SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Macintosh, 2010 NSSC 105

Date: 20100319
Docket: PtH No. 311459
Registry: Port Hawkesbury

Between:

Ernest Fenwick Macintosh

Applicant/Accused

v.

Her Majesty The Queen

Respondent

JUDICIAL STAY APPLICATION

Judge: The Honourable Chief Justice Joseph P. Kennedy

Heard: February 10, 2010, in Halifax, Nova Scotia

Decision: March 19, 2010

Counsel: David Bright, Q.C. and Brian Casey for the Applicant/Accused
Diane McGrath for the Crown

By the Court:

[1] The accused, Ernest Fenwick Macintosh (Macintosh), brings this application seeking a judicial stay of these proceedings pursuant to ss. 7 and 11(b) of the *Charter of Rights and Freedoms* based on allegations of pre-charge and post-charge delay that results in his being unable to receive a fair trial.

[2] Macintosh faces 36 charges under the *Criminal Code* (18 charges of indecent assault and 18 charges of gross indecency) allegedly involving 6 male persons. He is scheduled to go on trial on April 19, 2010.

[3] D.S. alleges that he was sexually assaulted in the period between September 1970 and September 1975. B.S. alleges that he was assaulted in the period between 1972 and 1975. J.H. alleges he was assaulted in the period between 1971 and 1977. R.M. alleges he was assaulted in the period September 1970 to September 1975. A.M. alleges he was assaulted in the period February 1971 and February 1973. W.M.R. alleges he was assaulted in the period January 1972 to December 1972. None of the allegations before the Court pre-date September 1970 or post-date March 1977.

[4] Every indecent assault charge is coupled with a collateral gross indecency charge.

[5] Macintosh submits that delay in bringing these matters to trial has compromised his ability to make "full answer and defence". The burden of proof that his rights pursuant to ss. 7 and 11(b) of the *Charter* have been breached, lies with the Applicant. The standard is on a balance of probabilities.

BACKGROUND

[6] Ernest Fenwick Macintosh was born in June 1943. In the early seventies, he returned to Port Hawkesbury. He was active in a number of businesses in the strait area.

[7] In February of 1973 a company owned by Macintosh purchased a commercial property in Mulgrave. This property is mentioned in the allegations.

[8] In July 1973, a company co-owned by Macintosh bought a residential apartment property known as the Farquhar House.

[9] Macintosh moved into the Farquhar House in the fall of 1973.

[10] Farquhar House was occupied by players on the local Junior A Hockey Team and is the location mentioned is several of the alleged incidents.

[11] Macintosh worked in marine electronics and telecommunications. In 1981, when much of that business moved to Halifax, he followed.

[12] On January 1, 1987, he was transferred by his employer from Halifax to Ottawa, and in 1989 transferred to Montreal.

[13] In August of 1994 Macintosh accepted employment with Digital Microwave, a California company.

[14] He established an office of that company in India in October/November 1994 and lived there for the next twelve years.

[15] At the time he left Canada, there were no charges against him, and no one had lodged a complaint with the police. Macintosh was not a fugitive.

[16] Although Macintosh had not lived in Nova Scotia for seven or eight years, when he left Canada he kept in touch with his family and they had his home and office telephone numbers in India.

[17] On January 4, 1995, D.S. made a complaint to the RCMP in British Columbia alleging that he was sexually assaulted by Macintosh, beginning when he was eight or nine years old at or near Mulgrave, Nova Scotia - the dates of alleged offences between 1970 and 1975.

[18] On December 4, 1995, the RCMP laid an Information, charging Macintosh with those offences.

[19] On February 8, 1995, J.H. made a statement to the RCMP. In it, he describes a single incident of oral sex with Macintosh which he says took place at the SeaKing Motel in Bedford, Nova Scotia. The time frame alleged is between 1971 and 1977.

[20] Because it involved Bedford, the J.H. complaint was referred to the Halifax Regional Police on February 10, 1995. The Halifax Police had difficulty contacting J.H. and did not lay a charge at that time. A charge specific to that complaint was eventually laid on December 10, 2001.

[21] By February 1995, Cst. Deveau of the Port Hawkesbury R.C.M.P. was the investigating officer on the D.S. complaint and was aware that Macintosh was living in New Delhi, India.

[22] In January 1996, he attempted to contact Macintosh by phone but received no answer.

[23] On February 21, 1996, a warrant is issued in Nova Scotia for Macintosh's arrest.

[24] Cst. Deveau continues to attempt to contact Macintosh in India by phone at his residence number without success until he makes contact with him in August of 1996.

[25] Cst. Deveau says that during this conversation he told Macintosh that "I was conducting an investigation involving allegations made against him and inquired whether or not he had any intention of returning to Canada", that "Macintosh advised that he had no intention of returning to Canada. Upon hearing that I advised Mr. Macintosh there was a warrant for his arrest in existence which would be executed if he returned". The conversation is in progress when the line goes dead. Macintosh says that he was not told that there was a warrant. He says he was simply told that the

R.C.M.P. were investigating an allegation of sexual assault and Cst. Deveau wanted to know when he would be back in Canada. The line went dead - he said the call "made him curious". He said he waited for a call back, but none came.

[26] Nothing happens between August 1996 and September 1997.

[27] In September 1997, the Nova Scotia Crown Attorney's Office begins a process seeking extradition of Macintosh from India.

[28] Late in 1997, Mr. Macintosh is informed by the Passport Office that his passport is not being renewed because of outstanding criminal charges. He retains Ottawa counsel to address this issue. His Ottawa counsel engage David Bright, Q.C., in Nova Scotia.

[29] On April 2, 1998, Mr. Bright requests disclosure of the Crown file. On April 16, 1998, a letter is sent to Macintosh's lawyer in Ottawa advising that Mr. Macintosh's passport will be renewed.

[30] Notwithstanding, on April 20, 1998 Mr. Bright again requests disclosure.

[31] On May 25, 1998 the Crown file is disclosed to Mr. Bright, including a copy of the R.C.M.P. file, the Information, the arrest warrant and the statement of D.S..

[32] On May 27, 1998 Mr. Bright writes to the Crown seeking copies of material being prepared for the extradition.

[33] On June 5, 1998 the Crown advises that documentation for the extradition is not yet prepared.

[34] On June 9, 1998 Mr Bright writes to the Crown acknowledging receipt of material and requesting copies of documents the Crown may rely on if seeking extradition.

[35] On June 29, 1998 D.S. swears an affidavit for use in the extradition proceedings.

[36] On August 20, 1998 the Nova Scotia Crown advises Mr. Bright that the Crown is requesting Mr. Macintosh's extradition from India and the matter in that regard is being handled by the federal Department of Justice.

[37] On August 24, 1998 Mr. Bright requests copies of the extradition documents from the federal Department of Justice.

[38] On September 2, 1998 the federal Department of Justice responds to Mr. Bright that the extradition documents will not be disclosed as they are state-to-state communications.

[39] In November 1998, the Crown is advised by the federal Department of Justice that identification affidavits are required from complainants for extradition to proceed.

[40] In January 1999 a photo lineup of Macintosh is prepared to be shown to complainants as required by the federal Department of Justice for the extradition process.

[41] On January 21, 1999 D.S. is shown the photo array and is unable to identify Macintosh. The Crown says the photos were of poor quality.

[42] At this point new allegations surface.

[43] On January 29, 1999 a statement is provided to the R.C.M.P. by R.M. disclosing allegation of sexual abuse by Macintosh.

[44] On March 27, 2000 a statement is provided to the R.C.M.P. by C.M. alleging abuse by Macintosh. C.M. is unable to identify Macintosh from a photo lineup which contains a photocopy of Macintosh's passport photo.

[45] On April 5, 2000 the R.C.M.P. meet with complainant D.S. and drive to various locations which D.S. identified in his statement as having been the location of various assaults by Macintosh, for the purpose of taking photographs and videotape.

[46] On April 6, 2000 the R.C.M.P. conduct a follow-up interview with D.S. seeking more detail with respect to his allegations of sexual abuse.

[47] In May 2000, the R.C.M.P. receive an updated passport photo of Macintosh for inclusion in a new photo lineup.

[48] On July 17, 2000 the RC.M.P. conduct a follow-up interview with J.H. with respect to more detail concerning his allegations against Macintosh. J.H. is shown a photo lineup and identifies Macintosh.

[49] On July 18, 2000 R.C.M.P. from Nova Scotia travel to Edmonton and are provided with a statement from W.M.R. alleging sexual abuse by Macintosh. W.M.R. is not able to conclusively identify Macintosh from a present day photo lineup.

[50] On July 21, 2000 R.C.M.P. from Nova Scotia travel to Vancouver and present D.S. with the new photo lineup from which D.S. identifies Macintosh.

[51] On August 25, 2000 R.M. is presented with a photo lineup and identifies Macintosh.

[52] In late August 2000, the Nova Scotia Public Prosecution Service is advised by the federal Department of Justice that all possible charges against Macintosh should be laid before extradition proceeds or they will be barred from proceeding on additional charges due to the law of speciality.

[53] On September 7, 2000 the R.C.M.P. receive allegations of abuse from A.M. concerning Macintosh.

[54] On October 18, 2000 the R.C.M.P. receive a statement from G.B. alleging sexual abuse by Macintosh.

[55] On March 14, 2001 D.B. provides the R.C.M. P. in Winnipeg with a statement alleging abuse by Macintosh.

[56] On August 8, 2001 the R.C.M.P. in Port Hawkesbury receive a faxed statement from B.S., residing in Florida, alleging sexual abuse by Macintosh.

[57] On October 22, 2001, an Information is sworn charging Macintosh in relation to offences disclosed in the statement of W.M.R..

[58] A 37 count Information is sworn charging Macintosh with various sexual offences against various complainants.

[59] On December 12, 2001 a new arrest warrant is issued for Macintosh in relation to the October 22, 2001 Information as well as the December 10, 2001 Information.

[60] In 2002 D.S. swears an Identification Affidavit for use in the extradition proceedings.

[61] On February 26, 2002 the Nova Scotia Crown requests the R.C.M.P., through their liaison officer in India, to confirm Macintosh's address in India and advise the passport authorities of the outstanding warrant.

[62] On April 18, 2002 the federal Department of Justice is provided with additional charges and warrants in relation to Macintosh as per the 2001 complaints.

[63] On July 11, 2002 A.M. swears an affidavit with respect to his allegations concerning Macintosh and in relation to the issue of identification.

[64] On October 18, 2002 C.M. swears an affidavit with respect to his allegations concerning Macintosh and in relation to the issue of identification.

[65] On June 8, 2003 J.H. swears an affidavit with respect to his allegations concerning Macintosh and in relation to the issue of identification.

[66] On June 21, 2003 R.M. swears an affidavit with respect to his allegations concerning Macintosh and in relation to the issue of identification

[67] On July 3, 2003 R. Mac. swears an affidavit for use in the extradition proceedings.

[68] In April/May of 2006, the Nova Scotia Crown consults with the federal prosecutors to finalize documentation needed to support the extradition request.

[69] In July 2006 the formal request for extradition is forwarded to the Government of India.

[70] On April 5, 2007 Macintosh is arrested in New Delhi. He contests the extradition process.

[71] On April 25, 2007, an Indian Court delivers the verdict recommending extradition of Macintosh.

[72] On May 26, 2007 the Government of India agrees to extradite Macintosh.

[73] On June 8, 2007, in Canada, is Macintosh's first appearance before the Provincial Court in Port Hawkesbury. The matter was set for a bail hearing.

[74] On June 13, 2007 a bail hearing is heard.

[75] On June 18, 2007, a decision is given denying bail.

[76] On July 23, 2007 the Defence seek further disclosure including documentation from the Federal Government in relation to the extradition and suggests the matter be scheduled "ahead a considerable distance". The election process is adjourned.

[77] On October 29, 2007 the Defence again asks that the election and plea be adjourned as they are seeking copies of every e-mail between the Crown, the R.C.M.P. and the federal Department of Justice concerning the extradition process.

[78] On December 17, 2007 the Defence requests a second bail hearing, claiming that the Extradition Treaty allows for such and suggests the election and plea be dealt with at the same time due to the recent voluminous disclosure.

[79] On February 20, 2008 the bail hearing is not held as the court determines no jurisdiction to re-visit the bail issue. The Defence again requests the election and plea be adjourned as they wish further documentation related to the extradition process and

the material supplied to the court in India in support of the request. Counsel for Macintosh suggests an April date.

[80] On April 17, 2008 the Defence requests an adjournment of the election and plea pending the hearing of a Defence application challenging the extradition. Crown does not agree and wants the matter brought back at an earlier date arguing that the material that has been requested is not material to the issue of election of mode of trial.

[81] On May 7, 2008 the Defence indicates that they are content with disclosure and election is made to the Supreme Court without a jury. The preliminary inquiry is set for October 7-10 and 20-22 with further dates to be set as necessary. It proceeds.

[82] On October 22, 2008 the preliminary inquiry is adjourned to call further witnesses.

[83] On January 27 and 29, 2009 the preliminary inquiry continues. On January 29, the matter is adjourned for written submissions and Mr. Bright suggests he be given until February 17 to file his submissions. The Crown requests until February 27 to respond. Defence counsel is not available the entire month of March and indicates, when April 29 is suggested by the court clerk, that "the 29th would be ideal for me".

Upon these dates being set, the Defence is given until February 27 for written submissions on committal and the Crown until March 27.

[84] On February 18, 2009 Defence counsel, by correspondence, requests that the April 29 date be adjourned until May 19 or 22, 2009. The matter is adjourned to May 1, 2009 for a decision on committal.

[85] On May 1, 2009 the accused is committed to stand trial and ordered to appear before the Supreme Court on June 5, 2009.

[86] On June 5, 2009 in Supreme Court, the matter is adjourned until June 22, 2009 in order to allow Defence and Crown to discuss the issue of severance as raised by the Defence. The presiding justice instructs counsel to keep November open for the trial.

[87] On June 22, 2009 the trial dates, with respect to three of the complainants, are confirmed for late October - early November 2009.

[88] As a result of this long delay between the dates of the alleged offence and trial, Macintosh submits that he will suffer prejudice to an extent that will cause trial on these charges to be unfair.

THE LAW

[89] A judicial stay is the "A-Bomb" of judicial remedies. Its result is to prevent the Crown from proceeding with criminal charges that the Crown believes will result in convictions. It is a finding that has serious implications.

[90] A judicial stay is to be exercised "only in the clearest of cases" (*R. v. Bennett* [1991] O.J. No. 884 (Ont. C.A.)).

[91] Section 7 of the *Canadian Charter of Rights and Freedoms* provides 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.

[92] It is pre-charge delay that is considered under s. 7. In order for s. 7 to apply in an instance where an accused person is seeking a stay of proceedings based on a pre-charge delay, there must exist evidence that the accused will be deprived of his or her right to a fair and impartial hearing (*R. v. Liakas* [1996] 2 S.C.R. 286).

[93] Section 11(b) of the *Canadian Charter of Rights and Freedoms* provides:

> 11. Any person charged with an offence has the right
>
> ...
>
> (b) to be tried within a reasonable time; ...

[94] It is post-charge delay that s. 11(b) addresses. With respect to post-charge delay, there is an available inference that long delay will be prejudicial to the accused. No such inference exists in assessing pre-charge delay.

[95] Delay alone does not justify a stay of proceedings as an abuse of process. In *R. v. L. (W.K.)* [1991] 1 S.C.R. 1091 Stevenson J. writing for the Court stated at pp. 1099-1100:

> 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.

> 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.

> 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*.

[96] Even the "mere possibility" that pre-charge delay may affect an accused's right to make full answer and defence does not justify a stay. The Applicant must demonstrate, on the balance of probabilities, actual prejudice (*R. v. Cunningham* 1992 CarswellOnt 4048 (Ont C.A.)).

[97] The prejudice that must be established by the Applicant on a balance of probabilities must affect one's ability to make full answer and defence. Stress and personal inconvenience will not suffice (*R. v. Hyde* 1994 CarswellSask 290; *R. v. Sample* 2002 CarswellAlta 1496 (ABQB)).

[98] When dealing with post-charge delay, prejudice may be inferred. The longer the delay, the more likely that such an inference will be drawn.

[99] In circumstances in which prejudice is not inferred and is not proved, the application will not succeed. The purpose of the right is to expedite trials and minimize prejudice and not to avoid trials on the merits. Action or non-action by the accused which is inconsistent with a desire for a timely trial is something that must be considered (*R. v. Morin* [1992] S.C.J. No. 25 at p. 3).

[100] In that case, the Supreme Court of Canada gives direction as to how courts are to assess the issue of post-charge delay. At para. 31, Sopinka J. (as he then was) writing for the majority stated:

> 31 The general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay. As I noted in Smith, supra, "[i]t is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable?" (p. 1131). While the Court has at times indicated otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be listed as follows:
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> 1. the length of the delay;
> 2. waiver of time periods;
> 3. the reasons for the delay, including
>
> (a) inherent time requirements of the case,
> (b) actions of the accused,
> (c) actions of the Crown,
> (d) limits on institutional resources, and
> (e) other reasons for delay; and
>
> 4. prejudice to the accused.

> These factors are substantially the same as those discussed by this Court in Smith, supra, at p. 1131, and in Askov, supra, at pp. 1231-32.
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> 32 The judicial process referred to as "balancing" requires an examination of the length of the delay and its evaluation in light of the other factors. A judicial determination is then made as to whether the period of delay is unreasonable. In coming to this conclusion, account must be taken of the interests which s. 11(b) is designed to protect. Leaving aside the question of delay on appeal, the period to be scrutinized is the time elapsed from the date of the charge to the end of the trial. See R. v. Kalanj, [1989] 1 S.C.R. 1594. The length of this period may be shortened by subtracting periods of delay that have been waived. It must then be determined whether this period is unreasonable having regard to the interests s. 11(b) seeks to protect, the explanation for the delay and the prejudice to the accused.

[101] While the *Charter* seeks to protect an individual's right, the courts have also recognized a public interest in the conduct of trials on their merits. As was stated by Trafford J. of the Ontario Superior Court of Justice in *R. v. James* 2008 CarswellOnt 9132 at para. 41:

> 41 The primary purpose of s. 11(b) is to protect the individual rights to liberty and security of the person under s. 7 of the *Charter* and the fair trial interests of the defendant under s. 7 and s. 11(d) of the *Charter*. There is also a recognized secondary interest of the public not only in the expeditious trials of serious allegations of crime but also in the conduct of trials on the merits. As was stated by Sopinka J. in *R. v. Morin, supra*, at 24, the purpose of s. 11(b) of the *Charter* is:
>
> > ...to expedite trials and minimize prejudice and not to avoid trials on the merits... (a)ction or non-action by the (defendant) which is inconsistent with a desire for a timely trial is something that the court must consider... (n)one the less, in taking into account inaction by the (defendant), the court must be careful not to subvert the principle that there is no legal obligation on the (defendant) to assert the right... (i)naction may, however, be relevant in assessing the degree of prejudice, if any, that (a defendant) has suffered as a result of delay...

[see also *R. v. Bennett* [1991] O.J. No. 884 (Ont. C.A.)]

[102] With respect to the issue of what constitutes a fair trial, Romilly J. of the British Columbia Supreme Court in *R. v. R.E.M.* [2004] B.C.J. No. 1849 (approved on appeal by the British Columbia Court of Appeal at 2007 BCCA 154) quoted the Ontario Court of Appeal at para. 29 of his decision:

> 29 In *R. v. B.(J.G.)* (2001), 151 C.C.C. (3d) 363 (Ont. C.A.) Weiler J.A., for the Court, stated at paras. 6-7:
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> > In assessing the prejudice to the accused's right to make full answer and defence as secured by s. 7 of the *Charter*, it is important to bear in mind that the accused is entitled to a trial that is fundamentally fair and not the fairest of all possible trials. As stated by McLachlin J. in *O'Connor*, [1995] 4 S.C.R. 411, at pp. 78-79:
> >
> > > ... the *Canadian Charter of Rights and Freedoms* guarantees not the fairest of all possible trials, but rather a trial that is fundamentally fair: *R. v. Harrer*, [1995] 3 S.C.R. 562. What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of he [sic] system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. Perfection in justice is as chimeric as perfection in any other social agency. What the law demands is not perfect justice but fundamentally fair justice.
> >
> > In a similar vein, Justices McLachlin and Iacobucci commented in *R. v. Mills*, [1999] 3 S.C.R. 668 at 718 that fundamental justice embraces more than the rights of the accused and that the assessment concerning a fair trial must not only be made from the point of view of the accused but the community and the complainant. The fact that an accused is deprived of relevant information does not mean that the accused's right to make full answer and defence is automatically

> breached. Actual prejudice must be established: *Mills, supra*, 719-720, citing *R. v. La*, [1997] 2 S.C.R. 680 at 693.

[103] The purpose of these *Charter* sections is not to protect the accused from the stress and diminished reputation incidental to being charged, but rather that which flows from the situation where it is prolonged by the delay (*R. v. James, supra*; *R. v. R.E.M., supra*).

[104] An accused who is out of the country and who is aware he would face charges if he returned to Canada yet chooses to remain outside the jurisdiction cannot seek to have that time counted against the Crown on an application for unreasonable delay (*R. v. Graham* 2009 NSSC 196; *R. v. White* [1997] O.J. No. 961).

[105] So, the issues of pre-charge and post-charge delay must be examined. As stated, while s. 11(b) applies to post-charge delay, pre-charge delay is assessed based on s. 7 of the *Charter*. Additionally, authorities are clear that any prejudice claimed as a result of pre-charge delay must be proven and cannot arise by inference based on the length of the delay.

Pre-Charge Delay

[106] Macintosh asserts that his right to a fair trial and his ability to make full answer and defence has been impaired by the passage of time before the bringing forward of the allegations. Delay is not unusual when dealing with historical sexual abuse allegations. In fact, it is recognized by the courts that delay in reporting sexual abuse is common. The Supreme Court of Canada in *R. v. L. (W.K.), supra,* states at p. 1100:

> ... The appellant was charged with several offences which amounted to sexual abuse. It is well documented that non-reporting, incomplete reporting, and delay in reporting are common in cases of sexual abuse. ...

[107] The often used reference to these types of charges as "historic" speaks to the common significant delay between the alleged offences and disclosure to the authorities.

[108] The pre-charge delay here is from 1970-1995 (25 years) in the case of D.S., 1970-2001 (31 years) in the case of R.M., 1971-2001 (30 years) in the case of J.H., 1971-2001 (30 years) in the case of A.M., 1972-2001 (29 years) in the case of W.M.R., and 1972-2001 (29 years) in the case of B.S.

[109] There is no question that the pre-charge delay in this matter is considerable.

[110] The Applicant, Macintosh, in order to show a breach under s. 7 must establish, on the balance of probabilities, that as a result of this pre-charge delay, he has lost his right to a fair and impartial trial.

[111] The accused claims that the actual prejudice which occurred in that time period is the loss of the evidence of deceased potential witnesses. He names those witnesses and suggests that they would have had relevant evidence to give primarily about times and places. He also laments the present unavailability of business, motor vehicle and police records.

[112] In particular, the Applicant says an entire police file relating to the W.M.R. complaint no longer exists. The notes taken by the police officers who spoke with J.H. from Halifax no longer exist. He claims that some of the notes and file materials relating to B.S. no longer exist.

[113] Macintosh submits that this unavailable evidence would have had the potential to raise doubt about the accusations.

[114] The Crown has responded to this submission addressing the question of potential evidence now unavailable. I cite from the Crown brief:

In his pre-hearing submissions the Applicant makes mention of several witnesses who are deceased. He mentions Marcel Romard, a hockey player who resided at Farquar House, one of the locations of several of the alleged incidents, during the relevant time period. Mr. Romard died sometime in the late 1970s prior to any of these allegations being made.

The Crown would respectfully submit that the assertion that Mr. Romard may have been able to provide evidence to assist the Applicant is based purely on speculation. Mr. Romard was not questioned in relation to these events and it is equally possible his evidence, if he had any, may have been of assistance to the Respondent.

It is further submitted that any evidence Mr. Romard may have been able to provide would have been collateral to the main issue of whether or not the assaults occurred as none of the complainants in the matter ever recall seeing Mr. Romard at Farquar House and there is no assertion by any of the complainants that Mr. Romard was a witness to the events in question.

It is the position of the Crown, that if it is to be the position of the accused that the hockey players who resided at Farquar House would have seen the complainants had they ever been there, there are other avenues for the Applicant to present this evidence to the Court. It is asserted by the Applicant that numerous hockey players resided at Farquar House yet Mr. Romard is the only one who is identified as deceased, certainly others could be called in his place to provide the same testimony if it is so critical.

The Applicant also makes reference to the passing of his father and Mr. Dawe. It is again the respectful submission of the Respondent that not only are the issues on which these witnesses may have been able to provide evidence collateral there are other witnesses available who may be questioned on the issue of when certain buildings existed and what their configuration would have been. There is for instance F.S. and Mr. Macintosh's former business associate Mr. Marcie MacQuarrie both of whom will be called by the Crown at trial and therefore open to cross-examination.

The Applicant's assertions with respect to the potential witnesses he has identified as deceased are, it is respectfully submitted, speculative at best. None of these

> witnesses were ever questioned. If they had any evidence to offer it is equally likely that such would have supported the complainants in this matter.
>
> With respect to the issue of the vehicles Mr. Macintosh owned during certain periods of time it is respectfully submitted that the Applicant's own submission that Mr. Macintosh is still in possession of some documentation and that certain records still exist at the Registry of Motor Vehicles negates his assertion that he has lost valuable evidence on this issue which again the Crown would submit is collateral to the issue at trial.
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> As was pointed out by McLachlin J. in *R. v. O'Connor*, supra, and reiterated by the Ontario Court of Appeal in *R. v. B. (J.G.)*, supra, as quoted in *R. v. R.E.M.*, supra, the accused is entitled to a "fundamentally fair trial and not the fairest of all possible trials". He is not entitled to every piece of evidence that might have existed in every form it may have possibly existed in which appears to be the assertion of the Applicant in the case before this Honourable Court.
>
> On the basis that sufficient evidence exists to permit the accused to make full answer and defence despite the passage of time between the dates during which the offences are alleged to have occurred and the dates the Informations were sworn, the Respondent respectfully submits that no case for prejudice based on pre-charge delay can be substantiated.
>
> The Respondent submits that absent any actual prejudice to the right of full answer and defence the Applicant should be denied his application for a stay of proceedings in this matter, with respect to the pre-charge delay, in accordance with the decided authorities.

[115] I agree. The pre-charge delay herein is considerable. It is possible that had the complainants come forward sooner that there would be evidence presently unavailable that would be of benefit to the accused, however, Macintosh has not shown that this is so.

[116] This is an unfortunate situation, not uncommon in historical sexual offence cases and yet fair trials commonly result.

[117] The accused has not established on the "balance of probabilities" that there has been a breach of his s. 7 *Charter* rights in this matter.

[118] There will be no stay resulting from the pre-charge delay herein.

Post-Charge Delay (1995-2009)

[119] The time to be considered with respect to the issue of post-charge delay is the time from the laying of the first Information to the time of trial.

[120] This time frame is from December 1995 to October 2009 and involved 13 years and 10 months. (It was agreed to by the parties on the record that the delay between the trial originally scheduled for October 2009 and the new date of April 2010 will not be considered in any delay assessment.) Such time frame is obviously of sufficient length as to warrant an enquiry into the reasons for the delay and an apportionment of responsibility.

[121] The period of post-charge delay can be divided into two categories, the first being the time from the laying of the charges to the time of the Applicant's extradition from India, and the second being from the point of his return to Canada to the originally scheduled trial.

(1) Laying of the Charges to Extradition (1995-2007)

[122] The first Information charging the accused with the offences currently before the Court was laid in December 1995. At that time it was clear to the authorities that the accused was not residing in Canada. In February 1996 an arrest warrant was issued by the Provincial Court.

[123] I repeat that the accused left Canada prior to any allegations being made against him. From the time the charges were laid until the accused was returned to Canada as a result of extradition proceedings, he was residing in India.

[124] When the investigating officer, Cst. Deveau, was finally able to contact the accused in August of 1996 he had conversation with him - some of the details of which are in dispute.

[125] Cst. Deveau says that he told Macintosh that there was a warrant for his arrest in Nova Scotia; Macintosh says he was not told so. However, both agree that Macintosh was told about the investigation involving him in sexual assaults and that he was asked if he was coming back to Canada. Macintosh said that information caused him to be "curious". Whether he knew about the warrant or not, it is clear that as of that conversation, Macintosh knew he had big trouble in Nova Scotia and yet he takes no action at that time to get to the bottom of the situation, to straighten it out. He is on notice that something of a criminal nature is going on that involves him - he does nothing in response.

[126] Macintosh was advised in late 1997 that his passport was not being renewed because there were outstanding criminal charges against him.

[127] He retained counsel in Ontario to deal with the passport issue. This is turn led to David Bright, Q.C., being retained in Nova Scotia to inquire into the issue as to what charges were in existence at that time.

[128] Despite the passport issue being resolved as of April 1998, Mr. Bright requested and received disclosure of the Crown file as well as the R.C.M.P. file, including

copies of the charges which had been laid up to that point in time, and the outstanding arrest warrant.

[129] As a result, I am satisfied Macintosh had knowledge of the outstanding charges as well as the warrant as of the summer of 1998.

[130] Further inquiries were made on the accused's behalf by his lawyer who was advised that the Crown would be commencing extradition proceedings against him.

[131] Thereafter, Macintosh's counsel contacted the federal government office responsible for providing assistance in extradition matters. The Crown's intention to proceed with extradition was confirmed to him.

[132] Macintosh, in possession of this information, does nothing to deal with the matter but rather waits for the authorities to compel his attendance in a Canadian court.

[133] This is of significance. This is central to the issue.

[134] I find the situation to be analogous to the situation of the accused in *R. v. R.E.M., supra.* Had Macintosh desired a timely trial on the merits he could have voluntarily returned to this jurisdiction upon being informed of the warrant and the extradition process.

[135] To have retained a lawyer to obtain disclosure and inquire into the intentions of the Crown with respect to proceeding and then claim to know nothing about the existence of the charges is an untenable position.

[136] The conclusion reasonably to be drawn is that the accused was aware of the outstanding charges that were laid in 1995 at least by the summer of 1998, as well as the warrant and the pending extradition proceedings.

[137] During the relevant time, 1999, further complainants came forward with additional allegations.

[138] As a result of the rule of speciality which would allow the accused to face trial only on those charges for which he was extradited, the extradition process was stopped until all further investigation was completed.

[139] Most of the prejudice which the accused is alleging with respect to the unavailability of evidence is attributable to the pre-charge period. During the years 1995-2007, there is no suggestion that any potential evidence was lost (other than some police notes which the Crown says never existed).

[140] The Crown addresses the suggestion of missing investigation material. The suggested missing evidence is a police file concerning W.M.R., police notes relating to the Halifax Police investigation of the J.H. complaint, and notes relating to conversations between the police and B.S.

[141] It is the Crown's response that the material which the Applicant claims is lost probably never existed.

[142] Again, I cite the Crown brief:

> At Preliminary Inquiry, W.M.R. was asked whether he had ever been a complainant in any police matter other than the one before the Court. His response was that he hadn't and that he had no knowledge what an officer had meant when he indicated in a continuation report that he knew how to contact W.M.R. from another matter which had recently (2000) been concluded. There is no evidence whatsoever to corroborate the statement that W.M.R. had made any complaint about any other individual to the RCMP prior to his allegations involving Mr. Fenwick Macintosh. In any event, if such a file did exist it is clear that it is not related to the matter currently before this Honourable Court. Even the notation which states that W.M.R.

had contact with an RCMP officer in another matter is clear that it was in relation to another matter entirely, if in fact it did occur. The value of such information, if it did exist, is speculative at best.

The second missing evidence issue the Applicant raises is the issue of police notes relating to the Halifax Police investigation of J.H.'s complaint.

On October 19, 2009, in response to the Applicant's request for disclosure of the Halifax Regional Police file, the Crown forwarded material received from the Halifax Police database. That material provides a summary of action taken on the file in a narrative form as entered by the investigator. The information provided indicates that the Halifax Regional Police reviewed that statement J.H. gave to the RCMP, confirmed that Mr. Macintosh still resided in India and, therefore, concluded the matter due to the difficulties in having the police in India interview Mr. Macintosh as well as the cost of returning him to Halifax for a court appearance. Cst. Deveau's notes, also in the possession of the Defence, and upon which he was cross-examined extensively at Preliminary Inquiry indicate that he was informed by the Halifax Regional Police that despite leaving several messages for J.H. to contact them, he never did. The Respondent is, therefore, left to wonder what "notes" of relevance are missing due to the unavailability of the actual paper file which would have been created when the RCMP statement was received by the Halifax Police. The Halifax Police investigation was negligible and did not involve any contact with any potential witnesses or the gathering of any evidence.

The final assertion on the issue of lost disclosure being made by the Respondent relates to the issue of notes concerning conversations between the police and B.S. which are alleged to "no longer exist". It is the Crown's respectful position that this is not a case of such notes no longer existing but rather a situation where no such notes ever existed. Cst. Boutilier testified under cross-examination by Mr. Bright, Q.C., at Preliminary Inquiry about his contact with B.S. in July 2007 when he contacted B.S. and asked him to come to the detachment at the Crown's request. Cst. Boutilier indicated under oath that he did not make any notes of that meeting as B.S. did not wish to discuss his allegations against Mr. Macintosh at that time, having already provided a written statement. This meeting was not taped in any manner and no notes were ever made as there was nothing to add to the material already received from B.S.

Likewise, Cst. Deveau testified at Preliminary Inquiry that he made no notes nor did he have any conversation of any consequence with B.S. other than providing him

> with the information of where to fax his statement which contained his allegations involving Mr. Macintosh. It is clear from the evidence given at Preliminary Inquiry, the Respondent submits, that there never were any notes created as a result of B.S.'s minimal contact with RCMP officers beyond that which is already in the possession of the Applicant.

[143] I conclude that the unavailability of this so called "lost material" is not shown, on the balance of probabilities, to be prejudicial to the accused.

[144] While the accused is claiming that prejudice is attributable to this period of time such that the charges should be stayed there is no clear evidence as to what that prejudice is, in relation to the trial. The prejudice is not shown.

[145] The accused was aware of the charges and chose to ignore them, thereby signalling his lack of interest in a timely trial and causing the delay which arose as a result of having to seek extradition. As a result, this portion of the delay is partially, but significantly, attributable to the accused.

[146] The accused's attitude in this regard is further demonstrated by the fact that he fought the issue of extradition until such time as the Indian court ruled that he would be sent back to Canada to face trial on the charges in question.

[147] He clearly had no desire to return to face the charges until forced to do so and would not have returned to face these charges on his own accord. I find some of his actions while in India to have been inconsistent with his desire for a timely trial.

(2) Extradition to Trial (June 2007 - present)

[148] Macintosh first appeared in court in Canada in relation to these charges on June 8, 2007. There were seven adjournments of the matter prior to the accused finally electing his mode of trial on May 7, 2008 - 11 months after his first appearance.

[149] The first 10 days of this time period, that from first appearance until decision on the bail issue is attributable to the "inherent time requirements" of the case and should therefore be assessed as neutral.

[150] From June 18 until July 23, 2007 the Defence had requested and was awaiting further disclosure from the Crown, this time is appropriately assessed against the Crown.

[151] From July 23, 2007 until election on May 7, 2008, Macintosh was seeking further material with respect to motions he wished to bring both in relation to a challenge to the extradition process and a request for a second bail hearing - material which was motion specific rather than information as to what evidence was available to support the allegations. The delay involved in dealing with those issues should not be attributable to the Crown. Macintosh, in trying to get this material, suggested adjournments and resisted electing a mode of trial until the Court insisted that the matter move ahead and forced the issue at the May 7, 2008 appearance.

[152] On May 7, 2008 a preliminary inquiry was set for October 7, 8, 9, 10, 20, 21 and 22, 2008 with the expectation that more time would likely be needed. This was initially a matter involving nine complainants and 43 charges which would require in excess of seven days for the preliminary inquiry. The five month, six day delay between the date of election and commencement of the preliminary inquiry is not unusual in this province.

[153] The preliminary inquiry was not completed in the allotted time and was adjourned for a further two months to find two further dates to complete the evidence. While there was some difficulty scheduling witnesses, Macintosh did not raise any

issue with respect to the pace at which the preliminary inquiry was proceeding. This preliminary hearing took a long time to accomplish, however, it is not shown that there was any Crown or systemic neglect.

[154] With respect to the remaining time between completion of the evidence and decision on committal, it is the submission of the Crown that a portion of this time should be assessed as neutral, being part of the inherent time requirements of the matter and part as against the Applicant.

[155] Certain issues with respect to committal arose based on the evidence and it was agreed by the Provincial Court and counsel that written submissions be completed in relation to these issues.

[156] The date on which the preliminary inquiry judge could provide the decision on committal was delayed by a month due to the unavailability of Macintosh's counsel. The Crown submits that the statement by that counsel that the later date "would be ideal" should be taken as waiver in this instance. That date was then adjourned a further two days to convenience the Defence once again.

[157] Decision on committal was delivered by the Court on May 1, 2009 and the accused ordered to attend Supreme Court on June 5, 2009 for the setting of trial dates. The June 5 date was adjourned by a joint request of Defence and Crown to explore the issue of severance without the need of a Defence application being brought, however at that time the Court directed counsel to keep certain dates available so as to not delay the trial dates in this matter.

[158] On June 22, the trial dates suggested by the Court on June 5 were set. The trial was to commence on October 21, 2009. That date was later adjourned to October 28 to accommodate the Court.

[159] I am satisfied that the Defence was responsible for a significant portion of the delay from the point that Macintosh arrives in Canada and bears responsibility for delay of approximately 11 months. The Crown is responsible for delay of approximately one month, five days, and the remainder of the time is attributable to the inherent time requirements of the matter.

[160] While this matter may not be overly complex from the perspective of the evidence that the Crown is relying upon, the number of charges and number of complainants added to the time requirements.

[161] The accused does set out what he describes as prejudice already suffered by him as a result of delay after his arrival in Canada.

[162] He was beaten at the Cape Breton Correctional Centre. He was held in solitary confinement. He was initially denied bail and was imprisoned from June 2007 until April of 2008. He has since been released under restrictive bail conditions. He has received death threats and the publicity surrounding his situation has been both extensive and commonly inaccurate.

[163] I agree with the Crown submission that most of this type of prejudice derives from the laying of the charges rather than delay. The delay may have exacerbated it, but has not caused it.

[164] These matters have been a very long time coming to trial.

[165] It is probable that the delay will affect the quality of some of the evidence to be produced, both by the accused and the Crown. The trial judge will assess that evidence.

[166] That said, when I apply the approach to this application as set out in *R. v. Morin, supra*, I conclude that this is not an appropriate case for a judicial stay.

[167] The suggested prejudice to the accused at trial is nebulous. It is not shown on the "balance of probabilities" and the delay inference available as to post-charge delay does not justify a stay.

[168] When I balance the interests involved, the right of the accused to a fair trial, the interest in the public in having these matters tried on their merits, I conclude that a stay is not to be had in this matter.

[169] I repeat and emphasize that the accused has been responsible for much of the unfortunate delay herein.

[170] I will not be granting the Applicant's request that these charges be stayed.

Chief Justice Joseph P. Kennedy