10-1-1974

The Discretionary Power to Stay Criminal Proceedings

Connie Sun

Follow this and additional works at: https://digitalcommons.schulichlaw.dal.ca/dlj

Part of the Criminal Law Commons

This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License.

Recommended Citation

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.
The Discretionary Power to Stay Criminal Proceedings

Connie Sun*

Introduction

The power of the attorney general to stay criminal proceedings is rarely discussed in most areas of Canada. However, in British Columbia, and particularly in the city of Vancouver, periodically letters appear in the local press referring to "subversion of the judicial process"¹ and irate judges attack prosecutorial procedures as "strange — sometimes sinister — manoeuvres".² In all cases the weapon used to effect the alleged injustice is identified as a "stay of proceedings". Such seemingly defamatory statements might prompt the uninformed to inquire into the use and alleged abuse of "stays".

This paper, the result of such an inquiry, is offered in the nature and spirit of a preliminary investigation into the use of the attorney general’s discretionary power to stay proceedings in criminal matters. The approach is to examine the historical foundation of the power, its present use, and the basis for recent allegations of abuse. Much of the study deals with "when" and "by whom" a stay can be entered. It is postulated that current uses of stays in certain Canadian jurisdictions constitute misuse of a statutory power because an attorney general cannot legally delegate discretion to implement stays. Probable illegality also exists in the use of stays before an indictment has been properly "found". These factors are central to an apparently illicit shift which has occurred in the use of stays in western Canada. The consideration of the need to stay a criminal charge in light of exceptional public policy factors has been supplanted by a consideration of the probable outcome of due process. The necessity

---

*This paper constitutes a research project undertaken by the writer as part of her third year LL.B. programme at Dalhousie University. The writer wishes to express her sincere gratitude to Professor H. N. Janisch of the Faculty of Law for his advice and supervision. Connie Sun is now with Workers’ Compensation Board of British Columbia in Vancouver.

The Discretionary Power to Stay Criminal Proceedings

The Discretionary Power to Stay Criminal Proceedings 483

to reverse this trend is implicit in the arbitrary nature of the power and its potential for abuse. It is suggested that the exercise of the power to stay proceedings be universally restricted to the person of the attorney general or subjected to such control as would make its abuse unlikely.

I. The Power to Stay Proceedings

Common Law Nolle Prosequi.

At common law one of the broad prerogative powers vested in the attorney general as chief law enforcement officer of the Crown was the authority to discontinue proceedings by entering a nolle prosequi or stay of proceedings.1 This power is still governed in England by the common law principles. While the exact origins of the procedure are uncertain its apparent basis is that the Crown, as the nominal prosecutor in all criminal matters, should retain the power to stop proceedings at will.2

Until the 19th century it was the practice of the attorney general to hear, applications and argument by one or both parties prior to his decision whether a nolle should be entered.3 However, in 1862 R. v. Allen4 upheld the right of the attorney general to enter a nolle prosequi without first hearing the parties concerned. The Allen case outlined the principles governing the attorney general’s power and reiterated that the court has no part to play in a properly directed nolle prosequi.

The power to enter a stay in England is strictly confined to cases being heard before a judge and jury on a bill of indictment, and then only after the indictment has been signed or found.5 Where the necessary preconditions are lacking the courts will act to prevent the minister from exercising his power. In R. v. Wylie, Howe, and McGuire6 the nolle had been entered during the preliminary hearing. The court held that since, at that stage, the matter was not properly before a court, there were no proceedings to be terminated and the fiat was in every sense a nullity. Despite the fact that instances have

2. Ibid., at 227.
3. Ibid., at 236.
arisen where it would be useful and politically expedient to do so, the *nolle* has never been used in summary conviction matters in England.  

Historically, entering a *nolle prosequi* was a very formal procedure in which the attorney general signed and submitted a lengthy document authorizing the Clerk of the Court to adjourn the proceedings. It is still the practice in England that the attorney general personally signs the fiat authorizing the entry of a stay, but the document itself now takes the following simplified form:

> The Queen v. A.B.
> Let a Nolle Prosequi be entered in my name in the case of the above named, whose trial at_______on charges of_______now stands adjourned, in order to discharge all further proceedings therein and for so doing this shall be your warrant.
> Her Majesty's Attorney-General.

For some time there was considerable doubt whether a *nolle prosequi* could be entered at the discretion of prosecuting counsel. However, it was conclusively settled in *R. v. Dunn* in 1843 that only the fiat of the attorney general would suffice to constitute a proper stay of the proceedings.

The effect of the common law *nolle prosequi* has been compared to a discontinuance in a civil action. All proceedings on the indictment are stayed, although the accused may be indicted again on the same charge. While staying the proceedings does not have the same effect as offering no evidence and submitting to acquittal, the procedure does put an end to the prosecution on that indictment. The case of *Goddard v. Smith*, which apparently has not been overruled in England, held that the termination of proceedings by the entry of a *nolle prosequi* did not operate as an acquittal of the accused so as to found an action by him for malicious prosecution.

In an attempt to characterize the circumstances under which the common law power was exercised, it has been suggested that there were historically really two quite different situations which justified a

---

The Discretionary Power to Stay Criminal Proceedings

*nolle prosequi.* First, it was used to dispose of technically imperfect proceedings instituted by the Crown. Prior to the reforms of the early 1900’s, the drafting of indictments was an extremely complicated process in which it was not uncommon for Crown prosecutors to commit errors which could not easily be remedied by an amendment to the indictment. Given modern statutory enactments governing the drawing and preferring of indictments, the use of *nolle prosequi* in this regard is no longer significant. Secondly, a *nolle prosequi* was used to prevent the continuance of oppressive but technically proper proceedings instituted by private prosecutors. Historically the power was most often identified with this control over private prosecutions. The unlimited power in the individual to institute proceedings does not carry with it an unlimited control over them once they are instituted and where private individuals prosecute alleged offences there has always been a duty recognized on the part of the Crown to ensure that the accused was not being persecuted. If the proceedings were frivolous, vexatious, oppressive, or if the Crown for any reason felt that the accused was not being treated fairly, the remedy was for the attorney general to stay the proceedings. In England the use of the *nolle prosequi* as a control over private prosecutions is now superfluous as statutory provisions empower the Crown to assume the prosecution of any criminal proceedings.

Current English practice appears to confine the entry of a *nolle prosequi* almost entirely to cases where, after the indictment has been signed, it is found that the accused is unlikely ever to be fit to stand trial. It is then not possible to place the accused in the charge of the jury with the object of bringing the proceedings to an end with a formal verdict of not guilty. There have been a very limited number of other circumstances over the past decade in England where the attorney general has exercised his power to stay proceedings. These infrequent instances reveal no pattern except that the cases are often of considerable notoriety and the decision to stay proceedings is usually well publicized in the local press. However, while the press may have criticized the attorney general’s decision to stay proceedings in specific cases, there has apparently been no instance in the

---

present century where the attorney general has been called upon in the House of Commons to account for his use of the power.\textsuperscript{20}

\textit{Statistics on Use in Canada}

In contrast to England, where the use of stays of proceedings has diminished to insignificance, statistics indicate that the annual incidence of stays in Canada has been, and continues to be increasing. Particularly alarming are the figures for the provinces of Manitoba and British Columbia, which have maintained an inordinately high incidence of stays whether considered numerically or as percentages of charges laid.

During the period 1966-1970 the average number of stays used per year in every province except British Columbia and Manitoba was less than 5.5 per 1000 charges. Newfoundland, Nova Scotia, New Brunswick, Ontario, and Quebec averaged less than one stay per 1000 charges. During the same period, British Columbia averaged 75.4 and Manitoba averaged 64.9 stays per 1000 charges.

While there are some difficulties inherent in analyzing the statistics of past decades, it seems fairly safe to state that the wholesale use of stays in British Columbia and Manitoba is a relatively recent phenomenon, occurring over the last 25 years.\textsuperscript{21} The identifiable upward trend in British Columbia became apparent around 1950. In that year, out of 98 stays entered across Canada, British Columbia accounted for 23.\textsuperscript{22} This was in contrast to the period 1946 to 1949 during which Canada had averaged 76 stays and British Columbia 3.5 per annum.\textsuperscript{23} By 1953, out of 533 stayed charges in Canada, 327 were in British Columbia.\textsuperscript{24}

While the use of stays in British Columbia during the period 1966-1970 has been fairly consistent each year, Manitoba has increased, with 1970 accounting for 842 stays out of 8334 charges, or 101.2 per 1000 charges. These figures all relate to indictable offence charges.

\textsuperscript{20} Ibid., at 579-582. Examples cited of recent use of \textit{nolle prosequi} are unreported cases: the dock strike, 1951; the Merrifield case, 1953; and, the Adams' case, 1957.

\textsuperscript{21} The difficulties with the statistics arise from section 904 in the 1927 Code which provided for \textit{nolle prosequi} in Ontario but was dropped in the 1953-54 revision. Also the periods covered by the reports varied.

\textsuperscript{22} D.B.S., 75th Annual Report, Stats. of Crim. and other offences, 85 and 102.

\textsuperscript{23} D.B.S., 71st, 72nd, 73rd, 74th Annual Reports, Stats. of Crim. and other offences, \textit{passim}.

\textsuperscript{24} D.B.S., 78th Annual Report, Stats. of Crim. and other offences, 73 and 83.
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>CANADA</strong></td>
<td>1307</td>
<td>1522</td>
<td>1589</td>
<td>1475</td>
<td>2102</td>
<td>565</td>
<td>638</td>
<td>689</td>
<td>650</td>
<td>926</td>
</tr>
<tr>
<td></td>
<td>89176</td>
<td>86689</td>
<td>75582</td>
<td>71921</td>
<td>86597</td>
<td>51080</td>
<td>51388</td>
<td>44039</td>
<td>43191</td>
<td>51866</td>
</tr>
<tr>
<td><strong>Nfld.</strong></td>
<td>1363</td>
<td>803</td>
<td>1346</td>
<td>1793</td>
<td>2001</td>
<td>795</td>
<td>541</td>
<td>684</td>
<td>997</td>
<td>1082</td>
</tr>
<tr>
<td></td>
<td>2</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td><strong>P.E.I.</strong></td>
<td>2</td>
<td>161</td>
<td>196</td>
<td>213</td>
<td>200</td>
<td>108</td>
<td>110</td>
<td>129</td>
<td>160</td>
<td>160</td>
</tr>
<tr>
<td></td>
<td>2</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td><strong>N.S.</strong></td>
<td>2298</td>
<td>2305</td>
<td>22341</td>
<td>2681</td>
<td>3549</td>
<td>1694</td>
<td>1697</td>
<td>1836</td>
<td>1990</td>
<td>2407</td>
</tr>
<tr>
<td></td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td><strong>N.B.</strong></td>
<td>1927</td>
<td>1943</td>
<td>2331</td>
<td>2765</td>
<td>3254</td>
<td>1339</td>
<td>1385</td>
<td>1709</td>
<td>1929</td>
<td>2238</td>
</tr>
<tr>
<td></td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td><strong>Ont.</strong></td>
<td>32</td>
<td>29</td>
<td>3576</td>
<td>38921</td>
<td>45470</td>
<td>17946</td>
<td>18441</td>
<td>20206</td>
<td>23594</td>
<td>27047</td>
</tr>
<tr>
<td></td>
<td>31933</td>
<td>30975</td>
<td>35176</td>
<td>38921</td>
<td>45470</td>
<td>17946</td>
<td>18441</td>
<td>20206</td>
<td>23594</td>
<td>27047</td>
</tr>
<tr>
<td><strong>Que.</strong></td>
<td>354</td>
<td>304</td>
<td>342</td>
<td>262</td>
<td>842</td>
<td>175</td>
<td>151</td>
<td>1213</td>
<td>2455</td>
<td>4309</td>
</tr>
<tr>
<td></td>
<td>5607</td>
<td>5820</td>
<td>5689</td>
<td>5499</td>
<td>8334</td>
<td>2773</td>
<td>2935</td>
<td>2771</td>
<td>2455</td>
<td>4309</td>
</tr>
<tr>
<td><strong>Sask.</strong></td>
<td>11</td>
<td>25</td>
<td>20</td>
<td>23</td>
<td>38</td>
<td>6</td>
<td>10</td>
<td>9</td>
<td>13</td>
<td>22</td>
</tr>
<tr>
<td></td>
<td>4168</td>
<td>4201</td>
<td>4734</td>
<td>5102</td>
<td>6234</td>
<td>2218</td>
<td>2346</td>
<td>2725</td>
<td>2928</td>
<td>3855</td>
</tr>
<tr>
<td><strong>B.C.</strong></td>
<td>871</td>
<td>1122</td>
<td>1126</td>
<td>1146</td>
<td>1199</td>
<td>358</td>
<td>435</td>
<td>432</td>
<td>488</td>
<td>450</td>
</tr>
<tr>
<td></td>
<td>13027</td>
<td>14408</td>
<td>13088</td>
<td>14574</td>
<td>17204</td>
<td>7759</td>
<td>8474</td>
<td>7774</td>
<td>8891</td>
<td>10527</td>
</tr>
<tr>
<td><strong>Yukon &amp; N.W.T.</strong></td>
<td>2</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>599</td>
<td>357</td>
<td>361</td>
<td>386</td>
<td>443</td>
<td>371</td>
<td>224</td>
<td>218</td>
<td>248</td>
<td>322</td>
</tr>
<tr>
<td><strong>Que.</strong></td>
<td>2</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>19729</td>
<td>16540</td>
<td>11185</td>
<td>10082</td>
<td>4890</td>
<td>5134</td>
<td>5956</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Alta.</strong></td>
<td>32</td>
<td>55</td>
<td>68</td>
<td>10303</td>
<td>13</td>
<td>35</td>
<td>25</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>8364</td>
<td>9141</td>
<td>10303</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

1 Number of stays/Number of charges laid  
2 Number of persons against whom charges stayed/Number of persons charged
Prosecutions under federal statutes are included in these figures. However, since the 1967 Criminal Code amendment, expanding the definition of "attorney general", offences under federal statutes other than the Criminal Code have been prosecuted primarily by representatives of the Federal Justice Department. The use of stays by federal prosecutors follows the previously described pattern with respect to frequency in British Columbia and Manitoba. For example, in 1970, out of 171 stays entered across Canada in prosecutions under federal statutes, 111 were in British Columbia and 54 in Manitoba.

Criteria for Use

The phenomenal disparity in the frequency of stays across Canada indicates vastly different standards for utilization. Inquiries made of the provinces infrequently using stays indicate some consistency in the circumstances justifying their use. The most common criteria stated were:

(1) when, in the case of a misdemeanor, a civil action is pending for the same cause;
(2) when there has been an attempt to oppress the defendants as by repeatedly preferring defective indictments for the same offence;
(3) when the accused is unable to stand trial or it is undesirable that he do so due to some mental infirmity;
(4) when a similar case is on appeal to a higher court;
(5) when a witness is missing or has been intimidated;
(6) when there is insufficient evidence but a good possibility of new evidence coming to light within a short period.

Provinces infrequently using stays were unanimous in describing it as an extraordinary power rarely required.

27. Inquiries concerning the criteria applied in the use of stays were sent to the 10 provincial attorneys general and a number of prosecutors across Canada chosen at random. For list of replies received see Bibliography.
29. Ibid.
32. Ibid.
The distinguishing feature of the responses from British Columbia and Manitoba was their inclusion of two additional criteria: that they would stay charges where there was insufficient evidence but not necessarily any likelihood of a change in circumstances so as to allow for recommencement of proceedings, and (2) that they would use stays in "plea bargaining" situations.

The director of the Federal Justice Department's Winnipeg office stated — "In Manitoba we do not follow the practice of withdrawing charges when for one reason or another the Crown decides not to proceed. We customarily use a stay. This situation can occur in a number of ways; for example: (1) cases where a number of charges are preferred against an accused and the Crown decides to proceed with the major charge or the accused pleads guilty to a major charge, the balance of the counts are disposed of by way of a stay of proceedings. (2) where there are three or four co-accused and a plea is entered by one and it is the Crown's intention not to proceed against the others, then a stay of proceedings is used."

The Manitoba attorney general's office added the criterion that a stay would be entered where the "right" person was charged but there was insufficient evidence to make out a case for the prosecution.

Consideration of the use of stays in British Columbia should be prefaced by noting that the prosecutorial system in that province is an exception to the usual Canadian practice of provincially employed Crown prosecutors. Organized municipalities in British Columbia are responsible for their own administration of justice. Lower courts prosecutors are employed by the municipalities; full time in the larger areas and part time in smaller centres. In unorganized territory, prosecutors are appointed by the provincial attorney general on an ad hoc basis, as they are for all trials in the superior courts of criminal jurisdiction. With that structure in mind it is perhaps easier to appreciate the contradictory state of affairs existing in British Columbia with regard to stays.

37. B. Grosman, The Prosecutor (University of Toronto Press, 1969) 19 and n.32; While this paper was being written the announcement was made that B.C. intends to institute a provincially operated crown counsel system in 1974.
The Senior Prosecutor for the city of Victoria cited the following instances when a stay would probably be entered: (1) when there has been a significant procedural error; (2) when presently available evidence appears insufficient; (3) when a material witness is unavailable; (4) where an abuse of process or lack of merit is indicated; (5) where the complainant on an information is unwilling, in proper circumstances, to terminate proceedings. As to instances (1) to (3), a good possibility of re-institution or renewal of the prosecution must be present.

The approach in Vancouver is considerably different and, although there are no official statistics available to support the proposition, it is apparent from the press and other sources that a disproportionate number of the stays entered in British Columbia are in Vancouver’s lower courts. The determining factor as to whether a withdrawal or stay will be used, according to Vancouver city prosecutor A. Stewart McMorran, is whether the accused has been “properly charged”. If the staff prosecutor unilaterally decides that the charge was proper a stay will be used rather than withdrawing the charge. McMorran stated his policy in these terms — “Generally speaking if witnesses are not available and for this or any other reason an adjournment cannot or should not be obtained, or an adjournment is refused, the Prosecutor should control the proceedings by entering a stay, not allow the charge to be read where the only result must be a dismissal. There should be no dismissals for want of prosecution. This is a reflection often undeserved on the administration of justice, in my opinion.”

According to Mr. McMorran charges are re-laid “very, very rarely”. Another criterion cited by Mr. McMorran,

39. Ibid.
40. The province of B.C. apparently maintains no statistics on judicial activity within the province. See letter from B.C. Att’y. Gen’s. Dept. to Connie Sun, 3 Dec. 1973. Officials of the Provincial Courts in Vancouver have their own statistical reports which indicate that stays entered in all types of offences (i.e. Crim. Code, Fed. statutes, Prov. statutes, Municipal by-laws) in Vancouver’s Provincial Courts totalled 1,768 in 1971, and 3,583 to the end of Nov. 1973. The statistics for 1972 are incomplete due to a strike of court officials in that year. However, the figure for 1972 has been cited as “over 2,100”. See His Honour, Judge A. L. Bewley, Prov. Ct. of B.C., “Paper delivered to Canadian Institute of Public Administration”, June 1973 (unpublished).
41. Appendix A, 1.
42. Ibid.
43. Ibid.
and common also to Manitoba, is to use a stay where two or more charges are laid against an accused and a plea of guilty is entered on one.44

This discussion of the use of stays in British Columbia has been concerned with provincially authorized exercise of the power. The federal regional director in Vancouver offers no explanation for the frequency of the use of stays by his office other than the fact that federal prosecutors utilize the established practice in British Columbia of entering stays rather than trying to withdraw charges or allowing dismissals when there is insufficient evidence to support a conviction.45

II. The Statutory Basis

The power to stay proceedings in Canada is in Criminal Code sections 508 and 732.1, which pertain to indictable and summary offence proceedings respectively.1

508.(1) The Attorney General or counsel instructed by him for the purpose may, at any time after an indictment has been found and before judgment, direct the clerk of the court to make an entry on the record that the proceedings are stayed by his direction, and when the entry is made all proceedings on the indictment shall be stayed accordingly and any recognizance relating to the proceedings is vacated. 1953-54, c.51, s.490.

(2) Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new charge or preferring a new indictment, as the case may be, by the Attorney General or counsel instructed by him for the purpose giving notice of the recommencement to the clerk of the court in which the stay of proceedings was entered, but where no such notice is given within one year after the entry of the stay of proceedings, the proceedings shall be deemed never to have been commenced. 1972, c.13, s.43(1).

732.1 (1) The Attorney General or counsel instructed by him for the purpose may, at any time after proceedings are commenced and before judgment, direct the clerk of the court to make an entry on the record that the proceedings are stayed by his

44. Ibid., at 2.

Part II

1. R.S.C. 1970, c.c.-34, ss. 508, 732.1. The codified version of the stay was s. 732 in the 1892 Code, s. 962 in the 1906 and 1927 Codes, and s. 490 in the 1953-54 Code.
direction and when the entry is made the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated.

(2) Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new information, by the Attorney General or counsel instructed by him for the purpose giving notice of the recommencement to the clerk of the court in which the stay of proceedings was entered, but where no such notice is given within one year after the entry of the stay of proceedings or before the expiration of the time within which the proceedings could have been instituted, whichever is the earlier, the proceedings shall be deemed never to have been commenced. 1972, c.13, s.62.

"... Before Judgment"

The power to direct a stay remains until the time judgment is entered. In the case of R. v. Beaudry2 the crown prosecutor entered a stay of proceedings after the accused had testified in his own defense while being tried for murder and the presiding judge had directed the jury to return an acquittal. Notwithstanding the stay, the judge received the verdict and discharged the accused who was immediately arrested and charged with assault causing bodily harm of the alleged murder victim.

While the Beaudry case appears to contravene all accepted notions of double jeopardy it was argued that the accused was charged in the second indictment with an offence different from that covered by the indictment for murder, and that a verdict of acquittal on the murder charge would not have supported a plea of autrefois acquit on the assault charge.3 This rationale avoids the main point in issue; if the alleged offences were unrelated, why was it necessary or proper to override the judge in the murder trial and deny the accused an acquittal he had earned on the merits of the case?

The pointed comment by Bull, J. A. of the British Columbia Court of Appeal, that the procedure adopted by the Crown was "somewhat odd, and perhaps harsh", appears well-founded.4 In addition to its procedural implications, the Beaudry case is instructive of the type of abuse possible if the power to stay proceedings is not regulated, since it is an exception to the general rule that an accused has the "right to be called upon once and only once to stand

in peril on an accusation in respect of the same matter and the same
offence."

**Effect of the Stay**

The Canadian law on the recommencement of stayed proceedings was in the past somewhat disputed. In *R. v. Takagishi*, the British Columbia Supreme Court held that a new charge was required in order to recommence stayed proceedings. However, in 1962 the Alberta Supreme Court in *R. ex. rel Graham v. Leonard*, distinguishing between the effect of withdrawing a charge and staying proceedings, stated per Kirby, J. — "When a charge has been withdrawn, there is no charge on the record, and in order to continue the prosecution a new charge would have to be laid. Withdrawing a charge has the effect of ending the proceedings. When a stay has been entered however the crown can at any further time continue the proceedings without laying any charge." The procedural question in these and other conflicting cases was resolved by the enactment of Code Section 508(2) in 1972, which dispensed with the need for a new charge.

**History of Section 732.1**

Added to the Code in 1972 section 732.1 created, for the first time in Canada, the power to stay summary conviction proceedings. For years prior to this amendment, however, prosecutors in British Columbia routinely used stays in summary conviction matters, apparently without objection from either magistrates or defence counsel. In a 1968 memorandum to his staff, Vancouver city prosecutor McMorran justified the use of stays in summary offence proceedings by

9. Criminal Law Amendment Act, S.C. 1972, c. 13, s. 43 (Bill C-2). In 1971 Andrew Brewin (NDP-Greenwood) had introduced Bill C-266 to provide for dismissal of charges one year after stay of proceedings directed but it completed first reading only. See *Debates*, House of Commons, (1971) Vol. VIII, 7862.
10. Criminal Law Amendment Act, S.C. 1972, c. 13, s. 62; Apparently no statistics are available on the use of stays in summary conviction matters prior to the amendment. The author’s informal discussions with judges in N.S. indicate that they were never used in that province, and that a strong common law tradition would prevent their use in summary conviction matters.
reasoning that, "... if the attorney general can stop a serious charge he must be entitled to stop a minor one..."¹¹

A 1969 decision in Burnaby, British Columbia, by Provincial Court Judge D. M. McNeil, held that a stay could not be used in summary offence proceedings while simultaneously confirming that countless numbers of such absolutely null and void stays had been entered in British Columbia courts.¹²

The case involved a number of students who were individually charged with a summary offence following occupation of some Simon Fraser University buildings. Those proceedings were stayed to facilitate a joint charge that was dismissed because it issued after the six month limitation period. The Crown then reverted to proceeding with the stayed charges on the strenuously opposed basis that, since summary offence proceedings could not be legally stayed, the previously directed stays were void and the original charges stood. That contention was upheld in a reserved decision after exhaustive legal argument, but, in the face of an expressed intention on the part of the defendants to appeal, the Crown withdrew the charges and avoided a binding appellate court decision on the issue.

That judgment on a longstanding illegal practice in British Columbia was seemingly overlooked by authoritative law reports, but it apparently prompted Vancouver prosecutor McMorran to initiate a recommendation to the Conference of Commissioners on Uniformity of Legislation which led to the 1972 code amendment regarding summary conviction stays.¹³

The proceedings in the House of Commons and the Committee on Justice and Legal Affairs reveal no explanation as to why the extension of the power was believed to be necessary, or why the majority of provinces did not question the amendment, as they seldom used stays in indictable offence matters and presumably had never sought to use them in summary conviction matters. At common law the power to stay proceedings has never been deemed necessary at the summary conviction level.¹⁴ In as much as the power is an extraordinary one, allowing suppression of the judicial process only to prevent grave injustice, by definition there must exist potential for

¹¹. Appendix A, 2.
¹⁴. Edwards, op. cit., at 236.
serious consequences in the prosecution. Presumably, it is assumed in England that summary conviction offences are of a type that the disposition and consequences could not justify such intervention.

Prior to the amendment the standard Canadian practice (except perhaps in British Columbia) was to apply to the court to withdraw the charge where valid reasons prevailed for doing so. The application could be refused for cause (and presumably appealed) but a withdrawal would not restrict the right of the Crown to lay a new information. In R. v. Somers Martin, J. A., delivering the judgment of the British Columbia Court of Appeal, cited with approval the following passage in R. v. Tyrone JJ.:

In my opinion, the permission given by the Justices to withdraw the first complaint did not amount to an acquittal. The order involved no more than the consent of the Justices that the question of the guilt or innocence of the defendant in the summons should be withdrawn from their cognizance, that is, that they should not adjudicate upon it. There was, therefore, an absence of adjudication; whilst, to amount to an acquittal, it was necessary that there should be an adjudication on the merits. The withdrawal had not, in my opinion any greater effect than that which a nolle prosequi has in proceedings by indictment, and that undoubtedly, would not be an answer to a subsequent indictment for the same offence.

"... After an Indictment has been Found"

Section 508 explicitly stipulates when a stay may be entered, i.e. "at any time after an indictment has been found and before judgement."

In non-Grand Jury provinces, the power to enter a stay has been held to arise after a formal charge has been preferred in lieu of an indictment.

Substantial impetus to western Canadian practices in staying indictable offence proceedings has come from the Alberta Appeal Court opinion in R. ex rel Graham v. Leonard. In that case the Crown had declined to prosecute and later intervened in a private prosecution for the purpose of withdrawing the indictable offence charge while it was still before a magistrate. In the Appeal Court’s opinion the Crown should have stayed the proceedings rather than

18. Ibid., at 48 per Palles C.B.
apply to withdraw the charges, but it was held that in either event the appellant had no absolute right to prosecute privately. In what appears to be obiter dicta, that court rationalized its divergent views with the obiter expressed by the learned judge appealed from and asserted that section 490 (now 508) must be read as if the word "information" was substituted therein for the word "indictment". This finding was based on the Code definition of "indictment", i.e. indictment includes (a) information, presentment, and a count therein; (b) a plea, replication, or other proceeding, and (c) any record.21

That judicial opinion manifestly ignores the definitive characteristics of an indictment found in the Code sections under Procedure by Indictment, and if it is valid it follows that as soon as a Justice of the Peace accepts an "information" from anyone, the accused is upon indictment for the purpose of applying section 508.22 However, section 508 further specifies that an indictment must be "found" and code section 503 states that finding an indictment includes (a) preferring an indictment, and, (b) presentment of an indictment by a grand jury.23 The appellate court in R. ex rel Graham v. Leonard apparently neglected to address itself to the meaning or effect of the word "found".

Code section 732.1 empowers the attorney general to stay summary conviction proceedings "at any time after proceedings are commenced and before judgment . . ." Comparing those qualifying words to the Section 508 phrase — "... at any time after an indictment has been found and before judgment . . ." — emphasizes that finding an indictment is materially different from merely commencing proceedings with respect to an indictable offence. There is surely no law or statutory procedure that even remotely suggests a valid indictment could be "found", or that it is legal to "direct the clerk of the court to make an entry on the record that the proceedings are stayed”, if prosecutors follow McMorran’s directive of not allowing "the charge to be read" in open court as is frequently done when staying proceedings in Vancouver.24

K. C. Davis, in his book Discretionary Justice observed that legislative bodies are most notably deficient in specifying the limits

23. R.S.C. 1970, c.c.-34, s. 503.
on delegated power by their failure to correct the administrative assumption of discretionary power which is illegal or of doubtful legality.\textsuperscript{25} Such an assumption of illegal power appears to be the result of the unchallenged interpretation of the phrase "at any time after an indictment has been found". It is probable that the correct interpretation of this phrase is that a stay is legally possible only after an indictment has been preferred by the Crown, i.e. after a committal for trial following a preliminary hearing, a presentment by a Grand Jury, or a direct indictment preferred by the attorney general.\textsuperscript{26} The common law position, as set out by Dr. John Edwards, is very clear on this point — "The entry of a \textit{nolle prosequi} by the principal law officer of the crown, it is once more emphasized, is strictly confined to cases which are heard before a judge and jury on a bill of indictment, and then only after the indictment has been signed or found."\textsuperscript{27}

MacLean, J., of the British Columbia Supreme Court, noted in \textit{Re O'Brien} that counsel for the applicant argued "with some considerable force" that a stay could only be entered "at a Supreme Court trial with a jury."\textsuperscript{28} He did not, however, find it necessary to determine the matter.

The Alberta judicial opinion which equates "information" with "indictment", as the term is used in section 508, is by no means conclusive. The result may be that stays of proceedings in indictable matters are quite improper in provincial courts or magistrate's courts. Allowing proceedings to be stayed only after they are duly before a federally appointed judge on an indictment probably reveals an intention by Parliament to inhibit provincial attorneys general from possibly abusing the power by assuming the supervision of high court judges.\textsuperscript{29}

It is interesting to consider the circuitous debate in the Justice and Legal Affairs Committee concerning the amendment extending the power to stay proceedings in summary conviction matters. It was contended by Andrew Brewin (NDP-Greenwood) that the power

\textsuperscript{27} Edwards, \textit{op. cit.}, at 236-237.
\textsuperscript{29} Until the 1967 amendment extending the Criminal Code definition of attorney general all prosecutions were under the authority of provincial attorneys-general. The validity of that amendment is, of course, still the subject of argument. See \textit{Re Collins and The Queen} (1973), 11 C.C.C. (2d) 40 (Ont. H.C.) which held the amendment \textit{intra vires}. To date \textit{Collins} has apparently not been appealed.
should not be extended to summary offences because, as a possible instrument of abuse or oppression, it should only be exercised before superior courts "which presumably are at a higher level of judicial sensitivity". D. H. Christie, Associate Deputy Minister of Justice, replied that since 95% of indictable offences are dealt with in magistrate's court, to be consistent one would also have to argue that the power should not apply in indictable offence proceedings. While Mr. Christie's argument would not seem particularly relevant to the issue of whether it was necessary to extend the power to summary offence proceedings, it is even more misleading if you consider that it may be an illicit assumption of power to enter stays in magistrate's court.

"... Counsel Instructed by Him for the Purpose"

The power to stay proceedings is vested in "the attorney general or counsel instructed by him for the purpose". Section 2 of the Criminal Code defines attorney general as the provincial attorney general or solicitor-general in prosecutions under the Criminal Code; the attorney general of Canada in proceedings either in the Territories or "by or on behalf of" the federal government under federal statutes other than the Criminal Code; and, their lawful deputies.

There is a wide and irreconcilable difference between eastern and western provinces as to what is meant by "counsel instructed by him for the purpose". The provinces of Ontario, Quebec, New Brunswick, Nova Scotia, Newfoundland, and Prince Edward Island appear to be adhering to common law precepts and recognized principles of statute interpretation in entering stays only on the direct authority of the attorney general, or when counsel has been specifically instructed by him with regards to the facts of a particular case. The four western provinces, however, have interpreted the phrase differently. In Alberta, the local Crown prosecutor, as agent of the attorney general, sends a recommendation to the Director of Criminal Justice who reviews the application and provides the necessary authorization. Saskatchewan treats the authority to enter stays

as implicit in the appointment of Crown prosecutors. The decision of
when to stay proceedings is made by the Crown prosecutor who
would consult with the Director of Public Prosecutions only where
some precedent might be created by the use of a stay in the particular
circumstances of a given case.\textsuperscript{34} Manitoba interprets the section as
permitting general delegation of the discretion and every Crown
Attorney is so empowered at all times.\textsuperscript{35}

British Columbia delegates, to all prosecutors appointed on an
\textit{ad hoc} basis and all municipal prosecutors, a general authority to stay
proceedings in summary conviction and minor indictable offences.
Should the matter be of a "serious nature", the prosecutors are
instructed "to be in touch with the Department directly".\textsuperscript{36} In prac-
tice in Victoria city prosecutor refers all stays to the minister for
approval\textsuperscript{37} although the attorney general's department describes this
as being done "out of an abundance of caution" on the prosecutor's
part.\textsuperscript{38} This contrasts sharply with the Vancouver city prosecutor
who described his authority in the following terms — "As City
Prosecutor of Vancouver I have the authority of the Attorney Gen-
eral, if needed, to enter stays of proceedings before, during, or after
court on any charges in which I consider it proper to do so and I am
authorized to delegate this authority to the Prosecutors for whom I am
responsible, and have done so."\textsuperscript{39} Mr. McMorran also offered the
suggestion that he may not need categorical authorization to enter
stays from the attorney general because the city is responsible for the
administration of justice under the Vancouver Incorporation Act or,
alternatively, by virtue of his appointment as agent for the attorney
general for all purposes under the Code.\textsuperscript{40}

In neither Manitoba nor British Columbia do the prosecutors
produce any written authority when entering a stay.\textsuperscript{41} The procedure

\begin{itemize}
\item \textsuperscript{34} Letter from Agent of the Att’y. Gen., Saskatoon, Sask. to Connie Sun, 2 Oct.
\item \textsuperscript{37} Letter from J. W. Anderson, Senior Prosecutor, City of Vancouver, to Connie
\item \textsuperscript{39} Appendix B, 1.
\item \textsuperscript{40} Letter from A. S. McMorran, Vancouver City Prosecutor, to Connie Sun, 12
\item \textsuperscript{41} Letters to Connie Sun from Judge H. F. F. Gyles, 9 Oct. 1973; Judge I. V.
Dubienski, undated; Judge M. Baryluk, undated; Judge W. M. Darichuk, 9 Oct.
\end{itemize}
is accomplished simply by a verbal instruction to the clerk of the court. In contrast, an attorney general in Ontario personally signifies his decision to stay proceedings in writing.\(^{42}\)

Identical qualifying words are used in the present Code sections 508 and 732.1 as were used in section 490 of the 1955 Code. The organization of the replaced section 962 of the 1927 Code may be of some assistance in interpreting the present sections.-

S.962 — The Attorney-General may, at any time after an indictment has been found against any person for any offence and before judgement is given thereon, direct the officer of the court to make on the record an entry that the proceedings are stayed by his direction, and on such an entry being made all such proceedings shall be stayed accordingly.

2. The Attorney-General may delegate such power in any particular court to any counsel nominated by him.\(^{43}\)

It is submitted that the words "may delegate such power" in former section 962(2) and "instructed by him for the purpose" in present sections 508 and 732.1 refer to the power to "direct" a stay in particular proceedings and not to a general or specific power to decide whether or not there is to be a stay.

The basic principle which speaks against allowing the attorney general to delegate his power is expressed in the maximum "delegatus non potest delegare". The power to stay proceedings is delegated to the attorney general as part of his function as chief law enforcement officer of the Crown and it is not open to him to sub-delegate.

Parliament, naturally, may authorize sub-delegation and where that express power is found in the legislation no question will arise, except perhaps as to its scope.\(^{44}\) Sections 508 and 732.1, however, cannot be taken as authorizing sub-delegation in view of the use of the word "instructed". Instruction has a common law definition of "order given by a principal to his agent in relation to the business of his agency."\(^{45}\) Since "instructed" was used in preference to the

\(^{42}\) Letter from Prof. J. D. Morton to Prof. J. Ortego, 25 Oct. 1973; Letter from J. Cassells, Crown Attorney, Ottawa-Carleton, to Connie Sun, 13 Nov. 1973. The author's informal discussions with judges and prosecutors confirmed that this is also the practice in N.S.

\(^{43}\) Tremeear, Annotated Criminal code of Canada (5th. ed., Calgary, Burroughs, 1944) 1220.


more general terms such as "authorized", "delegated", etc., it appears fairly clear that Parliament intended something in the nature of an agency relationship between the attorney general and his counsel. Agency implies a close and continuing alliance wherein the agent is well informed of the principal's policy and intentions, i.e. it presupposes the existence of established criteria and constant communication, if not specific authorization in each and every case. However, in neither British Columbia nor Manitoba can the attorney general claim such a relationship with the prosecutors who are, in fact, deciding when proceedings will be stayed. To suggest that counsel has been "instructed" under such circumstances is patently false.

Robert Reid in *Administrative Law and Practice* states — "The view has been propounded with increasing frequency by Canadian courts that, in the absence of express statutory authority a quasi-judicial or discretionary power — the terms are usually used synonymously in this context — may not be sub-delegated." However, the distinction between powers that are sub-delegable and those that are not has not always been expressed in terms of an "administrative-judicial" dichotomy and attempted sub-delegation of powers has been refused for lack of authority without their characterization as quasi-judicial. In any event, the power to stay proceedings is recognized at least by some provincial departments of the attorney-general to be quasi-judicial and such a classification would seem indisputable given its broad capacity to affect rights.

It is recognized, of course, that in modern government a great number of decisions, the responsibility for which is committed to a minister, are in fact taken by civil servants in the minister's name without reference to him personally. There is, however, an important exception to this trend where — "the class of decision is so

47. But see Letter from Judge D. Moffett to Connie Sun, 4 Oct. 1973, which describes the "instruction" as a "legal fiction". Mr. McMorran does not subscribe to this view but accepts his authority as a valid "blanket" delegation of power.
48. Reid, *op. cit.*, at 272 and see n. 106.
important that nothing less than the Minister's personal attention is appropriate (for example, because the decision concerns the liberty of the subject . . .).

In England the power to stay proceedings has always been recognized as falling within this category and hence requiring the personal exercise of the minister's discretion.53

Not only is the delegation of the discretion to stay proceedings without discernible legality but it is inherently dangerous and contrary to public policy. It is well established that the executive power should be separate from the judicial process.54 As an extraordinary exception to the general rule, the power to stay proceedings is a procedure whereby a specific politically responsible law officer can suppress the judicial process and override the independence of the judiciary. In principle it is assumed that this extraordinary power will be used sparingly and with circumspection by the attorney general personally, as he is in no way answerable to the courts in the matter of a properly founded stay and is only theoretically answerable to a legislature for any misuse.55

A large measure of the concern expressed over the 1970 implementation of the War Measures Act56 was that it allowed the executive to unduly usurp judicial functions without the ordinary safeguards of due process under the Criminal Code. For example, one complaint frequently heard was that the Identification of Criminals Act57 was effectively suspended in as much as many detained but uncharged persons were finger-printed and photographed. It was commonly appreciated in Quebec that many persons were taken into custody simply for the purposes of subjecting them to those identification procedures. Less conspicuous short term incarcerations and circumvention of the Identification of Criminals Act are facilitated by stays when police and prosecutors work in close alliance or operate under the same administrative body as in Vancouver.

It has been well established that a substantial gap exists between legal theory and prosecutorial practice, even without the license to local prosecutors to use stays on their own initiative. In fact, published studies suggest that prosecutorial values and processes resem-

52. Ibid.
53. Ibid., at 173.
54. See generally Act of Settlement 1701; de Smith, Constitutional and Administrative Law 356-376.
55. de Smith, Constitutional and Administrative Law 379; Edwards, op. cit., at 231.
ble administrative and managerial values more than they do adversary and judicia goals. For example, Mr. McMorran instructed his prosecutors that "there should be no dismissal for want of prosecution" in that this "is a reflection often undeserved on the administration of justice." Surely it is undesirable and unnecessary to so assiduously foster the belief that the police never err in laying charges.

The potential for abuse in delegating discretion to use stays to local prosecutors is simply phenomenal and militates against the legitimacy of some attorneys general attempting to interpret the Code so as to authorize such a delegation.

III. Controlling the Discretionary Power to Stay Proceedings

Rationale for the Frequent Use of Stays

The British Columbia attorney general's department sanctions the use of stays in circumstances that would generally warrant the withdrawal of the charge. The department's reason for favoring a stay is their assertion that judges in British Columbia will, more frequently than their colleagues in other provinces, exercise their discretion to refuse an application to withdraw charges. "Rather than have a lengthy argument with respect to the merits of the charge", a stay is

59. Appendix A, 1; But consider the following observation on the theory of prosecutorial discretion in England:

The police in England cannot withdraw a prosecution, once it has been started, without leave of the court . . . , or intervention by the Attorney-General; in America mere local prosecutors can enter a nolle prosequi without control or supervision. "G. Williams, "Discretion in Prosecuting", [1956] Crim. L. Rev. 222, 226-227.

60. The potential for undisclosed abuse of criminal processes by police is enhanced by the fact that stayed proceedings on the basis of section 508 (2) are probably sub judice with all the implications that has for inhibiting public comment. In view of the many allegations of police misconduct during the Vancouver Gastown Riots it seems highly probable that the staying by local prosecutors of several criminal proceedings initiated both by police and by citizens against police effectively suppressed public knowledge that would have ordinarily been disclosed through direct testimony and cross-examination. Stays were apparently used frequently with regard to both the "Gastown" and "English Bay Riots". E.g. "3 Gastown cases dropped", Vancouver Province, 23 Dec. 1971, 2; "Charge dropped", Vancouver Sun, 24 Dec. 1971, 3; "Riot charged dropped", Vancouver Sun, 21 Oct. 1971, 78.
entered which as an exercise of executive power is entirely outside the ambit of the courts’ authority.\(^1\)

The British Columbia position is based on the assumption that “from a practical point of view there is really no distinction between a stay and a withdrawal.”\(^2\) The fundamental fallacy in this approach was succinctly expressed by the United States Supreme Court in the case of \textit{Klopfer v. North Carolina}\(^3\) where it was held that, despite the fact that the accused was at liberty, the \textit{nolle prosequi} in that case violated the petitioner’s constitutional right to a speedy trial.\(^4\) In the words used by the court — “The pendency of the indictment may subject him (the accused) to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes.”\(^5\) The resulting “anxiety and concern accompanying public accusation” was persuasive reason to hold that the petitioner had been denied his constitutional right.\(^6\)

The procedure adopted in many American jurisdictions in dealing with stays closely approximates the Canadian approach to a withdrawal of charges. Concurrence is required between the prosecutor and the judge on the recommendation that a stay be entered. Also, written reasons must be filed with the court.\(^7\) The principle of judicial check on the executive intrinsically involved in this structure is a strong one, which focuses directly on correction of possible arbitrariness or illegality\(^8\) and, since it is in the nature of things that a judge cannot delegate his authority, it is easy to determine responsibility if abuses are alleged.\(^9\) To sanction the use of an arbitrary, i.e.

---

2. Ibid.
6. Ibid.
9. The question of where the discretion should lie, i.e. in the hands of the executive or the judiciary, is analogous to the current debate taking place with regard to who should provide the authorization to “wiretap”. The basis of the choice is whether it is more desirable to rely upon judicial independence or political responsibility for protection of rights.
unchecked, power by the prosecutor for the purpose of circumventing judicial attitudes on withdrawals also facilitates maneuvering by the Crown to avoid other judicial attitudes. Requiring judicial approval for stays as well as withdrawals is based on the logical proposition that abuses are less likely if collaboration is a prerequisite.

The operation of our system of administration of criminal justice is based on the principle that no one should be accused of a crime unless his accusers are prepared and capable of making out in evidence a *prima facie* case against him. If this cannot be done the accused’s remedy is in a tort action. It is, therefore, reasonable and proper that the accused should have a determination of his guilt or innocence duly made. The prosecution should not be able to easily retreat and stay the proceedings except where the matter is of such significance to public policy that the attorney general, personally, in good conscience, cannot allow the prosecution to continue.

The protection for the individual is presumed to lie in due process under our criminal adversary system, and in civil law remedies. The theory of the adversary system is that strong advocacy on both sides of a question will result in the emergence of the truth. Interjected into this system is the totally non-adversary procedure of a stay of proceedings. The implications of such a power cannot be overemphasized and the attorney general, as the one to make the decision, presumably recognizes that when he stays proceedings the accused is being deprived of his day in criminal court and has little practical recourse in the civil courts. At the same time the impartial judge of the proceedings is told that he cannot decide a case which lower level judicial officers have legally determined should be brought before the court for determination. The accused and organized society are unappealably denied the traditional benefits of the adversary system without any public determination of whether the proceedings are in fact terminated, or, if there has been a determination, whether it has been favourable to the accused. In such circumstances the authorities are clear that the accused cannot maintain an action for malicious prosecution, the proof of which demands the plaintiff show that the proceedings have terminated in his favour.10

Alternative tort actions would be unduly delayed, if not completely frustrated by a stay, since the pendency of the indictment effectively shields police and Justices of the Peace with, respectively,

10. See generally Scott, "Effect of 'Nolle Prosequi'."
one year and six month limitation periods for civil suits for false arrest and maliciously issuing criminal processes.\textsuperscript{11}

It is actually not surprising to find an increase in the use of stays in Canada where legislatively unsanctioned inroads on the trial process through pre-trial bargaining have developed. Empirical data has been compiled which suggests that the North American experience is one which more and more frequently circumvents the traditional common law protections in favour of creating exchange situations, outside normal court proceedings, which are anti-adversarial and discourage participation in the trial process itself.\textsuperscript{12}

It may be that the prosecutor's intention to deal with charges through alternative methods to the full trial procedure are socially commendable and that experimental efforts in this direction might be encouraged.\textsuperscript{13} Nevertheless if, as a result of these efforts on the part of prosecutors, tensions have developed between them and the bench, it is highly improper to exploit the stay of proceedings as a method of giving local prosecutors the upper hand. The following statement by S. A. deSmith is notable for its relevance to the power to stay proceedings. "It is not too much to say that in Britain the independence of the Judiciary and the impartiality of the administration of criminal justice are maintained in spite of the strictly legal powers vested in Parliament and the Executive.\textsuperscript{14}" To allow the attorney general to sub-delegate the power to stay proceedings would upset the balance within the system to such an extent that abuses would become almost inevitable.

\textit{Alleged Abuses of the Power}

It is outspokenly appreciated by some lower court judges in British Columbia that stays are being abused in their courts.\textsuperscript{15} His Honour, Judge A. L. Bewley, formerly a Vancouver assistant prosecutor for

\textsuperscript{11} See Statute of Limitations, R.S.B.C. 1960, c. 370, s. 11.
\textsuperscript{12} B. Grosman, "The Role of the Prosecutor: A Reappraisal" (1969), 7 Col. I. Dr. Comp. 181.
\textsuperscript{14} deSmith, \textit{Constitutional and Administrative law} 173.
\textsuperscript{15} In informal interviews a number of B.C. Prov. Ct. judges indicated that they had made repeated representations to various members of the executive concerning the misuse of stays and that they were hopeful a political solution would be found. There is clearly a strong reluctance on the part of the lower court judiciary to force an open confrontation with the executive over this matter despite their concern.
four years, and with over thirteen years experience on the provincial court bench, makes the following comment:

It has been my painful experience to observe stays entered when the 'right' person was charged with more than sufficient evidence, and no witnesses missing or other (even vague) suggestion of another such reason, with no reasons given (indeed, some have been entered out of court).

It has fairly often been observed that prosecutors, faced with the dismissal of the case, or the refusal by the court to grant the prosecutor a further adjournment, enter stays to circumvent the ruling or decision of the court; that done they have relaid the same or similar charges on new informations.

It has been observed that a stay has been entered, on the day of the trial, over the vehement objection of the accused who wanted his day in court and a public acquittal, which, on the facts of the case, he would in all probability have achieved.

It would be naive to believe that all stays have been entered totally and only with the interests of justice to the alleged victim or alleged offender, as the reason.

There may well be reasons why the Crown, through counsel, are seeking to avoid embarrassment by reason of their error, or to prevent a municipality from facing a suit for false arrest or imprisonment.  

Judge Bewley is not alone in his criticism of the use of stays in Vancouver courts. His experienced colleague in the British Columbia Provincial Court, His Honour Judge David Moffett, has also attacked the practice “of indiscriminately entering stays of proceedings” as “a violation of their intended use under section 508 of the Criminal Code.”

Some particular uses of stays in Vancouver courts have recently been a source of conflict between prosecutors and judges. As indicated by Mr. McMorran, and confirmed by Judge Bewley, prosecutors will enter stays when faced with an unfavourable ruling on a motion for adjournment, then relay the charge in order to obtain delays by that indirect method. Such action by the prosecutor was challenged in *R. v. Antonin Zetek* heard in Vancouver on 9 December, 1971, before His Honour Judge J. L. Davies of the Provincial Court.

The case involved a very minor shoplifting charge. Due largely to the Crown’s inefficiency there had been six court appearances

---

extending over many months. On the seventh appearance the prosecution's witness was unavailable due to illness. After submissions by both counsel, the presiding judge refused the prosecutor's request for a further adjournment. The prosecutor then directed the clerk to enter a stay but the judge countered the order and proceeded with the case. No evidence being called against the accused, the charge was dismissed. From the transcript it appears that the judge had two reasons for refusing to allow a stay to be entered: (1) The abuse inherent in the use of a stay in the circumstances of that particular case, i.e. to obtain an adjournment once the motion had been refused, and, (2) the failure of the prosecutor to produce any indication of authority from the attorney general. Although this lower court decision may be significant, it is not binding and has apparently not been consistently followed by judges of that court. As with the 1969 decision of His Honour, Judge D. M. McNeil, on the illegality of stays in summary offence proceedings, the Crown apparently decided against seeking a binding high court decision by appealing Judge Davies ruling. If Mr. McMorran's presumptions are correct, then Judge Davies was completely in error. One is tempted to conclude that if Mr. McMorran had been confident of his legal position he would not have hesitated to seek the ruling of a higher court.

A somewhat different response was elicited from the bench when the same tactic was attempted before His Honour, Judge N. Mussallem by a prosecutor for the Federal Justice Department acting on a charge under the Narcotics Control Act. After Judge Mussallem had refused an adjournment the prosecutor stayed the charge. Minutes later the accused was brought back into the court and the prosecutor relaid the charge. The judge's response was to order a 20 year remand — "I'll remand this man, of course. He is now on his own recognizance on a $50 bond until November 30, 1991, when the next appears in this court." Judge Mussallem later denied the original press reports which described him as being furious at the maneuvering of the Crown. Although the Justice Department originally announced their intention to appeal the twenty year remand they later entered a stay on the second charge without stating reasons for their

20. Ibid., Proceedings at Trial, 8-10.
decision. It seems that the Federal Justice Department like provincial Crown authorities, is also reluctant to risk a binding high court judgment on the ways and means of using stays in British Columbia.

Dealing with current abuses

To deal with abuses of the power to stay proceedings in specific factual situations it has always been assumed that one could find a political resolution in an application of ministerial responsibility.

It is recognized as a part of the theory of ministerial responsibility that culpability is a matter of degree, i.e. some powers, although within the statutory field of responsibility of the minister, are clearly a matter of conduct within the department, in which case it is unlikely that personal culpability could or should be implied. However, convention has assigned certain powers and duties to the minister personally and among those is the "decision whether to enter a *nolle prosequi* to stop a trial on indictment." Clearly if the Canadian statute permits wholesale delegation of discretion to stay proceedings in a few provinces then it is permissible in all and the innovative exploitations of stays may be properly copied in provinces that have overlooked this convenient way to circumvent due process. Of course an attorney general's political responsibility would be substantially reduced since he could not be expected to know the circumstances of each stay used.

The protection of ministerial accountability has worked well in England where only one parliament both enacts and is concerned with the administration of justice. However, the structural safeguard is immensely weakened in Canada because of provincial autonomy over federally enacted criminal law and procedure. While it is theoretically possible that questions in a legislature about particular cases might tend to moderate occasional prosecutorial excesses (if they happen to be complained about), the effectiveness of such political means is as variable as the comprehension, initiative, and special interest of individual members of parliament and provincial legislators. The present unrestrained practices with stays in British Columbia and Manitoba have apparently evolved without significant concern being expressed in Parliament or the respective legislatures. Yet, with respect to British Columbia at least, it is evident that many

---

24. deSmith, *Constitutional and Administrative law* 173.
MLA's and MP's have long been fully aware of serious allegations of abuses and that only since 1950 have ominously high incidences of stays become a unique characteristic of that province.25

An analysis of the very minimal reference to the use of stays during House of Commons and Justice Committee debate on Bill C-2 is sufficient to demonstrate that it would be foolhardy to rely solely on members of parliament to seek redress from responsible authorities or to provide a check on discretionary power. Debate on the second reading of the Bill included the following excerpt from a speech by Robert McCleave (P.C.-Halifax-East Hants) —

I am told by critics outside the House that in British Columbia the present method of stay of indictable proceedings has led to a great number of prejudicial actions by the Crown, that it facilitates arbitrary arrests, jailing and fingerprinting or even suppression of public disclosure and nothing ever comes out in court . . . I indicate to the minister that he must be prepared to defend this clause (extending power to summary conviction matters) with all his resources when he comes to committee.26

When the Bill did come up in committee Mr. McCleave was not present.27 Andrew Brewin (NDP-Greenwood) raised the matter of alleged abuse of the power in British Columbia. However, while he clearly indicated that the power was a possible "instrument of abuse or oppression", Mr. Brewin did not present a coherent attack on the amendment and no other members in committee responded to or queried the allegations of abuse.28 On third reading there was no debate on the provisions relating to stays.29 Further, there is no indication that either of these members followed up in Parliament the accusations of abuse which they considered sufficiently important to raise during the debate on Bill C-2.

It would be grossly unfair to single these particular members out for criticism. There is ample confirmation that numerous members of parliament, cabinet ministers, and senior civil servants have been made aware of serious allegations concerning the use of stays. The usual responses from both the lawyers and laymen among them vary

25. The problem was briefly raised in the B.C. legislature by Dr. G. Scott Wallace (PC-Oak Bay). See "Proceedings stays overdone: Wallace" Vancouver Province, 26 Feb. 1972, 6. Also Judge D. Moffett claims to have made representations to the B.C. Att'y. Gen's. Dept. See Letter from Judge D. Moffett to Connie Sun, 4 Oct, 1973.
from a seeming incomprehension of the basic issues involved to complete and utter indifference.

Traditionally, common law countries have relied heavily on a vigilant press and conscientious legal profession, as well as the accountability of the minister in parliament, to provide a check against indiscriminate use of discretionary power. In England the press provides a functional and effective curb on unwarranted use of stays. The few incidences in recent years when stays have been used were accompanied by comprehensive and discriminating comment in the daily press. The virtual inevitability of publicity undoubtedly influences the attorney general in England to use the utmost circumspection when exercising the power to stay criminal proceedings.

At least in those areas of Canada which have suffered abuses of the power to stay proceedings the press has been almost totally ineffectual in fulfilling the "watch dog" role traditionally ascribed to the fourth estate. There are numerous examples of newspaper reports of cases where proceedings were stayed without any question being raised as to why a stay was used, or in fact without indicating any substantial degree of understanding as to how the disposition differed from a withdrawal or dismissal. One can only conclude that in order to provide a meaningful check on discretionary power the press would have to be considerably more sophisticated in their approach to observations on criminal proceedings.

The effectiveness of the press as a force countervailing abuse of government power is inevitably geared to the political circumstances prevailing in the community. Current standards of monopoly ownership and political affiliation of the press in Canada leave little room for confidence in its ability to seek out and expose abuses of executive power in the administration of criminal justice. It is virtually inconceivable that the phenomenal increase in stays in B.C. since 1950 could have been accomplished without at least tacit co-operation of the regional press.

In a criticism of the use of stays in Vancouver His Honour, Judge David Moffett comments:

I share the view that abuse of the power set out in Section 508 of the Criminal Code in certain parts of Canada is in fact a weak--

ness in our legal system which if not checked could lead to serious and far reaching consequences. The fact that it has not done so in most of Canada can be attributed to the high calibre of the profession.\textsuperscript{32} (editor's emphasis)

It is characteristic of stays that their abuse in particular cases is not easily discerned because clarifying facts are usually concealed from the court, the public, and often from the accused. Only a few prejudicially involved persons know whether the accused has been wrongly denied an acquittal or unduly shielded from a conviction. To a large extent the failure of the "officers of the court" in British Columbia and Manitoba to inhibit the misuse of stays may be attributed to lack of tradition, errors in training, proclivities for undue administrative expediency, economic self-interest, and a low regard for the integrity and independence of lower court judges, of whom many are lay persons.

Basically, the primary victim of abuse of stays is the system of justice itself, and there has been no spokesman who, comprehending the long term effect of executive encroachment into the judicial system, has been both willing and in a position to put pressure on the legislative and administrative authorities to correct the misuse. Clearly, the consistent enforcement of ministerial responsibility such that it can be relied upon as the primary safeguard against abuse of the discretionary power to stay proceedings, requires a diligence, understanding, and integrity on the part of legislators, bar, bench, and press which cannot be assumed to exist in Canada.

Whereas political means are cumbersome and have apparently failed to rectify the largely regional confusion in law with respect to stays, there exists the possibility of judicial alternatives for bringing reasonable consistency to this area of criminal law administration. It is basic to Dicey's conception of the rule of law that — "the most arbitrary powers of the English executive must always be exercised under Act of Parliament (which) places the government, even when armed with the widest authority, under the supervision, so to speak, of the courts.\textsuperscript{33}

The issue of who can lawfully enter a stay of proceedings, i.e. whether the power is delegable is, in the absence of legislative clarification by statutory amendment, simply a matter for judicial

interpretation of the current Criminal Code provisions. In the Vancouver cases, where judges have challenged the entry of a stay, because they were not satisfied that counsel had been "instructed" by the attorney general, the Crown has apparently never appealed the rulings. If the judiciary were consistent as to what they would individually regard as satisfactory authorization for a stay, and refused to allow stays to be entered where the statutorily required "instructed" was not apparent, the Crown would be faced with either seeking a higher court determination of the issue or conforming to the interpretation of sections 508 and 732.1 current to the majority of jurisdictions in Canada.\(^3\)

The lower court judiciary is quite capable of initiative in this matter. A compelling reason for them to do so is that the adversary theory for finding the truth in our legal system has apparently broken down on the subject of stays of proceedings. Defence counsel and many of their clients obviously have as much, if not more, of a vested interest in illicit stays than do crown prosecutors. Implicit in any judicial proceeding is the presumption that the presiding judge knows the law. There would appear to be ample law available to enable a lower court judge to justifiably refuse entry of all stays that are not on specific instructions from an attorney general\(^3\), and all stays in respect to indictable offences before an indictment is found.\(^3\)

Another more arduous, costly, and limited procedure for effecting a binding judicial solution to part of the problem may lie in the prerogative writs, although they are dependent on some wronged victim lending himself to the cause and a counsel selling himself on the idea of being embroiled in lengthy, non-profitable litigation which might have to be pursued to the Supreme Court of Canada for an authoritative determination. It is well established in administrative law that if a power is granted for one purpose and exercised for a different purpose then that power has not been validly exercised.\(^3\) If the discretionary power is conferred without reference to purpose, as

---

34. Alternatively prosecutors might lobby parliament for a statutory amendment such as McMorran initiated with regard to stays in summary conviction matters.
35. R. v. Dunn (1843), 1 C&K 730; R. v. Antonin Zetek, supra, at n. 19; the adherence to non-delegation practiced in most provinces contributes to the weight of that interpretation.
in the case of the power to stay proceedings, it still must be exercised in good faith and in accordance with such implied purposes as the courts may attribute to the intention of the legislature. In addition, if the exercise of a discretionary power has been influenced by considerations that cannot be lawfully taken into account, or by disregarding relevant considerations, a court will hold that the power has not been validly exercised. Again if the relevant factors are not specified it is for the courts to determine whether the permissible considerations are impliedly restricted and, if so, to what extent. These principles were approved by the Supreme Court of Canada in the case of Roncarelli v. Duplessis. In the words of Rand, J.

There is no such thing as absolute and untrammelled ‘discretion’, that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute.

Rand, J. was, of course, referring to the scope of a licensing statute. It is suggested, however, that his words have a general application to the field of administrative law, including the administration of criminal justice, and in particular, can be applied to define and enforce the terms on which ministerial discretion has been granted under sections 508 and 732.1.

Since the power to stay proceedings has been made part of Canadian statute law it can no longer be viewed as an exercise of the Crown's prerogative immune from judicial challenge. It is simply a power Parliament has vested in the attorney general and should be subject to the regulation which the courts have always imposed on statutorily delegated power. The attorney general, therefore, would be acting outside his statutory authority if he acted for an unauthorized purpose or took into account an extraneous consideration (such as more administrative expediency), and historically the remedy has been to seek a prerogative writ.

38. Ibid., at 320.
39. Ibid., at 321; And see Shawn v. Robertson et al, [1964] 2 O.R. 696 (Ont. H.C.) which dismissed a motion to strike out a statement of claim on the basis that it disclosed no reasonable cause of action. Held, an executive or ministerial act may be impeached by an allegation of bad faith or irrelevant considerations and the court can call for an answer to such an allegation if a prima facie case is made out.
41. Ibid., at 705.
The British Columbia Supreme Court case of Re: O'Brien was an instance where a writ of mandamus was sought against a magistrate who had allowed a stay to be entered at a preliminary hearing. 42 The magistrate was called upon to show why the accused should not be either committed or properly discharged on the basis that there was no power to stay at that stage since no indictment had been found. The application was dismissed on the finding that the accused was effectively discharged by the stay and it was therefore unnecessary to consider the legality of the stay.

Also, on the initiative of an aggrieved accused, substantial argument could be made for an application of the Bill of Rights when a stay is entered on the basis that the "right" person has been properly charged, but for various reasons the case cannot be made out for the prosecution and there is no present intention to proceed at a later date. The effect of the stay in such circumstances is to deliberately deny the accused a prompt determination on the charge and may be regarded as a contravention of section 2(f) of the Bill of Rights. Lacking an express declaration of contrary intention sections 508 and 732.1 must be both "construed and applied" so as not to (f) deprive a person charged with a criminal offence of the right to be presumed innocent until proven guilty according to law in a fair and public hearing . . . 43

A further possibility for seeking to control abuses of the attorney general's power to stay proceedings lies in the inherent jurisdiction of a court to prevent abuse of its processes and the onus on the individual judge to preserve the integrity of his court. Substantial English authority exists favoring the proposition advanced by Lord Devlin that — "The courts cannot contemplate for a moment the transference to the executive of responsibility for seeing that the process of law is not abused." 44 This approach has not fared well in Canadian


43. R.S.C. 1970, Appendix III, s. 2(f); The cases in which s. 2(f) has been argued are of little assistance in that presumption of innocence is most often the issue in dispute. But see Re Armstrong and State of Washington (1972), 7 C.C.C. (2d) 331, [1972] 3 O.R. 229 (Ont. H.C.) concerning right to a "public hearing".

courts. The leading case on the subject is *R. v. Osborn*[^45] where the Supreme Court of Canada reversed a lower court ruling which dismissed proceedings because the court held that the prosecution was oppressive to the accused. Basically, the *Osborn* case stands for the position that the political arena must deal with all matters of conscience.[^46] It is suggested, however, that the Supreme Court in that case failed to make a really determinative pronouncement and there is still limited scope for the court to find that some uses of stays are an abuse of process. However, unless a lower court summarily asserts that a particular stay before it is inoperative for illegality it is certain that neither it nor any appellate court can properly hear submissions or evidence of alleged abuse of process in those proceedings unless they are recommenced. If the stay is valid in law there is absolutely nothing any court can do about it.

Recently, His Honour, Judge D. D. Jones, of the British Columbia Provincial Court, found an abuse of process in the case of *R. v. McAnish and Cook*[^47] when a prosecutor, who had stayed proceedings after being refused an adjournment, later proceeded with an identical charge upon a new information. In ordering the proceedings stayed from the Bench, Judge Jones declared — "The prosecution must not be permitted to render the exercise of judicial discretion completely nugatory by entering a Stay of Proceedings, 'for the reason that the court will not grant an adjournment' . . .'[^48] The learned Judge noted further — "It is not too difficult to contemplate the evils where such a procedure would be extended to manoeuvre any trial proceeding before a Judge of choice."[^49] The judgment was not appealed by the Crown but its effect is easily avoidable where local prosecutors exercise the discretion by simply directing a stay rather than letting the court rule on an adjournment.

*The Terms of Use of the Power*

The majority of the problems and abuses related to the use of stays


[^48]: Ibid., Proceedings at Trial, 2.

[^49]: Ibid.
could be adequately dealt with if the attorneys general personally decided when particular proceedings should be stayed. That has been the practice in most Canadian jurisdictions where there are no apparent indications that abuse of the power has occurred. This approach is only feasible, however, if it is generally recognized that stays should have a very limited application. If the categories of criteria in which stays can be used are recognized as similar to those warranting withdrawals then the nature of the power has been substantially altered and arbitrary use of the power cannot be tolerated.

The primary quality of the power to stay proceedings is that it is discretionary in nature. Discretion has been defined as—"an authority conferred by law to act in certain conditions or situations in accordance with an officials’ or an official agency’s own considered judgment and conscience." Large measures of discretion characterize the administration of criminal justice in North America, existing at the inception of a criminal matter and persisting until the end. Discretion is exercised by the police, prosecutor, grand jury, and judge in repeated instances. There was early recognition by Dicey that "wherever there is discretion there is room for arbitrariness" and, hence discretionary powers must only at "critical junctures" be wielded by the executive. Neither is it unusual for contemporary commentators to be concerned with the fact that discretion involves great hazard in that it makes easy the arbitrary, the discriminatory and the oppressive. It has been said to offer "a fertile bed for corruption" and "is conducive to a police state — or, at least, a police-minded state". Despite the apparent danger, however, it is generally recognized that discretion cannot be eliminated from the administration of criminal justice except at intolerable cost, in that it functions to provide the selectivity and individualization needed in criminal law enforcement. The question then, is not how to eliminate discretion but how to control it so as to avoid arbitrary, unjust, and oppressive

50. While there can be no assurance that the power has never been abused in those provinces the description applied to the British use of the power appears relevant: it would not, perhaps, be unfair to suppose that there has been no use of it amounting to such an interference with due process of law as to call for the intervention of Parliament. [1958] Crim. L. Rev. 573, 582.
53. Dicey, op. cit. at 188 and 413.
54. Breitel, op. cit. at 429.
results. In short, the goal is to provide a framework within which
discretion can function in order to ensure that in seeking the benefits
of discretion the rule of law is not completely replaced by the rule of
men.

In his pioneering work in the field of discretionary justice K. C.
Davis noted that a startlingly high proportion of all official discretio-
nary action pertaining to administration of justice is illegal or of
doubtful legality.\(^55\) One solution would be to provide legislative
approval of the illegal official practices which have become part of
our legal system.\(^56\) In fact that procedure was used with respect to
staying summary conviction proceedings. As to the use of stays
generally, however, a complete adoption of this approach is unac-
ceptable since legalizing all the practices which have become iden-
tified with the use of stays would involve too great an alteration to the
common law precepts, statutory protections and due process values
which characterize and justify our criminal justice system. Nonethe-
less, it is quite possible that certain practices which have been treated
in this paper as derogations from the law as presently constituted may
be sanctioned, either \textit{de jure} by legislative amendment or \textit{de facto}
by failure of Parliament, provincial legislatures, or the judiciary to
terminate their use. In that event the responsibility devolves to
individual administrators to ensure that the power is exercised with
the proper proportions of rule and discretion and a solution may lie in
adopting practical means current to administrative law for controlling
the discretion.

The central determination to be made with regards to the terms
of use of the power to stay proceedings is whether sub-delegation will
be sanctioned. In view of the foregoing, strict prohibition of sub-
delegation is to be preferred. If sub-delegation is to be tolerated, a
clear distinction must be drawn between responsible and irrespon-
sible delegation. The current practice, in British Columbia at least,
would appear to fall into the latter category because it is delegation
without any attempt to provide central policy determination or, in
fact, any limitation on the subjective, \textit{ad hoc} determinations of local
prosecutors. Clearly this form of delegation is unacceptable, not only
for the resulting lack of consistency, but also in its potential for
abuse. If the power to stay proceedings is going to be sub-delegated it
must be sufficiently structured to prevent utilization at the prosecutor-

\(^{55}\) Davis, \textit{op. cit.}, at 12.
\(^{56}\) \textit{Ibid.}
The Discretionary Power to Stay Criminal Proceedings

The purpose of structuring is to control the manner of the exercise of the discretion within the boundaries which have been established for the power. There are many useful instruments which can be adapted to the structuring of this particular discretionary power. The Vancouver City Prosecutor’s office, for example, makes admirable use of written memoranda which authoritatively set out the purpose of the power to stay proceedings as viewed by that department. Guidelines in this form should emanate from the provincial attorney general’s office to all prosecutors within the provincial jurisdiction. Similar considerations apply to the policies to be adopted by the federal attorney general and those should be the same throughout Canada.

The attorney general’s office has or should have goals in mind which they hope to achieve by the use of stays. In some form it must state those goals in order not only that those charged with invoking the power have a clear conception of what they are trying to accomplish but also that an “outsider” can know what the policies and principles are which govern the use of the power. Policy statements are only one very cautious step toward structuring the discretionary power to stay proceedings. If they fail to produce a more consistent application of the power then we should be prepared to look to the formal and binding approach of federal enactments.

Part of the instructions by Mr. McMorran to his prosecutors contains the following admonition — “It is quite unnecessary to make public disclosure of the reasons for causing a stay to be entered; indeed any comment may be highly inadvisable or even dangerous in some circumstances.” If attorneys general are to maintain reasonable control over the dispensation of this discretion when it has been delegated, they should require prosecutors to promptly file reports as to the facts and reasons for deciding to stay proceedings. In the interests of an open system of justice, reasons should be read into the court record. Mr. McMorran’s hesitation to give reasons for his decisions is the natural response of an administrator who, having a discretionary power conferred upon him, hides behind the fact that the law does not require him to formulate rules or follow precedents.

57. Ibid., at 97.
58. Appendices A and B.
59. Davis, op. cit., at 102.
60. Appendix B, 1.
Without the creation of a record he can be assured that there can be no check on the exercise of his discretion — Indeed, there can be no check on whether the action was even a reasonable one. The exercise of the power to stay proceedings will, therefore, remain completely arbitrary.

The interaction of well-defined policy with the necessity of stating reasons will tend to further develop identifiable guidelines as to when a stay is the proper course of action. However, in recognizing the place of discretion we, *ipso facto*, accept the limitations on verbalized law. The guidance of discretion does not lend itself to a rigid, particularized approach to precedent. The goal, therefore, is not to promote a slavish adherence to binding precedent, i.e. not "to maximize law and to minimize discretion", but "to maximize consistency and to minimize inconsistency", and thereby foster credibility in the judicial process.\(^1\)

Surely when a stay is entered the prosecutor is working on the basis of some notion as to why it is suitable in a given case. These unarticulated principles as to when a stay should be entered must be formalized, set out as rules, and opened to public scrutiny. While discretion to depart from rules can be tolerated, discretion to violate rules cannot.\(^2\) Because some attorneys general have never had open rules nor required open reasons, some prosecutors have had a free rein to disguise favoritism and discrimination in their arbitrary use of stays. To quote K. C. Davis — "Secret law, whether in the form of precedents or in the form of rules, has no place in any decent system of justice."\(^3\)

The lack of use of precedents can be understood where a power is newly constituted and there is a lack of experience in dealing with it. However, for many decades the more mature jurisdictions have adhered closely to the recognized precept that our legal system can tolerate stays in only a few exceptional circumstances. The derogations from this system in western Canada have occurred despite existing statutory limitations. At this point we can either reaffirm the validity of long-standing precepts, or, if it is determined that illicit use of stays occurred as a valid response to vital and unmet needs of the criminal justice system as it operates in western Canada, expand our categories to include those where it has been deliberatively

---

determined by Parliament to be necessary. In any event, it is inconceivable that the administrators, i.e. prosecutors, can be heard to argue that established precedents do not exist.

Conclusions

The historical origins of the stay of proceedings are found in the common law *nolle prosequi*, a substantial prerogative power enabling the executive to suppress the judicial process. In England and most of the provinces of Canada it is accepted law that this discretionary power is vested exclusively in the person of the attorney general, and that precedent and fundamental legal principles dictate very restrictive use of the power only when duly considered circumstances and public policy considerations confirm that a particular criminal prosecution should not be judicially determined.

The power has long been statutory in Canada, where it suffers from a lack of definitive judicial interpretation. In certain jurisdictions it has been deemed capable of delegation as a general power to local prosecutors to summarily manipulate the judicial process. Stays have been used to circumvent judicial discretion with respect to adjournments and applications to withdraw charges. The true reasons for suppressing particular proceedings are virtually unascertainable by the courts, or anyone outside the prosecution and the power is therefore a peculiarly versatile instrument for subverting the purpose and intent of criminal processes. Substantial allegations of abuse in the Vancouver courts have been voiced by concerned members of the judiciary. The divergent practices and grossly excessive use of the power which have developed in British Columbia indicate that the probabilities of abuse are considerable and lend weight to the accusations that have been made of corrupt use of stays.

Given the existence of this situation, substantial argument could be made in favor of total abolition of the power. The historical justifications for so empowering attorneys general have long since become inoperative and the limited number of instances which cannot be dealt with by a withdrawal of the charge or dismissal for want of prosecution could presumably be the subject of specific statutory provision.

However, assuming that this criminal law procedure is to be preserved, steps must be taken to assure at least reasonable uniformity in its use across Canada. It is submitted that tradition and present statutory limits on the power to stay proceedings dictate that delegation of the discretion cannot be tolerated. Support for this proposition
is found by reference to fundamental principles and practical consequences.

If the minister adhered to personal accountability for every stay entered, as set out in the statute, ordinary political prudence and demands on his time would tend to curb the number of stays used and thereby forestall most of the objectionable practices that are attendant to indulging local prosecutors with the discretion. While the present arbitrary power might be justified if exercised solely by the politically responsible chief law enforcement officer of the Crown, it cannot be tolerated at a lower level. If it is generally appreciated as desirable that the stay have a broader application than tradition and present statutory limits prescribe, then the nature of the power must be recognized and both administrative controls and procedural safeguards imposed.

If politically responsible individuals fail to respond to the current illicit use of stays it is imperative that a judicial solution be sought.

Appendices

Memoranda to prosecutors obtained from A. Stewart McMorran, former Chief Prosecutor, City of Vancouver.
A. 9 January 1968.
B. 2 February 1969.

MEMORANDUM TO PROSECUTORS

RE: Stays of Proceedings

I would advise Prosecutors that directing the Clerk to enter a Stay is a serious step and a good rule to follow is to consult a colleague or a more experienced Prosecutor before doing so, particularly in serious matters or in cases where difficulties might arise. This does not apply, of course, to those instances where a trial or hearing on a similar subject matter has just been concluded, or where an alternate charge has been laid, and it is necessary to deal with the matter then and there.

As City Prosecutor of Vancouver I have the authority of the Attorney-General, if needed, to enter Stays to Proceedings before, during or after Court, on any charges in which I consider it proper to
do so and I am authorized to delegate this authority to the Prosecutors for whom I am responsible, and have done so.

A stay of Proceedings effectively concludes a charge against the accused and there is clear authority in the various court decisions to support this proposition. As a result no Court is in a position to deal with the Information, or the charge, further, since there is no jurisdiction left, there being no charge left in existence, only a concluded Information. It is quite unnecessary to make public disclosure of the reason for causing a Stay to be entered; indeed and comment may be highly inadvisable or even dangerous, in some circumstances.

It is true, of course, that a charge can be re-laid after a Stay by swearing a new Information, in the same way as if there had been a dismissal without a hearing on the merits. In my opinion, however, it is improper to cause a new Information to be sworn unless at the time of re-charging there is evidence which was not available either in Court or otherwise at the time of the entering of the Stay. Even then, care should be taken and a very close examination should be made of the reasons why the evidence was not available originally. In every instance when it is considered proper and desirable to re-lay an Information after a Stay, this must have the specific approval of the City Prosecutor.

A Stay of Proceedings is entered by having this action so marked on the Information in order that the disposition of the case will appear on the filed document.

If it is found necessary or desirable to enter a Stay of Proceedings where the accused has pleaded or where there has been some discussion involving the Magistrate or Judge, such as a preliminary argument on the charge, etc., the action should be taken immediately, since an accused person is entitled to the benefit of the disposition as soon as it is possible to give it to him and this becomes doubly important where the accused is in custody. On the other hand, however, in such cases, as a matter of common courtesy, the Court must be advised of the action taken at the earliest opportunity, by phone call if necessary, in order that the Judge or Magistrate will not waste his time unnecessarily in considering any decision which might have been required.

There is no problem in directing that a Stay be entered prior to any Court appearance or in advance of the date to which the case may have been adjourned. This has been the accepted practice for many years in all the Courts, i.e., the Magistrates Courts and the criminal side of both the Supreme and County Courts. It should also be kept in
mind that once a case has been adjourned it may only be brought forward to an earlier date at the instance of the accused.

Sometimes two or more charges are laid against an accused and upon a plea of guilty to one, Stays are entered on the others. Make sure that Stays are not entered in advance of the conviction and sentence, but afterwards. There should be no Stays of Proceedings entered on duplicate Informations. Often single charges are laid on separate Informations at the beginning of an investigation, and prior to trial are joined together in separate counts in the same Information. If Stays are entered on the duplicates some difficulties may arise in connection with identical charges upon which an accused may be found guilty. In other words, if a Stay is entered on a duplicate Information after a conviction, this may have the effect of nullifying the conviction.

In entering Stays as well as in dealing with other duties and responsibilities Prosecutors should keep in mind the maxim *omnia praesumuntur rite esse acta*, i.e., all things are presumed to have been done rightly and in due form until the contrary is proven and where acts are of an official nature or require the concurrence of official persons, a presumption arises in favour of their due execution.

**MEMORANDUM TO PROSECUTORS**

**RE: Withdrawals and Stays of Proceedings**

In this regard see memoranda August 27, 1957, September 27, 1957, February 13, 1959 and August 12, 1964. (Copies filed with this memo in Memo to Pros. file).

As I see it the difference between a withdrawal and a Stay of Proceedings should be based on whether or not the accused was properly charged. If he was not then the charge ought to be withdrawn. But if he was and for some reason or other, such as the loss of a witness or a breakdown in continuity of exhibits, etc., the case cannot be made out on the evidence presently available, then a Stay of Proceedings should be entered. The Stay takes the whole proceeding out of the hands of the Court and it would seem advisable for a Prosecutor not to allow himself to be placed in a position where a Magistrate refuses to accede to a request for a withdrawal. If the Prosecutor wants to have an end put to the matter he should enter his Stay in the first place. In my view the responsibility for not proceeding with the case should rest with the Prosecutor, and the Magistrate
should only be asked to permit a charge to be withdrawn where the accused was not properly charged in the first place. (I think, perhaps, there may be a different consideration where a complainant in a common assault charge asks to be allowed to drop the charge). Since the Prosecutor is in charge of the prosecution, and not the police, and not the Magistrate, he should not avoid his responsibility on whether or not to proceed, and leave the matter in the hands of the Magistrate by having a plea taken and forcing him to make a conclusion, which can only be a dismissal. Where no evidence is to be called, I do not think the charge should be dismissed, (except in very special circumstances, when it should be at the request and instigation of the Prosecutor). Generally speaking if witnesses are not available and for this or any other reason an adjournment cannot or should not be obtained, or an adjournment is refused, the Prosecutor should control the proceedings by entering a Stay, not allow the charge to be read where the only result must be a dismissal. There should be no dismissals for want of prosecution. This is a reflection, often undeserved, on the administration of justice, in my opinion.

Although it is very, very rarely done, a charge can be relaid on a new Information where a Stay has been entered. This should be done only where at the time of the re-charging, evidence is in hand which was not available at the time of the entering of the Stay.

Sometimes two or more charges are laid against an accused and upon a plea of guilty to one, Stays are entered on the others. Make sure that such Stays are not entered in advance of the conviction and sentence but afterwards.

The above applies to all indicate offences because of the provisions of Code Sec. 490 and see R. v. O’Brien 36 C.R. 426 and R. v. Leonard ex parte Graham 133 C.C.C. 262. Although Code Sec. 490 does not apply to Part 24 and the Summary Convictions Act in Sec. 101 only applies Part 24, we have taken the position that if the Attorney-General can stop a serious charge he must be entitled to stop a minor one and accordingly have applied the “Stay of Proceedings” policy to summary conviction cases under Part 24 of the Code and under the Provincial Summary Convictions Act.

In the result the policy as set out above is to be followed and applied on all our charges as the need arises.