

Abuse of Process: The Need for Structure

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I INTRODUCTION

The purpose of this article is to propose a more principled framework for determining permanent stay applications in criminal trials. In particular, it suggests how the courts might better respond to abuse of process pleadings, which allege that continuing the prosecution would offend the court's sense of justice.

In my opinion, the prevailing approach to determining such applications has been unsatisfactory in two principal respects. First, the very concept of abuse of process is inadequately defined, with judgments often reaching a conclusion without any reasoning. This is problematic because a minimalist approach cannot guide the executive on the limits of acceptable policing and prosecution. Also, it invites defendants to file unmeritorious stay applications, which are a waste of court resources. The argument made in this article is that — despite the inherent difficulty in defining normative concepts — the courts would do well to categorise abuses of process into a non-exhaustive taxonomy.

The second problem is that the courts have often suggested that the stay of proceedings is an automatic remedy wherever an abuse of process is established. This is an erroneous and dangerous assumption. It results in the courts working backwards from the conclusion that no stay is warranted to the premise that no abuse of process has occurred. At times, this premise is patently unreasonable, requiring a major departure from ordinary understandings of abuse of process as an objective concept. Further, the courts' failure to separate the two stages of inquiry means forgoing an opportunity to consider alternative, more appropriate remedies and to criticise executive misconduct. Therefore, it is better to view the stay as one possible action among many to prevent the occurrence or continuation of an abuse of process. To determine whether it is appropriate in a given case, the courts should consider whether any lesser remedy is available and whether the broader public interest compels it.

Importantly, this proposal is only one possible alternative to the current framework. Hopefully this article will prove that the prevailing approach is deficient and encourage discourse from more experienced minds as to the future direction of the law.

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II PRELIMINARY MATTERS

What is the Point of the Debate?

Before proceeding to the substantive arguments, I anticipate an initial question, namely: “who cares?” In light of the proposal outlined above, the reader might fear that what follows is a discussion of antiquated judicial power, redundant in modern society. One might even feel inclined to set this article down now, to avoid being exposed to abstract academic quibbling.

To settle such concerns, I assure the reader that the questions raised in this article are of great importance to society. Indeed the abuse of process doctrine typically arises in situations that expose two strongly held beliefs in New Zealand. Consider, for example, a recent case in which 151 serious charges were dropped and then reinstated against 21 members of the Red Devils Motorcycle Club in Nelson.¹ In that case, the police had tried to bolster the credibility of an undercover officer within the group by forging search warrants and bringing sham criminal proceedings against him. The High Court described this action as a gross abuse of process, for which the 21 accused were dismissed.² By contrast, the Court of Appeal considered that, although the police misconduct was serious, a stay of proceedings was not appropriate because it had little bearing on the trial itself.³ When approaching a case such as this one, there is, on the one hand, a strong sense that the judiciary must uphold the rule of law and prevent the executive from abusing its powers. On the other hand, however, many ordinary New Zealanders will likely feel uneasy watching potentially dangerous individuals walk free “on a technicality” despite the merits of the case against them.

The way we resolve this tension at a legal level is important for two reasons. First, the approach we adopt for determining abuse of process pleadings will have a bearing on the outcome, at least in marginal cases. Put another way, our choice of legal methodology has practical ramifications for real defendants in real cases. Second, the framework we adopt reflects the very nature of our society. It speaks volumes about our commitment to due process, retributive justice and their hierarchical interplay. Specifically, it indicates the point at which our desire to maintain an unsullied justice system yields to the concern that there are some individuals who *belong* in the criminal justice system. These are the reasons why the reader should care about the debate and they should be borne in mind when considering the legal analysis that follows.

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- 1 *R v Antonievic* [2012] NZHC 2686 [*R v Antonievic* (HC)]; and *R v Antonievic* [2013] NZCA 483, [2013] 3 NZLR 806 [*R v Antonievic* (CA)]. The charges included participation in an organised criminal group, conspiracy to cause grievous bodily harm, threatening to kill and drug offences relating to the supply of methamphetamine
 - 2 *R v Antonievic* (HC), above n 1.
 - 3 *R v Antonievic* (CA), above n 1, at [109] and [115]. One of the accused, Terry Jones, applied for leave to appeal to the Supreme Court against the decision to set aside the stay. The Supreme Court held that there was no jurisdiction to grant leave to appeal and accordingly the application was dismissed: *Jones v R* [2014] NZSC 85.

The Scope of My Argument

As a second preliminary point, it is necessary to identify two limits of my argument. First, I focus exclusively on the courts' inherent jurisdiction to stay proceedings.⁴ This is despite the fact that the judiciary has two separate powers to terminate criminal proceedings, namely, a statutory power that may be invoked in a range of circumstances including abuse of process cases, and an inherent power that applies exclusively to abuse of process.⁵

This focus requires justification because one might suggest that the inherent power is redundant in light of its statutory equivalent. Given that the statutory power covers all situations to which the inherent power applies, the latter could be perceived as superfluous. I do not accept this argument. Defendants continue to peg their stay applications on the inherent jurisdiction and the courts continue to approach the question on that basis. Besides, the courts have not indicated that their inherent power has been replaced by the statutory power. At a more fundamental level, even assuming for argument's sake that abuse of process has been subsumed within the statutory power, one still needs to understand how to approach the identical issues in that context. As such, a principled framework for determining abuse of process pleadings is necessary regardless of the jurisdiction invoked to hear them.

The second limitation of this article is that my arguments do not extend to "fairness" abuse of process cases. By way of introduction, the courts have categorised abuse of process cases into two broad fields: first, where a fair trial has become impossible; and secondly, where trying the accused in the circumstances of the case would offend the court's sense of justice and propriety.⁶ I focus exclusively on the latter category because the fairness cases are more straightforward,⁷ more often encountered and better understood by the judiciary.⁸ Accordingly, my arguments relate to the courts' handling of the "sense of justice" cases.

4 The terms "inherent jurisdiction" and "inherent power" are used interchangeably in this article. While the concepts differ in some respects, the distinctions are not material for present purposes. For detailed analysis of the issue, see generally *Department of Social Welfare v Stewart* [1990] 1 NZLR 697 (HC); and *Watson v Clarke* [1990] 1 NZLR 715 (HC).

5 Criminal Procedure Act 2011, s 147. Before 1 July 2013, this power was vested in the court by virtue of the Crimes Act 1961, s 347.

6 *Beckham v R* [2012] NZCA 603, [2013] 1 NZLR 613 at [43].

7 See generally *R v Bain* HC Christchurch CRI-1994-012-217294, 2 March 2009. The court must merely decide whether, as a matter of fact, it has become "impossible" to ensure a fair trial for the accused.

8 See generally *R v BJ* HC Auckland CRI-2009-092-9763, 9 November 2011; and *H v R* HC Rotorua CRI-2011-019-002091, 2 December 2011.

III THE STATUS QUO: AN UNSATISFACTORY FRAMEWORK

With those qualifications in place, it is possible to set out the courts' current approach to abuse of process pleadings. The leading principles are set out in *Moevao v Department of Labour*⁹ and *Fox v Attorney-General*,¹⁰ with additional helpful comments made in *R v Bain*.¹¹

According to the Court in *Bain*, the starting point is that the discretion whether to prosecute is the prerogative of the executive. Therefore, judicial intervention to stay proceedings will always be exceptional, preserving the doctrine of the separation of powers.¹² Nevertheless, the courts retain an inherent jurisdiction to do so in order to prevent an abuse of their processes. As stated in *Moevao*:¹³

It is not the purpose of the criminal law to punish the guilty at all costs. It is not that that end may justify whatever means may have been adopted.

...

The justification for staying a prosecution is that the Court is obliged to take that extreme step in order to protect its own processes from abuse. It does so in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under law. It may intervene in this way if it concludes from the conduct of the prosecutor in relation to the prosecution that the Court processes are being employed for ulterior purposes or in such a way (for example, through multiple or successive proceedings) as to cause improper vexation and oppression. The yardstick is not simply fairness to the particular accused. It is not whether the initiation and continuation of the particular process seems in the circumstances to be unfair to him. That may be an important consideration. But the focus is on the misuse of the Court process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognised purposes of the administration of criminal justice and so constitutes an abuse of the process of the Court.

The separate judgments in *Moevao* were rationalised in *Fox*,¹⁴ where the Court stated:¹⁵

These principles set a threshold test in relation to the nature of a prosecutor's conduct which warrants a decision to end a

⁹ *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA).

¹⁰ *Fox v Attorney-General* [2002] 3 NZLR 62 (CA).

¹¹ *R v Bain*, above n 7.

¹² At [22].

¹³ *Moevao v Department of Labour*, above n 10, at 481–482.

¹⁴ Richmond P, Woodhouse and Richardson JJ wrote separate judgments. However, their views on the issue of abuse of process were largely consistent. As such, the passages above may be taken as the central holding on abuse of process in the case.

¹⁵ *Fox v Attorney-General*, above n 10, at [37].

prosecution, prior to trial, as an abuse of process. Conduct amounting to abuse of process is not confined to that which will preclude a fair trial. Outside of that category it will, however, be of a kind that is so inconsistent with the purposes of criminal justice that for a Court to proceed with the prosecution on its merits would tarnish the Court's own integrity or offend the Court's sense of justice and propriety. The power of stay is not available for disciplinary purposes nor to reflect a Court's view that a prosecution should not have been brought. The hallmarks of official conduct that warrant a stay will often be bad faith or some improper motive for initiating or continuing to bring a prosecution but may also be simply a change of course by the prosecution having a prejudicial impact on an accused. Finally, to stay a prosecution, and thereby preclude the determination of the charge on its merits, is an extreme step which is to be taken only in the clearest of cases.

IV FIRST PROBLEM: WHAT IS AN ABUSE OF PROCESS?

With respect, there are at least two problems with the foregoing statements and their application in subsequent cases. First, inadequate explanation is provided as to what constitutes an abuse of process under the "sense of justice" limb of the doctrine. Secondly, the courts sometimes erroneously assume that a finding of abuse of process necessarily triggers a permanent stay of proceedings. In the following sections, I consider the two problems in turn and propose a solution in each case.

Insufficient Guidance as to What Constitutes an Abuse of Process

The decisions in *Moenvao* and *Fox* provide little guidance as to what constitutes an abuse of process in the "sense of justice" cases. Stripping away the prose, one is left with only a few, very high-level directions from the courts. First, that an abuse of process will exist where proceeding to trial would be inconsistent with the recognised purposes of the administration of criminal justice. Secondly, that an example of abuse of process is where the court's processes are used for ulterior purposes, or to cause vexation or oppression. Additionally, although not cited above, the Court in *Moenvao* made clear that the underlying objective of the abuse of process doctrine is the maintenance of public confidence in the administration of justice.¹⁶

This article suggests that these directions are so abstract that they offer very little practical assistance. Clearly, abuse of process refers to a trial that would be defective or tainted due to its connection with wrongdoing. But several important issues remain. For example, must the misconduct have been committed by a particular party, say the prosecutor, as is suggested above? What exactly are "the recognised purposes of the administration of criminal justice"? Is it open to every judge to have his or her own view of

16 *Moenvao v Department of Labour*, above n 9, at 481.

what these purposes are? While one might suggest that the answers to these questions are axiomatic, I struggle to accept that they are. Rather, I subscribe to Lord Hoffmann's view that leaving the test at a very general level invites "highly subjective answers" from judges and a "'chancellor's foot' veto over law enforcement practices of which [they do] not approve".¹⁷

Without sufficient guiding principles, judges are forced to determine stay applications on an ad hoc basis. This is particularly worrying insofar as they often provide minimal reasoning on the facts to justify their determinations. Consider, for example, *R v Harder*, in which the defendant was charged with conspiracy to supply methamphetamine.¹⁸ The abuse of process issue in that case arose through the police's intended method of linking the accused to essential incriminating evidence. They planned to do so by using covert voice recordings of people discussing their plan to manufacture the drug.

Initially, police officers were to testify that they could identify the defendant as the person speaking on the tapes because they had spoken with him during his arrest and questioning at the police station. In reality, these conversations had occurred in breach of the defendant's rights. After having exercised his right to consult counsel, the police nevertheless engaged the defendant for the direct purpose of eliciting evidence. Accordingly, the Court of Appeal excluded their testimony about these conversations. But it allowed the officers to identify the accused by reference to other earlier conversations and engagements they had had with him, excluding from their mind any opinion formed from the tainted conversations. The accused argued, inter alia, that permitting such testimony was an abuse of process. In response, the Court simply paraphrased *Moevao* and stated that "[t]his case falls far short of any such test" because the accused had voluntarily engaged with the officers on the other occasions.¹⁹

While I do not claim that the holding in *Harder* was incorrect — I make no comment on the substantive issue — my point is that the reasoning behind the decision was less than satisfactory. Even if we assume that the result was correct, we have no understanding of why that is so. This is true of many abuse of process cases in New Zealand,²⁰ leading one author to suggest that the courts frequently hear and dispose of stay applications "with little notice".²¹ Unfortunately the outlook is no better abroad. Commentators in the United Kingdom similarly lament the lack of judicial direction in this

17 *Regina v Looseley* [2001] UKHL 53, [2001] 1 WLR 2060 at [47], citing *Regina v Sang* [1980] AC 402 (HL) at 431 per Diplock LJ and *United States v Russell* 411 US 423 (1973) at 435 per Rehnquist J.

18 *R v Harder* CA422/05, 29 May 2006.

19 At [34].

20 See, for example, *R v Campbell* HC Wellington CRI-2005-085-003703, 13 December 2007 at [9]; *Lisiate v R* [2013] NZCA 129, (2013) 26 CRNZ 292 at [39]–[46]; *Whale v R* [2013] NZCA 67 at [12]–[24]; and *R v C* HC Christchurch CRI-2008-009-014401, 31 July 2009 at [61]–[64]. While the depth of reasoning varies across these authorities, I submit that none is adequate.

21 AM Powell "Abuse of process in criminal cases" [2006] NZLJ 385 at 385.

area.²² In both jurisdictions, the cases fail to provide reasoned justifications for their conclusions, which severely limits their precedential value.

Why the Uncertainty Matters and Why Further Direction Is Required

Of course, different degrees of uncertainty exist in various areas of the law. Indeed, in some contexts flexibility is seen as vital to the just resolution of individual cases. As such, one might question my focus on uncertainty in the abuse of process context. The answer to that concern is two-fold. First, greater clarity is necessary to reduce the burden on the courts arising from hopeful stay applications that lack any real prospect of success. Secondly, more detailed explanation is required in order to provide meaningful guidance to the executive on the proper boundaries for apprehending offenders and processing them through the criminal justice system.

1 Uncertainty Invites a Waste of Court Resources

First, I suggest that the courts' failure to articulate reasons in determining abuse of process pleadings has served as a lure for unmeritorious stay applications. It is clear today that the abuse of process doctrine constitutes "one of the largest growth areas of law in the criminal trial jurisdiction", with defendants filing stay applications on a routine basis in New Zealand.²³ Reported decisions comprise only a tiny fraction of the total number of filed applications, as many applications are made and disposed of orally in cursory fashion.²⁴ Similarly in the United Kingdom, stay applications have been "made far too frequently",²⁵ to the point where former Lord Chief Justice Woolf remarked that they are "a normal feature of heavy and complex cases".²⁶

Of course, many stay applications have a reasonable prospect of success. My point is simply that others do not. In *R v Campbell*, for example, the accused applied for a permanent stay on the basis that the complainant's father was a partner in the firm of the Crown Solicitor in Wellington. This was despite the fact that the prosecution was not being handled by that office.²⁷ Further, this is almost certainly a mild example of an unmeritorious application: the truly hopeless ones are likely to be dismissed orally and go unreported as a result.

22 See generally Patrick O'Connor "Abuse of Process" after *Warren and Maxwell*" (2012) 9 Crim LR 672.

23 Richard Bray "Beckford and Beyond. Some Developments in the Doctrine of Abuse of Process." (2007) 19 Denning LJ 69 at 69.

24 For example, a Linxplus search for cases in which the courts have determined abuse of process applications generates close to 500 results.

25 Alec Samuels "Abuse of Process Applications – A Tougher Stance" *Criminal Law and Justice Weekly* (online ed, 9 March 2013).

26 Lord Chief Justice of England and Wales "Control and Management of Heavy Fraud and Other Complex Criminal Cases" (22 March 2005) The Crown Prosecution Service <www.cps.gov.uk> at 12.

27 *R v Campbell*, above n 20, at [9].

I suggest that there is a causative link between the large volume of stay applications and the lack of guidance provided by the courts. Where the “jackpot of judicial remedies” is potentially available and the basis on which the courts grant it is unclear, defendants will naturally try to invoke the doctrine.²⁸ Further, I suspect that defence lawyers might often feel ethically bound to plead abuse of process to fulfil their obligations to clients and avoid being accused of professional negligence.

Due to the uncertainty, defendants are motivated to present one big “‘rolled up’ argument”²⁹ as to why their case should be thrown out.³⁰ This is a waste of the courts’ valuable resources. It is impossible to criticise the strategy, however, because there are no objective standards against which to determine whether the applications are frivolous or vexatious. As such, the courts will likely remain burdened by an unnecessarily large volume of stay applications as long as the uncertainty persists. It would be better to clearly articulate a set of guiding principles today, so as to avoid a needlessly heavy workload going forward.

2 *Uncertainty Heightens the Risk of Executive Misconduct*

The second reason for which further guidance is required is that the current ad hoc approach cannot guide the executive in policing and prosecuting crime. Without judicial direction, the police are unable to accurately identify the dividing line between proper investigatory conduct and impropriety that might jeopardise a prosecution. Similarly, Crown prosecutors must struggle to identify the frontier between proper and improper trial strategy. Even Crown Law’s Prosecution Guidelines, for example, fail to provide any more guidance on abuse of process than to simply state that the courts’ jurisdiction to stay exists.³¹

This problem’s significance is apparent when one considers how it might play out in practice. Consider, for example, the issue of how the police may compel an accused to return from overseas for prosecution. While formal extradition procedures will govern ordinary cases, what happens in a situation where no process exists between the two states,³² or where extradition efforts would fail on a technicality?³³ To this question, one might suggest that the police should simply take a very cautious approach to ensure that their conduct will not undermine the subsequent trial. However, the problem is that effective policing during both the investigatory and apprehension stages increasingly requires officers to work very close to the

28 Tim Quigley “Stays of Proceedings due to Police Misconduct” (2011) 79 CR (6th) 124 at 130.

29 *R v Bain*, above n 7, at [20].

30 See, for example, *R v Campbell*, above n 20, at [4]–[10]. The accused put forward four alternative arguments as to why the proceedings against him should be terminated: first, no useful purpose would be served by the proceedings; secondly, the trial had been unacceptably delayed; thirdly, the prosecution constituted an abuse of process; and finally, the prosecution was patently unfair.

31 Crown Law Office *Prosecution Guidelines* (1 January 2010) at [1.4].

32 See *Regina v Horseferry Road Magistrates’ Court, ex parte Bennett* [1994] AC 42 (HL).

33 See *Regina v Mullen* [2000] QB 520 (CA).

dividing line between propriety and impropriety.³⁴ As such, the police are often forced to act, meaning they may act improperly — albeit unknowingly so — in some cases.

I suggested earlier that New Zealand, as a society, values two conflicting ideals: the protection of the rule of law and the need to publicly determine criminal cases. If we are serious about these values, then it is better to provide detailed guidance to police officers in advance. If the courts clearly state the test for abuse of process and the factors that weigh into their decisions, police officers could be fully trained on the subject. Consequently, the police could make informed decisions at a practical level. Abroad, officers have been educated about entrapment principles.³⁵ There is no obvious reason why a similar process cannot be implemented in this context. This would help the police to operate on the legal side of the divide, promoting our interest in maintaining a clean criminal justice system. Further, it would advance our interest in trying criminal defendants because prosecutions would not be thwarted by defects in the trial that are unrelated to the evidence against them.

Providing a Better Approach

I suggest that the present uncertainty — and the attendant problems for the executive, the defendants and the courts — can be mitigated by a more detailed framework for determining whether misconduct amounts to abuse. I accept that it is probably impossible to exhaustively define “abuse of process”. Still, I reject the proposition that this difficulty validates our failure to do better.

I suggest that a non-exhaustive taxonomy of different kinds of abuses provides a superior framework. To illustrate that in practical terms, the court would first ask whether the case falls under the “fairness” or “sense of justice” limb of abuse of process. If the latter, the court would then ask whether the case falls into a recognised category of abuse. This would allow the court to identify and discuss the various contextual levers that apply in that distinct area. For example, the court could note that the proceedings at hand might be abusive because of a breach of prosecutorial promise. It would then state the requisite nature of the promise and the incumbent prejudice that must be established by the accused. Finally, the court would refer to decided cases to gauge whether those thresholds are met.³⁶

This approach would function similarly to the method of determining whether a person owes another a duty of care in tort. In that context, the overarching test is whether it is fair, just and reasonable to impose a duty. This occurs by examining the proximity between the parties and any relevant policy considerations.³⁷ From this overall principle, the

34 *Warren v Attorney General for Jersey* [2011] UKPC 10, [2012] 1 AC 22 at [61].

35 O'Connor, above n 22, at 681.

36 David Young, Mark Summers and David Corker *Abuse of Process in Criminal Proceedings* (3rd ed, Tottel, England, 2009) at 50.

37 See generally *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341.

court then identifies what category the case falls into, with that determination dictating what will satisfy the proximity test and what policy concerns will apply.³⁸ Despite this approach, which provides a method but not necessarily any answers, I suggest that it gives real substance to a normative concept, one that is just as amorphous as abuse of process.

I am especially inclined to this strategy because academics have already made praiseworthy efforts towards a taxonomy of this nature. Young, Summers and Corker, for example, have catalogued the recognised abuses of process in the United Kingdom and explained the considerations which apply in each area.³⁹ While accepting that the categories are never closed, they divide the otherwise jumbled mass of cases into: delay, breach of prosecutorial promise, loss or destruction of evidence, police misconduct abroad, entrapment, double jeopardy and pre-trial publicity. Further, some of these categories themselves serve as umbrella terms, housing more specific instances of abuse. This more detailed analysis would provide greater certainty to the executive, judiciary and defendants alike. Accordingly, the courts should consider translating something comparable into the law on abuse of process in New Zealand.

Defending My Method of Definition

Three major objections are likely to be raised against this proposal and it is necessary to respond to all of them. First, one might argue that by codifying abuses of process the courts would lose the flexibility that is so essential in this area. According to Mathias, abuse of process is a continually evolving concept, meaning it would be foolish to try to enumerate all of its manifestations.⁴⁰ Similarly, the Court of Appeal has stressed that “[r]igid categorisation” is undesirable when considering the stay jurisdiction.⁴¹

I respond by accepting the objection’s premise but rejecting its conclusion. Evidently, novel abuses of process will always arise but this does not mean we cannot catalogue the classes of cases that are already recognised as abusive. In fact, provided we accept that the list of abuses is never exhaustive and that there is a residual discretion to label proceedings abusive, then there is no risk of worthy cases slipping through the gaps. It is much better to achieve clarity where it is possible than it is to say that, because we cannot achieve certainty in all areas, it is necessary to govern the entire range of cases with a broad, residual discretion.

38 By “categories of cases”, I refer to the different classes of factual scenarios that have been identified by the courts, for example, defective building cases, negligent misstatement cases and omissions cases.

39 Young, Summers and Corker, above n 36.

40 Don Mathias “The Duty to Prevent an Abuse of Process by Staying Criminal Proceedings” in Bruce Robertson (ed) *Essays on Criminal Law: A Tribute to Professor Gerald Orchard* (Brookers, Wellington, 2004) 133 at 134.

41 *R v Antonievic* (CA), above n 1, at [57]. In fairness, the Court of Appeal stated that categorisation is unhelpful in relation to the decision whether to stay, not in relation to whether conduct is seen as abusive. Nevertheless, the judgment indicates a clear preference for a holistic rather than mechanical approach. I imagine that the judges sitting in that case would share this concern about a taxonomy.

The second likely objection is that a taxonomy would simply be unhelpful. One might suggest that even after sorting abuses under convenient labels, we would still not know what they are in substance. To put it another way, determining whether a trial is — or will become — abusive would remain a highly fact-specific question that can only be resolved with a heavy measure of discretion. This is a particularly important issue because if this proposal were as uncertain as the current model then it would be futile to adopt it.

A satisfactory answer is available, however, because the depth of analysis in the literature goes well beyond sorting the cases under labels. In each category of abuse, Young, Summers and Corker provide detailed explanation of why the particular conduct can be seen as abusive, what considerations are germane in the category and any threshold requirements they view as appropriate. It would be helpful for the courts to develop clear categories of cases and the relevant analysis applicable to each.

Even if one accepts that codification is desirable in principle, the third objection is that the content of the suggested code is incorrect. Paciocco, for example, would argue that my schema is over-inclusive. According to him, the abuse of process doctrine is confined to misuse of the court's *actual processes*. It is wrong, he says, to transform the doctrine into a banner term encapsulating executive misconduct that is only tangentially connected to actual court procedures.⁴² From his perspective, breach of prosecutorial promise, for example, could not be included in the taxonomy because the accused objects to the very decision to prosecute, not to any use of the court's processes.⁴³

I offer two responses to Paciocco. First, my purpose in this article is primarily methodological and I ignore a number of narrower questions about what will qualify as abusive proceedings.⁴⁴ My goal is to suggest how the courts might better structure their analysis, not necessarily to provide the component parts of the taxonomy. I have used Young, Summers and Corker's substantive catalogue only as an example, albeit an attractive one, of how my proposal might be taken up in practice. Thus, while I offer their particular catalogue as the most logical and defensible I know of, I accept in principle that a superior approach may arise in the future.⁴⁵

42 David M Paciocco "The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept" (1991) 15 Crim LJ 315 at 318–327. It bears noting, however, that Paciocco does in fact accept that the court may terminate proceedings in this broader range of circumstances. The error, he says, is in claiming that the stay is granted to prevent abuse of process.

43 At 320.

44 See, for example, *R v Antonievic* (CA), above n 1, at [80]–[94]. The Court of Appeal discussed whether or not the abuse of process doctrine is exclusively prospective in the sense that the focus must always be on how misconduct will affect a proposed trial. While I endorse the Court's analysis of that issue, substantive questions such as this one are beyond the methodological purpose of this article.

45 See *R v Nixon* [2011] SCC 34, [2011] 2 SCR 566. One might take direction from Canada in filling in the substantive side of the taxonomy. There, abuses of process must be tagged to a particular right recognised under s 7 of the Canadian Charter of Rights and Freedoms, save in exceptional circumstances.

Nevertheless, even taking Paciocco on his own terms, I think he is incorrect to say that abuse of process is inherently limited to misuse of the court's *actual processes*. As a matter of law, the concept is not confined in this way. On the contrary, as stated by Woodhouse J in *Moevao*:⁴⁶

It is essential to keep in mind that it is the “process of law”, to use Lord Devlin’s phrase, that is the issue. It is not something limited to the conventional practices or procedures of the Court system. It is the function and purpose of the Courts as a separate part of the constitutional machinery that must be protected from abuse *rather than the particular processes* that are used within the machine. It may be that the shorthand phrase “abuse of process” by itself does not give sufficient emphasis to the principle that in this context *the Court must react not so much against an abuse of the procedure* that has been built up to enable the determination of a criminal charge as against *the much wider and more serious abuse of the criminal jurisdiction in general*.

As Woodhouse J and others make clear, criminal justice is an ongoing process.⁴⁷ It is not possible to delineate each aspect neatly and call them discrete parts.⁴⁸ As such, society ought to be concerned with the proper treatment of defendants and due process at every stage. The abuse of process doctrine should reflect this by responding wherever failings in those regards impact on the propriety of present proceedings.

Taking Stock

Before proceeding to my second substantive argument, it is useful to take stock of what has been said so far. I have argued: first, that the courts have provided insufficient guidance as to what constitutes an abuse of process; secondly, that this is problematic for the executive, judiciary and defendants alike; and thirdly, that better direction may be provided through a non-exhaustive taxonomy of abuses. If I have successfully shown that my proposal provides greater certainty than the current model and if I have rebutted the supposed impediments, then I respectfully encourage the courts to consider it.

V SECOND PROBLEM: AN ABUSE DOES NOT AUTOMATICALLY TRIGGER A STAY OF PROCEEDINGS

This section of the article will address the second problem with the prevailing approach to abuse of process pleadings: the common assumption

⁴⁶ *Moevao v Department of Labour*, above n 9, at 476 (emphasis added).

⁴⁷ *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL) at 536. Diplock LJ states that abuse of process covers “misuse of [the Court’s] procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless ... bring the administration of justice into disrepute among right-thinking people”.

⁴⁸ Antony Duff and others *The Trial on Trial: Volume 3 – Towards a Normative Theory of the Criminal Trial* (Hart Publishing, Portland, 2007) at 226.

that a finding of abuse of process will necessarily result in a stay. In fact, stays are merely one action among many that may be taken to prevent or correct abusive proceedings.

This section identifies instances in which the courts have made this assumption and explains why it is problematic to do so. I then suggest — and attempt to justify — an alternative two-stage approach that clearly separates the two pertinent questions. First, whether there is, or will be, an abuse of process and, secondly, whether a stay is the most appropriate remedy. Throughout, I refer to the courts' current framework as the “unitary approach” and to my proposed alternative as the “two-stage approach”.

The Current View: a Unitary Approach

Prevalent in New Zealand judgments is the assumption that a permanent stay of proceedings is an automatic remedy for abuses of process. Consider, for example, the recent High Court and Court of Appeal decisions dismissing an application to stay proceedings in the *Beckham* trial.⁴⁹ Mr Beckham was charged with serious drug dealing offences. He applied for a stay of proceedings on the basis that the police had seized — and potentially listened to — privileged phone calls between himself and his lawyer.⁵⁰ While the phone calls were obtained as part of an entirely separate operation to the one relating to Mr Beckham, he argued that the police had violated his right to communicate with counsel. Thus, even though the police misconduct presented no prejudice or unfairness to him, Mr Beckham claimed their actions would taint any prosecution brought against him. Therefore, he claimed the court was required to stay proceedings under the “sense of justice” limb of the abuse of process doctrine.

In the High Court, Andrews J approached Mr Beckham's stay application by noting that the police officers did not act in bad faith when they seized the phone records. Moreover, the records were not going to be used in any substantive proceedings against the accused. Further, her Honour recognised that there was a strong public interest in determining Mr Beckham's guilt or innocence at trial. In light of these factors, her Honour concluded that the police conduct did not justify “the extreme step of finding an abuse of process”.⁵¹

Reading between the lines and recalling the direction in *Fox* that it is always an extreme step to stay proceedings, I respectfully suggest that the decision carries an implicit assumption that a stay of proceedings would have been an automatic remedy had an abuse been found.⁵² If Andrews J had thought that she could deny a stay even after classifying the police conduct as abusive, she would not have considered it an “extreme step” to label the proceedings as such.⁵³ Thus, the determination whether to grant a stay seems

49 *R v Beckham* HC Auckland CRI-2008-404-29112, 4 February 2011; and *Beckham v R*, above n 6.

50 At trial, it was found that the conversations were not in fact listened to by police.

51 *R v Beckham*, above n 6, at [82].

52 *Fox v Attorney-General*, above n 103, at [37].

53 *Beckham v R*, above n 6, at [29].

to have hinged on a single question: whether the proceedings would be abusive in light of the police behaviour.

Before explaining why this is problematic, it is worth noting that the same assumption was accepted in the Court of Appeal. On appeal, the issue was whether the High Court had erred by failing to recognise a legal presumption that breach of solicitor-client privilege constitutes an abuse of process. Mr Beckham argued that if the presumption had been correctly identified in the High Court a stay would have been granted as a matter of logic.⁵⁴ Implicit in this argument, of course, was the assumption that there is an automatic connection between abuses of process and stays of proceedings.

The Court of Appeal accepted this premise at face value, despite dismissing the claim on the facts. The Court stated that if it were to recognise any presumptions in relation to categorising conduct as abuse, this would have the unsavoury implication that it would have to grant many more stays.⁵⁵ Again, the Court tacitly accepted that there is an inevitable link between finding an abuse of process and granting a stay of proceedings.

With the major exception of the Court of Appeal in *R v Antonievic*,⁵⁶ similar reasoning has pervaded the treatment of abuse of process cases in New Zealand and across the Commonwealth.⁵⁷ While it is not helpful to discuss more examples here, there is ample evidence of the courts accepting “a more or less mechanical link” between the recognition of an abuse of process and the granting of a stay of proceedings.⁵⁸ As one commentator has noted, the courts have “hopelessly confused [the] issues of jurisdiction and remedy”.⁵⁹

How is the Unitary Approach “hopelessly confused”?

Aside from being mistaken as a matter of law — this assumption is undesirable because it results in undue hesitation to characterise executive misconduct as abusive. Because judges assume in advance that finding an abuse of process will automatically result in “‘the cudgel of judicial intervention,’ ‘the blunt force trauma of constitutional remedies,’ [or] ‘the jackpot of judicial remedies,’” they are understandably hesitant to apply that term.⁶⁰ Accordingly, judges allow the threshold for abuse of process to be elevated due to considerations that are irrelevant at that stage of the

54 *Beckham v R*, above n 6, at [55].

55 At [60]–[61].

56 *R v Antonievic* (CA), above n 1, at [91], [93], [102], [109] and [115]. In that case, the Court clearly distinguishes between the factual identification of abusive circumstances and the question whether a stay of proceedings is justified, given all the dimensions of the case.

57 See, for example *Hunter v Chief Constable*, above n 47, at 536, where Diplock LJ stated that once it has been determined that there has been an abuse of process, a court has a “duty”, not a “discretion”, to terminate proceedings.

58 Paciocco, above n 42, at 338. See also Mathias, above n 40; Steve Coughlan *Criminal Procedure* (2nd ed, Irwin Law, Toronto, 2012); and Lee Stuesser “Abuse of Process: The Need to Reconsider” (1994) 29 CR (4th) 92.

59 Paciocco, above n 42, at 316.

60 Quigley, above n 28, at 130.

analysis.⁶¹ Consider, by analogy, how a jury might be reluctant to enter a conviction where such decision will result in a severe penalty. Thus, as a result of judicial behaviour, the abuse of process label risks being confined to only the most extreme circumstances despite many other situations properly falling within the concept.

The courts' reluctance has two worrying implications. First, the unwillingness to characterise misconduct and its effect on proceedings as an abuse of process means that the courts forgo an opportunity to award a lesser, more appropriate remedy.⁶² As many academics explain, a stay of proceedings is merely one remedy among many that can be granted to prevent or correct abusive trials.⁶³ In some cases, for example, the courts may sufficiently dissociate itself from the executive's impropriety by excluding tainted evidence.⁶⁴ In other cases, it requires an order for further disclosure,⁶⁵ or ensuring that the accused receives more lenient treatment in sentencing.⁶⁶ While in some cases the courts' only solution will be to stay proceedings, it is a valuable exercise to consider the other options first. Given that the unitary approach does not permit such consideration, this is a reason for rejecting it.

The second problem with the unitary approach — and the consequent narrow conception of abuse of process — is that the courts cannot fulfil their important rhetorical function. In particular, they waive the opportunity to comment on the ambit of investigatory and prosecutorial propriety. As aforementioned, the courts sometimes conclude that executive conduct is not abusive without providing reasons for that conclusion. If pressed, their decisions often seem to be motivated in large part because of the spectre of staying proceedings, not because they find the conduct unobjectionable.

The courts should thus separate the determination of whether misconduct constitutes an abuse of process from the question of remedies. In doing so, they would be able to send clear messages about what conduct is, or is not, compatible with the fundamental principles of justice. They could take greater opportunity in their judgments to criticise undesirable practices, which is important because one of the fundamental rationales for the abuse of process doctrine is to allow the courts to dissociate themselves from executive misconduct.⁶⁷ Insofar as admonition alone is sometimes sufficient to achieve this purpose, the courts should embrace the opportunity to provide it.

On this second point, one might contend that issuing “yellow cards” is unhelpful,⁶⁸ or even claim that it is dangerous.⁶⁹ Presumably the concern is

61 Stuesser, above n 58, at 95.

62 Paciocco, above n 42, at 339.

63 Stuesser, above n 58; Paciocco, above n 42, at 338–339; Mathias, above n 40; and Coughlan, above n 58.

64 Paciocco, above n 42, at 335.

65 Coughlan, above n 58, at 305.

66 Paciocco, above n 42; and *R v Glykis* (1995) 24 OR (3d) 803 (ONCA).

67 *Regina v Latif* [1996] 1 WLR 104 (HL) at 112–113.

68 See *R v Antonievic* (HC), above n 1, at [74].

that the police will be made aware of what constitutes an abuse of process, but know that the requisite misconduct will only trigger a stay in certain circumstances. Accordingly, they might only endeavour to remain within the rules in those specific circumstances.⁷⁰ Put another way, by endorsing a two-stage approach where a finding of abuse will not necessarily trigger a stay, the court would essentially provide the police with both the rule book and an appendix of loop holes.

However, this concern is probably overstated. Even setting aside an officer's moral or ethical concerns, the stay jurisdiction is not the only "sanction" for which the police think twice about overstepping the mark.⁷¹ A stay of proceedings certainly has the indirect effect of recognising and rebuking police misconduct. However, there are various other mechanisms for achieving this outside the abuse of process doctrine. Professional standards must always be complied with and an officer will face personal liability wherever he or she crosses tortious and criminal boundaries without lawful justification. As such, there is a cost-free benefit in allowing the courts to comment on the boundaries of proper executive conduct without necessarily issuing a stay.

An Alternative: a Clearly Delineated Two-stage Approach

My next task is to provide an explanation of how a two-stage approach might operate in practice. In my view, the following is a valuable framework to work within.

After concluding on the facts that the trial is or will become abusive, the court would proceed in two steps.⁷² First, as a matter of law, it would only be able to stay proceedings if no other remedy is sufficient to remove the taint of abuse.⁷³ This reflects the traditional concern that a stay of proceedings is a dramatic remedy of last resort.⁷⁴

Secondly,⁷⁵ if no alternative remedy is available, the court's discretion would then be guided by a balancing test between the public interest in staying proceedings and the public interest in continuing with the

69 O'Connor, above n 22, at 678.

70 While more will be said on this point later, a two-stage test provides for the possibility that an abuse of process is found on the facts but that the trial nevertheless goes ahead because of countervailing considerations.

71 I do not use the term "sanction" to suggest that the stay jurisdiction can be used for disciplinary purposes. Rather, it indicates the discouraging effect that the prospect of a stay might have on the police in the execution of their duties.

72 To be clear, these two steps operate *within* the second stage of the two-stage approach. Therefore, viewing the entire framework together, the court first asks whether an abuse of process can be established on the facts. If so, it proceeds to the second stage of the inquiry, which itself is comprised of two parts, as detailed in the following passages.

73 This is borrowed from the Canadian approach in *R v Regan* 2002 SCC 12, [2002] 1 SCR 297 at [54].

74 *Fox v Attorney-General*, above n 103, at [37].

75 This second question might reasonably be viewed as the *only* consideration under the two-stage analysis. Indeed, it is possible to say that the first question is actually a method of answering the second. This is because the public interest in staying proceedings cannot possibly outweigh the public interest in proceeding to trial if a sufficient alternative remedy is available. While this is probably true, I prefer to separate the questions in the clearest, most logical way possible.

prosecution.⁷⁶ In doing so, the court would recall that the overarching function of the abuse of process doctrine is to maintain public confidence in the administration of justice. Thus, it would ask how each public interest promotes that ideal. Strong judicial discretion is required to answer this second question.⁷⁷ However, at a minimum, the court would consider the seriousness of the executive's impropriety and the gravity of the defendant's offending.⁷⁸ If, having undertaken those considerations, the public interest in staying proceedings outweighs the public interest in prosecuting the accused then a stay must follow.

This test responds to the inadequacies of the unitary approach noted above. First, it ensures that the question whether executive proceedings are abusive is not influenced by irrelevant concerns about the result of such categorisation. By contrast, it complies with our intuition that executive misconduct is either sufficiently serious to be labelled abusive or it is not. Secondly, once an abuse is established, it enables the court to consider alternative remedies that might be more just in the circumstances than a stay. Thirdly, it permits the court to make clear statements about the acceptability of executive conduct, which will hopefully be heeded in future. As an additional benefit, the two-stage approach provides greater conceptual clarity, which should result in increasingly well-reasoned pleadings and decisions. Given that uncertainty has been a major problem in this area, the fact that this test provides further clarity is another significant reason for preferring it.

Defending the Two-stage Approach

So far I have pointed out the deficiencies in the unitary approach and explained how a two-stage analysis responds to them. It is now necessary to subject the two-stage approach to its own scrutiny and to consider whether adequate replies are available. If not, then this article merely identifies the relative advantages and disadvantages of two different models.

An opponent of my proposal is likely to raise only one — albeit seemingly devastating — objection. In short, one would argue that my approach unacceptably permits the possibility that the courts might find an abuse of process on the facts but decide not to provide a remedy. This is possible because, even after finding that the proceedings have become abusive and no other remedy is sufficient, the court retains discretion whether to grant a stay. Inevitably, there will be some cases where the public interest in proceeding to trial outweighs the public interest in terminating proceedings. This, the critic would claim, is unacceptable because it is contrary to the fundamental purpose of the abuse of process doctrine: to

76 "Public interest" should not be taken to mean popular sentiment. Instead, I refer to considered opinion, always having regard to the constitutional structure of our society and our criminal justice system within it.

77 Paciocco, above n 42, at 347.

78 For a more extensive list of factors that may be relevant, see *Warren v Attorney General for Jersey*, above n 34, at [22]–[25].

prevent abusive trials from ever occurring. Citing *Moevao*, one would argue that the courts have a duty, not a discretion, to prevent abuse of process.⁷⁹

I offer two responses to this objection. First, I disagree with the notion that the courts have an absolute duty to prevent abuse of their processes. Although the courts have phrased their protective role in absolute terms, the duty to prevent abuse of process will necessarily give way in some circumstances. As is true in the context of civil and political rights, it is exceptionally difficult to isolate values that may never be sacrificed over others. Rather, there are always exceptions to the rule. Accordingly, I subscribe to Mathias' view that the courts have a duty to prevent abuse of process by the means appropriate in a given case.⁸⁰ In some cases it will be appropriate to prevent abuse by excluding evidence, in others by staying proceedings. But, in some circumstances, it will not be appropriate to respond to the abuse at all. This will occur where, having regard to the public confidence rationale of the abuse of process doctrine, there is an overwhelming countervailing interest in proceeding to trial.⁸¹

The second response accepts that the objection is perfectly valid. That is, I concede for the sake of argument that there is an absolute duty to prevent abusive trials. Further, I accept that the two-stage approach will sometimes allow proceedings to continue despite the fact that an abuse of process has occurred and no other remedy is available. Nevertheless, I reject the proposition that this is a conclusive reason for rejecting my proposal. Put simply, that is because no other approach is capable of adequately dealing with cases giving rise to this problem. As such, we should endorse the method which best manages the issue, which in my view, is the two-stage analysis.

To understand why this is so, it is useful to compare how each approach would respond to a situation giving rise to the problem. Consider, for example, an intensified version of the facts in *Antonievic*. As aforementioned, that case involved a complaint that the police had forged search warrants and brought sham proceedings before the Court to bolster the credibility of an undercover officer. For the purposes of this hypothetical, assume some additional facts. First, assume that the police also broke a number of laws overseas in order to track the defendants and that the police wrongdoing was a necessary condition of the charges being brought. These additional considerations are important because they allow us to say that the police conduct was abusive and would severely taint the pending trial. Secondly, consider that the defendants now stand trial for murder and rape rather than the less serious charges in *Antonievic*. This ensures that the public interest in prosecution is exceptionally high. Thirdly, consider that no

79 *Moevao v Department of Labour*, above n 9, at 481.

80 Mathias, above n 40, at 133.

81 See *R v Antonievic* (CA), above n 1, at [82] and [115]. In its most recent treatment of the issue, the Court of Appeal seems to agree with the broad proposition that abuses of process will sometimes not be visited with a remedy. According to the Court, this will generally occur where a past abuse of process will not be aggravated or continued by proceeding to trial, because in such a case there is no prospective risk to the public confidence in the administration of justice.

other remedy would sufficiently address the impropriety, for which the only possible remedy is a permanent stay of proceedings.

I suggest that this hypothetical situation would continue to trial regardless of whether the courts applied their current approach or the two-stage analysis. Given the seriousness of the alleged crimes, the prosecution would never be stayed. Therefore, the pertinent question is which approach provides a more justifiable rationale for that conclusion.⁸²

Under the prevailing unitary approach, the court would likely hold that no abuse of process had occurred. Following the reasoning in *Beckham*, it would assess all the circumstances of the case, concluding that the seriousness of the alleged offending precludes “the extreme step” of categorising the police misconduct as an abuse of process. As such, the stay application would necessarily be denied.

By contrast, under the two-stage analysis, the court would find that the police misconduct was abusive and that the resultant trial would be tainted. It would chastise the executive and issue strong warnings about the boundaries of proper policing. Nevertheless, the court would accept that a stay is unavailable because the public interest in trying 21 of the most serious criminals outweighs the public interest in insulating the court from this particular executive misconduct. As Powell observes, the court would recognise that, at times, dismissing a tainted case does more harm to public confidence in the administration of criminal justice than allowing it to proceed through the courts.⁸³

In my view, the latter rationalisation is preferable. The unitary approach requires manipulation of abuse of process as a legal concept. By working backwards from the conclusion that a stay is not appropriate, the court is forced to endorse the premise that the police’s wrongdoing has not made the trial an abuse of process at all. Surely this would be an unreasonable view to take. An abuse of process is clearly present on these hypothetical facts. Indeed, one might ask, if there is no abuse of process in this case, then when will there ever be?⁸⁴

On the other hand, the two-stage approach frankly recognises the objective, constant boundaries of abuse of process and identifies the police misconduct as falling within that definition. It states openly and honestly that an abuse of process will occur by proceeding to trial and provides reasons for why that is so. Next, it explains that a stay of proceedings is nevertheless unwarranted. It explains that the case draws out a tension between two competing public values, namely respect for due process and the interest in prosecuting criminals. It suggests that — as regrettable as it might be — the facts of the case require that the prosecution continue despite its obvious defects. This conclusion is justified because staying proceedings would

82 This is not to say that my proposed framework will generate the same conclusions as the current approach in every case. In fact, they will sometimes generate opposing results. The focus here, however, is on *how* each approach rationalises its conclusion, whatever it might be.

83 Powell, above n 21, at 387.

84 O’Connor, above n 22, at 676.

undermine the public's confidence in the administration of criminal justice to a greater extent than proceeding to trial.⁸⁵

Therefore, the two-stage analysis is superior because it does not sacrifice conceptual integrity and certainty for litigants in order to arrive at the correct answer. Rather, it provides transparent discussion of an issue that is very challenging to decide. This is a more laudable approach, especially if we accept that the way in which we resolve difficult issues reflects the value-structure of our society. Do we openly recognise the dilemma and provide reasoned justifications for our conclusion that one outcome is the lesser of two evils? Or do we pretend that there was never any dilemma in the first place? In my view, the answer to this question is clear.

VI THE COMPLETE FRAMEWORK

Finally, it is necessary to tie this proposal together. To condense what I have said so far and to locate my proposals within the wider scheme of things, I offer the following set of principles as a meaningful point of departure for any court considering abuse of process pleadings:

- (a) The discretion whether to prosecute is the prerogative of the executive. The courts should not interfere with this power, save for exceptional circumstances.⁸⁶
- (b) Nevertheless, the court has powers to terminate criminal proceedings in certain situations. It has a statutory power to discharge an accused in various circumstances⁸⁷ and an inherent power to stay proceedings to prevent abuses of process.⁸⁸
- (c) The inherent power to stay can be invoked in two broad categories of abuse of process: first, where a fair trial has become impossible; and secondly, where it would offend the court's sense of justice and propriety to try the accused in the particular circumstances of the case.⁸⁹
- (d) When determining whether to stay a case that falls into the second category of abuse of process, the court should engage a clearly delineated two-stage analysis.
- (e) First, the court must identify the putative misconduct and ask whether, when viewed against objective standards, it renders the trial an abuse of process. It must identify the type of abuse alleged on the facts and proceed to identify the

85 Powell, above n 21, at 386.

86 *R v Bain*, above n 7, at [22].

87 Criminal Procedure Act 2011, s 147.

88 *Moevao v Department of Labour*, above n 9,

89 *Beckham v R*, above n 6, at [43].

considerations and precedents that are germane to that category.

- (f) If the answer to (e) is no, then that is the end of the inquiry and the stay application must be dismissed. Conversely, if the answer is yes, the court proceeds to the second stage of the analysis, consisting of two further steps.
- (g) The first step is to ask whether any remedy short of a stay is available. In doing so, it will determine whether such remedy would be sufficient to dissociate the court from the executive's wrongdoing and to maintain the public's confidence in the administration of criminal justice. If so, then that remedy should be granted and the stay application must be denied.
- (h) If no other remedy is appropriate, the court engages the second step, asking whether, on a public policy balancing test, the facts of the case militate in favour of staying or continuing the prosecution. In doing so, the court must weigh all the relevant dimensions of the case to answer the ultimate question whether staying proceedings or continuing them will better maintain the public's confidence in the administration of justice.

With respect, these principles provide a more transparent and justifiable framework for determining stay applications. They provide guidance to the executive on how policing and prosecution may occur. Similarly, they offer clearer directions to defendants as to whether there is any merit in lodging a stay application. This, in turn, would reduce the volume of applications filed in the courts and reduce the judiciary's workload.

VII CONCLUSION

I have pursued two central objectives in this article. First, I have sought to show that the court's current method of determining stay applications in criminal trials is unsatisfactory. Secondly, I have suggested how two particular problems can be corrected. In sum, my proposal is that the courts should determine stay applications using a clearly delineated two-stage test. It consists of separate inquiries for determining whether an abuse of process has occurred or will occur and whether a permanent stay of proceedings is the most appropriate response in light of the circumstances of the case.

Within each limb of that test, further guidance should also be provided. Under the first limb, abuses of process should be catalogued into a non-exhaustive taxonomy. Thus, making it easier for all interested parties to readily understand whether particular misconduct reaches the abuse of process threshold. Under the second limb, the courts should be guided by the

availability and appropriateness of other remedies and various public policy concerns.

Whether or not the courts take up this model is not my principal concern. Rather, I urge the judiciary to simply be clearer in their determination of stay applications. I encourage the appellate courts to carefully examine their inherent jurisdiction to stay proceedings and to recognise the deficiencies in the prevailing approach to date. From that starting point, they should provide detailed explanation as to what constitutes an abuse of process and how this concept relates to the stay of proceedings as a remedy. The Court of Appeal took highly commendable steps towards this end in its *Antonievic* judgment. However, similarly clear directions are required in subsequent cases to untangle the confusion created by earlier decisions.