

# QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2013 SKQB 336**

Date: **2013 09 16**  
Docket: Q.B.J. No. 68 of 2012  
Judicial Centre: Battleford

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BETWEEN:

HER MAJESTY THE QUEEN

- and -

PAUL MARY LEROUX

**Counsel:**

Michel L.J. Piché  
Paul Mary Leroux

for the Crown  
on behalf of himself

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CHARTER APPLICATION  
September 16, 2013

ACTON J.

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[1] This is a pre-trial application by the accused for a stay of all 17 charges of indecent assault and gross indecency which were alleged to have been committed by the accused on the 14 complainants at the Beauval Indian Residential School in Beauval, Saskatchewan, between January 1, 1959 and December 31, 1967. The accused was the senior boys' dorm supervisor, physical education instructor and choir and music director for the school at the time.

[2] The accused claims that his right to a fair hearing including the right to a full answer and defence as guaranteed by ss. 7 and 11(d) of the *Canadian Charter of*

*Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the “*Charter*”), has been infringed due to the delay in charging and prosecuting the applicant as the death of many witnesses and the loss of many documents and photographs preclude a fair hearing. As well there has been an abuse of prosecutorial discretion amounting to an abuse of process and infringement of natural justice.

[3] The indictment was filed on May 16, 2012 after approximately three years of a concentrated and thorough investigation by the RCMP. The original investigation was abandoned in 2003.

[4] A preliminary inquiry was held in late April and early May of 2012 and the matter is now set for trial commencing October 15, 2013.

[5] This matter has been proceeding expeditiously since the laying of the charges. There is no evidence before the court of any post-charge delay.

[6] The issue before the court is whether or not there is sufficient pre-charge delay to warrant a stay of proceedings.

### **The Law**

[7] The law respecting pre-charge delay has been succinctly summarized by Foley J. in *R. v. Slough*, 2006 SKQB 70, 277 Sask.R. 115, wherein he adopts the law as set forth in *R. v. L. (W.K.)*, [1991] 1 S.C.R. 1091, 64 C.C.C. (3d) 321, where:

... the accused was charged in 1987 with 17 counts of sexual assault,

gross indecency, and assault relating to his daughters and stepdaughter. The first incident was alleged to have occurred in 1957 and the last in 1985. The accused applied for a stay of proceedings on the ground that the substantial delay impaired his ability to make full answer and defence, contrary to ss. 7 and 11(d) of the *Charter*. Writing for a unanimous court, Stevenson J. stated that the accused bore the burden of showing an infringement of his or her *Charter* rights and that delay can clearly be the sole wrong upon which an individual rests the claim that his or her rights have been denied. However, he noted that simple delay in charging and prosecuting did not justify a stay of proceedings as an abuse of process at common law and this reasoning also extended to analysis under the *Charter*.

[8] The Supreme Court of Canada states further in *R. v. L.(W.K.)*, *supra*, at paras. 21-25:

21 Many of the cases which have considered the issue have held that “mere delay” or “delay in itself” will never result in the denial of an individual’s rights. This language is imprecise. Delay can, clearly, be the sole “wrong” upon which an individual rests the claim that his or her rights have been denied. The question is whether an accused can rely solely on the passage of time which is apparent on the face of the indictment as establishing a violation of s. 7 or s. 11(d).

22 Delay in charging and prosecuting an individual cannot, without more, justify staying the proceedings as an abuse of process at common law. In *Rourke v. The Queen*, [1978] 1 S.C.R. 1021, Laskin C.J. (with whom the majority agreed on this point) stated that (at pp. 1040-41):

Absent any contention that the delay in apprehending the accused had some ulterior purpose, courts are in no position to tell the police that they did not proceed expeditiously enough with their investigation, and then impose a sanction of a stay when prosecution is initiated. The time lapse between the commission of an offence and the laying of a charge following apprehension of an accused cannot be monitored by Courts by fitting investigations into a standard mould or moulds. Witnesses and evidence may disappear in the short run as well as in the long, and the accused too may have to be sought for a long or short period of time. 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. The Court can call for an explanation of any untoward delay in prosecution and may be in a position, accordingly to assess the weight of some of the evidence.

23 Does the *Charter* now insulate accused persons from prosecution solely on the basis of the time that has passed between the commission of the offence and the laying of the charge? In my view, it does not.

24 Staying proceedings based on the mere passage of time would be the equivalent of imposing a judicially created limitation period for a criminal offence. In Canada, except in rare circumstances, there are no limitation periods in criminal law. The comments of Laskin C.J. in Rourke are equally applicable under the *Charter*.

25 Section 7 and s. 11(d) of the *Charter* protect, among other things, an individual's right to a fair trial. 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. The comments of Lamer J., as he then was, in *Mills v. The Queen, supra*, at p. 945, are apposite:

Pre-charge delay is relevant under ss. 7 and 11(d) because it is not the length of the delay which matters but rather the effect of that delay upon the fairness of the trial. [Emphasis added.]

Courts cannot, therefore, assess the fairness of a particular trial without considering the particular circumstances of the case. An accused's rights are not infringed solely because a lengthy delay is apparent on the face of the indictment.

[9] As noted by Foley J. in *Slough, supra*:

[8] The issue of pre-charge delay was considered by the Saskatchewan Court of Appeal in *R. v. Ledinski* (1995), 102 C.C.C. (3d) 445 (C.A.). There a school teacher was charged with an indecent assault alleged to have taken place some 30 years earlier. Lane J.A. held that the test to determine whether the rights of the accused had been infringed by the delay was whether the delay would likely preclude a fair trial and that the mere absence of witnesses does not necessarily mean the appellant cannot have a fair trial. There must be an air of substantial reality that any missing evidence would in fact and in a material way assist the accused. A like test has been used by the Ontario Court of Appeal in *R. v. D.A.* (1992), 76 C.C.C. (3d) 1 (Ont. C.A.), and by the Alberta Court of Appeal in *R. v. Grimes* (1998), 122 C.C.C. (3d) 331 (Alta. C.A.). Although Lane J.A.'s reasons in *Ledinski* were subsequently withdrawn to enable a rehearing, his comments have nevertheless been relied upon. See *R. v. Carosella*, [1997] 1 S.C.R. 80.

[9] The requirement for an accused to demonstrate prejudice is also consistent with Supreme Court of Canada decisions dealing with lost or destroyed evidence and the corresponding effect on the accused's right to make full answer and defence. In *R. v. La*, [1997] 2 S.C.R. 680, the Crown failed to disclose a taped conversation between a constable and the accused, as the tape had been misplaced. The accused applied for a stay of proceedings based on the Crown's failure to disclose the tape. Sopinka J., holding that the main consideration in such cases is whether the Crown took reasonable steps in the circumstances to preserve the evidence for disclosure, stated:

... Suffice it to say that, where the Crown has met its disclosure obligations, in order to make out a breach of s. 7 on the ground of lost evidence, the accused must establish actual prejudice to his or her right to make full answer and defence. This requirement is seen most clearly in lost evidence cases reviewed by my colleague Justice L'Heureux-Dubé in her reasons in *Carosella*, *supra*; see paras. 76-80.

[10] In summary, to establish an infringement of one's right to make full answer and defence under the *Charter*, one must demonstrate, on a balance of probabilities, prejudice to the ability to make full answer and defence or precluding a fair trial, whether due to delay, lost evidence or deceased witnesses.

[10] With respect to the death of many potential witnesses and destroyed photographs, the accused has not established that any of these witnesses or photographs would materially assist in his defence. Such witnesses would at best only be able to provide evidence with respect to collateral issues which to some small degree may relate only to the issue of credibility. No material relevance of the additional photographs has been established.

[11] For these reasons, the accused has failed to prove on a balance of probabilities that there has been a breach of his rights to a fair trial or to the right to make full answer and defence under ss. 7 or 11(d) of the *Charter*.

[12] The application of the accused for a stay of proceedings based on a breach of ss. 7 and 11(d) of the *Charter* as an abuse of process is dismissed.

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J.  
M.D. ACTON