Date of Release: October 22, 1992

No. CC9206l7
No. 9l 6947
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

REGINA	)	**REASONS FOR JUDGMENT**
	)	
v.	)	**OF THE HONOURABLE**
	)	
HUBERT PATRICK O'CONNOR	)	**MR. JUSTICE THACKRAY**
	)	
	)	**(IN CHAMBERS)**

Counsel for the Crown: Greg Jones

Counsel for the Accused: Christopher M. Considine and Daniel Roy McDonagh

Heard at Vancouver: October l6, l992

The accused stands charged with four counts of sexual misconduct alleged to have occurred between 1964 and 1967. At the time he was the principal of the St. Joseph's Mission Residential School (the "School") near Williams Lake, British Columbia.

The motion before the Court is for a judicial stay of proceedings. The motion alleges that the accused's right to be tried within a reasonable time pursuant to Section 11(b) of the ***Canadian Charter of Rights and Freedoms*** has been violated as has his right not to be deprived of life, liberty or security of person pursuant to Section 7 of the ***Charter***.

In his written submission, counsel for the accused expanded the basis for the motion by alleging a violation of Section 650(3) of the ***Criminal Code***. He also contended that the common law provides grounds for staying the charges.

CHARGES

Mr. O'Connor is charged with having non-consensual sexual intercourse with P.B. between January, 1964, and November, 1967, and with M.J. between December, 1965, and September, 1966.

He is further charged with indecently assaulting R.D. between July, 1965, and July, 1967, and A.H. between August, 1965, and December, 1966.

BACKGROUND

Mr. O'Connor was born in Quebec on February 17, 1928. He became principal of the School in 1961 and retained this position until 1967. The School was run by the Oblate Order of the Catholic Church and employed both priests and nuns. In addition, both native and non-native men and women worked at the School.

The two women who were allegedly raped by the accused were employees at the School. The alleged assaults were upon two female

students. Mr. O'Connor denies all of the allegations. He states that his sexual relationship with the two employees was consensual. He denies that there was any improper conduct by him towards the two students.

Mr. O'Connor was appointed the Bishop of Whitehorse on October 15, 1971, and the Bishop of Prince George on June 9, 1986.

Charges were laid on February 7, 1991. A Preliminary Inquiry was heard in Williams Lake on July 3 and 4, 1991. Trial dates of January 13, 1992, and June 15, 1992, were not met. It is now scheduled to be heard in Vancouver commencing on November 30, 1992.

CHARTER AND CRIMINAL CODE

The Sections of the ***Charter*** upon which the accused relies read as follows:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> **ll.** Any person charged with an offence has the right
> (b) to be tried within a reasonable time;

The **Criminal Code** provision upon which he relies reads:

> **650.** (3) An accused is entitled, after the close of the case for the prosecution, to make full answer and defence personally or by the counsel.

MATERIAL BEFORE THE COURT

Defence counsel filed a detailed written submission and an affidavit from Mr. O'Connor. In an oral submission defence counsel related the affidavit evidence to the applicable law and to the alleged ***Charter*** violations. He said that the application has a unique quality in that the accused has filed an affidavit attesting to his position on each charge, detailed the "missing evidence", and shown how he has been prejudiced.

Mr. Considine said that in an analogous way the affidavit evidence amounted to "an agreed statement of facts." Crown counsel did not accept the analogy, but agreed that there was no opposing evidence and that he could not say that there were any factual errors in the affidavit. Crown counsel also agreed that it was unique to have such an affidavit from an accused. The uncontroverted evidence before the Court, in part, is as follows.

P.B.

P.B. was employed as a seamstress at the School at the time of Mr. O'Connor's appointment in 1961. She had maternity leave in 1967 but otherwise continued her employment until her marriage in

1969. Mr. O'Connor and P.B. had consensual sexual relations over many months, commencing when P.B. was 22 years of age.

Evidence at the Preliminary Inquiry from P.B. is that in about 1964, following a drive-in movie, the accused forced her to have sexual intercourse. He denies this allegation. He says that due to the vagueness of the complainant's recollection of the date of this alleged incident, he is unable to determine which Sisters were working at the time. He speculates that the Sisters on duty would be able to say that the complainant went directly to her room "upon returning from the movie."

Mr. O'Connor attested that despite extensive efforts the whereabouts of Ms. Patricia Skolsej, a social worker who attended P.B., cannot be ascertained. He believes that Ms. Skolsej would say that P.B. "had the same warm, caring and loving feelings towards me as I held towards her." The Crown counters that this is not an issue and that it is admitted that P.B. came to love him.

Another potential witness, Mr. Adam Smith, a leader in the girl's pipe band, has died. Ms. Rita Sandy who was a supervisor on band trips has also died. The accused speculates that Mr. Smith and Ms. Sandy would have sworn to the accused's appropriate behaviour while travelling with the band. Once again, the Crown concedes the point. The Crown says that the accused's behaviour in public was always appropriate.

The accused also swears to the unavailability of the complainant's employment records and medical records. He also states that he has destroyed cards and letters sent to him by P.B. which contained evidence of their "warm and cordial friendship". The Crown's position is that there is no contention that P.B. ever made any statement to an employer or medical adviser suggesting that she had been raped by Mr. O'Connor. Further, that the cards and letters were received by the accused and that they did contain warm and friendly messages.

M.J.

M.J. began employment at the School as the secretary in 1965 and continued in that employment until July, 1967. Mr. O'Connor denies the allegation of non-consensual sexual intercourse and states:

> M.J. and I worked closely together within the School office and a strong friendship developed over a period of months which eventually turned into a consensual sexual relationship. She was between the ages of 19 and 20 at the time of this relationship.

At the Preliminary Inquiry, M.J. testified that in December, 1965, she became ill and fainted in the Chapel and that she was attended to by Sister Joan [Sister Joan d'Arc]. She said that later that same day the accused came to her room and assaulted her. Sister d'Arc was born on December 15, 1901. Her doctor has provided a report stating that she "would not be considered legally

competent in terms of self care, etc.". He said that she has "shown gradual mental deterioration."

Mr. O'Connor speculates that if the charges had arisen sooner, Sister d'Arc would be able to testify as to the condition of M.J. on the occasion in question, the accused's concern for her, and as to the medication administered. "She would have also been able to testify that I had a friendly relationship with M.J. and that my behaviour at all times was appropriate."

The accused makes all of the same points regarding "missing evidence" as he did with respect to the charge concerning P.B. He also says, as he did with P.B., that he confided the nature of his relationship with M.J. to Father Edward Brown, who died in about 1978.

In addition, Mr. O'Connor says that three Sisters who served at the School during his tenure are now deceased. He expects that they would have been able to "provide evidence regarding my relationship with the students and the employees at the School."

R.D.

R.D. was born on July 26, 1948. She attended the School from the ages of 10 to 19. Mr. O'Connor denies the allegation of indecent assault. He said that "To my knowledge, I have never touched R.D. in an inappropriate manner or for sexual purpose."

Mr. O'Connor says that at the Preliminary Inquiry R.D. could not remember exact details and that "time runs together for her in those days." The transcript shows that the questioning was with regard to her age when she was in the band. When asked when she "stopped being in the band", she answered "Time runs together for me in those days". The accused says that her "inability to recall times, dates and places makes it extremely difficult to raise a full answer and defence".

At the Preliminary Inquiry, R.D. testified that she was at work cleaning in the Chapel when she was told by "an unidentified girl" to go to the accused's private quarters and clean the bathroom. She alleges that she was assaulted while in the accused's room. Three of the Sisters who were in charge of cleaning at the time are now deceased. A fourth Sister, Sister Mary Pezderic, is now 81 years of age. According to her doctor, she "shows definite signs of aging in her mental processes." Her doctor does not think that she would be a reliable court witness.

Mr. O'Connor attested that the now deceased Sisters would say that no student was ever so summoned to clean his room, but if such did occur, such an assignment would not be given to a student. Further, that his conduct was always friendly and appropriate and that his conduct "was above reproach with R.D.". He says that the death of Mr. Adam Smith also deprives him of evidence of his appropriate conduct.

The absence of medical records is a further prejudicial factor in this charge, according to Mr. O'Connor. He says that he has no knowledge of the whereabouts of such records. As I understand it, this is because the School records have been destroyed and thus there are no documents identifying the medical advisors. R.D. testified at the Preliminary Inquiry that she had been sexually assaulted before her arrival at the School. The accused states that medical records might "show that there were no indications of any physical, emotional or sexual abuse that occurred while she was at the School." The Crown says that they will accept that the medical records would be silent on this point.

A.H.

A.H. received her certificate as a practical nurse in 1966 and had a full-time position available to her in a Victoria hospital in 1967. Mr. O'Connor offered her temporary employment at the School in the fall of 1966 as a housekeeper and assistant instructor of the girl's pipe band. It is alleged the accused assaulted A.H. between August and December, 1966. Mr. O'Connor denies any assault on A.H. at any time.

At the Preliminary Inquiry, A.H. testified to an assault in approximately December, 1966. This was after a movie. Mr. O'Connor allegedly invited A.H. to his room and put his arms around her and pinned her to the bed.

Mr. O'Connor attests that if the charges had arisen earlier the names of people who may have been on the trip to the movie might be recalled. He thinks such people would be able to "corroborate that A.H. was in a playfully rambunctious mood on the evening in question."

Mr. O'Connor holds the opinion that if the witnesses named earlier but now deceased were available, they would be able to testify as to the "rambunctious and playful disposition" of A.H. and this would corroborate his evidence on this charge.

Mr. O'Connor has provided medical records showing that A.H. suffered a heart condition in 1983. Her evidence at the Preliminary Inquiry is that her memory has been adversely affected.

DEFENCE COUNSEL'S SUBMISSION

Mr. Considine submitted that the right of Mr. O'Connor to make a full answer and defence has been abrogated by the matters set forth in the affidavit of the accused. He restated the principle of the presumption of innocence, referred to Section 7 of the ***Charter*** and Section 650(3) of the ***Criminal Code***, and to what was said by Alderson, B. to a jury in ***The Queen v. Robins*** (1844) 1 COX C.C. 114:

> I ought not to allow this case to go further. It is monstrous to put a man on his trial after such a lapse of

> time. How can he account for his conduct so far back? If you accused a man of a crime the next day, he may be enabled to bring forward his servants and family to say where he was and what he was about at that time; but if the charge be not preferred to a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted. It would be very unjust to put him on his trial.

In that case the accused had been indicted for bestiality. His Lordship directed the jury to acquit Mr. Robins.

In ***R. v. Kalanj*** [1989] 6 W.W.R. 577 (S.C.C.), Mr. Justice McIntyre quoted the above words of Alderson,B. and went on to say that Section 11(b) of the ***Charter*** should not be distorted to guard against pre-charge delay. He said that delays at that stage fall to be adjudicated under Section 7 of the ***Charter*** and Section 650(3) of the ***Criminal Code***.

Brand v. College of Physicians and Surgeons of Saskatchewan [1989] 5 W.W.R. 516 (Sask. Q.B.) involved pre-charge delays of as much as 38 years. The charges were of sexual misconduct with six different individuals. Mr. Justice Gerein reviewed many authorities, including ***Kalanj***, and concluded as follows:

> Section 7 is substantive as well as procedural in its application. Therefore, denial of the ability to make full answer and defence constitutes an infringement of Section 7 of the Charter. Precharge delay is relevant in considering whether there has been such a denial. Precharge delay, in and of itself, will not constitute an infringement of Section 7, but it is otherwise if it

> results in a denial of the opportunity to make full answer and defence.

Defence counsel carefully reviewed the factual matters in Mr. O'Connor's affidavit to illustrate how they prejudice the accused's "opportunity to make full answer and defence." Apart from the "missing" witnesses he submitted that some of the complainants cannot be precise as to the timing of the incidents. For instance, P.B. appears to admit at the Preliminary Inquiry that the first sexual intercourse with the accused might not have occurred until two or three months after the movie night.

Another instance of conflict of dates appears in the evidence of R.D. The charge alleges the assault took place between 1965 and 1967. The evidence of the complainant in chief suggests that sexual touching took place in about 1967. In cross-examination it was illustrated that the witness had informed a police constable that they took place in about 1960.

Because of the difficulties in precisely determining dates, the defence argued that the accused cannot identify who might be potential witnesses.

The remedy, according to the defence, is to stay the charges. It is submitted that such a remedy is available both at common law and pursuant to Section 24(1) of the ***Charter***. This section

provides that anyone whose rights have been infringed may apply to a Court "to obtain such remedy as the Court considers appropriate and just in the circumstances."

In support defence counsel cited ***R. v. Desmond*** (1967), 46 C.C.C. (3d) 37 (N.S.S.C.). A motor vehicle which was the subject matter in the case had been disposed of following inspection by an insurance investigator. It was held that the accused was denied his right to make a full answer and defence. On the basis of Section 24(1) the charge was stayed.

In giving judgment in that case Grant, J. cited ***R. v. Bourget*** (1987), 35 C.C.C. (3d) 371 (Sask. C.A.). The accused was convicted at trial of driving with an alcohol reading of over .08. The conviction was quashed and the Crown appealed. The issue was whether the Crown's refusal to provide representative ampoules of the solution used to analyze the accused's breath constituted a violation of rights under Section 7 of the ***Charter***. In giving judgment for the Court, Tallis, J.A. noted that the Crown plays an essential role "in the truth-finding function of our system". He went on at page 377:

> The need to develop all the relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments or verdicts were to be fashioned on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in

> it must depend upon full disclosure of all the facts, within the framework of the rules of evidence.

Mr. Justice Tallis said that Section 7 of the ***Charter*** gives the Court broad power to promote the proper administration of criminal justice. He stated that Section 7 "is no longer limited to the notion of procedural fairness in court...".

Defence counsel submitted that while ***R. v. Askov*** (1990), 59 C.C.C. (3d) 449 (S.C.C.) is not a case of pre-charge delay, it nevertheless contains principles applicable to the case at bar. That is, that the whole process must be brought to fruition within a reasonable time so that the accused may have his "name cleared and reputation re-established at the earliest possible time." (***Askov***, p. 474).

Mr. Considine summarized the defence position in the following words:

> The remedy which, IT IS SUBMITTED, ought to apply is a Judicial Stay. It would offend the sense of justice of every citizen in this country if O'Connor was put to trial when he was not able to make full answer and defence in the circumstances of this case. Nor could it be said to be a fair trial if key witnesses for the defence are dead or mentally infirm. Material evidence has been lost, misplaced and destroyed. Due to the lapse of time and the poor memory of the complainants after 25 to 26 years, O'Connor is unable to even have the opportunity to establish the defence of alibi, which he would have been able to have done 25 years ago.

CROWN COUNSEL'S SUBMISSION

In a remarkably short brief Crown counsel opposed the application for a stay. The full text of the Crown's written submission is as follows:

> IT IS RESPECTFULLY SUBMITTED that the materials filed on behalf of the applicant do not set out a sufficient evidentiary basis upon which to grant the relief sought and, in particular that where the application for a Stay is based upon, inter alia, a dispute over the credibility of Crown witnesses "the Respondent does not meet the onus upon him unless the credibility of the complainants is properly assessed by the judge" - Mr. Justice Legg, British Columbia Court of Appeal, Regina v. W.K.L., 5l C.C.C. (3d) 304 - Crown's Vol. l, tab 20, also see p. 302 at line c, and line e; p. 303, line g.
>
> - see also R. v. L(WK) Supreme Court of Canada - Crown's Vol. l, tab 2l, p. l096, line c and h; also p. l099, line e, line h-j, p. ll00, line a-j, p. ll0l, lines c-e;
>
> - "Charter decision should not and must not be made in a factual vacuum" - McKaryn Manitoba (l989) 2 S.C.R. 357 at Crown's Vol l, tab l, p. 36l.

Crown counsel's oral submission was of equal brevity. He referred to ***R. v. L. (W.K.)*** (1989), 51 C.C.C. (3d) 297 (B.C.C.A.); [1991] 4 W.W.R. 385 (S.C.C.) and to "McKaryn Manitoba" which is properly entitled ***MacKay v. Manitoba*** [1989] 2 S.C.R. 357.

JUDGMENT

I am satisfied that there is discretion in a trial judge to stay proceedings where compelling an accused to stand trial would violate fundamental principles of justice. If it can be said that the fundamentals of justice which underlie the community's sense of fair play and decency have been violated, or that the court's process has been abused by oppressive or vexatious proceedings, then a stay may result. However, it is equally clear that this is a power of special application which can be exercised only in the clearest of cases. (See ***R. v. L.(W.K.)***, supra, page 302 of the B.C.C.A. decision.)

This motion may be brought pre-trial or before any evidence is heard at the trial. In ***R. v. Kalanj*** (supra), the motion was brought at the trial but before a plea was taken. Similarly, in ***R. v. L.(W.K.)*** the trial judge entered a stay on a motion made just before the trial was to commence. However, such timing poses problems for the applicant in that without any evidence it is difficult for the accused to demonstrate that the case is one of the "clearest of cases."

In ***R. v. L.(W.K.)*** Legg, J.A. for the British Columbia Court of Appeal said:

> ... where the granting of a stay is based upon a finding of credibility of the complainants' allegations, as here, and the respondent alleges that the delay in making those allegations exposes him to such prejudice that he is deprived of his rights under ss. 7 and 11(d) of the Charter, the respondent does not meet the onus upon him unless the credibility of the complainants is properly assessed by the judge. One way in which the judge might have proceeded in the case at bar was by hearing the evidence in support of the Crown's case.

In dismissing the Crown's appeal, Mr. Justice Stevenson for the Supreme Court of Canada said:

> I do not read the judgment of the Court of Appeal as saying that any particular procedure must always be employed in resolving applications under s. 24. It might, for example, be open to the parties to put forward an agreed statement of facts. The decision to continue to trial and argue the motion at the close of the Crown's case, to submit evidence by affidavit, or to agree to a statement of facts will depend on the extent to which the parties can agree and the nature of the facts which the parties seek to establish. I agree with the Court of Appeal that the informal procedure employed on this motion was inadequate since it did not produce the evidence required to support the submissions of the accused.

In the case at bar, the accused attempted to overcome the evidentiary hurdle by filing affidavit evidence.

It is therefore necessary to consider that evidence. There is no doubt that several potential witnesses are no longer available. For instance, Mr. Adam Smith and Ms. Rita Sandy from the girl's pipe band. They may have been able to say that Mr. O'Connor's conduct was publicly appropriate. However, the Crown concedes that such was the case. At this time, the potential evidence appears to

be redundant.

I do not see as a defence problem the inability to call certain Sisters who would attest to the accused's good relationship with the students. The Crown does not expect to suggest that the relationship was other than satisfactory. Furthermore, if such evidence is admissible or necessary, I have not been told that there are no available witnesses.

In my opinion the same applies to the need for the cards and letters from P.B. signalling her warmth and affection for the accused. Her feelings are conceded by the Crown. Mr. O'Connor can give evidence of the receipt of the cards and letters. The evidence of Ms. Patricia Skolsej as to P.B.'s loving feelings towards the accused is not clearly necessary. Ms. Skolsej might be located between now and the close of the Crown's case at trial.

I fail to appreciate the relevance of the inability of the defence to call Father Brown. The accused's statements to Father Brown might be admissible but at this time it is difficult to appreciate how they would add to the defence. This might become evident by the conclusion of the Crown's case.

It is arguable that the Sisters on duty after the drive-in movie might add to the defence. However, that depends on what the evidence is in the Crown's case. If the Crown's case is not

affected by whether or not P.B. went directly to her room after the movie, then there may be no need for the evidence.

I am not satisfied with the medical report on the mental condition of Sister Joan d'Arc. It is said that she is no longer legally competent in terms of self care. This, in my respectful opinion, is irrelevant to the case. The doctor also said that she has shown mental deterioration. That is not surprising in a 91 year old. The issue is whether or not she is mentally competent to give evidence, and whether or not she has any memory of the events. Further, it is relevant whether at any time she would have had any useful evidence.

Much the same applies to the medical report on Sister Pezderic. At age 81 she no doubt shows "signs of aging in her mental processes." While the doctor does not "feel" that she would be a reliable witness, she might surprise him. The doctor does not state that she is mentally incompetent.

The submission that medical records of the complainants are not available, and thus the accused is prejudiced, contains several problems. One is that there is no evidence that the records are unavailable. It is simply that the school records are unavailable and thus the identity of attending doctors has not been ascertained. I would think that it would not require an extensive effort to determine the identity of doctors practising in the

geographic area at the relevant time. The next step would be to find out if the complainants were patients of those doctors, and the availability of the records. If that fails, then it can be said that the information is unavailable.

This still leaves the matter of whether or not the records are necessary. The Crown says that it will agree that the complainants did not make any allegations of abuse to their medical advisers.

The inability of the complainants to recall times, dates and places would appear to me to be a significant problem for the Crown. If P.B. has given two distinctly different accounts as to when intercourse first took place, it will be the credibility of P.B. that will first be tested. Similarly regarding R.D. who might be faced with versions that vary by as much as seven years. As was said by Mr. Justice Stevenson in ***R. v. L.(W.K.)***: "The fairness of a trial is not, however, automatically undermined by even a lengthy pre-charge delay. Indeed, a delay may operate to the advantage of the accused, since Crown witnesses may forget or disappear."

It might be that the dual accounts will oblige the defence to seek out witnesses for both time periods. At this stage in the proceedings, it is far from clear how confusion on the part of the Crown's main witnesses would form the foundation for a stay of proceedings at the instigation of the defence. The difficulty

would seem to be one for the Crown.

I have not dealt with every evidentiary point raised by the defence. On reviewing all of them, including those which I have specified, I am not satisfied that the accused cannot have a fair trial. That is not to say that there is no prejudice through the effluxion of time. Such is inevitable. However, the mere passage of time pre-charge is not a foundation for a stay either at common law or pursuant to a violation of a ***Charter*** right. (See ***R. v. L.(W.K.)***, supra, page 302 of the B.C.C.A. decision, and page 327 of the Supreme Court of Canada reasons.)

In ***R. v. L.(W.K.)*** the accused was charged with indecently assaulting his stepdaughter. The judge said that the accused's rights under Sections 7 and 11(d) of the ***Charter*** would be infringed by proceeding. The pre-charge delay ranged from 1 year to as much as 29 years.

It should be noted that in that case, in spite of the requirement that to obtain a stay it must be a clear case, the motion was not supported by any evidence, nor were facts formally agreed upon. The B. C. Court of Appeal held that the trial judge erred in granting a stay without receiving proper evidence when the alleged infringement of rights "rested upon the credibility of the complainants and of the [accused]." A Crown appeal to the Supreme

Court of Canada was dismissed.

Defence counsel took the position that ***R. v. L.(W.K.)*** has no application here because the trial judge made a palpable error in basing his judgment on evidence that was not in existence. He said that in the case at bar the necessary evidence has been produced. I agree that evidence has been produced. However, I do not agree that it satisfies the onus of showing that the accused has been prejudiced to the degree that he cannot have a fair trial.

My ruling is without prejudice to the defence bringing the motion again at an appropriate time. I will refer to this again later in these reasons.

POSTSCRIPT

Judgment has been given based upon the submissions of counsel, the evidence adduced, and the case authorities to which I was referred. During the hearing I repeatedly suggested that the application might be premature in that no Crown evidence had been heard. I also asked if the war crime trials including holocaust actions had dealt with the problems faced by long pre-trial delays. Counsel provided nothing other than the cases to which I have referred.

My own "research" uncovered cases on point. If these cases had altered the decision to which I came on the authorities cited by counsel, I would have alerted counsel to them and have given them an opportunity to respond. However, they support my judgment in this case and consequently I will cite them, make some comments thereon, and agonize as to why counsel failed to bring them to the Court's attention.

R. v. Finta (1989) 69 O.R. (2d) 557 (Ont. High Court of Justice) is a war crimes and crimes against humanity case. The indictment was preferred some 44 years after the events. The accused applied for a stay of proceedings under s. 24(1) of the ***Charter***. He identified 15 people who were either dead or missing and who he alleged could have provided testimony on his behalf. He also claimed that the passage of time had removed the physical structures wherein events occurred and that his service and other personal records were no longer available.

Callaghan, A.C.J., commencing on page 594, sets forth the authorities on the subject of pre-charge delay. He noted that in ***R. v. Young*** (1984), 13 C.C.C. (3d) 1, Mr. Justice Dubin of the Ontario Court of Appeal determined that "even delay resulting in the impairment of the ability to make full answer and defence is not a basis for a stay of process." Callaghan, J. nevertheless said that if a person is impaired in his ability to make full

answer and defence "such that it prevents a fair trial then the trial judge can invoke s. 24(1) of the Charter and redress that injury in any way that is appropriate even to the extent of entering a stay of process."

Mr. Justice Callaghan also referred to ***R. v. Mills*** (1986), 26 C.C.C. (3d) 481 (S.C.C.) in which La Forest, J. said:

> I share the view of Lamer J. that as much as possible issues of unreasonable delay should be dealt with by the trial judge. This is consistent with the spirit of s. 24(1) of the Charter, which contemplates that an appropriate remedy is to be moulded to fit the circumstances. Only at trial will those circumstances have been fully dissected and explored. The trial judge, after hearing all the evidence, will be in the best position to determine precisely what has happened, what prejudice the accused has suffered ... remembering that delay will often be of benefit to the accused and used by him for that purpose.

Callaghan, J. then cited ***Rourke v. The Queen*** (1977), 35 C.C.C. (2d) 129 (S.C.C.) wherein Laskin, C.J. reviewed the issues arising from pre-charge delay. Mr. Justice Callaghan then said:

> Subject to such controls as are prescribed by the Criminal Code, prosecutions initiated a lengthy period after the alleged commission of an offence must be left to take their course and to be dealt with by the Court on the evidence, which Judges are entitled to weigh for cogency as well as credibility.
>
> ... in the Ontario Court of Appeal in *R. v. Ford, supra,* a stay imposed at trial on the basis of a violation of ss. 7 and ll(d) of the Charter was vacated and the court indicated that the issues arising in relation to long pre-charge delay should be disposed of at trial. Grange

J.A. at p. 380 said:

> It may well be that, as the trial proceeds, the respondent will be able to demonstrate that the delay has created a prejudice to his fair trial but at present I cannot see much prejudice in these complaints.
>
> . . . . .
>
> Again I say that if, as the trial develops, it appears the respondent has been prejudiced by delay, the question of his fair trial and the applicability of s. 7 of the Charter can again be considered. I say now only that prejudice has not yet been shown.

In the instant case, it will be necessary for the trial judge to hear the Crown allegations by way of evidence before being able to determine whether or not the applicant will be prejudiced as suggested by delays which have led to the loss of defence evidence, the death or disappearance of the various key witnesses or other forms of impairment of the defence as alleged in ex. J to this application. It will only be in that context that the trial judge will be able to determine whether or not these allegations of prejudice in fact prevent the applicant from making full answer and defence and, indeed, result in the denial of a fair trial and a violation of his ss. 7 and ll(d) rights under our Charter.

Furthermore, I note that under s. 650(3) of the *Criminal Code*, it is only "after the close of the case for the prosecution" that an accused is entitled to make full answer and defence personally or by counsel. That section, in my view, would seem to indicate that from a procedural point of view the application for a remedy under s. 24(l) the Charter would normally fall to be decided after the close of the case for the prosecution. With the Crown case before him, the trial judge would then be in a position to fully consider the nature of the alleged impairment and its impact on the ability to make full answer and defence. Accordingly, I am ruling that the application for a stay of process under 2. 24(l) of our Charter for infringement of the provisions of ss. ll(d) and 7 thereof is premature at this point in time. This ruling is without prejudice to the applicant, if so advised, to renew this application at the close of the case for the prosecution.

In ***R. v. Short*** (1991) B.C.C.A., Vancouver Registry CA013342, the Chief Justice gave reasons for the Court. This is a sexual abuse case in which the charge was laid some eight years after the events. Chief Justice McEachern said that it seems clear from such cases as ***Kalanj*** (supra) "that there is no formula for determining the amount of delay which the law will not tolerate."

McEachern, C.J., whose reasons were agreed to by the other two judges, relied upon ***R. v. L.(W.K.)*** to say that the lapse of time alone will seldom be a sufficient ground upon which to order a stay equivalent to an acquittal. There must be the inability of the accused to make a full answer and defence. The onus of demonstrating an infringement of ***Charter*** rights is upon the accused, "particularly when relying upon pre-charge delay."

Mr. Justice Trainor gave lengthy oral reasons on a stay application in ***R. v. Gatley*** (1990), New Westminster Registry X025054. At the beginning of the trial the accused applied for a stay based upon an infringement of his ***Charter*** rights due to a pre-charge delay of seven years. It appears that Trainor, J. heard the motion but "considered" it after hearing evidence led both before and outside of the jury. He considered the reasons of Callaghan, J. in **Finta** and then said:

> When the ***Finta*** case went on then for trial it was before Mr. Justice Campbell who said at page 10,089:

> It is, however, with those cautions, necessary to make some assessment of the potential value to the accused of the lost evidence...
>
> There must be an air of substantial reality about the claim that any particular piece of lost evidence or all of it cumulatively together would actually assist the accused in his defence.

Trainor J. reviewed many authorities. Based upon the principles found in those cases he said that it is then a matter of the exercise of the trial judge's discretion as to whether or not the accused can have a fair trial. He allowed the case to go to the jury.

The accused appealed: (1992) B.C.C.A., Vancouver Registry, CA012614. The appeal was dismissed and in its reasons the Court referred briefly to the significant case authorities and principles.

> These cases confirm that:
>
> 1) There is no set time in the proceedings to bring a stay application on the basis of pre-charge delay.
>
> 2) There must be evidence before the trial judge establishing that there is prejudice to the extent that the applicant cannot receive a fair trial.
>
> 3) It is only in the clearest of cases that a stay, amounting to an acquittal, will be granted.

4) There is no formula determining the amount of delay that the law will tolerate. This is because it is delay combined with what occurred during the delay that may result in insurmountable prejudice.

5) The usual time for bringing such a motion will be at the end of the Crown's case.

As the trial proceeds the accused may be able to demonstrate that what occurred during the pre-charge delay has prejudiced his case to the point that he cannot receive a fair trial. In the meantime the case must be "left to take its course and to be dealt with by the Court on the evidence."

"Allan D. Thackray, J."

Allan D. Thackray, J.

Vancouver, B.C.

October 22, 1992.