avoid imposing substantial hardships or burdens on the government; and (iii) avoid negatively impacting good governance. Respect for the separation of powers is often a key countervailing factor. Whether a proposed s. 24(1) remedy will unduly intrude on another branch's jurisdiction will depend both on the nature of the *Charter* infringement and the interference with the other branch's ability to fulfill its constitutional role. Courts should not manage the conduct of a prosecution through s. 24(1), but should instead grant carefully tailored remedies that respond to the rights infringement without unduly upsetting the prosecutorial role of the Attorney General. A section 24(1) remedial analysis should also consider the anticipated nature of the rights infringement. It may be more appropriate to order a remedy to prevent the probable future *Charter* infringement rather than a remedy that seeks to compensate the claimant. For example, when a court determines that without intervention, a

claimant's s. 11(b) right will probably be infringed, the same imperative for a stay of proceedings does not apply and the court will prefer to order a remedy short of a stay to prevent the *Charter*-infringing unreasonable delay from coming to pass.

In the instant case, the trial judge found that proceeding with a jury trial would likely lead to unreasonable delay, and so had jurisdiction to grant her order for a judge-alone trial as a *Charter* remedy for an anticipated breach of s. 11(b). These were the early days of the pandemic, marked by uncertainty and isolation, before even the development of a vaccine. Jury trials posed a grave health risk to jurors. Public health restrictions prevented large gatherings, to limit the risk of infection, and yet the jury selection process necessarily required gathering hundreds of people together indoors. Even if a jury could be selected, any infection amongst the jurors could derail the trial. With a second wave of infections approaching, there was sound reason to believe that a jury trial would not proceed in fall 2020, and for an indeterminate period thereafter. In this extraordinary situation, the trial judge's findings of fact established an anticipated breach of s. 11(b) of the *Charter*. By ordering a judge-alone trial, the trial judge prevented a probable s. 11(b) breach and avoided a stay of proceedings, thus protecting V's rights while also respecting the Crown's decision to prosecute the charge on its merits.

Per **Rowe** and Kasirer JJ.: There is agreement with the majority's disposition and its conclusion that the trial judge did not err in overriding the Crown's choice under s. 473(1) of the *Criminal Code* to proceed with a jury. Even though the

trial judge erred in qualifying the power conferred to the Crown by s. 473(1) of the *Criminal Code* as a tactical decision reviewable on a reasonableness and fairness standard, her conclusion can still be upheld. The Crown's decision constitutes an exercise of prosecutorial discretion, and is therefore only reviewable on an abuse of process standard. In the exceptional circumstances of the instant case, the Crown's refusal to consent to a judge-alone trial amounted to an abuse of process.

The trial judge could not use her remedial discretion under s. 24(1) of the *Charter* to order a judge-alone trial because no *Charter* breach was established. To obtain relief under s. 24(1) of the *Charter*, a claimant must first prove a *Charter* breach, whether past or future, on a balance of probabilities. When assessing whether a future breach is probable, the question is whether the breach is more likely than not to occur. Proof of breach must be demonstrated as it can influence the nature of the remedy. While no set procedure exists for a claimant seeking a remedy under s. 24(1), evidence should be presented to support the submissions. Establishing a breach of s. 11(b) first requires a claimant to demonstrate that the total delay from the charge to the actual or anticipated end of trial (minus defence delay) exceeds the presumptive *Jordan* ceiling.

In the instant case, the majority's conclusion that a breach of s. 11(b) enabled the trial judge to order a judge-alone trial as a remedy under s. 24(1) is not an accurate reading of the trial judge's reasons. The trial judge could not — and in fact did not — order a remedy under s. 24(1) because a violation of s. 11(b) was not demonstrated. There were no clear pleadings in V's motion regarding the total delay,

defence delay or the presence of exceptional circumstances that demonstrated how V's s. 11(b) rights were going to be infringed. Further, if a breach of s. 11(b) was made out, the only remedy is a stay of proceedings.

Regarding a superior court's ability to review prosecutorial discretion under inherent jurisdiction, the distinction between non-core and core prosecutorial discretion should not be reintroduced as it revives uncertainty over which standard of review applies to various types of prosecutorial conduct. There are only two avenues for judicial review of prosecutorial decision making: (1) prosecutorial discretion, which is reviewable only on an abuse of process standard, and (2) tactics and conduct before the court. A prosecutor's refusal to consent to a judge-alone trial is an exercise of prosecutorial discretion, reviewable on an abuse of process standard. Two main considerations support this conclusion. First, that the consent of the Attorney General is necessary under s. 473(1) for a superior court judge sitting alone to assume jurisdiction over s. 469 offences militates in favour of a view of that choice as prosecutorial discretion. Second, the decision to proceed with or without a jury goes to the nature of the prosecution and reflects the Attorney General's constitutional role as Chief Law Officer of the Crown. The Court's jurisprudence has held that decisions going to the nature and extent of the prosecution are exercises of prosecutorial discretion. The unique nature of a jury trial and the procedural specificities that flow from it illustrate how the decision to proceed with a jury goes to the nature of the prosecution. As a vehicle that serves to communicate the community's sense of justice and as a forum for public education about the criminal justice system, the jury trial is

fundamentally distinct from a trial by judge alone. Individual prosecutors must consider the public interest in the exercise of their constitutional Chief Law Officer function. The decision to submit an accused to the judgment of his peers goes directly to the prosecutor's role to protect the public and honour and express the community's sense of justice.

In the instant case, the Crown's decision to refuse to consent to a judge-alone trial was conduct that undermined the integrity of the justice system and therefore amounted to an abuse of process under the residual category. Abuse of process consists of conduct that shocks the community's conscience or offends its sense of fair play and decency. It is hard to overstate the degree of uncertainty that loomed over the criminal justice system in the early days of the COVID-19 pandemic. Jury proceedings were hazardous as court facilities could be a location for contraction and transmission of the virus. The trial judge's view was that, in the circumstances, the Crown did not sufficiently consider the community's interest in avoiding convening hundreds of people to form a jury as well as the risks of starting a trial that may not conclude within the time limits. In these exceptional circumstances, the Crown's conduct was vexatious to such a degree that it contravened fundamental notions of justice in the context of the enormous health risks posed by the pandemic. Since there was a remedy capable of redressing the prejudice that was less drastic than a stay of proceedings, which is only appropriate in the clearest of cases, ordering a trial by judge alone under the abuse of process doctrine was appropriate.

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APPEAL from a judgment of the Quebec Court of Appeal (Gagnon, Moore and Baudouin JJ.A.), 2023 QCCA 136, [2023] AZ-51911208, [2023] J.Q. n^{o} 511 (Lexis), 2023 CarswellQue 348 (WL), setting aside the verdicts entered by Mandeville J., 2020 QCCS 4057, [2020] AZ-51725810, [2020] J.Q. n^{o} 11331 (Lexis), 2020 CarswellQue 13332 (WL), and the order for a judge-alone trial made by Mandeville J., 2020 QCCS 2734, [2020] AZ-51697752, [2020] J.Q. n^{o} 5570 (Lexis), 2020 CarswellQue 8967 (WL), and ordering a new trial. Appeal allowed.

Maxime Hébert Lafontaine and *Martin Latour*, for the appellant.

Marie-Claude Bourassa and *Joëlle Huot*, for the respondent.

Katie Doherty and *Eunwoo Lee*, for the intervener Attorney General of Ontario.

Lesley A. Ruzicka, K.C., and *Rome Carot*, for the intervener Attorney General of British Columbia.

Written submissions only by *Christine Rideout, K.C.*, for the intervener Attorney General of Alberta.

The judgment of Karakatsanis, Côté, Martin, O'Bonsawin and Moreau JJ. was delivered by

KARAKATSANIS J. —

I. Overview

[1] When an accused is charged with an indictable offence listed in s. 469 of the *Criminal Code*, R.S.C. 1985, c. C-46 — including murder — the trial shall take place before a judge and jury. Section 473(1) of the *Criminal Code* provides an exception if both the accused and the Attorney General consent to a judge-alone trial.

[2] This appeal asks when a superior court judge can order a judge-alone trial for a murder charge, despite the prosecution's refusal to consent under s. 473(1).

[3] The appellant, Pascal Varennes, was charged with the second degree murder of his spouse. His trial was scheduled for September 2020, during the COVID-19 pandemic. In June 2020, he requested a judge-alone trial under s. 473(1). He argued, among other reasons, that pandemic-related delays to jury trials risked breaching his right to be tried within a reasonable time under s. 11(b) of the *Canadian Charter of Rights and Freedoms*.

[4] The prosecution refused to consent to a judge-alone trial. It asserted that the public interest favoured a jury trial for a murder charge in a domestic violence context in a small community and that pandemic-related restrictions would not clearly delay the trial.

[5] The appellant filed a motion seeking an order to proceed by judge alone. Concerned that pandemic-related restrictions would likely delay the trial, the trial judge found that the Crown's refusal to consent was [TRANSLATION] "unfair or unreasonable in the circumstances" and ordered a judge-alone trial (2020 QCCS 2734, at para. 50). After trial, she acquitted the appellant of second degree murder and convicted him of manslaughter.

[6] The Crown appealed the acquittal. It argued that the trial judge applied the wrong standard in overriding its refusal to consent. The Court of Appeal of Quebec concluded that the Crown's decision whether to consent to a judge-alone trial under s. 473(1) constitutes prosecutorial discretion, which is reviewable only for abuse of process. Finding that this high threshold was not met, the Court of Appeal declared the judge-alone trial a "nullity", and ordered a new trial.

[7] Before this Court, the parties disagree on whether the Crown can challenge an order relating to the mode of trial in an appeal against an acquittal, and on the standard a trial judge must apply when deciding whether to order a judge-alone trial. On the first issue, I agree with the Crown that the Court of Appeal had jurisdiction to

hear the appeal. On the second issue, I conclude the Court of Appeal erred by requiring proof of an abuse of process.

[8] Our law recognizes two distinct paths for superior courts to review decisions taken by prosecutors, such as a refusal to consent under s. 473(1). First, superior courts have inherent jurisdiction, including to review core prosecutorial discretion for abuse of process and other prosecutorial decisions on a lower standard. Second, superior courts may order an "appropriate and just" remedy for a rights violation pursuant to s. 24(1) of the *Charter*, including in anticipation of probable future breaches. Such s. 24(1) remedies can have the effect of overriding a prosecutor's decision.

[9] Either legal framework — inherent jurisdiction or s. 24(1) — could empower a superior court to order a judge-alone trial for an offence listed under s. 469. The Court of Appeal focused on whether inherent jurisdiction applied in this case, but did not consider s. 24(1) as a separate font of jurisdiction.

[10] Like the trial judge, I conclude that the Crown's decision whether to consent to a judge-alone trial is not a decision engaging core prosecutorial discretion, and so could be reviewed by the trial judge under her inherent jurisdiction on a standard lower than abuse of process. I also conclude that the trial judge found that proceeding with a jury trial would likely lead to unreasonable delay, and so had jurisdiction to grant her order as a *Charter* remedy.

[11] Reading the trial judge's reasons as a whole, I would review her decision as an application of remedial jurisdiction under s. 24(1). The trial judge found as fact that without intervention, the appellant's *Charter* rights were at substantial risk. Given the pandemic emergency, she concluded that proceeding with a jury trial would likely breach the appellant's right to be tried within a reasonable time, and so violate s. 11(b). I decline the Crown's invitation to disturb this finding as speculative or to view it with hindsight. These were the early days of the pandemic, marked by uncertainty and isolation, before even the development of a vaccine. As my colleague Rowe J. points out, in 2020 there was an extreme public health crisis, and jury trials posed a grave health risk to jurors; proceeding with a jury trial under these circumstances would have burdened an already overtaxed justice system. Public health restrictions prevented large gatherings, to limit the grave risk of infection. Yet the jury selection process necessarily required gathering hundreds of people together indoors. Even if a jury could be selected, any infection amongst the jurors could derail the trial. With a second wave of infections approaching, there was sound reason to believe that a jury trial would not proceed in fall 2020, and for an indeterminate period thereafter. In this extraordinary situation, the trial judge's findings of fact established an anticipated breach of s. 11(b) of the *Charter*.

[12] In considering whether to override the Crown and order a judge-alone trial under s. 24(1) of the *Charter*, trial judges must consider "the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system" (*R. v. O'Connor*, [1995] 4 S.C.R.

411, at para. 69). The judge must weigh the importance of vindicating *Charter* rights and ensuring state compliance with the *Charter* against countervailing considerations, including the public value in jury trials and respect for the separation of powers.

[13] By ordering a judge-alone trial, the trial judge prevented a probable s. 11(b) breach and avoided a stay of proceedings, thus protecting the appellant's rights while also respecting the Crown's decision to prosecute the charge on its merits. Based on her findings of fact, I conclude that the order for a judge-alone trial was an appropriate and just s. 24(1) remedy. The Court of Appeal erred in ordering a new trial. I would allow the appeal.

II. Background

[14] In October 2017, the appellant was charged with the second degree murder of his spouse. His trial was scheduled for the fall of 2020.

[15] Beginning in the spring of 2019, the appellant's counsel expressed concern about the travel time between Saint-Jérôme, where he was detained, and Mont-Laurier, the place of trial (estimated at four to six hours a day). The appellant's request to be moved closer to Mont-Laurier was rejected.

[16] In the spring of 2020, the COVID-19 pandemic began and Quebec was put under lockdown; all jury trials were suspended or cancelled outright. Pandemic-related restrictions made it difficult for the appellant to consult with his counsel. In May 2020,

the trial judge suggested proceeding by judge alone. The prosecution asked the appellant to express his clear consent to waive his right to a jury trial and his arguments supporting that position.

[17] Not having heard from the parties, the trial judge advised them that, despite the pitfalls created by COVID-19 health measures, she was trying to ensure the jury trial could take place in September. On June 30, the appellant waived his right to be tried by jury to maximize the likelihood that his trial would not be delayed.

[18] The prosecution refused to consent to a trial without a jury. It explained that the public interest dictated this trial should proceed with a jury, since: (i) the trial length would be substantially the same whether by jury or by judge alone; (ii) this was a domestic violence case and the appellant was charged with killing his spouse with a firearm; and (iii) the events took place in a small community. The prosecution added that it would reconsider its position if a change in circumstances — for instance a second wave of infections — meant that a jury trial could not proceed as planned.

[19] The appellant filed a motion seeking an order for a trial by judge alone on July 14, 2020 (A.R., vol. II, at pp. 2-8: [TRANSLATION] "Motion for a trial by judge alone (section 473 of the Criminal Code and sections 7, 11(b) and 24(1) of the Canadian Charter of Rights and Freedoms)"). The prosecution responded to the motion by repeating its refusal to consent.

III. Judicial History

A. *Superior Court of Quebec, 2020 QCCS 2734 (Mandeville J.): Judgment on the Accused's Motion for a Trial by Judge Alone*

[20] The trial judge allowed the motion for a trial by judge alone. She held that the prosecution's decision to refuse consent to a trial by judge alone does not fall within the category of prosecutorial discretion reviewable only for abuse of process but is, rather, [TRANSLATION] "a tactical decision" (para. 51). She concluded that the prosecutor's decision was "unfair or unreasonable in the circumstances".

[21] In concluding this, the trial judge found that holding a judge-alone trial would: (i) avoid the difficulties posed by a jury trial during the pandemic, including health and safety concerns; (ii) permit the appellant to have a trial within a reasonable time, given the substantial risk that the pandemic would interrupt, extend, or postpone the trial; and (iii) allow a full answer and defence for the appellant, because it would reduce many of the major inconveniences posed by the travel time between his detention centre and his place of trial, including the difficulty of consulting with counsel.

B. *Superior Court of Quebec, 2020 QCCS 4057 (Mandeville J.): Decision on Guilt*

[22] The judge-alone trial took place in September 2020, under the 30-month ceiling set out in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, for unreasonable

delay.[1] The trial judge acquitted the appellant of second degree murder but convicted him of manslaughter. She sentenced him to approximately nine years and three months' imprisonment, followed by probation.

C. *Court of Appeal of Quebec, 2023 QCCA 136 (Gagnon, Moore and Baudouin JJ.A.)*

[23] The Crown appealed the acquittal for second degree murder. It argued, among other grounds of appeal, that the trial judge erred in ordering a judge-alone trial.

[24] The Court of Appeal was satisfied that it had jurisdiction to review the order for a judge-alone trial within an appeal against an acquittal brought under s. 676(1)(a) of the *Criminal Code*. It rejected the suggestion that the Crown could only appeal such an order immediately to the Supreme Court of Canada.

[25] Recognizing that the trial judge did not have the benefit of *R. v. Lufiau*, 2022 QCCA 508, 82 C.R. (7th) 167, which characterized consent under s. 473(1) as a matter of prosecutorial discretion that can only be reviewed for abuse of process, the court concluded that the trial judge erred by applying the standard of [TRANSLATION] "unfair or unreasonable" (para. 27) in reviewing the prosecution's refusal to consent.

[26] The Court of Appeal held that the factors the trial judge considered failed to meet the high bar required to demonstrate an anticipated abuse of process. First, the

[1] The appellant waived his s. 11(b) right for a period of time, such that the ceiling extended to February 2021 (A.R., vol. II, at pp. 161-62; see also pp. 156-93 and 2023 QCCA 136, at para. 64).

appellant failed to show that the inconvenience associated with travel time to the courthouse, as well as the difficulties of consulting with his lawyers during a jury trial, made a breach of his right to make full answer and defence highly probable. Further, while the trial judge may have found a judge-alone trial *preferable* because a jury trial would be more demanding, costly, and time-consuming during the pandemic, this was not enough to override prosecutorial discretion. Finally, it was mere speculation that the trial would not take place within the *Jordan* ceiling. The trial judge could have used other means, such as proceeding with fewer jurors, to guard against any postponement due to illness. The Court of Appeal concluded that the trial judge failed to demonstrate an anticipated abuse of process. The decision of the trial judge was therefore vitiated by an error of law, which had the effect of rendering the judge-alone trial a nullity.

[27] The Court of Appeal allowed the Crown's appeal, set aside the verdicts, and ordered a new trial by jury on the charge of second degree murder. It did not consider other grounds of appeal arising from the trial judge's admission and treatment of evidence relating to her decision to acquit for second degree murder.

IV. Issues

[28] Three issues are raised in this appeal:

1. Did the Court of Appeal have jurisdiction to hear the appeal of the trial judge's decision to proceed by judge alone?

2. Was the trial judge entitled to order a judge-alone trial?

3. Should this Court stay further proceedings?

V. Analysis

A. *The Court of Appeal Had Jurisdiction To Hear the Appeal*

[29] The Crown appealed to the Court of Appeal under s. 676(1)(a) of the *Criminal Code*. This provision allows the Crown to appeal "against a judgment or verdict of acquittal . . . on any ground of appeal that involves a question of law alone". This language closely tracks the right of a convicted person to appeal "against his conviction" under s. 675(1)(a).

[30] The appellant argues that the Court of Appeal had no jurisdiction to hear an appeal against an order for a judge-alone trial after the verdict had been entered. He submits the trial judge's order for a judge-alone trial could not be appealed under s. 676(1)(a) because it is not a judgment of acquittal. By appealing in this way, the Crown can unfairly use a procedural irregularity to challenge a verdict it does not like. Instead, the Crown should have sought leave to appeal to this Court after the order was issued, potentially under s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26.

[31] I disagree.

[32] Interlocutory appeals in criminal matters are generally not allowed, in order to avoid fragmenting proceedings (*R. v. Awashish*, 2018 SCC 45, [2018] 3 S.C.R. 87, at para. 10; *R. v. DeSousa*, [1992] 2 S.C.R. 944, at p. 954). *Certiorari* provides an exception to this rule and permits a party to challenge jurisdictional errors by a trial judge on an interlocutory basis (*Awashish*, at para. 20). But *certiorari* is not available against decisions of a superior court judge and so was not open to the Crown in this case (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 865).

[33] The appellant's position would require a party in a criminal proceeding before a superior court to seek immediate leave to appeal to this Court under s. 40 of the *Supreme Court Act*, against any order by a trial judge that relates to jurisdiction rather than to the merits of the proceeding. It may be that an order relating to the mode of trial is appealable under s. 40 of the *Supreme Court Act*. However, this Court's precedents make clear that a party can challenge such an order within an appeal against a verdict entered after trial.

[34] This Court has held that verdicts rendered in the context of a legal error that results in a loss of jurisdiction (sometimes termed a "nullity") can be appealed post-trial (*Sanders v. The Queen*, [1970] S.C.R. 109, at pp. 147-48). It follows that the Crown can appeal acquittals under s. 676(1)(a) by arguing a loss of jurisdiction due to errors made in pretrial rulings.

[35] Indeed, this Court expressly held in *R. v. Litchfield*, [1993] 4 S.C.R. 333, at pp. 346-50, that the Crown can challenge pretrial procedural rulings unrelated to the

merits of an acquittal in an appeal against that acquittal. Since *Litchfield*, this Court has heard and adjudicated multiple appeals against verdicts that alleged only jurisdictional errors unrelated to the substantive accuracy of the verdicts entered at trial (see, e.g., *R. v. Esseghaier*, 2021 SCC 9, [2021] 1 S.C.R. 101; *R. v. Tayo Tompouba*, 2024 SCC 16).

[36] The Crown can invoke s. 676(1)(a) to appeal acquittals that they argue are void for jurisdictional error. The appeal in this case was validly before the Court of Appeal.

B. *The Trial Judge Had Jurisdiction To Order a Judge-Alone Trial*

[37] Under ss. 471 and 473 of the *Criminal Code*, all trials for offences listed in s. 469, including murder, must take place in a superior court before a judge and jury, unless the accused and Attorney General consent to a trial by judge alone. Section 473(1) states:

> **473 (1)** Notwithstanding anything in this Act, an accused charged with an offence listed in section 469 may, with the consent of the accused and the Attorney General, be tried without a jury by a judge of a superior court of criminal jurisdiction.

[38] The key question in this appeal is: on what basis can a superior court judge order a judge-alone trial for an offence listed in s. 469, notwithstanding the Attorney General's refusal to consent?[2]

[39] There are two recognized routes through which a trial judge can override a prosecutorial decision. First, superior courts have inherent jurisdiction to "control the process of the court, prevent abuses of process, and ensure the machinery of the court functions in an orderly and effective manner" (*R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 18; see also *R. v. Kahsai*, 2023 SCC 20, at para. 36). Courts have inherent jurisdiction to review any prosecutorial decision for abuse of process. For decisions falling outside the core of prosecutorial discretion, a court may be able to review on a wider basis (*R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 36). Second, judges have a constitutional duty to grant meaningful remedies in response to the violation of *Charter* rights. Courts can always review a prosecutor's decision for compliance with the *Charter* (*Anderson*, at para. 45). Either framework — inherent jurisdiction or *Charter* — could allow a superior court to order a judge-alone trial in the circumstances of a given case (see, e.g., *R. v. McGregor* (1999), 43 O.R. (3d) 455 (C.A.)).

[40] My analysis continues as follows. First, I shall explain why the Attorney General's decision under s. 473(1) of the *Criminal Code* is not core prosecutorial discretion and therefore could be reviewed under a superior court's inherent jurisdiction

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[2] Section 2 of the *Criminal Code* defines "Attorney General" to include "his or her lawful deputy". In Quebec, this includes the Director of Criminal and Penal Prosecutions (see para. 43, below).

on a standard less than abuse of process. Second, I shall address how the Crown's refusal to consent to a judge-alone trial can be overridden by a court using the framework for ordering remedies under s. 24(1) of the *Charter* in anticipation of a rights violation. I end by applying that framework to the factual findings made by the trial judge.

(1) A Decision Under Section 473(1) Does Not Involve Core Prosecutorial Discretion

[41] The issue debated in this case — and at the appellate court level over three decades — is whether the Crown's refusal to consent to a judge-alone trial under s. 473(1) lies within the core exclusive jurisdiction of the Attorney General and can only be reviewed under a court's inherent jurisdiction to remedy an abuse of process. To resolve that debate, I turn to first principles and our jurisprudence.

(a) *The Constitutional Role of the Attorney General*

[42] The doctrine of core prosecutorial discretion derives from the Attorney General's constitutional role as Chief Law Officer of the Crown (*Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, at para. 45; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 34). The Attorney General has exclusive constitutional responsibility to determine whether to bring the weight of the state to bear in criminal prosecutions and is the "first representative of the Sovereign in the courts, in whose name nearly all criminal

proceedings are conducted" (J. L. J. Edwards, *The Law Officers of the Crown* (1964), at p. 2; see also *Wilkes v. The King* (1768), Wilm. 322, 97 E.R. 123; *Krieger*, at para. 24; *R. v. Power*, [1994] 1 S.C.R. 601, at pp. 621-23).

[43] The provincial Attorneys General act under the provinces' responsibility under s. 92(14) of the *Constitution Act, 1867* for the administration of justice (see, e.g., *Act respecting the Ministère de la Justice*, CQLR, c. M-19, s. 4; *Ministry of the Attorney General Act*, R.S.O. 1990, c. M.17, s. 5). In Quebec, the legislature has delegated the prosecutorial aspect of the Chief Law Officer role to the Director of Criminal and Penal Prosecutions, who serves "[u]nder the general authority" of the Attorney General of Quebec as their lawful deputy (*Act respecting the Director of Criminal and Penal Prosecutions*, CQLR, c. D-9.1.1, s. 1; see also *Godbout v. R.*, 2017 QCCA 569, at para. 13). Crown prosecutors — here the prosecutors of the Director of Criminal and Penal Prosecutions — serve as agents of the Attorney General and bear the delegated role of the Chief Law Officer in individual prosecutions (*Criminal Lawyers' Association*, at para. 37).

[44] The Attorneys General exercise their constitutional Chief Law Officer function independently of partisan considerations and make prosecutorial decisions without interference from their cabinet colleagues (see generally *Krieger*, at para. 30; *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, at para. 47). Individual Crown prosecutors must also consider the broader public interest throughout the conduct of criminal proceedings (*R. v. Thursfield* (1838), 8 Car. & P. 269, 173 E.R.

490; *R. v. Puddick* (1865), 4 F. & F. 497, 176 E.R. 662). In Canada, Rand J. famously explained the Crown's responsibilities in *Boucher v. The Queen*, [1955] S.C.R. 16, at pp. 23-24:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

More recently, this Court has held that it is a principle of fundamental justice within s. 7 of the *Charter* that prosecutors must serve the public interest and not act "for the good of the government of the day" (*R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983, at paras. 26-28).

[45] When a prosecutor exercises discretion, they are presumed to do so in good faith, consistent with their *Boucher* responsibilities (*Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at para. 95). To respect the separation of powers and prerogatives of the Attorney General, courts must adopt a posture of deference whenever reviewing a decision by a prosecutor or considering making an order that would have the effect of overriding a prosecutor's decision.

(b) *Core Prosecutorial Discretion*

[46] Given the distinct constitutional role and responsibilities of the Attorney General as Chief Law Officer, this Court has recognized that certain decisions by Crown prosecutors, as their agents, must be immune from a court's inherent judicial review jurisdiction except in cases of an abuse of process. These decisions lie within the inherent prosecutorial jurisdiction of the Attorney General and go to "the nature and extent" of the prosecution of criminal offences that come before the judge (*Krieger*, at para. 47). These decisions constitute "core prosecutorial discretion".

[47] The use of the word "core" to qualify prosecutorial discretion does not imply that this is a narrow category (*Anderson*, at para. 41). Rather, core prosecutorial discretion encompasses prosecutorial decisions derived from the core constitutional authority inherent to the Attorney General (*Krieger*, at paras. 43 and 49). *Anderson* confirmed *Krieger* and the criteria that applied to such discretion. Although *Anderson* suggested that the use of the word "core" had caused some confusion, in my view it helpfully distinguishes discretionary decisions that engage the inherent jurisdiction of the Chief Law Officer from other discretionary decisions that prosecutors make in the conduct of proceedings. Indeed, this Court has continued to refer to "core prosecutorial discretion" since *Anderson* (see, e.g., *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 S.C.R. 214, at para. 62, per Moldaver J.; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 161, per Moldaver J.; *Ontario (Attorney General) v. Clark*, 2021 SCC 18, [2021] 1 S.C.R. 607, at paras. 126-30, per Côté J.). Parliament has codified some core prosecutorial decisions in statute (*Anderson*, at para. 44). But

what qualifies these decisions as core prosecutorial discretion is not their statutory nature, but their connection to the Attorney General's inherent constitutional function.

[48] In *Krieger*, this Court wrote that what unites instances of core prosecutorial discretion "is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for" (para. 47 (emphasis in original); see also *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566, at para. 30). Both *Krieger* and *Anderson* note that core prosecutorial discretionary decisions impact the "nature and extent" of the criminal proceedings. They confirm that such decisions do not encompass those that impact how the proceedings will be conducted (see, e.g., *Anderson*, at para. 60, citing *R. v. Auclair*, 2014 SCC 6, [2014] 1 S.C.R. 83). Rather, they involve decisions that fall outside the judiciary's role in adjudicating matters on their merits. *Anderson* provides a list of examples of core prosecutorial discretion: whether to repudiate a plea agreement, to pursue a dangerous offender application, to prefer a direct indictment, to charge multiple offences, to negotiate a plea, to proceed summarily or by indictment, and to initiate an appeal (para. 44). *Anderson* also determined that a decision on whether to provide a notice that would increase penal jeopardy is an instance of core prosecutorial discretion (para. 63).

[49] What is common to these examples is that they directly impact the *nature and extent of the criminal jeopardy* to which the accused will be subjected. These decisions are within the core constitutional jurisdiction of the Attorney General acting as the Chief Law Officer. Judicial deference to these decisions therefore respects the

separation of powers and the constitutional role of the Attorney General (*Krieger*, at paras. 45-46). It also has the effect of serving the public good (*Miazga*, at para. 47).

[50] While core prosecutorial discretion demands strong deference, it does not demand absolute immunity from review.

[51] This Court has long recognized that the actions of the executive are subject to judicial review. This principle is most often invoked in judicial review of the executive's exercise of authority delegated by the legislature. But this Court has also held that the judiciary can review the executive's exercise of its inherent constitutional authority and prerogatives and order remedies for arbitrary, abusive, or unconstitutional acts (*R. v. Jewitt*, [1985] 2 S.C.R. 128, at pp. 131-37; *Nelles v. Ontario*, [1989] 2 S.C.R. 170; *Air Canada v. British Columbia (Attorney General)*, [1986] 2 S.C.R. 539, at p. 545; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at paras. 36-37).

[52] The abuse of process doctrine reflects the necessarily high threshold for the judiciary to invoke its inherent jurisdiction and intrude on the Attorney General's core prosecutorial discretion.

[53] The doctrine of abuse of process applies in various fields of law and "engages the inherent power of the court to prevent misuse of its proceedings in a way that would be manifestly unfair to a party or would in some way bring the administration of justice into disrepute" (*Saskatchewan (Environment) v. Métis Nation*

– *Saskatchewan*, 2025 SCC 4, at paras. 33-36). Courts must remedy an abuse of process because to allow trials to proceed in such circumstances "would tarnish the integrity of the court" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667).

[54] In the criminal law context, abuse of process targets egregious conduct that threatens an accused's right to a fair trial or undermines the integrity of the justice system (*R. v. Brunelle*, 2024 SCC 3, at para. 27; *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at para. 31). This Court has called the threshold for finding an abuse of process in a criminal case "notoriously high" and stated that "successful reliance upon the doctrine will be extremely rare" (*Nur*, at para. 94; *R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316, at para. 42). That said, abuse of process can exist even absent prosecutorial misconduct. I agree with the intervener the Attorney General of Ontario that this Court has recognized abuses of process in situations of both improper intent and abusive effects (I.F., at paras. 12-13; see also *R. v. Keyowski*, [1988] 1 S.C.R. 657; *Babos*, at para. 37).

[55] In sum, where the Attorneys General or their agents make decisions that directly affect the nature and extent of the criminal jeopardy a person may face, these constitute decisions of core prosecutorial discretion and a court may not interfere under its inherent jurisdiction except to remedy an abuse of process.

[56] In addition to decisions directly affecting the jeopardy of an accused, prosecutors make a wide variety of discretionary decisions every day that do not fall within core prosecutorial discretion. *Krieger* and *Anderson* recognized that prosecutors

make decisions relating to "tactics or conduct before the court", which cover a wide range of decisions within the proceedings, including which charges to prioritize for limited court dates, what witnesses to call, what questions to ask, and how to present an opening or closing address — decisions that do not directly change the criminal jeopardy an accused may face (*Krieger*, at para. 47; *Anderson*, at paras. 57-61; see also *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751, at paras. 14 and 21). The term "tactics" does not mean that these discretionary decisions are unimportant. Rather, *Krieger* and *Anderson* used "tactics or conduct before the court" to reflect that these discretionary decisions do not attract the same separation of powers imperative as core prosecutorial discretion, since they do not tread on the core of the constitutional role of the Chief Law Officer.

[57] While courts may review or override non-core prosecutorial discretion on a less demanding standard than an abuse of process, deference will generally still be warranted (*Anderson*, at paras. 59-61). Like any litigant, the Crown will necessarily know many circumstances outside the purview of the trial judge. As made clear by this Court in *Boucher*, the Crown must use its knowledge to act in the public interest. And, as a practical matter, intrusive judicial oversight of prosecutorial decision making would grind the criminal justice system to a halt (*Smythe v. The Queen*, [1971] S.C.R. 680, at p. 686; *R. v. Beare*, [1988] 2 S.C.R. 387, at pp. 410-11). Because these non-core decisions cover a broad range — from the everyday issues that form part of a litigant's conduct of a trial to decisions authorized under statute — the standard for a judge to override a Crown decision will vary with the circumstances. The precise

standard in a given case will depend on the nature of the Crown conduct, the presence or absence of statutory authority, the impact on trial fairness, and any other relevant interest (see, e.g., *R. v. Cook*, [1997] 1 S.C.R. 1113, at paras. 61-62; *R. v. Samaniego*, 2022 SCC 9, [2022] 1 S.C.R. 71, at paras. 19-26; *R. v. S.G.T.*, 2010 SCC 20, [2010] 1 S.C.R. 688, at paras. 36-37). As I shall explain, the fact that a non-core prosecutorial decision is made pursuant to statutory authority will require that deference feature prominently in the analysis.

(c) *A Decision Under Section 473(1) of the Criminal Code Does Not Fall Within Core Prosecutorial Discretion*

[58] This is a question of first instance for our Court. For at least 30 years, appellate courts have differed on whether a Crown's decision to refuse to proceed by judge alone — under s. 473(1) or similar provisions — engages core prosecutorial discretion, and on which standard to apply when reviewing the decision. Some cases have clearly characterized a Crown's refusal to consent as core prosecutorial discretion (*R. v. E. (L.)* (1994), 94 C.C.C. (3d) 228 (Ont. C.A.); *R. v. Ng*, 2003 ABCA 1, 173 C.C.C. (3d) 349; *R. v. Effert*, 2011 ABCA 134, 276 C.C.C. (3d) 487; *R. v. Matthews*, 2022 ABCA 115, 41 Alta. L.R. (7th) 30; *Lufiau* (2022)). Others have not characterized the decision and have simply stated that the threshold for overriding the Crown's decision will be high (*R. v. Khan*, 2007 ONCA 779, 230 O.A.C. 179, at paras. 13-16; *R. v. Saleh*, 2013 ONCA 742, 303 C.C.C. (3d) 431). Still others have held that the decision falls outside of core prosecutorial discretion altogether (*R. v. R. (J.S.)*, 2012

ONCA 568, 112 O.R. (3d) 81, at para. 127; *St-Pierre v. R.*, 2016 QCCA 545, at para. 25). All have recognized that the standard is demanding.

[59] In this case, the Court of Appeal followed the line of jurisprudence that characterized the Crown's refusal to consent to a judge-alone trial as core prosecutorial discretion. The court then asked whether the decision was an abuse of process because of its direct or anticipated effects on the right of the accused (C.A. reasons, at para. 27). It concluded that the trial judge erred in law by characterizing the decision as falling outside of core prosecutorial discretion and by using a broader standard of review than abuse of process (para. 24).

[60] With respect, I disagree. A decision under s. 473(1) affects the identity of the fact finder and the mode of trial. It does not impact the nature and extent of the criminal jeopardy facing the accused. It relates to how the proceedings will be conducted and not to whether a prosecution will be brought, or what the prosecution will be for. While the jury system is obviously a key feature of our criminal justice system, a trial by judge alone or a trial by judge and jury are two comparable routes to a fair trial of the charges laid by the prosecutor. As such, the Attorney General's decision under s. 473(1) does not engage their core, inherent constitutional role as Chief Law Officer of the Crown.

[61] However, the Attorney General's decision is made pursuant to statute, which engages the separation of powers imperative of parliamentary sovereignty (*Canada (Attorney General) v. Power*, 2024 SCC 26, at para. 49). Parliament has

exclusive jurisdiction to make policy decisions relating to criminal procedure (*Criminal Lawyers' Association*, at para. 28; *Constitution Act, 1867*, s. 91(27)). Courts must be respectful of Parliament's legislative decision, made pursuant to its constitutional authority, to vest these responsibilities in prosecutors and the accused rather than the courts.

[62] This said, courts have a constitutional duty to review the executive's exercise of delegated authority for legality and compliance with the Constitution (*Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326, at p. 360; *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140). Further, statutes cannot abrogate the inherent jurisdiction of a superior court, which includes jurisdiction to ensure that trials operate fairly and efficiently (*Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27, [2021] 2 S.C.R. 291, at paras. 65 and 68, per Côté and Martin JJ., at paras. 232 and 234, per Wagner C.J., and at para. 301, per Abella J.). At a minimum, courts can still review decisions taken by prosecutors under delegated statutory authority for abuse of process.

[63] Here, Parliament determined that the mode of trial would be judge and jury, unless both the accused and the Attorney General consent to judge alone. It is not appropriate in this case to decide generally how a superior court, acting under its inherent jurisdiction, should approach trial fairness when faced with a statutory decision by the Crown that does not fall within the core of prosecutorial discretion. The parties and interveners focused their arguments on whether s. 473(1) engaged core

prosecutorial discretion. The Crown made no submissions on what standard to apply if the decision fell outside the core. The appellant relied on the trial judge's selection of "unfair or unreasonable" as the basis to override the decision.

[64] I need not decide what precise standard would be required for a court to review, under inherent jurisdiction, such a non-core prosecutorial decision made pursuant to statute, in the absence of full argument from the parties, given that the remedial jurisdiction under the *Charter* also applies in this case.

[65] In addition to inherent jurisdiction, the appellant invoked s. 24(1) of the *Charter* in his motion. The trial judge's reasons for ordering a judge-alone trial related primarily to the risk of unreasonable delay.

[66] Delay that does not constitute an abuse of process can still violate s. 11(b) of the *Charter*. A trial judge's discretion to remedy unreasonable delay under s. 24(1) of the *Charter* is therefore broader than it is under inherent jurisdiction (see generally *R. v. Rahey*, [1987] 1 S.C.R. 588, at pp. 635-36, per La Forest J.; *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, [2022] 2 S.C.R. 220, at paras. 45-49). I thus turn now to the framework for a trial judge's remedial jurisdiction under s. 24(1) of the *Charter*.

(2) Remedial Jurisdiction Under Section 24(1) of the *Charter*

[67] Section 24(1) of the *Charter* states: "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."

[68] The text of s. 24(1) denotes a two-stage process. First, the claimant must establish a *Charter* infringement. Second, the court must determine what remedy is "appropriate and just in the circumstances".

(a) *Threshold: Proof of Breach*

[69] To obtain relief under s. 24(1), a claimant must first prove a *Charter* violation on the balance of probabilities (*Khadr*, at para. 21).

[70] Section 24(1) remedies are available in anticipation of a probable future *Charter* infringement (*Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 450; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at paras. 50-51).

[71] Some courts, including the Court of Appeal in this case (at paras. 39 and 42), have cited to Cory J.'s concurring reasons in *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, to argue that a higher standard of proof applies to anticipated *Charter* breaches, namely that there must be a "real and substantial risk", a "high probability", or a "virtual certainty" of

a *Charter* breach (paras. 110-11). However, the majority in *Westray* did not adopt Cory J.'s position on this point.

[72] Instead, before ordering a s. 24(1) remedy, this Court's decisions require "proof of 'probable future harm'" (*G. (J.)*, at para. 51, quoting *Operation Dismantle*, at p. 458; *United States of America v. Kwok*, 2001 SCC 18, [2001] 1 S.C.R. 532, at para. 66). There is only one standard of proof for establishing prior, ongoing, and future *Charter* breaches: the balance of probabilities.

[73] There is no right under the *Charter* to a judge-alone trial (*R. v. Turpin*, [1989] 1 S.C.R. 1296). But the Crown's insistence on a jury trial may engage an accused's *Charter* rights in the specific circumstances of a case. Here, the appellant alleged that the Crown's failure to consent under s. 473(1) would violate his rights under ss. 7 and 11(b) of the *Charter*. He was therefore required to prove, as a threshold, that without intervention he would likely suffer an infringement of one or both rights.

(b) *Remedy: "Appropriate and Just in the Circumstances"*

[74] Once a claimant establishes an expected *Charter* breach, the court's inquiry turns to what specific remedy is "appropriate and just in the circumstances". Like all provisions of the *Charter*, s. 24(1) must be given a purposive and generous interpretation (*R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at paras. 18-20).

[75] Courts faced with prior, ongoing, or future *Charter* breaches must order responsive and effective remedies (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 25). While a court's discretion to grant a remedy under s. 24(1) is broad, it is exercised on "principled remedial discretion" (see generally *Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629, at paras. 89-93). Over the decades, this Court has distilled factors to consider when assessing whether a proposed remedy is appropriate and just in the circumstances.

[76] An appropriate and just remedy will: (i) vindicate the claimant's rights and freedoms; (ii) ensure future state compliance with the *Charter*; and (iii) compensate the claimant for the loss caused by any infringements (*Doucet-Boudreau*, at para. 55; *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, at paras. 25-29).

[77] The court must also consider whether countervailing factors make a specific remedy inappropriate in the circumstances. A s. 24(1) remedy should also: (i) respect the separation of powers; (ii) avoid imposing substantial hardships or burdens on the government; and (iii) avoid negatively impacting good governance (*Ward*, at paras. 38-44; *Power* (2024), at paras. 82-83; *Doucet-Boudreau*, at para. 58).

[78] Respect for the separation of powers is often a key countervailing factor.

[79] The separation of powers is "part of the foundational architecture of our constitutional order" (*Power* (2024), at para. 50; see also *Fraser v. Public Service Staff*

Relations Board, [1985] 2 S.C.R. 455, at pp. 469-70). The division of the functions of state into the executive, legislative, and judicial branches promotes institutional efficiency and accountability.

[80] The doctrine respects the institutional roles and competencies of each branch, recognizing that some functions must be exclusively reserved to each branch. At the same time, our Constitution does not insist on a strict separation of powers (see P. W. Hogg and W. K. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at §§ 7:15-7:20; *Power* (2024), at para. 82). The Canadian form of separation of powers recognizes that the branches have overlapping and complementary responsibilities (*British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20, [2020] 2 S.C.R. 506, at paras. 65-66). A robust system of checks and balances ensures that each branch achieves institutional effectiveness while curbing arbitrary or unlawful conduct. In this sense, the separation of powers permits the branches of state to work together to maintain our constitutional democracy.

[81] Section 24(1) remedies must not exceed the institutional capacity of the court and unduly intrude on the jurisdiction of the legislature or executive. Whether a proposed s. 24(1) remedy will be an "undue" interference on the executive and/or legislative branch will depend both on the nature of the *Charter* infringement and the interference with the other branch's ability to fulfill its constitutional role. Courts should thus be wary not to manage the conduct of a prosecution through s. 24(1), but to instead grant carefully tailored remedies that respond to the rights infringement

without unduly upsetting the prosecutorial role of the Attorney General. However, the separation of powers does not imply a hierarchy, or demand immunity from judicial review. The judiciary is itself a branch of state, and the executive must yield to a court's constitutional duty to protect the rights and freedoms of Canadians through meaningful remedies (*Power* (2024), at paras. 83 and 95; *Khadr*, at para. 36-37).

[82] A s. 24(1) remedial analysis should also consider the anticipated nature of the rights infringement. It may be more appropriate to order a remedy to prevent the probable future *Charter* infringement rather than a remedy that seeks to compensate the claimant. The s. 11(b) context is illustrative. The remedy for a breach of s. 11(b) that has already occurred has been a stay of proceedings, since any lesser remedy would allow the trial to continue and thus increase the unreasonable delay.[3] But when the court determines that, without intervention, the claimant's s. 11(b) right will probably be infringed, the same imperative for a stay does not apply. In this circumstance, the court will prefer to order a remedy short of a stay — one that will expedite the proceedings and so prevent the *Charter*-infringing unreasonable delay from coming to pass.

[83] The intervening Attorneys General suggest that clarity is needed on the relationship, if any, between an abuse of process and a stand-alone *Charter* claim (I.F., Attorney General of British Columbia, at para. 20; I.F., Attorney General of Ontario, at para. 15).

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[3] In saying this, I take no position on the appropriate remedy for a breach of s. 11(b) that occurs after a conviction is entered, but before sentencing (see *Jordan*, at para. 49, fn. 2).

[84] Abuse of process is a common law doctrine that predates the *Charter* (see generally *R. v. Krannenburg*, [1980] 1 S.C.R. 1053, at p. 1061; *Connelly v. Director of Public Prosecutions*, [1964] A.C. 1254 (H.L.), at p. 1354; *Cocker v. Tempest* (1841), 7 M. & W. 502, 151 E.R. 864; R. Grondin, "Une doctrine d'abus de procédure revigorée en droit pénal canadien" (1983), 24 *C. de D.* 673, at pp. 685-86). That said, abuse of process and the *Charter* overlap in certain respects. It is a principle of fundamental justice under s. 7 of the *Charter* that a person must not be subject to an abuse of process (*R. v. Potvin*, [1993] 2 S.C.R. 880, at p. 915). The factual underpinnings of a claim of abuse of process may also establish a breach of another *Charter* right (*O'Connor*, at para. 73; *Brunelle*, at para. 28).

[85] However, the common law abuse of process doctrine and s. 24(1) of the *Charter* each have their own remedial framework. A claimant whose *Charter* rights have been violated need not establish an abuse of process before obtaining a remedy under s. 24(1) (*R. v. La*, [1997] 2 S.C.R. 680, at para. 20). The appellant did not need to establish an abuse of process to obtain a *Charter* remedy in this case. Every *Charter* violation merits a remedy, even if that remedy is merely a judicial declaration recognizing the violation (*Ward*, at para. 37).

[86] It may be appropriate and just for a court to make an order under s. 24(1) that affects an exercise of core prosecutorial discretion, even absent an abuse of process. As our Court said in *Jordan*, "Crown counsel must be alive to the fact that any delay resulting from their prosecutorial discretion must conform to the accused's s.

11(*b*) right" (para. 79; see also para. 138; *R. v. Vassell*, 2016 SCC 26, [2016] 1 S.C.R. 625, at para. 5; *R. v. K.J.M.*, 2019 SCC 55, [2019] 4 S.C.R. 39, at para. 110; *R. v. Thanabalasingham*, 2020 SCC 18, [2020] 2 S.C.R. 413, at para. 5).

(c) *Application to This Case*

[87] The trial judge opened her reasons by referring to s. 24(1) of the *Charter*. She characterized the Crown's decision as a tactical one, following the reasoning in *R. v. Lufiau*, 2019 QCCS 1630 (before it was overturned in *Lufiau* (2022); see also *St-Pierre*, at paras. 24-25). She then asked whether the Crown's decision was "unfair or unreasonable" in the circumstances.

[88] This was not a typical s. 11(b) motion. The parties did not make submissions characterizing periods of delay between the laying of the charge and the anticipated end of the trial. However, the appellant argued at all levels of court for a judge-alone trial given the risk of unreasonable and indefinite delay. As I shall now explain, in the extraordinary circumstances of this case, where the trial judge was faced with a potentially indeterminate period of delay due to the pandemic, she was entitled under *Jordan* to conclude that without intervention the appellant's s. 11(b) right to a trial within a reasonable time would probably be violated.

[89] I accept the trial judge's factual findings, as well as her conclusions regarding an anticipated s. 11(b) breach, and would uphold her order. When appealing an acquittal, the Crown cannot challenge findings of fact that are not tainted by legal

error (s. 676(1)(a) of the *Criminal Code*; *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at paras. 24-39). As I will show, the trial judge's clear factual findings of a probable s. 11(b) violation and her reasoning justify the remedy she ordered, under the s. 24(1) remedial framework.

[90] For the following reasons, the trial judge concluded that proceeding with a jury trial would likely prejudice the appellant's *Charter* rights:

(i) The greater likelihood of infection with a jury of 12 to 14 people created a substantial risk ("*risques substantiels*") of a suspension or delay of the trial. [TRANSLATION] "If counsel, the accused or the judge became infected or had to quarantine, this would necessarily result in either a significant suspension of the trial or even a mistrial" (motion decision, at para. 90).

(ii) Given the many uncertainties due to the pandemic, a jury trial would be more risky, time-consuming, and require more resources than proceeding by judge alone (para. 88). [TRANSLATION] "In the circumstances of the pandemic, which makes it difficult to hold an efficient and safe trial and which weakens the chances of the trial being completed within a reasonable time, the holding of a trial by judge alone is easily justified" (para. 87).

(iii) The risk to the appellant's s. 7 right to make full answer and defence would be exacerbated by a jury trial, given the long commute to

> trial (an estimated total of four to six hours per day for over three weeks), which limited his ability to consult with counsel and prepare his defence (paras. 57-58, 79 and 105).

[91] The trial judge concluded that [TRANSLATION] "[t]he Prosecutor's position is irreconcilable with her obligation to ensure that the trial is fair and that it is completed within a reasonable time" (motion decision, at para. 89). While the trial judge did not make a finding that the appellant's s. 7 right to make full answer and defence would likely be breached, she was entitled to take any impact on that right into consideration in fashioning an appropriate and just remedy.

[92] In the s. 11(b) context, this Court in *Jordan* recognized that trial judges are best placed to assess how long it will take to bring a matter to trial, "in light of the relevant local and systemic circumstances" (para. 89). The trial judge in this case provided ample basis for her conclusion that a jury trial was "irreconcilable" with the appellant's s. 11(b) right and created a "substantial risk" of a breach. She found that the pandemic's onset in March 2020 had suspended all jury trials in Canada and was both unexpected and unprecedented. The appellant's request for a judge-alone trial was not motivated by trial strategy, but came only after the pandemic jeopardized even the possibility of holding jury trials. The trial judge agreed with the appellant's view that a judge-alone trial could comply with tightened public health restrictions that would be incompatible with a jury trial. The trial was to coincide with the beginning of the school year and the return from vacation, and COVID-19 infections were gaining momentum,

(motion decision, at para. 98). Any suggestions to mitigate these concerns, for example through legislative amendments allowing videoconferencing during jury selection or creating exemptions for vulnerable groups, had not yet been acted upon and the trial judge did not see how they could be realistically adopted by September (paras. 98-102). And yet, as Rowe J. notes, many features inherent to in-person jury proceedings also tended to facilitate exposure to the COVID-19 virus (para. 175).

[93] The Court of Appeal points out that the Crown remained open and flexible to changing its position if need be. But the trial judge was justified in her concern that, with a trial beginning in six weeks and almost certain predictions of a second wave of the virus, a future breach of s. 11(b) was likely without immediate action.

[94] I also do not agree with the Court of Appeal's assessment, repeated by the Crown, that it was only speculation that a jury trial would not happen within the *Jordan* deadline and that it could still technically take place if the trial judge took certain measures, such as holding the trial with fewer jurors (paras. 63-67; R.F., at paras. 76-81). Appellate courts should not review a trial judge's findings with the benefit of hindsight, especially during such extraordinary circumstances as the pandemic. As Pomerance J. (as she then was) stated in *Ontario (Attorney General) v. Trinity Bible Chapel*, 2022 ONSC 1344, 160 O.R. (3d) 748, at para. 6, aff'd 2023 ONCA 134, 166 O.R. (3d) 81, when it comes to protecting rights during a pandemic emergency, hindsight is not the standard: ". . . historical measures must be understood against the backdrop of historical knowledge. The question is not what we know now; it is what

was reasonably known and understood at the time of each impugned action." I agree with Rowe J. that "[i]t is hard to overstate the degree of uncertainty that loomed over the criminal justice system in the summer of 2020" (para. 177).

[95] The trial judge made her decision at the height of the pandemic, before a vaccine. Her findings of fact were grounded in the record as it existed in the profound uncertainty of summer 2020, and display no legal errors. The trial judge was also best equipped to determine whether the Crown had taken reasonable steps in response to an exceptional circumstance (*Jordan*, at para. 79).

[96] Finally, if a jury trial did go over the *Jordan* presumptive ceiling, the Crown could no doubt have argued that some delay should be deducted to account for the COVID-19 pandemic as a discrete exceptional circumstance. But *Jordan* held that such circumstances cannot be deducted unless the Crown took reasonable, available steps to address the problem *before* the delay exceeded the ceiling (paras. 70 and 75). At the time of the trial judge's decision, the availability and timing of future jury trials was unknown. The Crown's decision not to consent to a judge-alone trial in these circumstances would have played a role in an assessment of whether it took reasonable steps.

[97] The risk of a breach of s. 11(b) brought on by the Crown's refusal to consent to a judge-alone trial is not hypothetical — it occurred in *R. v. Hanan*, 2023 SCC 12. Côté and Rowe JJ.'s reasons in that case resonate here:

> The delay beyond the ceiling was due not to a lack of time for the system to ameliorate ingrained institutional delays, but to the Crown's refusal to agree to a trial by judge alone, despite being warned of the possible consequences of delay, and despite *Jordan* having been decided almost two and a half years earlier. Were it not for the Crown's decision, the trial would have occurred within the ceiling. This clearly demonstrates that there was enough time for the parties and system to adapt. [para. 7]

[98] In sum, the trial judge was entitled to find that without intervention, a breach of s. 11(b) in the future was more likely than not. Given this finding, the trial judge had jurisdiction under s. 24(1) of the *Charter* to order a remedy.

[99] The trial judge concluded that proceeding by judge alone would substantially reduce the likelihood of a s. 11(b) breach, especially with the *Jordan* ceiling fast approaching (motion decision, at paras. 54-63 and 88). She explained: [TRANSLATION] ". . . a trial by judge alone has many advantages, including that of maximizing the chances of the trial being held within a reasonable time and thus avoiding a possible stay of proceedings" (para. 104).

[100] Under the s. 24(1) remedial analysis, there were admittedly strong countervailing factors that militated against ordering a judge-alone trial.

[101] The Crown's preference for a jury trial, given the nature and location of the crime, was a legitimate factor and engaged good governance concerns, since a jury trial "promotes public trust in the criminal justice system" (*R. v. Kokopenace*, 2015 SCC 28, [2015] 2 S.C.R. 398, at para. 55). Further, the decision here was based on a statutory provision that provided for a trial by judge and jury unless both the accused and the

Crown consented to a judge-alone trial. The Crown was subject to its *Boucher* role and uniquely placed to consider the broader public interest. But the separation of powers does not function as a conclusive factor against overriding the Crown's decision under s. 473(1).

[102] The trial judge did not expressly consider these various countervailing factors. However, she acknowledged, citing to *Anderson*, that deference is generally owed to the Crown in its tactical decisions (para. 51). She also acknowledged the Crown's reasons for withholding consent, including its general policy preference for a jury trial to adjudicate crimes of domestic violence in small communities. Ultimately, she concluded that the prosecution's position was "irreconcilable" with the accused's right to be tried within a reasonable time (motion decision, at para. 89).

[103] The usual remedy for a s. 11(b) breach is a stay of proceedings. Yet this Court has been clear that a stay harms the public's interest in adjudication on the merits (*Babos*, at para. 30). A stay also frustrates the Chief Law Officer's decision to subject an accused to criminal jeopardy, which is itself an exercise of core prosecutorial discretion attracting separation of powers concerns. A stay is a remedy of last resort.

[104] The record reveals a trial judge seeking solutions to both protect *Charter* rights and respect the separation of powers. The trial judge's findings of fact show that the vindication of the appellant's *Charter* rights by ordering a judge-alone trial outweighed the impact on the separation of powers and the public benefit of a jury trial.

[105] Ordering a judge-alone trial was a tailored remedy, using "a scalpel instead of an axe", to prevent a breach while doing as little harm to other public interests as possible (*O'Connor*, at para. 69).

[106] The trial judge framed her analysis on whether the Crown's refusal to consent was "unfair or unreasonable". The remedial inquiry under s. 24(1) of the *Charter* asks whether a remedy is appropriate and just in all the circumstances and not whether state action is "unfair or unreasonable". Nonetheless, her findings of fact and reasoning make clear that the order she granted was an "appropriate and just" remedy. It protected the appellant's rights and avoided the risk of a stay down the road, thus respecting the Crown's core prosecutorial discretion to seek adjudication of this murder charge on the merits. Since the trial judge clearly would have ordered a judge-alone trial under the proper s. 24(1) framework, her failure to explicitly conduct her analysis within that framework had no material bearing on the appellant's acquittal for second degree murder (*R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14).

[107] Accordingly, based on her findings, I would affirm the trial judge's order for a judge-alone trial. The Court of Appeal erred in holding that the trial judge made this order without jurisdiction.

VI. Conclusion

[108] I would allow the appeal and quash the order for a new trial.

[109] Regrettably, the Court of Appeal did not consider all the grounds of appeal brought by the Crown, since it ordered a new trial after finding the trial judge erred in law in ordering a judge-alone trial, which meant the judge had no jurisdiction over the trial proper. The Crown asks that, if the appeal is not dismissed, this Court remand the proceedings to the Court of Appeal to resolve the other grounds of appeal. The appellant argues that instead, this Court should stay further proceedings under s. 686(8) of the *Criminal Code*.

[110] The Crown's decision to appeal a criminal verdict directly impacts the criminal jeopardy facing the accused, and so constitutes core prosecutorial discretion. This Court can only stay the proceedings in the face of unresolved grounds of appeal in the clearest of cases to remedy an abuse of process.

[111] The appellant points to four factors supporting his request for a stay: (i) the events that are the subject of the charge occurred almost a decade ago; (ii) he has served without incident his full carceral sentence of nearly nine years for manslaughter — which is close to the minimum incarceration period for second degree murder — and has begun reintegrating into the community; (iii) he disclosed his defence strategy and demonstrated weaknesses in the Crown's case at trial, which the Crown could consider and remedy in seeking a conviction at a retrial; and (iv) he has already been found not guilty of the second degree murder charge.

[112] On the record before us, I cannot conclude that these factors amount to an abuse of process. In any successful Crown appeal against an acquittal where the court

orders a new trial, the Crown will be aware during that new trial of the original defence strategy. As well, the Crown will have the benefit of any appellate conclusions regarding errors of law in the initial trial. Given that our law allows for Crown appeals, including those that challenge procedural pretrial rulings, these general consequences are not in and of themselves abusive. This is not a case like *R. v. Ryan*, 2013 SCC 3, [2013] 1 S.C.R. 14, where this Court stayed proceedings because, among other reasons, the accused was prejudiced by the Crown changing its position on a key legal issue between trial and appeal (para. 35).

[113] As for the passage of time, while such lengthy delay is problematic, there is no record before this Court to demonstrate that the appellant has suffered particular prejudice due to delay. A court cannot stay a proceeding for abuse of process absent a demonstration of prejudice (*R. v. Sullivan*, 2022 SCC 19, [2022] 1 S.C.R. 460, at paras. 93-97).

[114] These factors may well influence the Crown in determining whether to exercise its core prosecutorial discretion to pursue the remaining grounds of appeal. However, this is not one of the "clearest of cases" where an abuse of process warrants this Court granting a stay of proceedings at this time (see generally *Babos*, at para. 44). The appellant is free to repeat his request for a stay before the Court of Appeal or a trial court, with a fuller record, if necessary.

[115] Given the outstanding grounds of appeal, it is in the interests of justice to remand this case to the Court of Appeal under s. 46.1 of the *Supreme Court Act*. I would

allow the appeal, set aside the Court of Appeal's decision, and remand this matter to the Court of Appeal for determination of the outstanding grounds for appeal.

[116] The decision whether to pursue the outstanding grounds of appeal in these circumstances rests with the prosecution.

The reasons of Rowe and Kasirer JJ. were delivered by

ROWE J. —

I. Introduction

[117] I agree with my colleague's conclusion that the trial judge did not err in overriding the prosecutor's choice to proceed with a jury and with her disposition of this appeal. However, I disagree with the reasoning through which my colleague arrives at this conclusion.

[118] The trial judge could not use her remedial discretion under s. 24(1) of the *Canadian Charter of Rights and Freedoms*, because no *Charter* breach was established. Demonstrating a *Charter* breach on the balance of probabilities is a threshold condition to order a remedy under s. 24(1) (*R. v. Dixon*, [1998] 1 S.C.R. 244, at para. 32).

[119] Moreover, the Crown's decision under s. 473(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, constitutes an exercise of prosecutorial discretion, and is therefore only reviewable on an abuse of process standard. Because the prosecutor's refusal to consent to a judge-alone trial amounted to an abuse of process in the exceptional circumstances of this case, the trial judge made no reviewable error in overriding it, even though she misidentified the nature of the decision and the standard of review applicable to it.

[120] In the following reasons, I consider first the remedial jurisdiction route under s. 24(1) of the *Charter*, and then the inherent jurisdiction route. I conclude with the disposition of the case.

II. The *Charter* Route

A. *The Proof of a Charter Breach Is a Threshold Consideration to Order a Remedy Under Section 24(1)*

[121] There is no doubt that "the Crown possesses no discretion to breach the *Charter* rights of an accused" (*R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 45). I agree with my colleague that to obtain relief under s. 24(1) of the *Charter*, an applicant must first prove a *Charter* breach (para. 69). I also agree that the balance of probabilities is the standard of proof that applies to *Charter* breaches, whether they are past or future. "Thus, before granting any sort of remedy under s. 24(1), it must be found that it was more likely than not that the *Charter* right in question was infringed

or denied" (*Dixon*, at para. 32). When assessing whether a future breach is "probable" (Karakatsanis J.'s reasons, at para. 70), the question is whether the breach is more likely than not to occur.

[122] In addition to being a threshold consideration, proof of breach must be demonstrated as it can influence the nature of the remedy. For example, a Crown prosecutor may not use their discretion to refuse to disclose evidence, if that impairs the accused's right to a full and fair defence protected under s. 7 of the *Charter*. There are situations in which the impact of a refusal to disclose on the *Charter* right would be so egregious as to warrant a stay of proceedings as a remedy. In other instances, the violation can be "cur[ed]" by a disclosure order (*R. v. O'Connor*, [1995] 4 S.C.R. 411, at paras. 76-77).

[123] Matthew Asma and Matthew Gourlay emphasize the importance of proving a specific violation of the *Charter* when the Crown fails to disclose evidence to defence counsel:

> When a Charter-violating failure by the prosecution to make disclosure is established in the trial court, the court has a wide range of section 24(1) remedies to consider. . . .
>
> . . . The most modest remedy at trial is to simply order the prosecution to provide the disclosure. The most extreme remedy is a stay of proceedings. Since a stay is a remedy of last resort, other more moderate remedies must be considered first — such as re-calling witnesses, adjournment of the trial, or mistrial; costs against the Crown; and excluding late-disclosed evidence. Remembering that Crown disclosure is not a Charter right in itself but is merely a function of the right to make full answer and defence, the remedy chosen under section 24(1) must be responsive to the actual circumstances of the Charter violation in the

> particular case and should focus on remediating the actual prejudice suffered by the accused. [Emphasis added; footnotes omitted.]
>
> (*Charter Remedies in Criminal Cases* (2nd ed. 2023), at pp. 229-30)

[124] There is no constitutional right to a judge-alone trial (*R. v. Turpin*, [1989] 1 S.C.R. 1296, at p. 1323). A prosecutor's decision to refuse to consent to a trial by judge alone may or may not infringe an accused's *Charter* rights. No matter which *Charter* right is alleged to have been breached, proof of the breach is important to determine the remedy that will be "responsive to the actual circumstances of the Charter violation" (Asma and Gourlay, at p. 229 (footnote omitted)).

[125] There exists no set procedure for claimants in a criminal trial who seek a remedy under s. 24(1) of the *Charter* and application judges have a wide discretion to decide how to conduct *Charter* applications. While no particular procedure is required, evidence should be presented to support the submissions (*R. v. L. (W.K.)*, [1991] 1 S.C.R. 1091, at p. 1103). "[T]he guiding principle is judicial discretion, with the focus always on fair and efficient determination of the material issues" (Asma and Gourlay, at p. 18).

[126] In a general sense, establishing a breach of s. 11(b) first requires a claimant to demonstrate that the total delay from the charge to the actual or anticipated end of trial (minus defence delay) exceeds the presumptive ceilings of 18 months or 30 months established by this Court in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631. Then, the Crown can rebut the presumptively unreasonable delay by establishing there were

exceptional circumstances (para. 47). As such, an application alleging a s. 11(b) breach will typically summarize each appearance and characterize delay between each appearance as Crown or defence delay according to *Jordan* (T. Kozlowski and J. Stuart, *A Proactive Practitioner's Guide to Section 11(b) of the Charter* (2024), at p. 16).

[127] It is common place for accused to put in, or be required to put in, their *Jordan* applications as soon as their trial date is set. For example, the *Consolidated Provincial Practice Direction for Criminal Proceedings* of the Ontario Superior Court provides that "[u]nless otherwise directed by the Court, all s. 11(b) applications must be scheduled to be heard at least 60 days before the first scheduled day of trial or, where pre-trial applications are scheduled to be heard separately in advance of the trial, at least 60 days before the first scheduled day of pre-trial applications" (amended January 6, 2025 (online), Part VI(B.)).

[128] In some provinces, practice directions and directives specify the format that *Jordan* applications must comply with. In Quebec, the *Directive CR/2019-01 Concerning Jordan Applications (Section 11(b) of the Charter)* requires that *Jordan* applications contain a table of delays and applicable transcripts (January 8, 2019 (online), at para. 12). In Ontario, the practice direction states that the "delay must be set out in a chart (or charts) attached to the factum setting out the history of the proceeding from the date of charge until the anticipated disposition of the proceeding" (*Consolidated Provincial Practice Direction for Criminal Proceedings*, Part VI(C.)

(emphasis deleted)). These directions illustrate the nature of *Jordan* proceedings and the record required when seeking to establish a breach of s. 11(b).

B. *The Charter Breaches Cannot Be Said to Have Occurred*

[129] At the outset, I make observations about the nature of the submissions of the parties. As will be demonstrated below, the parties' submissions focused on whether or not the consent of the Crown required at s. 473 was an exercise of prosecutorial discretion in the proceedings in first instance, at the Court of Appeal and before our Court. My colleague's reasons appear to displace the submissions of the parties and centre the question on ss. 11(b) and 24(1) of the *Charter* in this appeal. Said respectfully, this transforms the substantive issues that were before our Court and erodes the principle of *audi alteram partem* which "requires that courts provide an opportunity to be heard to those who will be affected by the decisions" (*A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536, at para. 27).

[130] According to my colleague, the trial judge's reasons reveal that "[t]he Prosecutor's position is irreconcilable with her obligation to ensure that the trial is fair and that it is completed within a reasonable time" (para. 91, citing motion reasons, at para. 89). While not making a finding of a s. 7 breach, my colleague writes that the trial judge considered the impact that proceeding by judge alone would have on the defence of the appellant (para. 91). My colleague's view is that a breach of s. 11(b) enabled the trial judge to order a remedy under s. 24(1) of the *Charter*.

[131] Respectfully, that is not an accurate reading of the trial judge's reasons. Even adopting a generous reading of the record, a breach of s. 11(b) is not demonstrated. The trial judge could not — and in fact did not — order a remedy under s. 24(1) because this threshold consideration was not met.

(1) The Violation of Section 11(b) Is Not Demonstrated

[132] In the appellant's motion for a trial by judge alone (reproduced in A.R., vol. II, tab 9), he focused his submissions on the fact that the decision to proceed by judge alone was not an exercise of prosecutorial discretion. He argued that the Crown's decision should be reviewed on the basis of whether the decision was [TRANSLATION] "unfair, likely to bring the administration of justice into disrepute and/or unreasonable" (paras. 25-38).

[133] This motion did not contain any specific descriptions of how the appellant's s. 7 or 11(b) rights were going to be infringed. In it, there were no submissions related to the characterization of delays since the charge and the anticipated end of the trial, which was set to end on October 5, 2020 (A.R., vol. II, at p. 10).

[134] In its answer to the appellant's motion (reproduced in A.R., vol. II, tab 2), the respondent argued that the refusal to consent to a judge-alone trial was an exercise of prosecutorial discretion reviewable on a higher standard. In all cases, it argued that even on the appellant's standard, [TRANSLATION] "the reasoned decision in this case is

not unreasonable, unfair, nor does it bring the administration of justice into disrepute" (para. 103 (emphasis deleted)).

[135] In the appellant's oral submissions on the motion, there were no specific allegations regarding *Jordan* delays. Counsel did not make specific submissions as to the total delays since the charge, and how they could be characterized according to the *Jordan* framework. Counsel for the appellant pleaded that if he were to submit a *Jordan* motion, the Crown would allege exceptional circumstances, ostensibly implying that a *Jordan* motion would likely fail:

> [TRANSLATION] If we aren't in an exceptional situation, I don't know what we're in. I can tell you that if defence counsel start bringing *Jordan* motions, we'll just hear that we're in an exceptional situation. There's no doubt that we're in an exceptional situation, it's a hundred percent certain.
>
> (A.R., vol. III, at p. 220)

[136] The trial judge was responsive to these considerations, and focused her analysis on the fact that the decision of the Crown was tactical, and therefore reviewable on whether it was an unreasonable decision. She concluded that the refusal of the Crown to proceed by judge alone was [TRANSLATION] "not only unreasonable in the exceptional circumstances we are going through, but it does not take into account the fundamental rights of the Accused" (2020 QCCS 2734, at para. 108).

[137] While she was concerned about preserving the rights of the appellant, she stopped short of finding a violation of s. 11(b). Rather, she wrote at para. 63:

> [TRANSLATION] The Court notes that the trial has been scheduled since June 2019, that the alleged offence goes back to December 2015 and that the "*Jordan*" date could be at play. The trial was scheduled for the fall of 2020, in accordance with the defence's availability, but at the time of the June 2019 pre-hearing conference the Prosecutor identified the so-called "*Jordan*" date as being November 28, 2019. [Emphasis added.]

[138] The fact that the *Jordan* ceiling "could be at play" cannot be equated with a finding that a *Charter* breach was established on the balance of probabilities. In the absence of any clear pleadings regarding the total delay, defence delay or the presence of exceptional circumstances, it is impossible to establish a s. 11(b) violation.

[139] My colleague is right to affirm, at para. 97 of her reasons, that "[t]he risk of a breach of s. 11(b) brought on by the Crown's refusal to consent to a judge-alone trial is not hypothetical", and to point out that this occurred in *R. v. Hanan*, 2023 SCC 12. However, in that case, the proof of a violation of s. 11(b) was based on the record. The accused had put in a proper *Charter* application (for the ruling on the motion, see *R. v. Hanan*, 2019 ONSC 320). This Court agreed with him that the *Jordan* ceiling had been exceeded and the Crown had not succeeded in its argument that exceptional circumstances justified going over the ceiling. Importantly, the remedy this Court ordered was a stay, which further distinguishes *Hanan*. I now turn to the question of remedy.

(2) If a Breach of Section 11(b) Was Made Out, the Proper Remedy Is a Stay

[140] In *Jordan*, this Court held that total delay is calculated from the charge to the real or "anticipated" end of the trial (para. 47). In that way, judges are empowered to remedy a s. 11(b) breach as soon as it is proven on the balance of probabilities. There is no requirement that the actual ceiling be surpassed, that the trial be completed or that the breach needs to have otherwise "already occurred" as my colleague states (para. 82).

[141] For breaches of s. 11(b), stays are the "minimum" remedy (*R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 615). Indeed, "at common law and under the *Charter*, outside the s. 11(b) context a stay of proceedings is a discretionary remedy to be granted sparingly. But for a s. 11(b) violation a stay of proceedings is the minimum remedy" (*R. v. Steele*, 2012 ONCA 383, 288 C.C.C. (3d) 255, at para. 31; see also J. A. Y. Trehearne, R. C. Bottomley and J. Frost, *Justice Delayed: A Practitioner's Guide to Section 11(b) of the Charter* (2020), at pp. 66-67; Asma and Gourlay, at p. 120).

[142] *Jordan* did not change the state of law on remedy from *Rahey*. In a footnote, the Court noted, "[w]e were not invited to revisit the question of remedy. Accordingly, we refrain from doing so" (para. 35, fn. 1). As Asma and Gourlay explain, expanding the available remedies for a breach of s. 11(b) could undermine this Court's efforts in *Jordan*:

> While not definitively shutting the door on future reconsideration of this question, broadening the range of remedies would arguably undermine the *Jordan* Court's efforts to curb delay via bright-line rules. In *R v Ste-Marie*, the Court declined an invitation from one of the Crown interveners to revisit the remedial question but did not comment on the issue in its brief

> reasons. It therefore seems unlikely that the authority of *Rahey* on this point will be challenged in the foreseeable future. A stay of proceedings remains the minimum remedy for infringement of section 11(b), at least where the impugned delay relates to the time from charge to verdict. [Emphasis added; footnotes omitted; p. 120.]

[143] That said, judges' hands are not tied if they wish to prevent unreasonable delays. A court can make orders "to avoid a violation of section 11(b) that has not yet occurred, but appears likely" (Trehearne, Bottomley and Frost, at p. 68). *Jordan* criticized the fact that participants in the justice system, including courts, "are not encouraged to take preventative measures to address inefficient practices and resourcing problems" (para. 41). For example, a court can order that the trial occurs at an earlier date, or order the parties to engage in case management. That said, these are measures that are taken when a violation has not been established (Trehearne, Bottomley and Frost, at pp. 68-69). If a measure is taken to *prevent* a breach, it cannot be said that it is a remedy under s. 24(1), contrary to what my colleague states (paras. 13, 82 and 105). This is because the proof of a breach is a threshold consideration under s. 24(1).

[144] Respectfully, my colleague's reasons cast doubt on the teachings of *Jordan*. Judges need not wait for the trial to be completed to find a breach; they may order stays as soon as the trial dates are set. If proven, the only remedy to cure a breach of s. 11(b) is a stay of proceedings.

III. The Inherent Jurisdiction Route

[145] My colleague resolves this appeal on the basis of the *Charter* route. She nevertheless provides *obiter* comments about courts' ability to review prosecutorial discretion under their inherent jurisdiction. In doing so, she revives a distinction between "core" and "non-core" prosecutorial discretion — a distinction that diverges from the approach taken by this Court in *Anderson*. She characterizes the Crown's refusal to consent to a judge-alone trial under s. 473 of the *Criminal Code* as a form of "non-core" discretion. Yet, she does not specify which standard of review should apply to this type of prosecutorial decision (para. 64). As a result, the legal framework governing how courts can review a prosecutor's refusal to allow a judge-alone trial under their inherent jurisdiction remains uncertain in our jurisprudence.

[146] A prosecutor's refusal to consent to a judge-alone trial is an exercise of prosecutorial discretion, reviewable on an abuse of process standard. Even though the trial judge erred in qualifying the power conferred to the Crown by s. 473(1) of the *Criminal Code* as a tactical decision reviewable on a reasonableness and fairness standard, her conclusion can still be upheld. In the exceptional circumstances of this case, the Crown's decision to refuse to consent to a trial by judge alone amounted to an abuse of process. To begin, I summarize the applicable principles.

A. *The Distinction Between Non-Core and Core Prosecutorial Discretion Should Not Be Revived*

[147] In *Anderson*, this Court wrote that after *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, there was confusion as to the meaning of

"prosecutorial discretion" and that "the law ha[d] become cloudy" (para. 38). To clarify the law related to the review of prosecutorial discretion, Moldaver J., for a unanimous Court, stated that "[t]here are two distinct avenues for judicial review of Crown decision making. The analysis will differ depending on which of the following is at issue: (1) exercises of prosecutorial discretion; or (2) tactics and conduct before the court" (para. 35).

[148] The recognition of prosecutorial discretion as "an expansive term" was an effort to resolve some of the confusion that arose from qualifying core and non-core exercises of prosecutorial discretion and the applicable standard of review for different types of Crown decisions (*Anderson*, at paras. 41, 44 and 51). *Anderson* clarified that

> prosecutorial discretion is reviewable solely for abuse of process. The *Gill* test applied by the Newfoundland and Labrador Court of Appeal was developed at a time when courts were struggling with the post-*Krieger* "core" versus "outside the core" dichotomy. To the extent the *Gill* test suggests that conduct falling short of abuse of process may form a basis for reviewing prosecutorial discretion, respectfully, it should not be followed. [para. 51]

[149] Abuse of process consists of "Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system" (*Anderson*, at para. 50). The two categories of abuse of process are (1) state conduct affecting the fairness of the trial, the main category, and (2) state conduct that undermines the integrity of the judicial process, the residual category (*R. v. Brunelle*, 2024 SCC 3, at para. 27). As this Court explained recently in *Brunelle*, *Charter* breaches and the doctrine of abuse of process overlap:

> 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 . . . . [para. 28]

[150] I therefore agree with my colleague that factual scenarios may establish both *Charter* breaches and abuse of process (para. 84). As stated by the Quebec Court of Appeal in *R. v. Lufiau*, 2022 QCCA 508, 82 C.R. (7th) 167, when the Crown exercises its prosecutorial discretion [TRANSLATION] "in violation of the constitutional rights of an accused, such conduct could be considered an abuse of process" (para. 117).

[151] My colleague affirms that this Court has continued to refer to "core prosecutorial discretion" in its decisions since *Anderson* (para. 47). While the expression "core prosecutorial discretion" is used in the three decisions cited (*Henry v. British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 S.C.R. 214; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773; *Ontario (Attorney General) v. Clark*, 2021 SCC 18, [2021] 1 S.C.R. 607), it was used in dissenting reasons in *Nur* and in *Clark*. Most importantly, while the term is mentioned in passing in all three sets of reasons, it is not deployed as an analytical norm to distinguish between core and non-core forms of prosecutorial discretion. All three decisions are firmly anchored in the *Anderson*

framework that distinguishes between "prosecutorial discretion" as an expansive term on the one hand, and tactics and conduct before the court on the other, where prosecutorial discretion is reviewable only on an abuse of process standard.

[152] In reintroducing a distinction between core and non-core prosecutorial discretion that hinges on whether the decision engages the inherent jurisdiction of the Attorney General as Chief Law Officer (Karakatsanis J.'s reasons, at para. 47), my colleague departs from the guidance this Court offered in *Anderson*. This creates a problem by reviving uncertainty over which standard of review applies to various types of Crown conduct. It also risks recreating the very confusion that *Anderson* aimed to resolve and bring back courts to an era where they "were struggling with the post-*Krieger* 'core' versus 'outside the core' dichotomy" (*Anderson*, at para. 51).

B. *The Attorney General's Decision Under Section 473(1) of the Criminal Code Is an Exercise of Prosecutorial Discretion, Reviewable on an Abuse of Process Standard*

[153] The decision not to consent to a trial by judge alone is an exercise of prosecutorial discretion in the *Krieger* and *Anderson* sense and is therefore reviewable on an abuse of process standard. This is in line with the "the overwhelming body of jurisprudence today" that "confirms that the power provided for at s. 473(1) falls into the category of prosecutorial discretion" (see G. Warby, "Who Holds the Keys? Section 473 and the Prosecutor's Gatekeeper Role in Canadian Murder Trials" (2025), 28 *Can. Crim. L. Rev.* 143, at p. 153).

[154] Two main considerations support this conclusion. First, that the consent of the Attorney General is necessary for a superior court judge sitting alone to assume jurisdiction over s. 469 offences militates in favour of a view of that choice as prosecutorial discretion. Parliament intended that that choice be left to prosecutors, as agents of the Attorney General; to give effect to the separation of powers, courts must adopt a posture of deference. Second, the decision to proceed with or without a jury goes to the "nature" of the prosecution (*Anderson*, at para. 44) and reflects the Attorney General's constitutional role as Chief Law Officer of the Crown.

(1) Parliament's Intent Is That the Attorney General's Consent Be Attributive of Jurisdiction

[155] The provisions at stake in this appeal, ss. 468 et seq., appear at the outset of Part XIV of the *Criminal Code*, "Jurisdiction". As my colleague explains, at para. 37 of her reasons, an accused charged with an offence listed in s. 469, including murder, "shall be tried" by superior court before a judge and jury (s. 471). The "net effect" of ss. 469 and 471 of the *Criminal Code* is that murder is "normally required to be tried by jury" (S. Coughlan, *Criminal Procedure* (4th ed. 2020), at p. 456).

[156] However, "an accused charged with an offence listed in section 469 may, with the consent of the accused and the Attorney General, be tried without a jury by a judge of a superior court of criminal jurisdiction" (s. 473(1)). In that provision, "Parliament has made its intention clear" that individuals charged with murder should

be tried by a judge and jury, in the absence of the consent of the accused and the Attorney General (*R. v. Khan*, 2007 ONCA 779, 230 O.A.C. 179, at para. 13).

[157] As per the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 11, "[t]he expression 'shall' is to be construed as imperative and the expression 'may' as permissive." Parliament intended it to be imperative that s. 469 offences be tried by a judge and jury. At the same time, it made room for an exception: with the consent of both the accused and the Attorney General, a trial without a jury is permitted. Courts are bound to give effect to that intent "to respect the separation of powers and to adhere to their role as a neutral umpire" (Warby, at p. 155).

[158] Part XIV of the *Criminal Code*, "Jurisdiction", interacts with Part XIX, "Indictable Offences — Trial Without Jury". For the purpose of jurisdiction over indictable offences, in Quebec, a "judge" is defined as a provincial court judge, whereas in other provinces "judge" designates a superior court judge (s. 552). As the Quebec Court of Appeal explained in *Pouliot v. R.*, 2015 QCCA 9, [TRANSLATION] "while a superior court judge can hear a trial without a jury with the consent of the parties, s. 473 *Cr.C.* states that this possibility is limited to the offences described in s. 469 *Cr.C.*, primarily murder" (para. 16).

[159] This difference with other provinces is fundamental because a superior court judge in Quebec sitting without a jury is rare. A superior court judge acting alone in Quebec has jurisdiction only for s. 469 offences and only when both the accused and the Crown consent to proceeding without a jury.

[160] In *Godbout v. R.*, 2017 QCCA 569, the Quebec Court of Appeal described the consent of the accused and the Attorney General as [TRANSLATION] "confer[ring] jurisdiction to a superior court judge sitting without a jury" (para. 13). In *Charbonneau v. R.*, 2024 QCCA 78, the same court reiterated that [TRANSLATION] "a superior court judge has jurisdiction only if sitting with a jury, as stipulated in section 471 *Cr.C.*, or if sitting without a jury with the consent of the parties, as stipulated in section 473 *Cr.C.*" (para. 9).

[161] I agree with the reasoning set out at para. 105 of *Lufiau* that

> [TRANSLATION] [c]onsent to a trial by judge alone cannot be classified as a decision relating to tactics or conduct before the court, because the consent of the parties, including that of the prosecution, confers jurisdiction according to this Court's judgment in *R. v. Godbout*. It would be incongruous to describe such a decision as tactical when the decision is necessary for the judge alone to exercise jurisdiction.

[162] Parliament intended for the Attorney General's consent to be attributive of jurisdiction. "To respect the separation of powers and prerogatives of the Attorney General, courts must adopt a posture of deference" towards the choice of the prosecutor to consent to proceeding with or without a jury (Karakatsanis J.'s reasons, at para. 45).

(2) <u>The Decision To Proceed With a Jury Goes to the Nature of the Prosecution and Reflects the Attorney General's Constitutional Role as Chief Law Officer of the Crown</u>

[163] *Krieger* and *Anderson* held that all decisions that go to the "nature and extent of the prosecution" are exercises of prosecutorial discretion (*Krieger*, at para. 47; *Anderson*, at para. 44), not just the "nature and extent of the criminal jeopardy" faced by the accused, as my colleague writes (paras. 49 and 60). The decision to proceed with a jury is one that goes to the nature of the prosecution, because a trial with a jury is of a different nature than a trial by judge alone.

[164] My colleague affirms that the decision to proceed with a jury "affects the identity of the fact finder" (para. 60). Said respectfully, this is a reductive approach to the role that the jury institution plays in Canadian law and society. The prosecutor's decision to submit an accused to the judgment of his peers, even when the latter does not consent, is inherent to what my colleague calls the "*Boucher* responsibilities" and "prerogatives" of prosecutors as Chief Law Officers (para. 45, referring to *Boucher v. The Queen*, [1955] S.C.R. 16).

[165] The jury system in Canada has a unique nature that distinguishes it from other modes of trial. It has been described as "one of the great protectors of the citizen because it is composed of twelve persons who collectively express the common sense of the community" (*R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 77).

[166] Jury trials allow for the judging of an accused by 12 ordinary individuals who have a duty to render a unanimous verdict. The nature of a jury verdict carries a particular weight that distinguishes it from a judge-alone verdict. As Cory J. explained in *R. v. G. (R.M.)*, [1996] 3 S.C.R. 362, at paras. 13-14:

> The jury system is clearly a significant factor in many democratic regimes. This is emphatically true in Canada. It is extremely important to our democratic society that jurors as representatives of their community may make the decision as to the guilt or innocence of the accused before the court based solely on the evidence presented to them. There is a centuries-old tradition of juries reaching fair and courageous verdicts. That tradition has taken root and been so well and fearlessly maintained that it has flourished in this country. Our courts have very properly stressed the importance of jury verdicts and the deference that must be shown to those decisions. Today, as in the past, great reliance has been placed upon those decisions. That I think flows from the public awareness that 12 members of the community have worked together to reach a unanimous verdict.
>
> . . . Of course, it is the great strength and virtue of the jury system that members of the community have indeed come together and reasoned together in order to reach their unanimous verdict. It is truly a magnificent system for reaching difficult decisions in criminal cases. It has proven itself in the centuries past and continues to do so today. [Emphasis added.]

[167] The jury system has been described as "lending the weight of community standards to trial verdicts" (*Turpin*, at pp. 1309-10). Citing Sir James Stephen in *A History of the Criminal Law of England* (1883), vol. I, at p. 573, this Court noted that

> trial by jury interests large numbers of people in the administration of justice and makes them responsible for it. It is difficult to over-estimate the importance of this. It gives a degree of power and of popularity to the administration of justice which could hardly be derived from any other source.
>
> (*Turpin*, at p. 1310)

[168] This Court has also held that the jury "acts as the conscience of the community" and that it "provides a means whereby the public increases its knowledge of the criminal justice system and it increases, through the involvement of the public,

societal trust in the system as a whole" (*R. v. Sherratt*, [1991] 1 S.C.R. 509, at pp. 523-24).

[169] In addition to the substantive differences between jury and judge-alone trials, there are also procedural differences. For example, a court of appeal cannot substitute a conviction for an acquittal that was rendered in first instance when there was a jury trial, because it does not know the reasons for the verdict. It can only order a new trial (*Criminal Code*, s. 686(4)(b)(ii); *R. v. Skalbania*, [1997] 3 S.C.R. 995, at para. 12). The differences between jury trials and judge-alone trials also justify specific procedures at sentencing, because the sentencing judge does not know the reasons that led the jury to its conclusion (s. 724(2); *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at paras. 17-18).

[170] The unique nature of a jury trial, where 12 members of the public are called on to judge a peer, and procedural specificities that flow from it illustrate how the Attorney General's decision to proceed with a jury goes to the "nature" of the prosecution. As a vehicle that serves to communicate the community's sense of justice and as a forum for public education about the criminal justice system, the jury trial is fundamentally distinct from a trial by judge alone.

[171] As my colleague notes, individual Crown prosecutors must consider the public interest in the exercise of their constitutional Chief Law Officer function (para. 44). The prosecutor's role "is not only to protect the public, but also to honour and express the community's sense of justice" (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616).

The decision to submit an accused to the judgment of his peers and proceed with a jury goes directly to that role.

C. *In the Exceptional Circumstances of This Case, the Crown's Decision Not to Consent to a Trial by Judge Alone Amounted to an Abuse of Process*

[172] Abuse of process consists of state conduct that "shocks the community's conscience" or "offends its sense of fair play and decency" (*R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at para. 41). In this case, the Crown, in July 2020, insisted on holding a jury trial, and for the jury selection process to begin on September 10, 2020 (motion reasons, at paras. 30-32). This was in the midst of first and second waves of the COVID-19 pandemic, when court houses had just re-opened their doors. The appellant had renounced his constitutional right to a jury trial.

[173] In the exceptional circumstances of this case, the trial judge was justified in overriding the Crown decision because it was conduct that undermined the integrity of the justice system — the residual category of abuse of process under s. 7 of the *Charter*. The Crown's conduct was "vexatious to such a degree that it contravene[d] fundamental notions of justice" (*Brunelle*, at para. 28) in the context of the enormous health risks posed by the early days of the COVID-19 pandemic.

[174] According to the Institut national de santé publique du Québec, courtroom activities were suspended on March 14, 2020, and all indoor and outdoor gatherings were banned on March 21. On May 22, the provincial government authorized outside

gatherings of a maximum of 10 people, from a maximum of 3 households. On May 29, the case count of COVID-19 in the province reached 50,000. Courtrooms re-opened on June 1. By June 8, 5,000 deaths from COVID-19 had been recorded. On July 18, a gradual return to the office was allowed for government workers at a maximum occupancy rate of 25 percent workplace capacity. The first wave ended on July 11, 2020, and the second wave started on August 23, 2020. The first Quebec residents received their vaccinations on December 14, 2020 (*Ligne du temps COVID-19 au Québec*, last updated October 5, 2022 (online)).

[175] After the World Health Organization declared COVID-19 a global pandemic on March 11, 2020, Canada paused its court operations. It did not move to conduct jury trials online via technological means, compared to other jurisdictions that did, including the United Kingdom, Brazil, China, India, and Singapore (M. I. Bertrand et al., "Dispensing Digital Justice: COVID-19, Courts, and the Potentially Diminishing Role of Jury Trials" (2021), 10 *Ann. Rev. Interdisc. Just. Res.* 38, at p. 39). The Action Committee on Court Operations in Response to COVID-19, established by the federal government, stated that in-trial jury proceedings were hazardous as court facilities in that context could be a location for contraction and transmission of the virus due to "[p]oorly ventilated and crowded places", "[p]rolonged close contact and close-range conversations between jurors, counsel, the judge, court staff" and "[c]ontact with common surfaces in the courtroom, within the jury stand, in the jury room, or during movement between locations" (*In-Trial Criminal Jury Proceedings*, last updated December 14, 2022 (online)).

[176] Some argued that the forcing of in-person jury trials during the pandemic not only exposed jurors to serious health risks, but that this also endangered justice, because it could lead to higher risks of faulty verdicts, mistrials, and juries not representative of the community (M. D. Wilson, "The Pandemic Juror" (2020), 77 *Wash. & Lee L. Rev.* 65). Others noted that consenting to judge-alone trials when this was the accused's wish was a step available to the Crown to avoid additional delay in the context of the pandemic (P. Paciocco, "Trial Delay Caused by Discrete Systemwide Events: The Post-*Jordan* Era Meets the Age of COVID-19" (2020), 57 *Osgoode Hall L.J.* 835, at p. 853). As noted above, *Jordan* was a call incumbent on all participants of the judicial system, including Crown counsel, to take actions to move beyond a "culture of complacency" and ensure that the constitutional rights of accused individuals were met (para. 41).

[177] It is hard to overstate the degree of uncertainty that loomed over the criminal justice system in the summer of 2020. The trial judge's motion reasons demonstrate her view that the Crown's decision undermined public confidence in the criminal justice system and thus, undermined the integrity of that system. At paragraph 98, she wrote:

> [TRANSLATION] In the circumstances, when the health guidelines are constantly evolving and influencing the measures to take to hold trials, and when the infection situation instead of easing off seems to be picking up again, giving rise to huge concerns in the community, particularly for vulnerable persons, and when the month of September corresponds to the return to school and the return from holidays, it is unfortunate to see that the Prosecutor is not sufficiently considering the community's interest in avoiding, when possible, convening hundreds of people to form a jury as

> well as the risks of starting a trial that may not conclude within the time limits. [Emphasis added.]

[178] When the trial judge was drafting those reasons, the courtrooms had only recently reopened after a period of closure and the staffing levels were not yet back to full capacity. The reduced number of staff meant that the court system was operating under significant constraints. Many accused persons who wanted to exercise their constitutional right to a jury trial had to wait while the courts were fully closed between March and June 2020. Aware of the growing backlog and pressure on the court system, the trial judge wrote at para. 103 of her decision:

> [TRANSLATION] In addition, requiring the Court's presence over several weeks even though the trial could be shorter adds to the already heavy burden on the judicial system, but also to the limitations on infrastructures and availability of rooms and staff, whereas an attempt must be made to hold not only the scheduled trials, but also those that had to be postponed because of COVID-19.

[179] This illustrates that in the specific and exceptional circumstances of the summer of 2020 in the midst of the COVID-19 pandemic, the Crown's decision amounted to abuse of process. The next question is what remedy was appropriate.

[180] In the "clearest of cases", the appropriate remedy will be a stay of proceedings. One of the conditions for a stay to be ordered is that "[t]here must be no alternative remedy capable of redressing the prejudice" (*Babos*, at para. 32). The question is whether a remedy other than a stay "will adequately dissociate the justice system from the impugned state conduct going forward" (para. 39). A remedy other

than a stay in response to the residual category of abuse of process serves both the interest of the society to adjudicate the case on the merits and the interest in maintaining the integrity of the justice system (J. Couse, "'Jackpot:' the Hang-Up Holding back the Residual Category of Abuse of Process" (2017), 40 *Man. L.J.* 165, at p. 181). In this case, there was a remedy less drastic than a stay capable of redressing the prejudice. Ordering a trial by judge alone under the abuse of process doctrine was appropriate.

IV. Disposition

[181] I am in accord with Karakatsanis J. that the case should be remanded to the Court of Appeal. In agreeing with my colleague in declining to order a stay of proceedings, I highlight that the decision to pursue remaining grounds of appeal is now in the hands of the respondent. If the Crown decides to pursue its remaining grounds of appeal, and the Court of Appeal allows the appeal and orders a new trial, it will also be at the court's disposal to order a stay under s. 686(8).

[182] In assessing the countervailing considerations between society's interest in the full adjudication of this case on the merits and whether a new trial would lead to an "oppressive result" (*R. v. Ryan*, 2013 SCC 3, [2013] 1 S.C.R. 14, at para. 35), I would think it to be wise to note the following factors: the appellant has already served a sentence equivalent to nine years and three months and has reintegrated into his community and family life (A.R., vol. I, at p. 91).

[183] In all cases, that decision is now in the hands of the respondent who will, in the exercise of its discretion, determine whether the public interest requires that the remaining grounds of appeal be pursued.

Appeal allowed.

Solicitors for the appellant: Latour Dorval, Montréal.

Solicitor for the respondent: Director of Criminal and Penal Prosecutions, Montréal.

Solicitor for the intervener Attorney General of Ontario: Attorney General of Ontario, Crown Law Office — Criminal, Toronto.

Solicitor for the intervener Attorney General of British Columbia: Attorney General of British Columbia — Criminal Appeals and Special Prosecutions, Vancouver.

Solicitor for the intervener Attorney General of Alberta: Alberta Crown Prosecution Service — Appeals and Specialized Prosecutions Office, Calgary.