SUPREME COURT OF NOVA SCOTIA
Citation: *R.* v. *Joudrey*, 2010 NSSC 230

Date: 20100614
Docket: Ken 317000
Registry: Kentville

Between:

Regina

Applicant

v.

Glenn William Joudrey

Respondent

Judge: The Honourable Justice Gregory M. Warner

Heard: May 28, 2010 at Kentville, Nova Scotia

Counsel: Elizabeth Buckle, Counsel for the Applicant, Glenn Joudrey

Robert Morrison, Crown Attorney

Application for stay of proceedings under Section 24(1) of the *Charter*

By the Court:

A. **Issue**

[1] On June 5, 2008, the applicant was charged that between December 1994 and March 1995, he defrauded the Government of Canada of about $27,000.00 by submitting an invoice containing false information, contrary to Section 380(1)(a) of the *Criminal Code*.

[2] The trial by judge and jury is scheduled to commence on September 7, 2010.

[3] The applicant seeks a stay pursuant to the common law and Section 24(1) of the *Charter*. His grounds are pre-charge and post-charge delay in violation of his Section 7 and Section 11(b) *Charter* rights. Specifically, he claims that the pre-charge delay constitutes an abuse of process, and prejudices his ability to make full answer and defence.

B. **Chronology of relevant facts**

[4] The facts are set out in:

(a) affidavits of the applicant and the current RCMP investigator (Corporal McWhinney), upon which they were cross-examined;

(b) the Information, including the attached court appearance record;

(c) transcripts of court appearances and the Section 625.1 pre-trial conference; and

(d) the agreed admission that a co-accused John Parsons pleaded guilty to the included offence of forgery and was sentenced to 12 months probation.

Pre- investigation events

[5] In 1994/5, the applicant, through a corporation, participated in a Department of Fisheries and Oceans Canada ("DFO") program that supported experimental aquiculture. The program paid one half of approved expenses, up to a cap.

[6] The applicant's corporation hired Mid-Valley Construction Limited ("Mid-Valley") to construct a pipe line to bring water from a lake to its trout farm.

[7] The Crown's theory is that the applicant requested (and obtained) an inflated invoice from John Parsons of Mid-Valley, submitted the inflated invoice to DFO, and was paid money to which he was not entitled. The applicant promised, in writing, to pay Parsons (Mid-Valley) for creating the inflated invoice.

[8] In 1996, the applicant's company sued Mid-Valley for claimed deficiencies in its work, and Mid-Valley counter claimed for payment for its work. In 1999, in the civil action, Mid-Valley made the "inflated invoice" accusation.

[9] On February 27, 2001, when Joudrey was not ready to proceed with a scheduled trial and Mid-Valley objected to an adjournment, a Justice of the Nova Scotia Supreme Court dismissed the plaintiff's action and the defendant withdrew its counterclaim. *South Mountain Trout Farm Ltd.* v *Mid-Valley Construction (1982) Ltd.*, 2001 NSSC 50.

[10] On March 31, 2001, the Justice contacted the RCMP respecting a possible criminal offence respecting the inflated invoice.

Pre-Charge Investigation

[11] Corporal McWhinney's involvement commenced in July 2008, after the single-count information was laid. The history of the investigation is based primarily on his review of the RCMP Commercial Crime Section's investigation file. He has not reviewed all materials collected during the investigation.

[12] On cross-examination he acknowledged that any activity respecting the investigation would normally be documented in the investigation file upon which his affidavit is based. Applicant's counsel asked me to infer that, where no record of activity is documented in the investigation file or Corporal McWhinney's affidavit, it is likely that no activity occurred.

[13] Upon receipt of the complaint, the RCMP decided to investigate the matter. Constable Redden was assigned the file. Because of his other investigations and the "low priority" given this file, he carried out only two activities:

(a) in July 2001, he conducted inquiries with DFO to review their records and speak with various employees about DFO's dealings with the applicant; and

(b) in April 2002, he met with DFO representatives and received (seized) "a large number of documents."

In October 2001, the file was "designated as inactive" due to Redden's other commitments. Due to staff shortages, the file was not reassigned.

[14] Redden was transferred to another section in or shortly after April 2002. No investigator was assigned to the file until Const. Marble's assignment in November 2002.

The investigation file records Constable Marble's activities as:

a) "a thorough review of the DFO documents" by January 2003;
b) interviews with potential DFO and Mid-Valley witnesses in September 2003;
c) consultation with the public prosecution service in November 2003, resulting in the decision to prepare a search warrant of Mid-Valley's premises;
d) completion of interviews with Mid-Valley's employees by March 2004;
e) preparation and execution of the Mid-Valley search warrant in February 2005, resulting n the seizure of 1,059 items (one banker's box);
f) itemization of the seized items and the report to the issuing Justice;
g) interviewing additional potential witness in November 2005;
h) preparation for, and attendance at, a hearing in January 2006 respecting potential privileged documents seized in the Mid-Valley search, followed by a review of those documents; and,
i) interviews with some additional witnesses and the taking a sworn statement from the accused in January 2007, with the assistance from Constable Peskett.

[15] Constable McWhinney notes that Constable Marble was diverted to other duties between November 2002 and January 2007, including:

a) frequent call outs as a member of the emergency response team (ERT) between November 2002 and September 2003;
b) commitments to another case between March 2004 and February 2005; and,
c) commitments to other cases and an eight-week ERT call out, after January 2006.

[16] Constable Peskett replaced Constable Marble as the investigator on January 21, 2007. After that date, it appears that he:

a) copied the file for disclosure, which disclosure filled two banker's boxes;
b) prepared can-say statements for witnesses;
c) prepared the Crown's synopsis and court brief;
d) met with the Crown prosecutor on March 7, 2008;
e) swore the Information on June 5, 2008.

[17] It is difficult to calculate the amount of investigation activity that occurred in the 86 months between March 31, 2001, and June 5, 2008. It is acknowledged by the Crown that this file had a low priority and for long periods of time no activity occurred. Based on Corporal McWhinney's cross-examination, I agree that whatever investigative activity occurred, it was likely recorded in the investigation file. I infer that no other activity likely occurred respecting this investigation.

[18] If one makes generous estimates for each of the steps described in Corporal McWhinney's affidavit, the total investigative activity most likely consumed less than 12 months.

Post-Charge events

[19] The applicant is a rural postal carrier. He appeared in Provincial Court, without counsel, eight times between July 14, 2008, and January 21, 2009. The transcripts show that almost all of the adjournments were for the purpose of giving the applicant further (but unsuccessful) opportunities to retain counsel. He was without counsel at the preliminary inquiry held on September 9, 2009, at which he was committed to stand trial.

[20] At his first appearance in the Supreme Court (October 22, 2009), the applicant expressed a desire to be represented by counsel and described the circumstances that had made his efforts to date unsuccessful. The Court offered to set the charge down for trial for either the March or May 2010 jury terms. The applicant asked for more time. The Court accommodated by setting the trial for the September 2010 jury term.

[21] At the pre-trial conference (*Criminal Code*, Section 625.1), held on November 24, 2009, it was apparent that the applicant was still without counsel and having difficulty obtaining counsel. He was not able to provide responses respecting trial management issues. The pre-trial conference was adjourned to April 11, 2010, to provide him more time to find counsel for trial.

[22] While he still does not have counsel for trial, he did retain counsel for this application.

[23] I conclude that the post-charge delay has been caused almost exclusively by the applicant's requests for adjournments to secure counsel.

C. **Submissions**

Applicant's Submissions

[24] The applicant submits that the lengthy pre-charge delay was an abuse of process, deprived him of the right to full answer and defence, and affects trial fairness. He acknowledges that the onus is on him to show, on a balance of probabilities, that his *Charter* rights were breached and a stay is the appropriate remedy. (R v *L(WK)*, [1991] 1 SCR 1091).

[25] Pre-charge delay is assessed in accordance with the principles of fundamental justice. It is the effect of a delay on trial fairness that is relevant. (*R* v *Mills*, [1986] 1 SCR 861)

[26] In *R* v *Kalanj*, [1989] 1 SCR 1594, at ¶ 19, the Supreme Court noted that the pre-charge investigatory period is unpredictable. Circumstances surrounding investigations vary from case to case. The reasonableness of pre-charge delay is analyzed on the basis of when investigators should be in a position to lay a charge.

[27] Most pre-charge delay applications involve historic sexual assaults, where the delay is in the reporting to police rather than in the investigation. For that reason, application for a stay for delay

based on late reporting in sexual assault cases are distinguishable from delay at the investigatory stage.

[28] The applicant directs the Court's attention to the analysis in two 24(1) applications involving similar circumstances to the case at bar: *R* v *Young*, [1984] O.J. No. 3229 (ONCA) and *R* v *Doston*, 2008 NSSC 417.

[29] In *Young*, the Court upheld a stay of proceeding for a pre-charge delay of seven years. The accused was charged in 1983 for fraud and forgery relating to an affidavit sworn in 1976 under provincial property legislation. The police were first contacted in January 1982.

[30] In *Doston*, a forensic audit by a college of its director of finance uncovered a theft (fraud, forgery) by the director over an extended period of more than one million dollars from the college. In May 2002, the RCMP commercial crime section was advised of the fraud and in September provided with a copy of the forensic report. In October 2007, Doston was charged with fraud. MacDonald J. concluded that the five-year pre-charge delay was unreasonable and a violation of Doston's Section 7 *Charter* rights. However, due to the seriousness of the charge (a breach of trust over an extended period involving more than one million dollars) and the absence of any ulterior or bad motives by the police, he declined to stay the charges.

[31] The applicant refers the Court to the *Doston* analysis respecting unreasonable delay. He distinguishes the circumstances in *Doston* (the breach of trust and the very substantial theft) that lead the Court to deny a stay, despite unreasonable investigatory delay.

[32] The applicant acknowledges that a stay of proceeding is a remedy of last resort. The Supreme Court articulated a two-step test in *R* v *O'Connor*, [1995] 4 SCR 411, at ¶ 75, repeated in *Canada* v *Tobiass*, [1997] 3 SCR 391, at ¶ 90, and in *R* v *Regan*, 2002 SCC 12, at ¶ 54, to the effect that a stay of proceeding is appropriate when two criteria are fulfilled:

> 1) the prejudice caused by the abuse in question will be manifest, perpetuated or aggravated through the conduct of the trial, or by its outcome; and,
>
> 2) no other remedy is reasonably capable of removing the prejudice.

[33] While a stay is typically a prospective remedy deployed to avoid further misconduct or prejudice to an accused, it can be given, in very rare cases, where past misconduct is so egregious as to be offensive (*Tobiass*, at ¶ 91).

[34] The Supreme Court, in *O'Connor*, at ¶ 73, *Tobiass*, at ¶ 89, and *Regan*, at ¶¶ 53 to 57, recognize the residual category of abuse that will warrant a stay even where the accused could still receive a fair trial, but where the abuse is likely to continue or be carried forward.

[35] In *Doston*, the Court declined to stay based on three factors that weighed heavily in favour of the public interest in advancing the proceeding - the large amount of money involved, the breach

of trust, and the lack of bad faith by the state. In *Young*, the lack of bad faith was not a determining factor.

[36] For his argument that the pre-charge delay is a specific prejudice to his ability to make full answer and defence, the applicant relies upon three circumstances described in his affidavit (about which he was not cross-examined).

a) His father-in-law was involved in the financial side of the business as well as the decision-making concerning the relevant events of 1994. His health has deteriorated. He has had cancer and recurring lung problems, for which he was recently hospitalized. Because of his advanced age, his memory and acuity are diminished. He is no longer likely able to give helpful evidence.

b) A Crown witness, the co-accused, John Parsons of Mid-Valley, states that the applicant wrote an agreement to pay him a fee for preparation of the bogus invoice. The document has not been produced in disclosure. Credibility between Parsons and the applicant is a live issue. If the matter had proceeded to trial on a timely basis, a jury might draw a negative inference as to Parsons' credibility by reason of his inability to produce the document. Sixteen years later, such inability may be excused due to the passage of time.

c) The RCMP technological crime section experienced a computer problem during the investigation which caused a loss of large portions of their copy of the hard drive seized from Mid-Valley. It is not clear whether information is missing.

[37] Respecting general prejudice to the applicant, counsel directs the court's attention to the fact that, after the RCMP had been in contact with DFO in 2001, the applicant was refused further assistance in the development of the trout farm by DFO. Further, after March 2003, when Mr. Parsons and other persons associated with Mid-Valley were interviewed by the RCMP (unbeknownst to the accused), the applicant, who represented his rural community as a municipal counsellor, was defeated by a candidate associated with Mid-Valley. Counsel argues that his reputation in the community, a small rural community, was ruined by the taint of the investigation - known by DFO from July 2001, and by members of his community from March 2003, but not known by him until late 2007.

[38] With respect to the "residual category" of abuse, Counsel argues that the conduct of the investigation was unreasonably slow because of the low priority given to it by the police. This circumstance is the same as that condemned in *Doston* (and *Young*) as an abuse of process. Society has an interest in seeing that matters that warrant a criminal charge proceed in a reasonable manner. The public's perception of the criminal justice system - that is, the principles of fair play and decency - would be offended by unreasonable delay.

[39] In summary, the applicant submits that the only just remedy is a stay of proceedings "both because there has been specific prejudice to his [the applicant's] ability to make full answer and defence (loss of potentially relevant evidence) and applying the "residual category" to prevent

ongoing abuse." and " a remedy of stay can be utilized to prevent the continuation of a wrong that, if left uncorrected, would have a negative impact on the applicant and society in future investigations."

Crown's Submission

[40] The Crown acknowledges the pre-charge investigative delay of seven years, three months. It says that the main factor in the delay appears to be a lack of resources and the reassignment of investigators.

[41] Delay itself does not give rise to a *Charter* breach. Only if the delay is connected with a finding of abuse of process is a remedy under Section 24(1) available.

[42] Absent a finding that the delay was intentional, or for the ulterior purpose of depriving the accused of the opportunity to make full answer and defence, delay is no basis for a stay. (*Young* ¶¶ 88 to 93)

[43] In *Doston*, Justice MacDonald relied on Justice L'Heureux-Dube's comments in *O'Connor* that a *Charter* violation is analogous to an abuse of process. An abuse of process is a "flagrant impropriety," which "amounts to conduct which shocks the conscience of the community." (*R* v *Ng*, 2003 ABCA 1, at ¶ 27).

[44] The fact that a delay in instituting proceedings may result in some prejudice to the accused is insufficient to establish a *Charter* breach.

[45] If a breach occurred in this case, it was not one of the "clearest of cases" for which a stay may be granted.

[46] In oral submissions, Crown adds that at the time of *L(WK)* in1991, the law was clear. Pre-charge delay was tied to an abuse of process. It submits that this court should not rely on ambiguous developments in the case law since 1991 - when courts ceased using the term "abuse of process" - and instead, tied unreasonable delay to the concepts of trial fairness and prejudice to the accused in making full answer and defence.

[47] The Crown acknowledges that this case is not the most sophisticated or complicated case, and that the investigation was slow; however, the circumstances are not analogous to the *Doston* circumstances where the police had the benefit of the victim's forensic audit at an early stage of the investigation. Counsel describes the investigation as making "slow, steady progress . . . small steps over time." In this case, in contrast to *Doston*, the police were not in a position to lay a charge until late 2007 or early 2008, and there is very little evidence of prejudice to the accused.

D. **Analysis**

Section 7

[48] Section 7 of the *Charter* reads:

> 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.

[49] The guarantee of fundamental justice is not a freestanding right. The guarantee depends upon infringement of the accused's life, liberty or security interests (See *Reference re Section 94(2) Motor Vehicle Act*, [1985] 2 SCR 486).

[50] Respect for human dignity is a value underlying the *Charter*, but dignity and reputation are not freestanding constitutional rights protected by Section 7 (*Blencoe* v *British Columbia*, [2000] 2 SCR 307 at ¶¶ 78 - 79). Not all Section 7 interests fall within the boundaries of the principles of fundamental justice. Lamer, J., in *Motor Vehicle Reference* wrote that the principles of fundamental justice ". . . do not lie in the realm of public policy but in the inherent domain of the judiciary as guardians of the justice system . . . [they] are to be found in the basic tenets of our legal system."

[51] In early *Charter* decisions, the Supreme Court held that societal interests could not limit the exercise of Section 7 rights. In *Cunningham* v *Canada*, [1993] 2 SCR 143, McLachlin, J. (as she then was), clearly stated otherwise:

> The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally . . .
>
> The first question is whether, from a substantive point of view, the change in the law strikes the right balance between the accused's interests and the interests of society.

[52] The Supreme Court refined this analysis in *R* v *Malmo-Levine*, 2003 SCC 74, at ¶¶ 97 to 99, and *Charkaoui* v *Canada*, 2007 SCC 9, at ¶¶ 21 to 24:

> 21 Unlike s. 1, s.7 is not concerned with whether a limit on life, liberty or security of the person is *justified*, but with whether the limit has been imposed in a way that respects the principles of fundamental justice. Hence, it has been held that s. 7 does not permit "a free-standing inquiry . . . into whether a particular legislative measure 'strikes the right balance' between individual and societal interest in general" (*Malmo-Levine*, at para. 96). Nor is "achieving the right balance . . . itself an overarching principle of fundamental justice" (*ibid.*). As the majority in *Malmo-Levine* noted, to hold otherwise "would entirely collapse the s. 1 inquiry into s. 7" (*ibid*.). This in turn would relieve the state from its burden of justifying intrusive measures, and require the *Charter* complainant to show that the measures are not justified.
>
> 22 The questions at the s. 7 stage is whether the principles of fundamental justice relevant to the case have been observed in substance, having regarding to the context and the seriousness of the violation. The issue is whether the process is fundamentally unfair to the affected person. If so, the deprivation of life, liberty or security of the person simply does not conform to the requirements of

> s. 7. The inquiry then shifts to s. 1 of the *Charter*, at which point the government has an opportunity to establish that the flawed process is nevertheless justified having regard, notably, to the public interest.

[53] The Section 7 analysis is contextual. It varies with the interests and principles of fundamental justice at stake in the particular case (*R* v *Mills*, [1999] 3 SCR 668).

[54] Traditionally Section 7 has been interpreted as describing one right, analyzed in a two-stage inquiry:

1. Has there been a deprivation of the right to life, liberty or security of the person?

2. If so, does the deprivation conform to the principles of fundamental justice?

[55] In *R. v. White* [1999] 2 SCR 417 at ¶ 38,the Supreme Court divided these into three analyses: whether a real or imminent deprivation of life, liberty or security of the person exists; identification and definition of the relevant principles of fundamental justice; and whether the deprivation occurred in accordance with the relevant principles.

[56] With *Malmo-Levine* and *Charkaoui*, a third stage to the inquiry was added:

3. If so, is the impugned conduct justified as a reasonable limitation under section 1?

[57] The *Malmo-Levine* and *Charkaoui* analyses were made in the context of substantive justice as opposed to procedural justice.

[58] In respect of procedural justice, the same balancing exercise of society's interest in effective prosecution of crime and the accused's (and society's) long-term interest in trial fairness and full answer and defence is carried out as a separate analysis, but not in the context of section 1 of the Charter. The third inquiry is most often framed as whether the affront to fair play and decency is disproportionate to other individual and societal interests. It is in this balancing of interests that the analysis becomes contextual. *White* ¶¶ 45-48.

First Stage of the Inquiry - Is the applicant deprived of his life, liberty or security of the person interests?

[59] The applicant does not claim deprivation of his right to life. He does claim deprivation of his right to liberty and security of the person.

[60] The liberty interest is engaged when an accused faces the possibility of a criminal conviction involving actual or potential loss of liberty (*Motor Vehicle Reference*). It is not restricted to mere

freedom from physical restraint. It includes state conduct which affects fundamental life choices that go to the core of what it means to enjoy individual dignity and independence.

[61] The security interest has two dimensions: the physical and psychological integrity of the individual. The former is engaged whenever state conduct may lead to bodily harm or deprivation. The latter is engaged by "serious state-imposed psychological stress" or trauma (*Mills, R.v. Morgentaler* [1988] 1 SCR 30 at page 173). To be "serious," stress must have a serious and profound effect on a person's psychological integrity. It is assessed objectively. It need not rise to the level of nervous shock or psychiatric illness but must be greater than ordinary anxiety. (*Blencoe* v *British Columbia*). In *Mills*, the psychological trauma arose from delays in the trial process.

[62] The applicant is charged with an indictable offence exposing him to incarceration for up to 14 years. This clearly engages his liberty interest.

[63] He also claims that other investigative conduct has engaged the his liberty and security interests. The RCMP undertook the investigation in March 2001. By July 2001, they had spoken to the alleged victim, DFO, about their investigation. By September 2003, they had conducted interviews with several potential witnesses from DFO and Mid-Valley. Mid-Valley carried out business in the same small rural community where the accused lived and worked. The applicant was unaware of this until late 2007 or 2008.

[64] The applicant testified, and his counsel submits, that the persons interviewed perceived that he was involved in crime. The accused says that he was unsuccessful with his dealings with DFO after July 2001, for reasons he could not then fathom. He further states that he was defeated in his bid for re-election as the local municipal counsellor by a person associated with Mid-Valley. His reputation, both with DFO and his own community, was ruined for seven years before the information was laid. He claims this engages his liberty and security interests.

[65] I am not satisfied that sufficient evidence was tendered by the applicant to validate this allegation.

[66] I find that the investigation and laying of the criminal charge against the applicant engaged his liberty and security interests. There is a real possibility that he may lose his liberty.

Second Stage of the Inquiry - Does the deprivation conform to principles of fundamental justice?

[67] The accused's Section 7 rights are not absolute. The state may deprive persons of these rights if they do so in conformity with the principles of fundamental justice (*R* v *S(J)*, [1995] 1 SCR 451 and *R* v *Clay*, 2003 SCC 75).

[68] The principles of fundamental justice are founded in the basic tenets of our legal system. They must be legal principles. They may be reflected in the common law or a statutory scheme that exists outside of the *Charter*.

[69] The principles embrace more than the rights of the accused. They include broad societal concerns such as a trial process that arrives at the truth, and protection of society. Fundamental justice is broader than natural justice, taking its scope from the legal rights enumerated in Sections 8 to 15 of the *Charter* (but not being limited to these sections).

[70] The principles are contextual; that is, they vary according to the context in which the rights are raised. They cannot be definitively enumerated. They are inclusive, not exhaustive.

[71] The principles include the concept of fairness in both a substantive and a procedural context. Fairness includes the right to make full answer defence and the right to a fair trial. It includes the right to elicit any evidence relevant to the defence but not evidence that does not bear on the accused's liability on the charge before the Court.

[72] The principles also include protection from abuse of process in a more general sense (the "residual category").

Third Stage of the Inquiry - Balancing the Interests

[73] To the two-part test described in *O'Connor* (set out in ¶ 33 in this decision), was added a third hurdle in *White*, further described in *Regan* at ¶¶ 54 to 57.

> . . . 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 the 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'.

Only where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases will a stay be appropriate (*R. v. Conway* [1989] 1 SCR 1659).

[74] In abuse of process analyses, the seriousness of the offence is always a contextual factor in the determination of whether a deprivation that does not conform to the principles of fundamental justice justifies a stay of proceedings. In the case-law, it is part of the third inquiry.

Abuse of Process

[75] The basic tenets of our legal system include the common law doctrine of abuse of process.

[76] The common law doctrine empowered courts to stay proceedings in exceptional circumstances and in the clearest of cases, where the conduct of the police or Crown, or sometimes the complainant, was so serious that preservation of the integrity of the justice system required termination of the case (*R* v *Jewitt*, [1985] 2 SCR 128). Traditionally the goal was to protect society's interest in a fair trial process, in both civil and criminal contexts.

[77] While abusive conduct calls into question the integrity of the justice system, it also gives rise to protection to the rights of the accused to a fair trial and to make full answer and defence (*R v O'Connor* [1995] 4 SCR 411).

[78] In *Jewitt*, the Supreme Court adopted the test formulated by the Ontario Court of Appeal in *Young*. Since then, the doctrine has been considered in a wide range of criminal contexts. Some of the many contexts are described by **Robert J. Frater** in *Prosecutorial Misconduct* (Aurora: Canada Law Book, 2009) at c.4. One of them is pre-charge delay (pages 92-94).

[79] In *O'Connor*, the court clarified that the common law doctrine was basically subsumed by section 7 of the *Charter* (except in contexts to which the *Charter* does not apply). The court held that the doctrine was not limited to protection of fair trial interests. It included a residual category of conduct - diverse and unforeseeable circumstances in which the prosecution is conducted unfairly to such a degree as to contravene fundamental notions of justice.

[80] In *R. v. Keyowski* [1988] 1 SCR 657, the Supreme Court added an important refinement to the elements of abuse. In that case, the Saskatchewan Court of Appeal held that the accused had to establish prosecutorial misconduct or that the Crown proceeded for some ulterior motive (as the Crown argues in this case) to prove that the proceedings were oppressive and therefore an abuse of process. The unanimous Supreme Court disagreed:

> **To define 'oppressive' as requiring misconduct or an improper motive would, in my view, unduly restrict the operation of the doctrine** *[my emphasis]*. . . Prosecutorial misconduct and improper motivation are but two of many factors to be taken into account when a court is called upon to consider whether or not in a particular case the Crown's exercise of its discretion to re-lay the indictment amounts to an abuse of process.

[81] The Supreme Court denied a stay, despite finding that a third trial may "stretch the limits of the community's sense of fair play", because of "the seriousness of the charge" (criminal negligence causing the death of two bicyclists) and because the proceedings had "not occupied an undue amount of time". (The incident occurred in September 1984, the first jury trial was held in October 1985, the second trial in January-February 1986, and the third trial was scheduled for April 1986.)

[82] In *Young*, the seminal decision adopted by the Supreme Court in *Jewitt*, the court found an abuse and upheld a stay. The court did not attribute any ulterior motive to the investigator or Crown, but simply neglect (¶ 100).

[83] In *Doston*, the court found an abuse and breach of section 7 (but declined to grant a stay at the third inquiry stage). MacDonald J. did not attribute "any ulterior or bad motives" to the police or Crown, but was very disturbed by the "systemic delay" that the low priority placed on the investigation that "impacted badly" on the public perception of the criminal justice system (¶¶ 26 and 32).

[84] In each of those cases the delay was shorter that in this case. The delay was based on low priority and neglect, and not to any legitimate problem connected to the investigation.

[85] In *R. v. Power* [1994] 1 SCR 601, the court described "clearest of cases", the threshold for granting a stay, as requiring overwhelming evidence that the proceedings are unfair to the point that they are contrary to the interests of justice and " that it would genuinely be unfair and indecent to proceed" (¶ 12).

Pre-Charge Delay as an Abuse of Process

[86] The applicant claims that pre-charge delay has breached his section 7 right in two ways: as an abuse of process in the 'residual category' sense, and because it prejudices his right to make full answer and defence.

[87] *Jewitt*, an entrapment case, adopted the approach in *Young*, a pre-charge delay case, for the establishment and analysis of abuse of process claims.

[88] Pre-charge delay itself is not sufficient to justify a stay. A stay based on mere passage of time would be the equivalent of imposing judicially created limitation periods. Trial fairness is not automatically undermined by even a lengthy pre-charge delay. *L(WK)* and *R v Finta* [1994] 1 SCR 701. In *R v Potvin* [1993] 2 SCR 880, the court wrote that *L(WK)* decided that delay that prejudiced fair trial issues could constitute an abuse of process.

[89] In *L(WK)*, the Supreme Court held that even lengthy pre-charge delay, per se, does not automatically undermine trial fairness; but evidence of the specific circumstances of pre-charge delay may support a finding of breach of fundamental justice or trial fairness. In *L(WK)*, the court held that the evidence did not support a finding of abuse; the court did not define what circumstances would make delay abusive.

[90] It is the effect or prejudice caused by delay, not the length of the delay, that is most important. Prejudice may take many forms. **Frater** describes some at page 93. I agree with him that sometimes it will be the cumulative effect of a number of factors that create a serious prejudice.

[91] The Crown submits that pre-charge delay only breaches Section 7 if it constitutes an abuse of process. Further, the Crown submits that the applicant must establish an improper, ulterior or oblique motive by the state for the delay.

[92] I do not agree. The applicant needs not prove an ulterior motive for a court to find an abuse of process. An improper motive will be a relevant factor, but an improper motive is not a prerequisite. In none of the pre-charge delay decisions read by the court (from *Young* forward) where delay was at the investigative stage, was an ulterior or improper motive alleged or found to exist. In many of these decisions, the delay was held to be unreasonable and a breach of section 7. In some, stays were granted or upheld. In others, stays were not granted (despite the finding of a section 7 breach) when, at the third inquiry stage, society's interest in prosecution was held to outweigh the interests protected by the section 7 breach - most often because of the seriousness of the offence.

[93] I conclude that pre-charge delay may found a Section 7 breach where the delay is so unreasonable as to constitute a traditional abuse of process, and where the consequences of the delay cause serious prejudice to the accused's right to a fair trial and to make full answer and defence, regardless of whether the state actors carried out the investigation with an improper motive.

[94] The analysis is contextual, or fact-specific, and the facts may found either prejudice to the accused's right to make full answer and defence or an abuse of process in a broader sense, or both.

[95] There is little case law on the impact of pre-charge delay on sections 7 and 24(1) of the *Charter*, other than in respect of historic sexual and physical abuse cases. Most often delay in these cases occurred before the reporting of the offence to the police and not at the investigation stage. The combined length of the pre-reporting delay and the investigative delay may prejudice the accused's ability to make full answer and defence. However, delay that is relevant to the 'abuse of process' analysis concerns the conduct of state actors; that is, events that occur during the investigative stage.

[96] The seriousness of sexual and physical abuse offences, and the understandable delay in reporting them are contextual factors that tend to distinguish sexual and physical abuse offences from the type of offence in this case.

[97] I found relevant guidance for the analysis of this case in the following cases:

i *R* v *Young*
ii *R* v *L(WK)*
iii *R* v *DLD*, [1992] MJ No. 541 (MCA)
iv *R* v *Cunningham*, [1992] OJ No. 2754 (ONCA)
v *R* v *O'Connor*
vi *R* v *GWR*, [1996] OJ No. 4277 (ONCA)
vii *R* v *Gambill*, [2000] OJ No. 119 (ONCA)
viii *R* v *Perrier*, [2000] CMAJ No. 4 (Court Martial Appeal Court of Canada)
ix *R* v *Doston*

[98] *Young* is one of the first significant *Charter* decisions respecting pre-charge delay. The accused was charged in 1983 with fraud and perjury relating to an affidavit sworn in 1976 under provincial property legislation. When charged, the limitation period for charging under the provincial legislation had passed. A complaint to police was made in January 1982. The relevant information had been in the hands of a government department since 1977.

[99] The Information was sworn in March 1983. When asked what took so long for the investigation to proceed (14 months), the investigator answered:

> Your Honour, I was tied up with other investigations, this was not my only investigation I was involved with. I was involved in many other things. And things tended to get shoved back a little bit now and then. I couldn't see any great rush to contact Mr. Somerleigh for the simple fact that the matter had gone for, well it was several years old at this point and to give it top priority would be, you know it wouldn't really, there was other things that had more priority at the time.

[100] In a thorough often-cited analysis, Justice Dubin upheld a stay of proceedings. He determined there was a residual discretion in a court to stay where compelling the accused to stand trial would violate fundamental principles of justice which underline the community's sense of fair play and decency, and to prevent an abuse of process through oppressive or vexation proceedings.

[101] Justice Dubin's stressed the caution which must be exercised by a court before finding that pre-charge delay violated the principles of fundamental justice, and before purporting to supervise state investigative processes (¶ 90).

[102] He analyzed the case primarily as an abuse of process case (not a "full answer and defence" case). This is apparent in ¶ 93, where he noted:

> . . . there is a distinction to be drawn where the institution of the proceedings is valid and the only issue is delay prejudicial to the accused, and the case where the executive action leading to the institution of proceedings is offensive to the principles upon which the administration of justice is conducted by the courts. I think this is such a case.

[103] What appears to have been sometimes misunderstood is his proposition at ¶ 89 that:

> . . . absent any finding that the delay in the institution of the proceedings was for the ulterior purpose of depriving an accused of the opportunity of making full answer and defence, delay in itself, even delay resulting in the impairment of the ability to make full answer and defence, is not a basis for a stay of process.

[104] Justice Dubin did review in detail the police investigation. He commented on the reasons why the court should not second guess the police investigation. However, in his conclusion he writes:

> 100 I do not attribute any ulterior motive to either the investigating constable or the various Crown counsel who were consulted about laying the charge, but as a result of their neglect, the accused is now charged with the offences of fraud and perjury for an information sworn on April 5, 1983, offences for which he would in all probability never have been charged but for the delay. A conviction for either or both of these offences would have far graver reprecussions not only for Mr. Young's liberty but also on his professional career than a conviction under the *Land Speculation Tax Act*, 1974.

At Paragraph 103:

> The prejudice is not confined to the impairment of the ability to make full answer and defence, although such impairment is claimed. The prejudice asserted goes beyond that. His life has once again been disrupted, his reputation in the community in which he lives again damaged . . .

[105] At ¶ 104, he describes the nature of the prejudice by citing Martin J.A. in *R. v. Beason*, 1983 CarswellOnt 99 (ONCA) at ¶ 60. The policy underlining the constitutional guarantee of a trial without unreasonable delay is not predicated exclusively in the obvious forms of prejudice such as impairment of the right to make full answer and defence. Trials held within a reasonable time have

an intrinsic value. The constitutional guarantee enures to the benefit of the society as a whole and to the ultimate benefit of the accused. For this reason, it was appropriate for the court to control the pretrial process to prevent such unfairness.

[106] In *L(WK)*, the accused was charged in January 1987 with several counts of sexual abuse of his children, covering a period from 1957 to 1985. The first complaint was received by the police in July 1986. On the facts, the Supreme Court upheld the Court of Appeal's overturning of the trial judge's stay. The Supreme Court addressed the question of whether an accused can rely solely on the passage of time as establishing a violation of Section 7 and 11(d). The Court addressed delay in the context of an abuse of process, not in the context of a prejudice to making full answer and defence.

[107] Citing Laskin, C.J. in *Rourke* v *The Queen*, [1978] 1 SCR 1021, a common law abuse of process case, the Court wrote:

> 22 Delay in charging and prosecuting an individual cannot, without more, justify staying the proceedings as an abuse of process at common law. . . .
>
> 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.

[108] After noting that delay in reporting sexual abuse is recognized as a common and expected consequence of abuse, the Court wrote at ¶ 29:

> The question here is not to define a breach of fundament justice or of the right to a fair trial, but the much narrower one of determining whether there was evidence to support the fact findings.

The Court agreed that the facts in that case did not support a clear finding of abuse of process.

[109] In *DLD*, the accused was charged in January 1991, with five sexual misconduct offences that occurred between 1963 and 1971. The police were first notified in November 1990. There was no delay at the investigation stage.

[110] The Court of Appeal upheld the trial judge's stay for pre-charge delay. Scott, C.J., made these points.

> The question is whether the accused presented evidence, which, if accepted, could establish a *Charter* breach on a balance of probabilities.
>
> Simply proving delay in prosecuting a person cannot justify staying proceedings as an abuse of process. Citing ¶ 25 in *L(WK)*, he agreed that it is not the length of delay but the effect of the delay on trial fairness that counts.
>
> While early Canadian and US case law (including *Young*) referred to the necessity of establishing an ulterior or oblique motive purpose by the Crown, or at least negligent misconduct, in later cases, like *L(WK)*, the Supreme Court made no mention of the requirement that the accused prove an oblique motive by the Crown. He concluded that an oblique motive is not an essential element to a Section 7 breach.
>
> He asked what undue delay an accused must demonstrate to justify a stay and answered:
>
> > . . . it is neither useful nor necessary to attempt to precisely define a specific threshold that an accused must cross to demonstrate a breach of the *Charter* respecting pre-charge delay. Each case will be governed by the evidence presented before the trial judge by the accused, directed to the critical issue of the substantial prejudice and the impact of such prejudice, if any, on accused's right to a fair trial. To attempt to be more specific would, in my opinion, be counter-productive.
>
> On the timing of a stay application, he concluded:
>
> > Whatever the timing of such a motion, counsel for the accused must be prepared to tender specific evidence of prejudice going to the fairness of the trial, rather than relying exclusively on evidence tendered during the trial itself. Here again the trial judge will have considerable latitude as to what form that evidence should take - be it by affidavit, by *voir dire*, or whatever. The important thing is for the motion to proceed in an expeditious fashion in a way best calculated to interfere as little as possible with the traditional and time-honoured trial process.

[111] In a brief endorsement in *Cunningham*, the Ontario Court of Appeal overturned a trial judge's stay based on the inadequacy of the accused's evidence of prejudice. The Court held that the mere possibility that pre-charge delay could prejudice the right to make full answer and defence does not justify a stay of proceedings at the commencement of a trial. Actual prejudice must be demonstrated.

[112] In *GWR*, the Ontario Court of Appeal analyzed pre-charge delay in two contexts - at ¶¶ 6 to 8, as it affected the ability to make full answer and defence; at ¶ 16, as it was an abuse of process.

The charges were very serious charges alleging repeated acts of sexual assault upon the accused's stepdaughter between 1968 and 1974 (when she was between the ages of 10 and 16). The accused was charged in 1974 but charges were dropped and laid again in 1992.

[113] In the "full answer and defence" analysis, the Court found that the accused failed to establish that the death of three witnesses and the failed memories of others interfered with his ability to cross-examine and present a full answer and defence.

[114] In the abuse of process analysis, the Court adopted Justice L'Heureux-Dube's analysis in *O'Connor*, ¶¶ 58 to 83, and especially at ¶ 82. This analysis again considered prejudice to the accused from the fact that three witnesses had died, memories had faded, police records were inadequate and the accused faced more serious penalties. As in its full answer and defence analysis, the Court concluded that there was insufficient evidence of actual prejudice (". . . it is mere speculation that the absence . . . will prejudice the respondent at trial.")

[115] The Court distinguished *Young* on its facts. In *Young*, the accused had led evidence to demonstrate real prejudice.

[116] On the issue of irreparable prejudice to the judicial system, the Court stated that it was "troubled by these circumstances." In that context, the Court carried out a balancing of society's and the accused's interests (¶¶ 15 and 16). It concluded that:

> the charges were very serious- alleging repeated, unlawful sexual acts against a young stepchild;
>
> courts must have the respect of the community to fulfill their function;
>
> where an affront to fair play and decency is disproportionate to the societal interest to effective prosecution of crime, the administration of justice is best served by a stay; and,
>
> there was insufficient basis to conclude that ". . . the societal interest in proceeding with these very serious charges was outweighed by any alleged affront to fair play and decency."

[117] In *GWR*, the seriousness of the offences clearly outweighed the affront to fair play that 'troubled' the Court.

[118] In *Gambill*, the accused was charged in or about 1998 with several counts of indecent assault between 1958 and 1965. The accused gave evidence that several potential witnesses were dead or missing. The Crown argued that it was speculation as to what they may have testified to. The trial judge granted a stay on the basis that there was an air of reality that the missing evidence would materially assist the accused and that its absence would, on a balance of probabilities, likely deny the accused full answer and defence. The Ontario Court of Appeal upheld the stay.

[119] In *Perrier*, the Court of Appeal upheld a stay. During an investigation in the disappearance of public funds, the accused was interviewed, and confessed, in July 1997. In August 1997, he was suspended from his military duties without pay. The investigation was completed in January 1998 and turned over to the legal department. Nothing was done until April/May 1999. A two-count indictment was laid on June 22, 1999. After "administrative errors" and a vacation, seven additional counts were added to the indictment in November 1999.

[120] Citing *Kalanj*, the Appeal Court accepted that Section 7 was engaged by delay involving both pre- and post-charge events.

[121] Applying the three-step analysis in *White*, the Court held that what constituted a reasonable period before the swearing of the information was relevant to the issue of the reasonableness of the delay. In that case, because the accused confessed in July and August 1997, the two-year delay in charging him was unreasonable. As to prejudice, the Court held that the anxiety, stress and social stigmatization of being suspended without pay for two-years was a relevant issue affecting his security interest. The Court also found relevant institutional interest in ensuring the "speediness of action" in matters of military discipline.

[122] *Doston* was reviewed in counsels' submissions. The factual matrix of that case is quite similar to the case at bar. MacDonald J. found that the five-year delay in the investigative stage constituted an unreasonable delay and breached Doston's section 7 rights.

[123] A relevant factual difference between *Doston* and this case, favourable to the Crown on the issue of the reasonableness of the delay, was that early in the investigation the police had the forensic report of the complainant. This should have made the police investigation shorter and easier.

[124] Relevant factual differences favourable to the accused are that: (a) the fraud in *Doston* was a complex fraud involving more than one million dollars carried out over years, as opposed to a single "bogus" invoice of $27,000.00; and (b) the investigative delay in *Doston* was five years, and in this case was more than seven years.

[125] A relevant factual similarity between the cases is the absence of any justification for the delay in either investigation. Both investigations were slow, not because of the complexity of the crimes or the extent of investigations needed, but because the investigations were given low priority. The investigators had other responsibilities, the investigators were regularly replaced, and, for periods of times, no investigator was assigned (*Doston* ¶19). In both cases, the time needed to investigate the offences was substantially less than the time taken.

[126] In this case, it is very unlikely that the investigation consumed one year of one investigator's time. For more than six full years, no investigation was conducted.

[127] Despite finding a breach of Section 7, Justice MacDonald did not stay the *Doston* proceeding because of the seriousness of the offence. The decision not to stay was made at the third stage of the inquiry - the stage where the balancing of societal interests in seeing that the matter proceeds to trial

are balanced against the accused's interests in a fair trial and the affront to society's sense of fair play and decency.

E. **Application of Law to the Facts**

[128] The liberty and security interests of the applicant are engaged. He is subject to imprisonment upon conviction for up to 14 years.

[129] Relevant to both aspects of the applicant's claim (abuse of process and deprivation of full answer and defence) are three circumstances that give an air of reality to his claim of actual prejudice to a fair trial caused by the lengthy delay. The applicant was not cross-examined on any of the three circumstances described in Paragraph 12 of his affidavit.

[130] First, he states that his father-in-law, who is now 82 years old and in very poor health (recently hospitalized), both mentally and physically, assisted him and was involved in the financial side of the trout farm expansion project in 1994. His evidence would relate directly to the issues that are at the centre of the charge. The crux of the charge is that the applicant obtained for his company a bogus invoice from Mid-Valley and submitted it to DFO in connection with the experimental trout farm project. While the affidavit does not specify exactly what the applicant's father-in-law would say, it is apparent from Paragraph 12(a) that his evidence would relate directly to the *actus reus* and *mens reus* of the offence.

[131] I accept that, but for the passage of 16 years, and the father-in-law's advanced age and weak health, that his evidence in this case can be perceived to be relevant and likely helpful to the applicant. The relevance of his evidence is more than mere speculation. It is difficult to imagine his involvement in the financial side of the business and the decision-making respecting the proposed expansion, and conclude that there is no air of reality to the fact that his evidence would actually be relevant.

[132] Second, the applicant states that the Crown's theory (and I presume John Parsons' evidence) is that the applicant wrote an agreement to pay Parsons to prepare the bogus invoice. The written agreement is not in the Crown's disclosure. Clearly the credibility of Parsons will be an issue. The passage of 16 years may, as the Crown suggests, weaken Mr. Parsons' evidence and consequently benefit the applicant. The applicant's point, however, is that a jury may now - 16 years later, excuse Parsons' (the Crowns') inability to produce the written agreement. It may have been less likely to do so if either the reporting of the event or the investigation had occurred earlier.

[133] The fact that the agreement was supposedly in writing would add credence to Parsons' evidence and the Crown's case. It is disturbing that the charge will proceed in the absence of a key document. The Crown's submission that the failure to produce the agreement may, at the end of the day, is something that the Crown 'may have to wear', does not, in my view, remove the significant actual prejudice to the applicant. He is required to put his credibility on the line at a time when the failure to produce an important written document may be excused.

[134] To speculate as to whose oral evidence a jury may believe after 16 years is fundamentally unfair. It arises from the failure to produce an important relevant document that is not producible 13 years (when charged) or16 years later.

[135] Possibly the document never existed. Possibly it did. I agree that the passage of 16 years from the time of the alleged written agreement and offence might cause a reasonable jury to discount its present non-existence.

[136] Third, the applicant states that the RCMP Technical Crime Section experienced computer problems, which appear to have caused loss of substantial portions of the hard drive seized from Mid-Valley. It is not evident that the lost material has been recovered.

[137] These circumstances, considered separately, may not deprive the applicant of the ability to make full answer and defence. Cumulatively, these factual circumstances exacerbate the prejudice to the applicant receiving a fair trial.

[138] Particularly relevant to the abuse of process aspect of the applicant's claim is the low priority accorded to the investigation for more than seven years and the lack of investigative action during most of that period.

[139] Salient facts relevant to the abuse of process claim include:

> The matter does not appear to be complex. It involves the issuance and payment of one invoice of about $27,000.00.
>
> The event was already six years old when the complaint was received by the police and the police decided to investigate. This should have added some urgency to the investigation.
>
> The total investigative effort described by Corporal McWhinney, when viewed generously from the point of view of the Crown, does not appear to have approached one year by one investigator.
>
> No reason was given for the low priority this investigation received for over seven years - either in time or manpower. If it was because the allegation was not a serious offence, there was no excuse for keeping the investigation open so long. If it was a serious offence, it was inexcusable that it was not given a higher priority from the perspective of both the community and the applicant.
>
> The delay in investigating the complaint was longer than the delay in the reporting of the matter to the police in the first place. This factual circumstance differs from most of the cases (including those cited in this decision) where delay, especially in cases of sexual and physical abuse against children, preceded the reporting of the offences to the state.

> The total delay in this case exceeds thirteen years from the date of the alleged crime to the laying of the charge.

[140] There was no justification for the minimal effort put into the investigation that caused the information to be laid 13 years after the alleged offence and 7 years after it was reported to the police. A low priority is not a good reason for delay as lengthy as in this case. While no single specific prejudice to the applicant's ability to make full answer and defence stands out as very significant, the accumulation of prejudices is significant and makes the applicant's trial unfair.

[141] Other factors are relevant to the balancing the societal interest in crime being prosecuted with the societal concern about affronts to its sense of fair play and decency and the accused's right to a fair trial.

[142] The seriousness of the offence in this case does not equate with sexual and physical abuse cases, war crimes or the kinds of circumstances that existed, for example, in *Doston* (where the fraud was for a significant amount and involved a serious breach of trust).

[143] The alleged offence in this case cannot be equated with the most minor of thefts, but it is much less significant than cases where the community rightfully insists on prosecution 'to the full extent of the law'. It reflects on the seriousness of this offence that the co-accused was sentenced for producing the invoice (on the included offence of forgery) to 12-month probation with conditions.

[144] While there is no evidence that the state intentionally investigated this complaint at an unreasonably slow pace for an ulterior or oblique motive, it did make a positive decision to undertake the investigation; it did make a positive decision to give it a low priority, and it did, on occasion, make a positive decision to designate it as "inactive". It knew that the subject matter of the complaint was already six years old when it commenced the investigation. It neglected to assess the seriousness of the offence, the effect of it's decisions on the applicant, or the societal interest in fair play and decency.

[145] I conclude that the unreasonably slow investigation of an event that occurred many years before the investigation began did deprive the applicant of his life and security interests in a manner that did not conform to the principles of fundamental justice.

[146] The applicant has discharged the burden, on a balance of probabilities, of showing an air of reality to actual prejudice to his ability to make full answer and defence and to receive a fair trial. The specific prejudices to the accused are significant when taken cumulatively.

[147] Combined with these specific prejudices is the general prejudice to the applicant and the community. The principles of fundamental justice are not static, and are evolving in response to society's changing perception of what is arbitrary, unfair or unjust. What is fair (or in the context of section 7 what is fundamentally unfair) depends on context.

[148] Both the community and the applicant have a reasonable expectation that, when alleged offences are reported to the police, they will be investigated in a reasonable manner - not in a manner that prejudices the accused's right to make full answer and defence or to have a fair trial, or that breaches the community's right to the investigation and prosecution of crime in a timely manner, or that offends society's sense of fair play and decency.

[149] In the case law, the significant factors, when stays were not granted (or were overturned on appeal), have been the seriousness of the crimes, or delays in the reporting of the crime for justifiable reasons. Sometimes the conduct of the accused contributed to the delay. None of the factors are present in this case.

[150] Courts grant stays only as a matter of last resort, and only in the clearest of cases. This standard, enunciated in *Jewitt*, was recently reaffirmed by the Supreme Court in *R* v *Bjelland*, 2009 SCC 38.

[151] Counsel have not suggested, and I cannot conceive of, any effective remedy short of a stay to undo the prejudice to the applicant and to prevent the reoccurrence of conduct by the state that, at least in respect of a less serious offence, brings disrepute to the administration of justice. I order a stay of this proceeding.

J.