COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Mivasair, 2025 ONCA 179
DATE: 20250310
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Lauwers, George and Copeland JJ.A.

BETWEEN

His Majesty the King

Respondent

and

David Mivasair and Rehab Nazzal

Appellants

Sherif M. Foda and Shane Martinez, for the appellants

David Quayat, for the respondent

Heard: November 7, 2024

On appeal from the judgment of Justice Suhail A.Q. Akhtar of the Superior Court of Justice, dated April 27, 2023, dismissing the application for *certiorari* and *mandamus*, with reasons reported at 2023 ONSC 2506.

Copeland J.A.:

Introduction

[1] The Crown's exercise of prosecutorial discretion is reviewable by the courts. However, the jurisprudence establishes that a party seeking to review the Crown's

exercise of prosecutorial discretion must meet the high standard of showing an abuse of process before a court will intervene.

[2] The issues raised by this appeal do not concern whether Crown discretion is reviewable by the courts or the standard that must be met for a court to intervene in the Crown's exercise of prosecutorial discretion. Rather, this appeal concerns who may seek review of the Crown's exercise of prosecutorial discretion and where. More specifically, can an informant who has laid a private Information before a Justice of the Peace seek judicial review of the Crown's exercise of prosecutorial discretion to intervene in and withdraw or stay the private prosecution? And if so, is the appropriate route to do so a criminal application for *certiorari* or a civil action or application?

[3] As I will explain, the appropriate route for review is a criminal application for *certiorari*. The review of the Crown's exercise of discretion to intervene in and withdraw or stay a private prosecution is fundamentally a problem of criminal law and procedure. To the extent it is subject to supervision by the courts, that supervision is governed by criminal procedure. As a practical matter, given the high standard for review of the exercise of prosecutorial discretion, a successful application to review the Crown's exercise of prosecutorial discretion to intervene in and withdraw or stay a private prosecution will be rare.

[4] The application judge erred in concluding that he did not have jurisdiction to hear the application for *certiorari* and that the appellants did not have standing to bring it. However, I agree with the application judge that the appellants failed to meet the threshold evidentiary burden in relation to abuse of process discussed in *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at paras. 52-55. I would dismiss the appeal.

A. FACTUAL BACKGROUND

[5] This appeal arises out of an application for *certiorari* and *mandamus* brought as a result of the decision of the Public Prosecution Service of Canada (the "Crown") to intervene in a private prosecution and withdraw the Information on the grounds that there was no reasonable prospect of conviction.

[6] The appellants are Rabbi David Mivasair and Dr. Rehab Nazzal. Rabbi Mivasair is a Canadian Jew, who in the past has lived in Israel. Dr. Nazzal is a Canadian-Palestinian woman.[1] Both appellants describe in their affidavits a history of engagement in issues related to peace-building and justice in the Middle-East.

[7] The appellants became concerned about the activities of Sar-El Canada ("Sar-El"). The appellants allege that Sar-El was recruiting volunteers in Canada to enlist or accept other engagements in Israel's armed forces.

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[1] I include the appellants' ethnicities as they refer to them in their factum and the affidavits in the record in explaining their interest in the conflict in the Middle-East.

[8] The appellants formed the view that the actions of Sar-El in Canada contravened s. 11 of the *Foreign Enlistment Act*, R.S.C. 1985, c. F-28 (the "*FEA*").

[9] Section 11 of the *FEA* provides as follows:

> **Recruiting**
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> **11 (1)** Any person who, within Canada, recruits or otherwise induces any person or body of persons to enlist or to accept any commission or engagement in the armed forces of any foreign state or other armed forces operating in that state is guilty of an offence.
>
> **Exception**
>
> **(2)** Subsection (1) does not apply to the action of foreign consular or diplomatic officers or agents in enlisting persons who are nationals of the countries they represent and not Canadian nationals, in conformity with the regulations of the Governor in Council.

[10] The appellants raised their concerns about Sar-El's activities in Canada through a Parliamentary petition and a complaint to the Toronto Police Service. In their view, these efforts were met with inaction on the part of the Canadian government and the Toronto Police Service.

[11] On May 5, 2022, the appellants attended before a Justice of the Peace of the Ontario Court of Justice, pursuant to s. 504 of the *Criminal Code*, R.S.C. 1985, c. C-46, to lay an Information[2] against Sar-El. The appellants swore that they had

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[2] Initially the appellants each laid an Information making identical allegations against Sar-El under the *FEA*. After the Justice of the Peace conducted the pre-enquete hearing into whether to issue process, he issued process on only one Information, since the second one was duplicative. That was the Information laid by Rabbi Mivasair, which was amended to add Dr. Nazzal as a second informant. The result was that both appellants were informants for the Information for which process issued.

reasonable grounds to believe that "[b]etween the 10th day of May, 2006 to the present (May 5, 2022), Sar-El Canada in the City of Toronto did recruit or otherwise induce persons within Canada to accept commissions or engagements in the Israeli armed forces, contrary to section 11(1) of the Foreign Enlistment Act [citation omitted]".

[12] Pursuant to s. 507.1 of the *Criminal Code*, on September 22, 2022, a designated Justice of the Peace held a pre-enquete hearing to determine whether to issue process on the Information. The appellant Rabbi Mivasair testified in support of issuing process. In addition, affidavits from Rabbi Mivasair and Ms. Nazzal were placed in evidence before the presiding Justice of the Peace. Crown counsel attended the hearing, cross-examined Rabbi Mivasair, and made submissions. Crown counsel did not oppose process issuing.

[13] On September 22, 2022, the Justice of the Peace issued a summons for Sar-El to attend the Ontario Court of Justice at the Old City Hall courthouse (federal practice court), on November 23, 2022, in response to the charge.

[14] On November 23, 2022, counsel for Sar-El attended court in response to the summons on behalf of Sar-El. Crown counsel and counsel for the appellants were also in attendance. Crown counsel put on the record that this was a private prosecution and that the Crown had not yet made a decision on its position as it relates to this prosecution. The matter was adjourned to December 14, 2022, for

Sar-El's counsel to review disclosure and for the Crown to continue its review of the case and make a decision about its position on the prosecution.

[15] On December 13, 2022, Crown counsel wrote to counsel for the appellants to advise that, based on his review of the Information provided by the appellants at the pre-enquete hearing and other publicly available information, he had concluded that there was no reasonable prospect of conviction. He advised that the Crown would intervene and terminate the prosecution at the next court appearance. In the letter, Crown counsel outlined in some detail the reasons for his conclusion that there was no reasonable prospect of conviction.

[16] On December 14, 2022, Crown counsel, counsel for Sar-El, and counsel for the appellants appeared in the Ontario Court of Justice. Crown counsel assumed carriage of the prosecution and withdrew the charge, stating as follows:

> I can indicate that the PPSC has conducted an analysis of the law and the available evidence as per our desk book and we've determined that there is no reasonable prospect of conviction on this matter. The PPSC will be assuming the carriage of this prosecution and we are going to direct the Court to enter a withdrawal.

The Justice of the Peace endorsed the Information that the charge was withdrawn at the request of the Crown ("WD @ RC").

[17] In response to the Crown's intervention in the proceeding and withdrawal of the charge, the appellants brought the application for *certiorari* and *mandamus* that gives rise to this appeal.

B. THE APPLICATION JUDGE'S DECISION

[18] The application judge dismissed the application for *certiorari*. He found that the appellants lacked standing to bring the application. He based his decision primarily on the decision of the Supreme Court in *R. v. Awashish*, 2018 SCC 45, [2018] 3 S.C.R. 87, which addressed the issue of the availability of *certiorari* for a third party to a criminal proceeding to seek to challenge an order in a criminal case based on an error of law on the face of the record.

[19] The application judge found that the appellants lacked standing because the Justice of the Peace who presided when the Crown withdrew the charge had no legal authority but to do as the Crown asked. For this reason, the application judge concluded that there could be no "error of law on the face of the record" or "final and conclusive order", as required by *Awashish*. In addition, the application judge did not accept that the appellants had an identifiable legal interest in the subject of the order (the withdrawal of the charge) because they were not the subject of the order. Finally, he was of the view that the appellants' argument that "it is a reasonable necessity" that private prosecutors have standing to bring an application for *certiorari* revealed a misunderstanding of the role of the Crown in the justice system. In his view, "only the State can have the final word on whether a person is charged with an offence and forced to undergo the stress, pressure, and stigma of criminal proceedings."

[20] The application judge went on to consider whether the record put forward by the appellants in support of their abuse of process claim met the threshold evidentiary burden discussed in *Anderson*. He found that there was nothing before the court capable of showing abuse of process. At best, the evidence relied on by the appellants amounted to a disagreement with the Crown's decision to intervene in and withdraw the charge.

C. ANALYSIS

(1) Jurisdiction to review the Crown's exercise of discretion to intervene in and withdraw or stay a private prosecution

[21] I structure my analysis of the appropriate procedure for an application to review the exercise of the Crown's decision to intervene in a private prosecution and withdraw or stay an Information as follows. First, I summarize the positions of the parties. Second, I outline the law that makes clear that the Crown's exercise of prosecutorial discretion is reviewable by the courts – although with the requirement that the party challenging the exercise of discretion must meet a very high standard. Third, I consider procedural options potentially available to review the exercise of prosecutorial discretion in this context and the interests at stake. I conclude that the appropriate procedural route is an application for *certiorari* in the Superior Court brought by the informant/private prosecutor. In other words, the

Superior Court had the jurisdiction to hear the appellants' application and the appellants had standing to bring it.

(i) The positions of the parties

[22] The appellants argue that the Superior Court has jurisdiction in a criminal application for *certiorari* to review whether the Crown's exercise of prosecutorial discretion to intervene in and withdraw or stay a private prosecution is tainted by abuse of process: *Ahmadoun v. Attorney General (Ontario)*, 2012 ONSC 955, 281 C.C.C. (3d) 270; *Olumide v. Ontario*, 2014 ONCA 712; *R. v. McHale*, 2010 ONCA 361, 256 C.C.C. (3d) 26, leave to appeal refused [2010] S.C.C.A. No. 290; *Gauvin c. Directeur des poursuites criminelles et pénales*, 2022 QCCS 862; *Holzbauer v. British Columbia (Attorney General)*, 2021 BCCA 458, leave to appeal to S.C.C. refused, 40105 (July 21, 2022); *Holland v. British Columbia (Attorney General)*, 2020 BCCA 304. The appellants argue that an informant/private prosecutor has standing to bring such an application for *certiorari* based on the right of a citizen to institute a private prosecution: *R. v. Dowson*, [1983] 2 S.C.R. 144, at p. 155; and cases cited earlier in this paragraph.

[23] The appellants argue that their application for *certiorari* is within the scope of the remedy available to third parties to criminal proceedings as described in cases such as *Awashish*, at paras. 10-12, and *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at pp. 865, 875. They argue that if an abuse of process

by the Crown is established, that is reviewable within the scope of *certiorari* as an error of law on the face of the record. They further argue that the Crown intervention in and withdrawal of the prosecution resulted in a final and conclusive order. It ended the private prosecution. There is no statutory right of appeal.

[24] The appellants argue, for the first time on appeal, that they have standing because the decision of the Crown to intervene in and withdraw the private prosecution violated their rights under s. 7 of the *Canadian Charter of Rights and Freedoms*. They argue that s. 7 protects the informant/private prosecutor in a private prosecution from "the state's arbitrary termination of their criminal prosecution."

[25] The Crown argues that a criminal application for *certiorari* cannot be used to review the Crown exercise of discretion to intervene in and withdraw or stay a private prosecution because the pre-requisites to ground an application for *certiorari* set out in *Awashish* are not met. The Crown argues that there is no order of a "final and conclusive character" because the presiding Justice of the Peace who endorses a withdrawal by the Crown on the Information has no discretion whether to permit the withdrawal (i.e., there is no order). The Crown argues further that a decision by the Crown to intervene in and withdraw or stay a private prosecution cannot amount to error of law on the face of the record (or jurisdictional error – but the appellants do not assert jurisdictional error).

[26] The Crown further argues that the appellants lack standing because once the Crown intervened in the prosecution, the appellants became "nothing more than potential witnesses in a prosecution."

(ii) The Crown's exercise of prosecutorial discretion is reviewable

[27] The law is clear that prosecutorial discretion is reviewable by the courts. However, a party challenging the exercise of prosecutorial discretion must meet the high standard of showing abuse of process. The courts must be cautious before second-guessing a prosecutor's motives.

[28] In *Anderson*, at para. 44, Moldaver J., writing for the court, clarified what is encompassed by the term "prosecutorial discretion":

> In an effort to clarify, I think we should start by recognizing that the term "prosecutorial discretion" is an expansive term that covers all "decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it". As this Court has repeatedly noted, "[p]rosecutorial discretion refers to the discretion exercised by the Attorney-General in matters within his authority in relation to the prosecution of criminal offences". [Citations omitted. Emphasis in original.]

[29] In *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, at para. 46, Iacobucci and Major JJ., writing for the court, explained that the discretion to enter a stay of proceedings in a private (or public) prosecution, codified in s. 579 and 579.1 of the *Criminal Code*, is an exercise of prosecutorial discretion.

[30] Numerous Supreme Court decisions have discussed the very high standard that must be met before a court will intervene in the exercise of prosecutorial discretion. Moldaver J. summarized the principles in *Anderson*, at paras. 46-50.

> The many decisions that Crown prosecutors are called upon to make in the exercise of their prosecutorial discretion must not be subjected to routine second-guessing by the courts. The courts have long recognized that decisions involving prosecutorial discretion are unlike other decisions made by the executive...
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> …
>
> Manifestly, prosecutorial discretion is entitled to considerable deference. It is not, however, immune from all judicial oversight. This Court has repeatedly affirmed that prosecutorial discretion is reviewable for abuse of process.
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> The jurisprudence pertaining to the review of prosecutorial discretion has employed a range of terminology to describe the type of prosecutorial conduct that constitutes abuse of process. In *Krieger*, this Court used the term "flagrant impropriety". In *Nixon*, the Court held that the abuse of process doctrine is available where there is evidence that the Crown's decision "undermines the integrity of the judicial process" or "results in trial unfairness". The Court also referred to "improper motive[s]" and "bad faith" in its discussion.
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> Regardless of the precise language used, the key point is this: abuse of process refers to Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system. [Citations omitted.]

[31] The issue before the court is, thus, <u>where and by whom</u> a challenge to the exercise of prosecutorial discretion should proceed, not <u>whether</u> the exercise of

prosecutorial discretion is reviewable[3] – always bearing in mind the very high threshold to establish abuse of process in the exercise of prosecutorial discretion.

(iii) Where and by whom can a review of Crown prosecutorial discretion to intervene in and stay an Information proceed?

[32] Although the application judge characterized the preliminary issue as jurisdictional when he asked the parties to prepare submissions on it, in his reasons he characterized the issue as the appellants' lack of standing. To some extent, in their arguments on appeal, the parties also characterize the issue before the court as one of standing. In my view, it is more aptly characterized as an issue of jurisdiction or a combination of jurisdiction and standing. Indeed, when questioned during oral argument about who would be better placed to seek a review of the Crown's exercise of prosecutorial discretion in the circumstances of this case than the informants on the private Information, Crown counsel acknowledged that the appellants have sufficient interest in the matter to ground

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[3] The Crown has not argued on appeal that the exercise of prosecutorial discretion to intervene in and withdraw or stay a private prosecution is not reviewable for abuse of process. However, to some extent the application judge's reasons question whether the abuse of process doctrine can apply to an exercise of prosecutorial discretion to end a prosecution. Some Superior Court decisions which have questioned the court's review jurisdiction in such cases also raise this concern: see *Ahmadoun*, at paras. 6-8. This view appears to be based on early abuse of process decisions, such as *R. v. Jewitt*, [1985] 2 S.C.R. 128, which focus their discussion of abuse of process on conduct "which operates prejudicially to accused persons." Respectfully, subsequent jurisprudence makes clear that the Superior Court's inherent jurisdiction to review the exercise of prosecutorial discretion for abuse of process goes beyond circumstances of prejudice to the accused, and encompasses the public interest and the need for the courts to dissociate themselves from conduct which compromises the integrity of the justice system: *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566, at paras. 36, 39-41; *Anderson*, at para. 50; The Hon. Mark Rosenberg, "The Attorney General and the Administration of Criminal Justice" (2009), 34 Queens L.J. 813, at pp. 839, 854.

standing. However, the Crown took the position that since the challenge is to the Crown's exercise of discretion rather than a decision by the presiding justice at the time the charge was withdrawn, the appropriate procedural route was a civil action or application.

[33] One of the central tensions in this appeal is that the law is clear that where the Crown intervenes in and withdraws or stays a private prosecution prior to plea, the presiding justice has no discretion to refuse the Crown request to stay or withdraw the Information. This proposition is well-established as a matter of law: *McHale*, at para. 32. In that sense, there is no decision by the presiding justice when the Crown intervenes in a private prosecution and withdraws or stays the Information.

[34] The absence of a decision by the presiding justice is relied on by the Crown to argue that *certiorari* is not available. It was also the central factor that led the application judge to find that the appellants lacked "standing".

[35] In my view, the reasoning posited by the Crown and followed by the application judge is too formalistic an approach. It also focuses unduly on the act of the presiding justice in endorsing the withdrawal on the Information, rather than the Crown's exercise of prosecutorial discretion in intervening in and withdrawing the private prosecution. The latter is the true object of the appellants' abuse of process claim. There is no dispute that the Crown's exercise of discretion to

intervene in and withdraw or stay a private prosecution is reviewable for abuse of process. The issue in this appeal is where that review should take place and who can instigate it.

[36] The underlying issue of whether the Crown's exercise of prosecutorial discretion was tainted by abuse of process is fundamentally a criminal law problem. It is also fundamentally an issue of the criminal courts of Ontario controlling their own process. The forum to conduct the review should be our criminal courts, so long as the review can reasonably fit within existing criminal procedures. It should be dealt with by criminal procedures, not through an admixture of civil procedure.

[37] The Supreme Court of Canada faced a similar problem in *Dagenais*. In *Dagenais*, the court considered the appropriate route of review for a third party to a criminal proceeding affected by a publication ban – a problem which did not fit neatly into established procedures. Lamer C.J. wrote the judgment for 5 of 6 judges in the majority. Lamer C.J.'s analysis with respect to procedure considered a variety of procedural routes, looking at the pros and cons of each, before he reached his conclusion on the appropriate routes of review. He made the following comment at the outset of his analysis, which is apposite to this appeal (at p. 858):

> I should note at the outset that none of these avenues is absolutely satisfactory. I am forced to choose the least unsatisfactory of a set of unsatisfactory options.[4]

[38] I take the same approach. Of the options before the court for review of the exercise of Crown prosecutorial discretion to intervene in a private prosecution and withdraw or stay an Information, an application for *certiorari* brought by the informant is, in the words of Lamer C.J., the "least unsatisfactory" procedural route. On this basis, I conclude that the application for *certiorari* brought by the appellants is the correct procedure to seek review of the Crown's exercise of prosecutorial discretion to intervene in and withdraw the Information. The application judge erred in finding that he lacked jurisdiction to hear the application and that the appellants lacked standing to bring it.

[39] The two procedural options to review the exercise of prosecutorial discretion by the Crown – here the federal Public Prosecution Service of Canada – that the parties addressed in their submissions are a criminal application for *certiorari* or an application for judicial review in the Federal Court.[5] In my view, a review of both makes clear that a criminal application for *certiorari* is the most appropriate procedural route.

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[4] He then made a plea for legislative reform that has gone unanswered for over thirty years.

[5] It is not necessary to consider the availability of a civil application for judicial review in the Superior Court under the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, as neither party advocated for this. However, I would note that, although using that procedure would keep the matter in the Ontario Superior Court, it would remove it from ordinary criminal procedures, which I consider undesirable, as I explain below. Further, as discussed later in these reasons, the *Criminal Code* provisions in relation to prerogative writs and criminal procedure would appear to make civil jurisdiction over this issue doubtful.

[40] I reach this conclusion for five reasons.

[41] First, the underlying issue – whether the Crown's exercise of prosecutorial discretion was tainted by abuse of process – is a criminal law problem. The issue arises from a criminal proceeding, namely the private prosecution. The applicable law in relation to abuse of process is criminal law. It is preferable that the review be conducted using existing criminal procedures, if reasonably available: *Dagenais*, at pp. 863-64.

[42] Second, using a criminal application for *certiorari* in the Superior Court as the route of review of the Crown's exercise of prosecutorial discretion for abuse of process is consistent with the concerns that the doctrine of abuse of process is designed to address. The doctrine of abuse of process exists to prevent the court's process from being abused by a party: *Jewitt*, at pp. 136-37; *Nixon*, at para. 34; *R. v. Ahmad*, [2020] 1 S.C.R. 577, 445 D.L.R. (4th) 1, at para. 17. What is alleged in the appellants' application is an abuse of the process of the courts of Ontario. Consistent with that concern, the review of whether an abuse has occurred should take place in the court system where the abuse is alleged to have happened – the criminal courts of Ontario. Review by way of criminal *certiorari* is the most direct process to achieve that review.

[43] Third, a criminal application for *certiorari* as the route for review has practical benefits. It is a well-known, straightforward, and expeditious procedure.

[44] Fourth, using a criminal application for *certiorari* as the route of review results in the same route of review whether prosecution is one within the jurisdiction of the provincial Crown or the federal Crown. As I have noted above, the review of the Crown exercise of discretion to intervene in and withdraw or stay a private prosecution is a criminal law problem. The Crown argues here that for the Public Prosecution Service of Canada, review of the Crown's exercise of discretion should take place in the Federal Court, pursuant to s. 18 of the *Federal Court Act*, R.S.C. 1985, c. F-7. If the Crown were correct, it would result in different routes of review depending on whether it is the federal Crown or the provincial Crown that intervenes in and withdraws or stays a private prosecution. Efficient administration of criminal justice favours that the procedural route for such a review not vary by whether the criminal prosecution is one handled by the provincial Crown or the federal Crown.

[45] Fifth, the interest of the person who lays a private Information before a Justice of the Peace (the private prosecutor) is sufficient to give them standing to seek review by way of *certiorari* to challenge the Crown's decision to intervene in and withdraw a private prosecution as being tainted by abuse of process.

[46] Indeed, it is difficult to see who would be better placed to seek such a review than the informants who laid the private Information. The right to institute a private prosecution is part of a "citizen's fundamental and historical right to inform under oath a Justice of the Peace of the commission of a crime": *Dowson*, at p. 155;

McHale, at paras. 67, 73-74. The interest of a private prosecutor in pursuing a private prosecution is not absolute, and is subject to the (non-abusive) exercise of Crown discretion to intervene in and stay or withdraw the private prosecution. But that interest is certainly sufficient to ground standing to bring an application for *certiorari*. The Crown has effectively conceded that the appellants have the type of interest required for standing by taking the position that they could bring an application for judicial review of the Crown's conduct in the Federal Court.

[47] I am unpersuaded by the Crown's arguments, based on *Awashish*, that a criminal application for *certiorari* is not available.

[48] *Awashish* involved the procedural propriety of a Crown application for *certiorari* to quash a disclosure order made by a provincial court judge. The concern that permeates the *Awashish* decision is that applications for *certiorari* not be used by parties to criminal proceedings to undermine the legislative policy of the *Criminal Code* generally prohibiting interlocutory appeals.

[49] In considering the scope of *certiorari* for parties to a criminal proceeding, Rowe J., writing for the court, discussed the scope of the right of third parties to a criminal proceeding to bring applications for *certiorari* when their interests are affected by a decision in a criminal matter (at para. 12):

> *Certiorari* is available to third parties in a wider range of circumstances than for parties, given that third parties have no right of appeal. In addition to having *certiorari* available to review jurisdictional errors, a third party can

> seek *certiorari* to challenge an error of law on the face of the record, such as a publication ban that unjustifiably limits rights protected by the *Canadian Charter of Rights and Freedoms* (see *Dagenais*), or a ruling dismissing a lawyer's application to withdraw (*R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331). The order has to have a final and conclusive character vis-à-vis the third party (*R. v. Primeau*, 1995 CanLII 143 (SCC), [1995] 2 S.C.R. 60, at para. 12).

As is evident from the reference to *Dagenais* in the quoted passage, these comments build on the foundation laid in *Dagenais* broadening the availability of *certiorari* for third parties to criminal proceedings based on error of law on the face of the record.

[50] The concerns about interlocutory proceedings that drove the *Awashish* decision have no relevance to this appeal. The Crown's decision to intervene in and withdraw the private prosecution ended the prosecution. There is nothing interlocutory about the appellants' application for *certiorari*. The application does not undermine the *Criminal Code*'s general prohibition on interlocutory appeals.

[51] I also reject the Crown's contention that the requirements in *Awashish* for an order with a "final and conclusive character vis-à-vis the third party" and error of law on the face of the record undermine the appropriateness of a criminal application for *certiorari* as the route for a private prosecutor to challenge the exercise of Crown prosecutorial discretion to intervene in and withdraw or stay a private prosecution.

[52] The Crown makes two arguments about the requirement for a decision with a final and conclusive character vis-à-vis the third party. First, the Crown argues that because the presiding justice had no discretion in the face of the Crown's request to withdraw the private prosecution prior to plea, there is no order to review. Second, the Crown argues that the withdrawal does not impact a cognizable legal interest of the appellants. I reject both of these propositions.

[53] With respect to the Crown's first argument, as I have outlined above, the law is clear that the Crown's exercise of prosecutorial discretion is reviewable for abuse of process. The discretion of the Crown to intervene in and withdraw or stay a private prosecution is not immune from review for abuse of process. In my view, it would be unduly formalistic to hold that because the presiding justice was required to endorse on the Information that it was "withdrawn at the request of the Crown", there is no decision or order. The presiding justice's endorsement is the means by which the withdrawal is implemented and officially recorded for the public and the parties.

[54] Further, the Crown's argument unduly focuses on the presiding justice's endorsement of the withdrawal, rather than the Crown's exercise of prosecutorial discretion in intervening in and withdrawing the private prosecution. The latter is the true object of the appellants' abuse of process claim. The jurisprudence I have outlined earlier in these reasons is clear that the Superior Court has inherent jurisdiction to supervise the Crown's exercise of prosecutorial discretion. Because

the standard for the exercise of that supervisory authority is an exacting one – abuse of process – interventions by the Superior Court on this basis will be rare. But this supervisory authority fits neatly with the Superior Court's supervisory role through *certiorari* and other prerogative writs.

[55] With respect to the Crown's second argument – that the appellants lack a cognizable legal interest in the withdrawal of the charge – as I have outlined above, our law recognizes the fundamental and historical right of a citizen to lay an Information before a justice. Although that right is not absolute, the Crown's exercise of discretion to intervene in and withdraw the private prosecution had a sufficient impact on the right to come within the meaning of *Awashish* as having a final and conclusive character vis-à-vis the appellants. There is no dispute that it ended the prosecution commenced by the appellants. There is no alternative remedy such as a statutory right of appeal.

[56] With respect to the requirement from both *Dagenais* and *Awashish* that a third party establish an error of law on the face of the record[6] in order to be entitled to *certiorari*, in my view, if an applicant can establish abuse of process on the part of the Crown in the exercise of its prosecutorial discretion to intervene in and withdraw or stay a private prosecution, that would constitute an error of law on the face of the record.

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[6] As noted above, the appellants did not allege jurisdictional error.

[57] In *Dagenais*, Lamer C.J. held that an order implementing a publication ban that is not authorized by the common law rules in relation to publication bans would constitute error of law on the face of the record, grounding a *certiorari* remedy: at pp. 864-65, 875. In my view, the same principle would apply in a case where an applicant could establish that a Crown exercise of discretion to intervene in and withdraw or stay a private prosecution was tainted by abuse of process. The implementation of the withdrawal or stay in circumstances tainted by abuse of process would constitute error of law on the face of the record. See also: *R. v. Ottawa Citizen Group Inc.* (2005), 75 O.R. (3d) 590, 197 C.C.C. (3d) 514 (C.A.), at paras. 48-49; *R. v. Mullings*, 2012 ONSC 2910, at paras. 27-29.

[58] For these reasons, a criminal application for *certiorari* appears eminently suitable as the procedural route to seek review of the Crown's exercise of discretion to intervene in and withdraw or stay a private prosecution.

[59] I turn now to the alternative proposed by the Crown – an application for judicial review in the Federal Court. In my view, this route is not consistent with the underlying issue at play – review of the Crown's exercise of prosecutorial discretion in a criminal case – nor is it a practical or sensible procedural route.

[60] First, as I have noted above, the underlying issue in the review sought by the appellants relates to the Crown's exercise of prosecutorial discretion in a criminal proceeding. It makes sense for the review to take place in the criminal

courts that have jurisdiction over the proceeding (in this case, the supervisory jurisdiction of the Superior Court by way of *certiorari*): *Dagenais*, at p. 864.

[61] It does not make sense for a review of this fundamentally criminal law issue to take place in the Federal Court, a court which does not have criminal law jurisdiction. I mean no disrespect to the judges of the Federal Court. But their jurisdiction is different than that of the Ontario Superior Court and does not include jurisdiction over criminal proceedings. Although it is possible that some proceedings before the Federal Court may indirectly touch on criminal law issues, the practical reality is that the judges of the Federal Court are not regularly called on to consider and apply Canada's criminal law.

[62] Second, as I have noted above, the doctrine of abuse of process is about a court's ability to prevent abuse of its process. To go to a court outside the jurisdictional hierarchy of the court whose process is said to have been abused is inconsistent with the nature of the abuse of process remedy. It is not the job of the Federal Court to protect the Ontario courts from the abuse of their processes. Sitting as a trial court, judges of the Ontario Court of Justice may consider issues of abuse of process affecting that court. In the circumstances of this appeal, where the Crown has intervened in and withdrawn a private prosecution, thus ending the proceedings in the Ontario Court of Justice, it falls to the supervisory jurisdiction of the Ontario Superior Court to ensure that the process of the Ontario courts is not abused by allegedly improper exercise of Crown discretion.

[63] Third, an application for judicial review in the Federal Court would result in an admixture of civil procedure and criminal procedure. In *Dagenais*, at pp. 863-64, one of the factors that led Lamer C.J. to reject civil appeals as a route for a third party to challenge a publication ban issued in a criminal trial was the unpredictability that results from mixing criminal and civil procedure.

[64] Fourth, given the provisions of the *Criminal Code* in relation to applications in the nature of *certiorari* or other prerogative writs, I am doubtful that the Federal Court would have jurisdiction, in any event.

[65] The jurisdictional foundation for applications for *certiorari* and other prerogative writs is the inherent jurisdiction of the Superior Courts. The procedure for an application for a prerogative writ in criminal matters is governed by Part XXVI of the *Criminal Code* and rules made by superior courts, enacted under the authority of s. 482 of the *Criminal Code*. Section 774 of the *Criminal Code* provides that: “This Part applies to proceedings in criminal matters by way of *certiorari*, *habeas corpus*, *mandamus*, *procedendo* and prohibition.” In Ontario, rule 43 of the *Criminal Proceedings Rules for the Superior Court of Justice* governs the procedure for applications for extraordinary remedies.

[66] Given that Parliament has legislated in relation to the procedure for applications for prerogative writs in criminal matters, it is difficult to see any jurisdictional space left for a role for the Federal Court. In this respect, I am in

general agreement with the analysis of Harris J.A. of the British Columbia Court of Appeal in *Holland*, at paras. 18-27, on a similar point in relation to the possibility of overlapping civil jurisdiction.

(iv) Conclusion on jurisdiction and standing to review the Crown exercise of discretion to intervene in and withdraw or stay a private prosecution

[67] I return to the *Dagenais* approach of looking for the "least unsatisfactory" procedural route for review of the Crown's exercise of prosecutorial discretion to intervene in and withdraw or stay a private prosecution.

[68] The only potential flaw with the procedural route of a criminal application for *certiorari* is that it could be said to fit awkwardly with the language in *Awashish* related to an "order", in the sense outlined above that the presiding justice cannot refuse the Crown request to withdraw or stay an Information prior to plea. Respectfully, this is a matter of form and not substance.

[69] Even so, a criminal application for *certiorari* is still the "least unsatisfactory" route to review the exercise of prosecutorial discretion to intervene in and withdraw or stay a private prosecution. Indeed, a criminal application for *certiorari* is a <u>good</u> route for this review. It is a straightforward and expeditious criminal procedure. It allows all parties with an interest to be heard – the informant/private prosecutor, the Crown, and the accused. And by following established criminal procedure, it

keeps the review in the criminal courts, where it belongs – both because it is a criminal matter and because it is the procedure of Ontario's criminal courts that the remedy of review for abuse of process is designed to safeguard.

[70] As explained above, the interest of the person who lays an Information before a Justice of the Peace, pursuant to s. 504 of the *Criminal Code*, as a private prosecutor gives that person a sufficient interest in the criminal proceedings to support standing to bring an application for *certiorari* alleging abuse of process, where the Crown intervenes and withdraws or stays the prosecution.

[71] I take comfort in my conclusion that the appropriate route of review is a criminal application for *certiorari* and that the private prosecutor has standing to bring the application from decisions of other provinces that have reached the same conclusion: *Holland*, at paras. 2-3, 18-26; *Holzbauer*, at paras. 18-19; *Gauvin*, at paras. 3, 87, 107-113.

[72] I am aware that in *Currie v. Ontario (Attorney General)*, 2017 ONCA 266, at para. 18, this court, while not deciding the issue, expressed "serious concerns" about a private prosecutor's standing to challenge the exercise of prosecutorial discretion to intervene in and withdraw a private prosecution. Our court has been somewhat ambivalent on this issue, having heard at least four appeals in similar circumstances and having not raised concerns about standing or jurisdiction: *Paik c. Bullen*, 2023 ONCA 642, leave to appeal to S.C.C. refused, 41031 (May 9,

2024); *R. v. Glegg*, 2021 ONCA 100, 400 C.C.C. (3d) 276; *P.C. v. Ontario (Attorney General)*, 2020 ONCA 652, 396 C.C.C. (3d) 216, at paras. 52-55, leave to appeal to S.C.C. refused, 39805 (November 25, 2021); *Perks v. Ontario (Attorney General)* (1998), 116 O.A.C. 399 (C.A.), leave to appeal refused, [1999] S.C.C.A. No. 89. Indeed, in *Perks*, this court expressly declined to rule on the jurisdictional issue (referring to paragraphs of the lower court decision, reported at [1998] O.J. No. 421, addressing that issue).

[73] With full argument on the issue, I conclude that the appellants followed the appropriate procedure to challenge the exercise of prosecutorial discretion to intervene in and withdraw the private prosecution. The application judge erred in concluding that the Superior Court did not have jurisdiction to hear the application for *certiorari* and that the appellants did not have standing to bring it.

[74] Before leaving this issue, I flag a matter of practice. It is unclear from the record before us whether the accused, Sar-El, was served with the application for *certiorari*. Because I conclude that the application judge did not err in finding that the appellants failed to meet the threshold evidentiary burden in relation to abuse of process, the possible lack of service is a moot point. But I emphasize that a private prosecutor who brings an application for *certiorari* to review the Crown's exercise of prosecutorial discretion to withdraw or stay an Information must serve the application on the accused person or persons. Given the interest of an accused

in whether the charge(s) proceeds, they would have a right to respond and be heard on the application.

[75] Because I would find that the Superior Court has jurisdiction to hear the application for *certiorari* and the appellants have standing to bring it based on the law in relation to review of the exercise of Crown discretion and *certiorari*, it is not necessary to consider the appellants' argument based on s. 7 of the *Charter*. I note that this argument was not included in their Notice of Application for *certiorari* filed in the Superior Court. It was raised for the first time on appeal.

(2) The floodgates concern

[76] The application judge was concerned about the prospect of a flood of applications for *certiorari* from disgruntled private prosecutors, if the court were to find jurisdiction and standing for the *certiorari* application brought by the appellants. He raised the issue during oral submissions. In his reasons, he wrote:

> If the applicants were correct, the courts would be faced with numerous applications from dissatisfied parties with meritless cases ended by the Crown after it had conducted an objective review of the case and concluded – on a test with a low threshold – that there was no reasonable prospect of conviction or that it was not in the public interest to continue.

[77] Although no statistics were put before the court about the number of private Informations laid in Ontario in criminal matters each year, I accept, based on experience in the criminal justice system, that the number is high enough that if

every private informant whose charge was stayed by the Crown sought review of the Crown's exercise of discretion, the Superior Court would properly be concerned with how to manage the applications.

[78] That said, the floodgates problem appears to be more theoretical than real. Acknowledging that there might be unreported decisions, I have found fewer than ten decisions over the past 30 years on applications for *certiorari* involving the Crown intervening in and terminating a private prosecution.[7] This is so in spite of the fact that, although some judges of the Superior Court have questioned whether an informant has standing to bring an application for *certiorari* in these circumstances, until the decision under appeal, cases have been decided on the merits. Four of these decisions (*Perks*, *Paik*, *Glegg*, and P.C.) were affirmed by this court with no comment on jurisdiction or standing.[8]

[79] Accepting for the sake of argument that this court confirming that the Superior Court has jurisdiction and that an informant has standing in relation to an application for *certiorari* to review the Crown's decision to intervene in and

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[7] See *Ahmadoun*; *Perks v. Ontario (Attorney General)*, [1998] O.J. No. 421 (Gen. Div.), aff'd (1998), 116 O.A.C. 399 (C.A.); *P.C. v. Ontario*, 2020 ONSC 758, aff'd 2020 ONCA 652; *R. v. Paik*, 2022 ONSC 7407, aff'd *Paik c. Bullen*, 2023 ONCA 642; *R. v. Lloyd*, 2024 ONSC 3757; *R. v. Glegg*, 2018 ONSC 3861, aff'd 2021 ONCA 100; *Gentles v. Ontario (Attorney General)* (1996), 39 C.R.R. (2d) 319 (On. Gen. Div.); *Lochner v. Attorney General of Ontario*, 2017 ONSC 5293; *R. v. Perkins-Aboagye*, 2016 ONSC 4473.

[8] Indeed, although *Perks* is a short endorsement, this court expressly stated that it made no comment on the two paragraphs of the application judge's reasons which questioned the Superior Court's jurisdiction to hear an application for *certiorari* involving a Crown exercise of prosecutorial discretion to terminate a private prosecution.

terminate a prosecution could lead to an increased number of such applications, the Superior Court is not without authority to manage its process.

[80] The high standard that must be met to show abuse of process in the Crown's exercise of prosecutorial discretion is not a small impediment. The practical reality is that the vast majority of exercises of prosecutorial discretion will not come close to showing abuse of process and this will be clear from a summary review of the record. Two tools are available to Superior Court judges to manage meritless applications and dismiss them at an early stage. The first is specific to claims of abuse of process. The second is applicable to all criminal proceedings.

[81] First, in *Anderson*, at paras. 52-55, Moldaver J. explained that a court should not embark on a review of prosecutorial discretion without first engaging in a "threshold determination" that there is an evidentiary foundation to do so: see also *Nixon*, at paras. 60-62, 65.

[82] In *Anderson*, Moldaver J. did not elaborate on the nature of the threshold burden. However, the references to *Nixon* and *R. v. Pires*; *R. v. Lising*, 2005 SCC 66, [2005] 3 S.C.R. 343, at para. 53 of *Anderson* suggest that the threshold standard is whether the applicant has provided an evidentiary foundation that there is a reasonable likelihood that a hearing of the application on the merits would assist in determining the issues before the court.

[83] This court has held that the threshold burden can be met in one of two ways: first, with an evidentiary foundation; second, where the discretionary prosecutorial decision is so rare and exceptional that it demands an explanation, such as the repudiation of the plea agreement in *Nixon*: *R. v. Delchev*, 2015 ONCA 381, 325 C.C.C. (3d) 447, at paras. 49-54. I agree with the approach in *Heffernan v. Alberta*, 2018 ABQB 12, 358 C.C.C (3d) 519, at paras. 50-56, that where an evidentiary showing is relied on to meet the threshold burden, it must be evidence beyond suspicion or speculation. It must be evidence on which a court sitting on judicial review, acting judicially, could conclude that the Crown's decision involved an abuse of process.

[84] I note that in the alternative portion of his reasons, the application judge made clear that he also would have dismissed the application for failing to meet the threshold evidentiary burden in *Anderson*.

[85] Second, in *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, at para. 38, the Supreme Court encouraged trial judges to exercise their case management powers to minimize delay and ensure efficient use of court resources. The court held that before permitting an application to proceed, a trial judge should consider whether it has a reasonable prospect of success, and, in appropriate circumstances, exercise their discretion to summarily dismiss the application. These comments are equally applicable in the context of an application for *certiorari* in the Superior Court.

[86] For these reasons, I am not persuaded that a concern about a flood of applications weighs against my conclusions that the Superior Court has jurisdiction to hear the application and the appellants have standing to bring it.

(3) The application judge did not err in finding that the appellants had not met the threshold evidentiary burden from *Anderson*

[87] The appellants argue that in the second, alternative, branch of his analysis, the application judge decided the application for *certiorari* on the merits, and did so without hearing submissions from the parties on the merits. I disagree on both counts.

[88] The trial judge's reasons in the alternative are not on the merits of the application as such, but on the threshold burden from *Anderson* that a party alleging abuse of process must establish an evidentiary foundation that there is a reasonable likelihood that a hearing of the application on the merits would assist in determining the issues before the court (discussed above). And the application judge did hear submissions on the threshold evidentiary burden during the hearing on jurisdiction and standing.

[89] I will first explain why I conclude that the parties did make submissions on the threshold burden before the application judge, which means there was no procedural unfairness. I will then explain why I agree with the application judge's

conclusion that the appellants failed to meet the threshold evidentiary burden from *Anderson*.

(i) The application judge heard submissions on the threshold evidentiary burden from *Anderson*

[90] The appellants argue that the application judge decided the merits of the application for *certiorari* without hearing submissions. That is not what he decided. Rather, he found that the appellants had not satisfied the threshold evidentiary burden from *Anderson* for a hearing on the merits. I am satisfied from my review of the transcript of the proceedings that he did hear submissions on the issue of the threshold evidentiary burden in *Anderson* during the hearing on jurisdiction and standing.

[91] A review of the chronology of proceedings before the application judge assists in showing that there was no denial of procedural fairness.

[92] When the application was first addressed in assignment court in the Superior Court, on February 10, 2023, the application judge raised, of his own motion, the issue of the court's jurisdiction to hear an application for *certiorari* related to the Crown's exercise of discretion to intervene in and withdraw a private prosecution. In addition, the Crown was seeking dismissal of the application for failing to meet the threshold evidentiary burden from *Anderson*. The application judge directed

the parties to file materials addressing the jurisdictional issue, and set a hearing date on this issue for March 10, 2023.

[93] The parties appeared before the application judge on March 10, 2023. On that date they made submissions on the issues of standing and jurisdiction and the threshold burden from *Anderson* for a claim of abuse of process to proceed to a hearing on the merits.

[94] The submissions on March 10, 2023 show that the parties were given the opportunity to make submissions on the *Anderson* threshold burden and did so.

[95] After counsel for the appellants had made a number of submissions in relation to jurisdiction and standing, the application judge asked: “And you’re saying the abuse of process is what? Because that’s a threshold you have to meet as well.” In response counsel for the appellants outlined, in detail, the basis for the claim of abuse of process. During counsel’s explanation of the abuse of process claim, which in part alleged that “partisan interests” played a role in the Crown’s decision-making, the application judge asked: “Well, what evidence do you have of partisan decisions being made?” After counsel for the appellants provided a response to that question, the application judge interjected:

> But you, you have to show something right, like, right, to meet the threshold. It’s not, you don’t get to the threshold by passing the threshold and coming back and saying, well, we want to argue it and that will show we’ve met the threshold. Before to go, before you can go any further, you have to show something. You have to show

> something that clearly exists that will allow you to make that application on an abuse of process argument, so …

At which point, counsel for the appellants resumed his submissions on the basis for the abuse of process claim.

[96] The *Anderson* threshold issue was also the subject of submissions by Crown counsel before the application judge. Crown counsel began his submissions by saying there were "three problems" with the application, the "standing problem", the "jurisdictional problem", and the "threshold issue." After addressing standing and jurisdiction, Crown counsel turned to the threshold argument, saying: "And that leads to my last threshold argument." He then made submissions on why the record was not capable of establishing abuse of process.

[97] These passages clearly show that the application judge asked for and received submissions from the parties on the *Anderson* threshold evidentiary burden.

[98] The appellants rely on a statement by the application judge at the close of the hearing in support of their argument that they were denied procedural fairness. At the close of submissions, the application judge reserved his decision and said he would get the parties a decision in three or four weeks. He then said to the parties:

> [J]ust so that you have some idea of where it's going, and if I decide that you do have standing, we're going to bring it back into the special motions court to decide where we

> go from there. Obviously if I dismiss the application then it's over, as far as this level of court, anyway.

[99] Respectfully, in the context of the submissions and colloquies with the application judge that preceded it, I do not read this passage in the same way as the appellants. The application judge had heard submissions on jurisdiction, standing, and the *Anderson* threshold evidentiary burden. The reference to bringing the matter back to special motions court to set a date was in the event that the appellants prevailed on all of those issues – including the threshold evidentiary burden. If that happened, a hearing date on the merits would be set. As it turned out, the application judge found that the appellants lacked standing (a finding I would set aside) and, in the alternative, that they failed to meet the threshold evidentiary burden under *Anderson*. In light of the latter finding, there was no requirement for a hearing on the merits and no denial of procedural fairness.

(ii) The application judge did not err in finding that the appellants had not met the *Anderson* threshold evidentiary burden

[100] The appellants argue that the evidentiary record placed before the application judge was sufficient to show abuse of process in the Crown's decision to intervene in and withdraw the private prosecution. I disagree.

[101] I agree with the application judge's conclusion that the appellants failed to meet the threshold burden set out in *Anderson*. The record was not capable of

establishing abuse of process. There was not a reasonable likelihood that a hearing would assist in determining whether the Crown's decision to intervene in and withdraw the private prosecution constituted an abuse of process. The reason for this is that the abuse of process claim rested on two speculative inferences: first, an unfounded assertion of inconsistency between the Crown's positions at the pre-enquete and when it intervened and withdrew the charge; and second, an unfounded assertion that the Crown was motivated by Canada's foreign policy positions in withdrawing the charge. In other words, although the applicants tendered some evidence in support of their claim of abuse of process, their claim had two significant inferential gaps that prevented it from meeting the *Anderson* threshold burden.

[102] The appellants' argument that the Crown decision to intervene in and withdraw the private prosecution was an abuse of process rested on two bodies of evidence. The first related to comments by Crown counsel at the pre-enquete hearing as compared to the letter where the Crown outlined its reasons for terminating the prosecution. The second related to Canada's foreign policy positions regarding the conflict in Israel and Gaza. I outline each body of evidence and the appellants' arguments as context for my conclusion that they did not meet the *Anderson* threshold burden. The appellants rely on the same bodies of evidence on appeal.

[103] The first body of evidence is based on comparing a comment made by Crown counsel during the pre-enquete hearing to the reasons given in his letter of December 13, 2022 explaining his conclusion that there was no reasonable prospect of conviction.

[104] During the submissions portion of the pre-enquete hearing, after Rabbi Mivasair's testimony and after submissions by counsel for the appellants, Crown counsel made the following submission:

> I think it may be the first time I've actually done this, but it does appear that there is some evidence for each of the elements of the offence for this [i.e., process] to be issued at this time. I would say that I agree that whether the engagement is with the Israeli military is probably going to be a trial issue. If it gets that far, I don't know, but it does appear based on the evidence of Mr. Mivasair and Ms. Nazzal that there is something for each element of the offence.

[105] On December 13, 2022, prior to the court hearing when the Crown formally intervened in and withdrew the private prosecution, Crown counsel wrote to counsel for the appellants to explain the reasons the Crown was intervening in and withdrawing the private prosecution. He explained that after reviewing all of the relevant information provided by the appellants and other publicly available information, he had come to the conclusion that there was no reasonable prospect of conviction. Crown counsel explained the reasons for that conclusion based on his interpretation of the elements of the offence created by s. 11 of the *FEA*, and the available evidence.

[106] The appellants argue that the change in Crown counsel's position between the pre-enquete and the December 13, 2022 letter is evidence of abuse of process and demonstrates an oblique motive.

[107] The second body of evidence relied on by the appellants is evidence about Canada's foreign policy in relation to the conflict in Israel and Gaza. The foreign policy evidence is supplemented by evidence that the appellants had previously sought to raise their concerns about Sar-El's activities in Canada through multiple Parliamentary petitions and a complaint to the Toronto Police Service. Neither of these routes led to an investigation of Sar-El.

[108] The appellants argue that the decision of Crown counsel to intervene in and withdraw the private prosecution was improperly influenced by Canada's foreign policy positions and is "part of a pattern of exceptional treatment shown to the Israeli armed forces by the Canadian government."

[109] The application judge found that the evidence was not capable of supporting a finding of abuse of process. He first outlined in some detail the applicable legal standard – that exercises of prosecutorial discretion are subject to review only for abuse of process and the high standard required to show abuse of process. In doing so the application judge relied on relevant Supreme Court authority, including *Anderson*. He then stated:

> Notwithstanding the repeated expressions of abuse of process by the applicants, there is nothing before this court that constitutes conduct of that description.
>
> In a letter dated 13 December 2022, the respondent informed the applicants' lawyers of its decision to withdraw the charges because it had determined there was no reasonable prospect of conviction. As previously noted, it set out in explicit and clear terms the absence of evidence necessary to support the foundation of the charges. There is nothing before this court to demonstrate any flagrant impropriety or egregious conduct that undermines trial fairness.
>
> What emerges from the applicants' position amounts to a disagreement with the Crown's decision to stay the charges. Generally speaking, the prosecutorial discretion is immune from review absent evidence of an abuse of process.
>
> I also do not agree with the applicants' alternative argument that the application should be granted even in the absence of evidence of bad faith. In *Anderson*, at paras. 52-55, the Supreme Court of Canada made clear that a proper evidentiary threshold burden had to be met before embarking on an enquiry behind the exercise of prosecutorial discretion.

[110] I see no error in the finding that the appellants failed to meet the evidentiary threshold from *Anderson*.

[111] As noted above, the *Anderson* threshold burden requires that a party alleging abuse of process establish an evidentiary basis showing that there is a reasonable likelihood that a hearing can assist in determining the issues before the court. In my view, it is not necessary to define the limits of the evidentiary threshold to decide this appeal. The two central inferences that the appellants rely

on for their claim of abuse of process are speculative on the record before the court.

[112] The Crown's positions at the pre-enquete hearing and in the letter explaining the reasons for terminating the prosecution are not inconsistent and do not provide a basis to draw an inference of abuse of process.

[113] The comment of Crown counsel at the pre-enquete (excerpted above) was directed to the standard a Justice of the Peace must consider in deciding whether to issue process (after an Information is received). The standard to issue process is whether there is some evidence on each element of the offence: *McHale*, at paras. 5-11, 43-48, 64-71, and 74; *P.C.*, at paras. 27-30; *Criminal Code*, ss. 507 and 507.1. The standard for issuing process is also informed by the reasonable and probable grounds standard for a Justice of the Peace to receive an Information, set out in s. 504 of the *Criminal Code*.

[114] A different standard applies when Crown counsel is deciding whether to continue a prosecution after a Justice of the Peace has issued process – whether there is a reasonable prospect of conviction.[9] This is a higher standard than the standard applied when a Justice of the Peace decides whether to issue process:

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[9] Most prosecution services in Canada also consider a second issue. If the Crown is of the view that there is a reasonable prospect of conviction, is it in the public interest to proceed with the prosecution? In this case, the public interest assessment was not in play because Crown counsel formed the view that there was no reasonable prospect of conviction.

Public Prosecution Service of Canada Deskbook, chapter 2.3 “Decision to Prosecute” at 4.1 and following; *Ontario Crown Prosecution Manual*, “Charge Screening” at D.3; The Honourable G. Arthur Martin, O.C., O. Ont., Q.C., LL.D., Chair, *Report of the Attorney General’s Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (Toronto: Ontario Ministry of the Attorney General, Queen’s Printer for Ontario, 1993), at pp. 65-74.

[115] The fact that Crown counsel took the view at the pre-enquete that there may be triable issues sufficient that he did not object to a summons issuing is not capable of establishing abuse of process in the Crown’s ultimate decision to withdraw the charge on the basis of no reasonable prospect of conviction. As I have explained, different legal standards apply to the decision of a Justice of the Peace at a pre-enquete whether to issue process and Crown counsel’s later assessment of whether there is a reasonable prospect of conviction.

[116] Further, the record is clear that Crown counsel’s assessment of whether there was a reasonable prospect of conviction was made after a more thorough review of the available evidence and the law. This is entirely consistent with the *Criminal Code* and the caselaw. Indeed, this court has held that the discretion of the Crown to intervene in and withdraw a private prosecution cannot be exercised before a Justice of the Peace has issued process: *McHale*, at paras. 71-77. The inference sought by the appellants is entirely speculative.

[117] The appellants argue that the Crown's interpretation of the *FEA* in the December 13, 2022 letter is wrong and that the wrongness is evidence of abuse of process. I disagree. The issue is not the correctness of the Crown's interpretation of s. 11 of the *FEA*. Indeed, I emphasize that I express no view on whether the Crown's interpretation of s. 11 is correct. The Crown's legal interpretation could be wrong without being an abuse of process. Legal error is not abuse of process.

[118] Nor does the evidence of Canada's foreign policy positions or the fact that the appellants' Parliamentary petitions and complaint to the police did not lead to investigation of Sar-El provide any basis to infer that Crown counsel who made the decision in this case acted for improper motives. I, of course, make no comment on the merits of Canada's foreign policy. There is no basis in the record to infer that Canada's foreign policy positions had any impact on the decision made by Crown counsel in this case to terminate the prosecution. There is no evidentiary link to support the inference. It is, again, a speculative inference.

[119] I have addressed the two branches of the appellants' abuse of process argument separately above for reasons of analytical clarity. I have also considered whether the two arguments taken together and the evidence the appellants have marshalled in support of them are sufficient to show an abuse of process. I am not persuaded that they are. The inferences the appellants seek to draw are speculative. The record is not capable of showing abuse of process in the Crown's

decision to intervene in and withdraw the private prosecution. Thus, I see no error in the application judge's finding that the appellants failed to meet the *Anderson* threshold evidentiary burden.

[120] For sake of completeness I would add, although it was not specifically argued, that the Crown's decision to intervene in the private prosecution in this case is not the type of "rare and exceptional" event discussed in *Delchev* that would, in and of itself, surpass the *Anderson* threshold. Crown decisions to intervene in and stay or withdraw private prosecutions are commonplace. There is nothing about the circumstances of the intervention and withdrawal in this case that raises concerns about the Crown's exercise of discretion in the sense described at para. 56 of *Delchev*.

Disposition

[121] I would dismiss the appeal.

Released: March 10, 2025 "P.D.L."

"J. Copeland J.A."
"I agree. P. Lauwers J.A."
"I agree. J. George J.A."