COURT FILE NO.: 08-70-MO
DATE: February 3, 2009

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
HER MAJESTY THE QUEEN	)	*Peter Keen*, for the Crown
- and -	)	
RALPH ROWE	)	*Robert Sinding,* for the accused Ralph Rowe
	)	**HEARD:** December 15, 2008

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REASONS ON MOTION FOR STAY

Stach, J.

[1] Ralph Rowe has been previously prosecuted and convicted for committing multiple sexual offences against young boys. In the main, these offences occurred in First Nations communities in northwestern Ontario between 1970 and 1987. In the indictment now before the court, 10 new complainants (in 21 counts) allege that Ralph Rowe indecently assaulted or sexually assaulted them. The current indictment alleges acts of sexual abuse by Ralph Rowe in several First Nation

communities in northwestern Ontario committed over a time span ranging from 1971 to 1987. There is no dispute that the current complainants are adult Aboriginal males, that they allege criminal acts committed against them by Ralph Rowe when they were children, and that Ralph Rowe has *not* been previously prosecuted in the respect of these individuals.

[2] In the motion now before the court, Ralph Rowe seeks a "stay" of the current proceedings. He challenges the prosecution on a number of grounds:

- 'repeated' prosecution for offences he committed in the 1970's and the 1980's in northwestern Ontario constitutes cruel and unusual treatment;
- 'repeated' prosecution is contrary to the principle of finality;
- he has already been punished globally for the offences he committed, "in total", in the 1970's and 1980's;
- given the publicity surrounding the earlier prosecutions, the complainants in the current indictment should have come forward at an earlier time, and the crown should have proceeded with this prosecution, if at all, at a much earlier time;
- the time periods alleged in individual counts in the current indictment are overly broad and lack specificity;
- serial prosecution by the crown prevents Ralph Rowe from "moving on with his life" and, in the event of 'serial' convictions and 'serial' sentencing, amounts to a life sentence for Ralph Rowe by installment;

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- serial prosecution entails deferral, interference with, and prejudice to his parole applications.

[3] The defence concedes that each of these grounds of challenge to the current prosecution cannot, by itself, permit the court to find an abuse of process but that, viewed in context, and cumulatively taken, rise to the level of an abuse of process which would warrant the court staying the current proceeding.

[4] Ralph Rowe raised many of these challenges in earlier proceedings before this court[1]. His challenges were unsuccessful. In my judgment, I am constrained to consider the challenges anew, in view of any new information or development that was not previously before the court and, as asked by the defence, to view matters cumulatively.

Abuse of Process

[5] The test for abuse of process was definitively laid down by the Supreme Court of Canada:

> [T]here is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse

[1] R v. Rowe [2006], O.J. No. 3203; [2007] O.J. No 2971; [2007] O.J. No 2997.

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> of a court's process through oppressive or vexatious proceedings…. This is a power which can be exercised only in the "clearest of cases".[2]

[6] Although the notion of 'abuse of process' has it origin in the common law, the analysis of that issue in Canada is now subsumed with that of the *Charter*.[3] It is well understood that the threshold for establishing an abuse of process is high.

[7] Finding an abuse of process requires that the prosecution be tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. It entails circumstances where the affront to fair play and decency is so disproportionate to the societal interest in the effective prosecution of criminal cases that the administration of justice is best served by staying the proceedings.[4] In criminal cases, courts have a residual discretion to remedy an abuse of the court's processes but only in the 'clearest of cases' where the conduct so shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention.[5]

[8] The onus in this motion is on Ralph Rowe to show on a balance of probabilities that the crown has, by its conduct, breached Ralph Rowe's *Charter* rights and that such conduct, viewed, in its entirety, constitutes an abuse of

[2] R v. Jewitt, [1985] 2 S.C.R. 128 at paragraph 25.
[3] See R v. O'Connor, [1995] 4 S.C.R. 411 at paragraph 63; See also R v. Pan, [2001] 2 S.C.R. 344 at paragraph 112.
[4] Regina v. Conway, [1989]1 S.C.R. 1659 at paragraph 8.
[5] Regina v. Power, [1994]1 S.C.R. 601.

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process.[6] In the absence of any evidence of bad faith or ulterior motive, there is no basis for placing a burden on the crown to explain the investigative and prosecutorial processes.[7]

discussion

[9] In support of its position on this motion the defence relies upon the affidavits of Ralph Knight Munck Rowe and Pat Rowe, the agreed statement of facts on this motion and the transcripts, documents and judgments in previous proceedings. No other evidence was placed before me.

[10] I propose to address the challenges raised by the defence individually and then cumulatively. The defence presentation on this motion was not a model of organization. Some of the categories and submissions have been commingled and I shall attempt to address all of them although not necessarily in the order of presentation.

Pre-charge delay

[6] Regina v. L. (W.K.), [1991], 64 C.C.C. (3d) 321(S.C.C.), at page 326 paragraph 19.
[7] Regina v. National Steel Car Ltd, (2003), 63 O.R. (3d) 693 (Ont.CA.).

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[11] The defence says that there is no reason why the current charges could not have been bought forward in 1994 in the initial prosecution of Mr. Rowe or, alternatively, in the 2005 prosecution[8]. He argues that both earlier prosecutions were well publicized. He argues that most of the current complainants provided some disclosure of their allegations before the 2005 prosecution was completed. He says that it would have been both possible and reasonable to deal with all of the current charges in the 2005 prosecution, that the failure to do so is evidence of bad faith and improper motive on the part of the crown, and that the complainants were not reasonably diligent in bringing the charges forward.

[12] The trial for what has been referred to as "the 2005 prosecution" took place in May 2007. It is clear from the agreed statement of facts on this motion that, between October 2006 and January 2007, the crown became aware that still other complainants were coming forward. The agreed statement of fact confirms that defence counsel was also made aware that other complainants were coming forward. Initially defence counsel declined the crown disclosure package respecting other complainants. Defence counsel subsequently requested the disclosure package and it was promptly provided to him. Similarly the crown indicated to defence counsel that, at that late stage in the trial proceeding, new charges would not be rolled into the existing prosecution. Defence counsel did not object.

[8] The 2005 prosecution resulted in a trial held in May 2007.

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[13] I have had the opportunity to review the rationale for deferring prosecution respecting the emerging complainants, as set out in the agreed statement of facts. In my judgment, it is a reasoned and sensible basis for deferring prosecution respecting the emerging complainants to which the defence did not object. There is no hint of bad faith or improper crown motive in it.

[14] As a general proposition time will be reckoned from the date the information was laid or indictment prepared in determining whether an accused has been accorded trial within a reasonable time.[9] Pre-charge delay may in certain circumstances have an influence on the overall determination as to whether post-charge delay is unreasonable but, of itself, is not counted in determining the length of the delay.[10] In the matter now before me there is no complaint about post-charge delay in regard to the current prosecution. In my opinion, the defence has merely had second thoughts about whether it would have been preferable to delay the trial in 2007 in order to "roll into" that trial the prosecution for the emerging complainants.

[15] I think it appropriate to add some further comment in this segment in view of the defence criticism of the complainants for not having come forward sooner.

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[9] Regina v. Kalanj, [1989]1 S.C.R. on 594 at paragraph 18.
[10] Regina v. Morin [1992]1 S.C.R. 771 at paragraph 34; and see R. Finta,[1994]1 S.C.R. 701 at paragraph 113.

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[16] In my opinion, private disclosure of sexual abuse by a victim to family members and counsellors – even, in some cases to police officers – should not be equated with "psychological preparedness" on the part of a complainant to make a formal allegation against the accused, particularly in view of the very public consequences of such a step. As the Supreme Court long ago noted:

> It is well documented that non-reporting, incomplete reporting and delay in reporting are common in sexual assault cases… For victims of sexual abuse to complain would take courage and emotional strength in revealing those personal secrets, in opening old wounds. If proceedings were to be stayed based solely on the passage of time between abuse and the charge, victims would be required to report incidents before they were psychologically prepared for the consequences of that reporting.[11]

> To stay proceedings against an accused on the basis of pre-charge delay alone would be the equivalent of imposing a judicially created limitation period for a criminal offence, allowing sexual abusers to take advantage of the failure to report which they themselves, in many cases, caused. This is not a result that we should encourage.[12]

Finality

[17] Mr. Rowe says that the offences to which he entered pleas of "guilty" in earlier prosecutions (1994 and 2007) are symbolic of *every* offence he committed in the remote northern communities during the 1970's and 1980's, whether they

were actually prosecuted or not. It is on this ground that he uses the phrase 'repeated prosecution' in presenting his challenge. He says that he has already been punished, not only for charges on which he was previously convicted, but also in respect of *all* complaints that may be brought forward from the remote northern communities by future complainants. He says further that proceeding with the current charges cannot or should not add significantly to a 'global' sentencing result. He argues, in short, that he has already paid his debt to society. He argues that the principle of finality should bar these proceedings against him.

[18] In my opinion, these defence submissions ignore entirely the previous plea agreement that, with the benefit of counsel, Mr. Rowe entered into with the crown in 1994. The plea agreement related to sentencing only. It did not proscribe future prosecution. By that agreement, Mr. Rowe remained subject to future prosecution and additional jail time in respect of after–discovered offences involving more egregious conduct. Similarly, Mr. Rowe, by his plea agreement, faced additional prosecution even for after–discovered offences that were similar in gravity to those already known in 1994. The most he could hope for was no *additional* jail time for offences similar in gravity to those for which he was convicted in 1994.

[11] Regina v. L (WK) (1991); 64 C.C.C (3d) 321 per Stevenson J. at page 328.
[12] 1bid at paragraphs 25 and 28.

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[19] The defence submission on 'finality' is premised upon the proposition that 'finality' is a freestanding and independent principle of our criminal justice system that gives rise to new substantive rights. In my opinion that basic premise is flawed. 'Finality' is, indeed an important interest of the criminal justice system but it is recognized and promoted through the law of issue estoppel.[13] Mr. Rowe has presented no authority in support of the proposition that the 'finality' principle, as he uses the term, has been independently applied to halt a prosecution.

[20] In its submissions respecting 'finality', the defence asserts that the current prosecution violates Mr. Rowe's right under s.11(h) of the *Charter* not to be exposed or punished a second time for the *same* offence. It is enough, on this issue, to say that the parties in the current proceedings are not the same. The defence submissions respecting s.11(h) of the *Charter* are entirely without merit.

the argument that the counts in the indictment are overly broad and lack specificity

[21] In its submissions before me on the motion the defence did not seriously press its argument under this head of challenge. Accordingly I will not address it extensively in these reasons.

[13] Regina v. Mahalingan, [2008] S.C.J. N0.6 (S.C.C.).

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[22] The time of an alleged offence is not normally an essential element in the prosecution of sexual offences. The defence concedes that it has not brought, nor does it intend to bring, any application to quash the indictment on this ground.

I infer that the time periods referenced in individual counts on the indictment are responsive to the evidence of the complainants at the preliminary inquiry.

[22] I do not attach any weight to this ground of the defence challenge.

Breach of Mr. Rowe's right to a fair trial under sections 7 and 11(d) of the *Charter*

[23] In his affidavit Ralph Rowe deposes that the serial delay in prosecution has resulted in the loss of defence evidence which now impedes his right to a fair trial. This issue was not argued by defence counsel on the motion before me. Indeed prejudice under this alleged ground, had, in fact, been raised by the defence in an earlier hearing before me where the defence was unsuccessful.

[24] Save for the effluxion of time between the 2007 prosecution and the current proceedings, there has been no development that adds anything of substance in respect of this issue. I was not persuaded previously and I am not persuaded now that there is anything of substance that undermines the accused's right to a fair trial here. Indeed, in his affidavit, Ralph Rowe desposes that "once

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a complainant comes forward and I am made aware of their name and some details reminding me of who they were, I can articulate details of my knowledge and memory of my interaction with that individual".

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the public interest / the personal impact of serial prosecutions

[25] The defence submissions on these issues were commingled. Accordingly I will also deal with these submissions together.

[26] In affidavits filed by Mr. Rowe and by his sister, considerable emphasis is placed upon the impact on Mr. Rowe of the previous sentencing proceedings and, particularly, the impact on him of serial periods of incarceration. In 1994, a sentence of imprisonment for 6 years was imposed. In 2007, a 3 year prison sentence was imposed.

[27] The affidavits filed on the motion, particularly that of Ralph Rowe, are substantially directed to describing some of the more unpleasant aspects and side-effects of incarceration. They are directed also towards the loss of hope engendered in Ralph Rowe when, after release on parole from the first period of incarceration, he set out to establish a new life and, while on parole, the crushing impact on him of having that 'rehabilitation' interrupted by a new set of charges

in a fresh prosecution that resulted in another jail sentence in 2007. Mr. Rowe also indicates that the launch of the current prosecution has both deferred and prejudiced an existing application for parole in respect of the 2007 sentence.

[28] Ralph Rowe maintains that this history of "repeated" or "continued" prosecutions not only derails the rehabilitative process time and again but also amounts, cumulatively, to the imposition of a "life sentence" on him. Moreover, the defence, in its submission, maintains that the deferral of and new launch of the current proceedings was a deliberate attempt by the crown to prejudice his existing application for parole. I should say at once, that while the timing of the present prosecution may have impacted on Mr. Rowe's existing quest for parole, there is absolutely no support for the notion that the crown acted here out of a sense of malice or bad faith.

[29] Relying on the totality principle and on the previous sentences of imprisonment imposed against Mr. Rowe, the defence maintains that, even if convicted, Mr. Rowe is unlikely to be sentenced to significant additional jail time. In short, the defence says that it is not in the public interest to continue with the expense of the current criminal prosecution.

[30] The defence maintains that there is no public interest to be served from multiple prosecutions, particularly where they interfere so significantly with the attempt of the accused to reintegrate himself into society.

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[31] In its submissions the crown says there is a public interest in delineating the true scope of Ralph Rowe's offending in the remote communities of the northwest region. Mr. Keen for the crown asserts that the current prosecution will add to that picture. Equally important, he submits that the current prosecution will permit fulfillment of another important public interest by allowing the present complainants (who have not previously been heard) to come forward in a public process that permits them either to see Mr. Rowe accept responsibility for wrongdoing he allegedly perpetrated against them or, by proceeding to trial, permit them the opportunity to testify about their experiences at his hands. The crown asserts a high public interest in protecting the ability of these aboriginal complainants to come forward. I agree.

[32] I note that the Supreme Court of Canada has held that a series of trials will not, in and of itself, constitute an abuse of process.[14] In my opinion multiple prosecutions, based in each instance on new allegations from newly emerging complainants is neither contrary to law nor offensive unless the totality of circumstances demonstrably raises further prosecution to the level of an abuse of process.

[33] The totality principle is a factor this court should never lose sight of, just as the need to do justice in individual cases must be borne in mind. It occurs to me, however, that a global or 'total' view is impossible of attainment in

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circumstances where the full scope of wrongdoing is subject, to a process of continuous unfolding. While it may well be argued that the prosecution of Ralph Rowe on criminal charges arising out of his tenure in northwestern Ontario must at some point cease, the submissions advanced under this head of challenge do not persuade me that the line must be drawn at the current prosecution.

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cruel and unusual punishment

[34] The defence submission under this head of challenge was scant. Putting it at its highest, the defence submission is that with respect to both the "incarceration experience" and his repeated subjection to the trial process, Mr. Rowe is unwarrantably exposed to cruel and unusual treatment or punishment contrary to s.12 of the *Charter.*

[35] The defence conceded openly and candidly that there is no case law or precedent which establishes that serial prosecutions on similar charges involving different complainants constitutes cruel or unusual treatment or punishment. Nevertheless, it may be argued that serial *prosecution* by state authorities can indeed constitute reviewable *"treatment"* within the meaning of s. 12 of the *Charter*. Assuming that to be true, the real issue in my judgment is whether

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[14] Regina v. Keyowski, [1988]1 S.C.R. 657 at paragraphs 3-4.

further prosecution in the case before me should be characterized as "cruel or unusual".

[36] The test for "cruel and unusual" has its origins in the pre-Charter case of *Regina* v. *Miller and Cockriell,*[15] where Laskin C.J. (as he then was) indicated that the 'punishment' must not be *so excessive as to outrage the standards of decency.* This test was adopted in the context of the s.12 of the Charter in Regina v. Smith[16] and subsequently applied in other cases[17].

[37] If Mr. Rowe's argument on this point were fuller he would likely have urged this court to find that his treatment at the hands of the crown by way of serial prosecutions for what, he says, are essentially "the same" offences is cruel and unusual treatment. Mr. Rowe, however, has failed to persuade me that he is being prosecuted for essentially the same offences or that the crown's prosecution of him to date – including the current prosecution - is so grossly disproportionate that Canadians' standard of decency would be outraged.

Conclusion

[15] [1977]2 S.C.R. 680.
[16] [1987]1 S.C.R. 1045 at paragraph 53.
[17] Canadian Foundation for Children, youth and the law v.Canada [2004]1 S.C.R. 76 per McLachlin C.J. at paragraph 49.

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[38] The defence, in its submissions, has invited the court to consider each of the challenges individually and in combination. Although the defence concedes that none of these challenges can by itself rise to the level of an abuse of process, the defence argued that they can, when taken in context and considered cumulatively constitute an abuse of the court's process that warrants the court putting a stop to the current prosecution.

[39] The leading case, and one which establishes the test for a stay of proceedings based upon an abuse of process is the Supreme Court decision in Regina v. Regan.[18]:

> 53. A stay of proceedings is only one remedy to an abuse of process, but the most drastic one: "the ultimate remedy"….It is ultimate in the sense that it is final. Charges that are stayed may never be prosecuted; an alleged victim will never get his or her day in court; society will never have the matter resolved by a trier of fact. For these reasons, a stay is reserved for only those cases of abuse where a very high threshold is met: "the threshold for obtaining a stay of proceedings remains, under the Charter as under the common law doctrine of abuse of process, the 'clearest of cases'.
>
> 54. Regardless of whether the abuse causes prejudice to the accused because of an unfair trial, or to the integrity of the justice system, a stay of proceedings will only be appropriate when two criteria are met:
>
> 1. the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
> 2. no other remedy is reasonably capable of removing that prejudice
>
> The….first criterion is critically important. It reflects the fact that a stay of proceedings is a prospective rather than a retroactive remedy. A stay

[18] [2002]1 S.C.R. 297.

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of proceedings does not merely redress a past wrong. It aims to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole, in the future.

55. As discussed above, most cases of abuse of process will cause prejudice by rendering the trial unfair. Under s. 7 of the Charter, however, a small residual category of abusive action exists which does not affect trial fairness, but still undermines the fundamental justice of the system. Yet even in these cases, the important prospective nature of the stay as a remedy must still be satisfied: "[t]he mere fact that the state has treated an individual shabbily in the past is not enough to warrant a stay of proceedings". When dealing with an abuse which falls into the residual category, generally speaking, a stay of proceedings is only appropriate when the abuse is likely to continue or be carried forward. Only in "exceptional", "relatively very rare" cases will the past misconduct be "so egregious that the mere fact of going forward in the light of it will be offensive".

56. Any likelihood of abuse which will continue to manifest itself if the proceedings continue then must be considered in relation to possible remedies less drastic than a stay. Once it is determined that the abuse will continue to plague the judicial process, and that no remedy other than a stay can rectify the problem, a judge may exercise her or his discretion to grant a stay.

57. Finally, however, this Court in *Tobiass* instructed that there may still be cases where uncertainty persists about whether the abuse is sufficient to warrant the drastic remedy of a stay. In such cases, a third criterion is considered. This is the stage where a traditional balancing of interests is done: "it will be appropriate to balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits". In these cases, "an egregious act of misconduct could [never] be overtaken by some passing public concern [although] ... a compelling societal interest in having a full hearing could tip the scales in favour of proceeding". [citations omitted]

[40] The onus of establishing abuse of process rests with Mr. Rowe on a balance of probabilities.

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[41] In the period since counsel completed their oral submissions on this motion, I have had the opportunity to review not only my notes but also their factums and the several authorities to which they referred me. I have taken time to consider the defence challenges to the current prosecution, individually and cumulatively in the overall context presented. Neither the material nor the submissions of counsel persuade me that the defence challenges to the current prosecution, either alone or in combination, rise to the high threshold required for a stay of proceedings.

[42] The defence motion is dismissed.

Justice Stach

Released: July 24, 2009

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COURT FILE NO.: 08-070-MO
DATE: December 15, 2008

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Her Majesty the Queen

- and –

Ralph Rowe

REASONS FOR JUDGMENT ON MOTION

Stach, J

Released: July 24, 2009