Date: 1999 05 03
Docket: CR 03301

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

-and-

BUD WAYNE WEAVER

Applicant

Application by accused for a judicial stay of proceedings on the basis of abuse of process.

Heard at Yellowknife on April 26, 1999
Reasons filed: May 3, 1999

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Counsel for the Applicant: **Robert H. Davidson, Q.C.**

Counsel for the Respondent: **Bernadette Schmaltz**

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REASONS FOR JUDGMENT

[1] The applicant, Bud Wayne Weaver, is to go on trial before a judge and jury on two charges of sexual assault. This will be his third trial on these charges. Both of the previous trials resulted in mis-trials due to the jury's inability to reach a decision. He now applies for an order staying the prosecution on the basis that holding another trial would be an abuse of process of this court and contrary to the principles of fundamental justice. For the reasons that follow, the application is dismissed.

Facts:

[2] The applicant was arrested on July 2, 1996. He was charged with six criminal offences. Two of the charges (being the two counts in the current Indictment) were that he:

Count #1: On or between the first day of December, 1983 and the thirtieth day of September, 1992 at or near the City of Yellowknife in the Northwest Territories did commit a sexual assault on T.S.W., contrary to Section 271 of the Criminal Code.

Count #2: On or between the first day of December, 1983 and the thirtieth day of September, 1992 at or near the City of Yellowknife, in the Northwest Territories did commit a sexual assault on T.A.W., contrary to Section 271 of the Criminal Code.

[3] The complainants, T.S.W. and T.A.W., were, at the material time, the applicant's stepdaughters. He had married their mother in September, 1983, and they lived as a family unit until the applicant left the matrimonial home at the end of October, 1991.

The Crown alleges that during that time frame the applicant molested the complainants by touching them on the breast and vaginal area. The complainants are imprecise as to when these alleged assaults started but their evidence is that they were repetitive and continued until the applicant left the home. The complaints were not disclosed to the police, however, until a few years later. The complainants are now in their early twenties so they were young children and teenagers when the alleged abuse occurred.

[4] The four other charges against the applicant also related to these complainants. There was a charge of unlawfully pointing a firearm at the complainants and their mother, a charge of possessing a firearm for a dangerous purpose, a charge of uttering death threats to the complainants and their mother, and a charge of unlawfully confining the complainants and their mother. All of these charges were alleged to have been committed at some point in September, 1987.

[5] After his arrest the applicant was released on bail. He has never been detained in custody throughout the course of these proceedings.

[6] A preliminary inquiry was held in November, 1996, at which he was committed to stand trial on all six charges. His trial, before a judge and jury, took place in Yellowknife on September 8 to 12, 1997. He was acquitted on the four charges set out above but the jury was unable to reach verdicts on the two sexual assault charges. On April 20, 1998, the applicant stood trial again but this time only on the two counts of sexual assault. On April 24th, a mis-trial was declared due to the jury's inability to agree on the verdicts.

[7] In both trials, the evidence consisted essentially of the complainants testifying as to what allegedly happened to them and the applicant testifying that he did not do those things. Counsel agree that the sole issue before the jury in both cases was credibility. As applicant's counsel put it, it is a case of "oath against oath". In both trials the juries were sequestered overnight and their deliberations apparently lasted as long or longer than the evidence at trial.

[8] There has been extensive publicity over this case ("extensive" at least in terms of a small city of the size of Yellowknife). The applicant is a businessman from a prominent and long-established family in Yellowknife. He remarried in 1994 and has two young children. His only prior involvement with the criminal law is a conviction for impaired driving in 1983.

[9] The Crown has confirmed its intention to proceed to a third trial on these charges. Crown counsel concedes that nothing has changed in the Crown's case from the two previous trials. The evidence will be the same.

The Application:

[10] The applicant seeks an order staying the prosecution. He argues that to hold a third trial, in the circumstances of this case, would be an abuse of process. Therefore, this court should exercise its common law power to stay proceedings. In addition, the applicant invokes the protection of s.7 of the Charter of Rights and Freedoms and submits that to permit the prosecution to go forward would be contrary to the principles of fundamental justice and therefore violate his right to liberty and security of the person. The applicant also raises his right to trial within a reasonable time, as guaranteed by s.11(b) of the Charter, but his counsel acknowledges that the factor of delay is a part of the abuse of process issue, and not a stand-alone ground.

[11] The Crown's position, simply put, is that there is nothing inherently unfair or abusive about holding a third trial on serious criminal charges. Further, it is submitted that there is nothing in the circumstances of this case to warrant the court's exercise of the extraordinary power to stay proceedings.

General Principles:

[12] The application is brought on the basis of both the common law doctrine of abuse of process and the fundamental rights guaranteed by the Charter. I think counsel recognized that there is not much point in maintaining a distinction between the two concepts since the same principles apply. And there was no disagreement as to those principles.

[13] The common law doctrine of abuse of process recognizes the power of the court to prevent abuse in the prosecution of cases before it. The Charter also recognizes that there is a role for the court to play in controlling its process. This is done through protection of the individual's rights as well as preservation of the integrity and repute of the administration of justice. In *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.), the judges of the Supreme Court of Canada agreed that common law abuse of process has been subsumed in the Charter and need not be considered separately unless circumstances arise to which the Charter does not apply. There is no utility in maintaining any distinction between the two in terms of the appropriate analytical approach.

[14] The common law test for abuse of process was stated in *R. v. Jewitt*, [1985] 2 S.C.R. 128, as that where "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency, or where the proceedings are oppressive or vexatious". The rationale was explained by L'Heureux-Dubé J. in *R. v Conway* (1989), 49 C.C.C. (3d) 289 (S.C.C.), at page 302:

> Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge. The prosecution is set aside, not on the merits (see *Jewitt, supra,* at p.23), but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. The doctrine is one of the safeguards designed to ensure "that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society": *Rothman v. The Queen* (1981), 59 C.C.C. (2d) 30 at p.69, 121 D.L.R. (3d)578, [1981] 1 S.C.R. 640 (S.C.C.), *per* Lamer J. It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings.

[15] There is no need to show prosecutorial misconduct in order to establish an "affront to fair play and decency". In *R. v. Keyowski* (1988), 40 C.C.C. (3d) 481 (S.C.C.), the court made it clear that all relevant factors, including, but not restricted to, bad faith on the part of the Crown, must be considered. There may be conduct on the part of the Crown that triggers a specific concern over trial fairness. But there may be nothing specifically improper done by the Crown. As L'Heureux-Dubé J. pointed out in *O'Connor* (at page 39), there is also a "residual category" that "does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the Charter, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process."

[16] The blending of the common law and constitutional doctrines of abuse of process were pointed out in *O'Connor* (at page 34) where L'Heureux-Dubé J. also wrote that "the principles of fundamental justice in s. 7 are, in large part, inspired by, and premised upon, values that are fundamental to our common law...The common law doctrine of abuse of process is part and parcel of those fundamental values."

[17] The purpose of the abuse of process power, therefore, is to protect the integrity of the justice system. It is an extraordinary power because, as stipulated in all the jurisprudence, it is to be exercised only in the "clearest of cases". What is meant by this phrase was explained also by L'Heureux Dubé J. in *R. v. Power* (1994), 89 C.C.C. (3d) 1 (S.C.C.), at page 10:

> I, therefore, conclude that, in criminal cases, courts have a residual discretion to remedy an abuse of the court's process but only in the "clearest of cases", which, in my view, amounts to conduct which shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention.
>
> To conclude that the situation "is tainted to such a degree" and that it amounts to one of the "clearest of cases", as the abuse of process has been characterized by the jurisprudence, requires overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice.

[18] The blending of the common law and constitutional doctrines with respect to this "clearest of cases" standard was also explained in *O'Connor* (at page 37) when discussing the strong parallels between the two doctrines:

> I also recognize that, despite these strong parallels, the common law and Charter analyses have often been kept separate because of the differing onus of proof upon the accused under the two regimes. In *R. v. Keyowski* (1986) , 28 C.C.C. (3d) 553 at pp.561-2, 53 C.R. (3d) 1, (1986) 5 W.W.R. 150 (Sask. C.A.) for instance, it was noted that while the burden of proof under the Charter was the balance of probabilities, the burden under the common law was the "clearest of cases". It is important to remember, however, that even if a violation of s.7 is proved on a balance of probabilities, the court must still determine what remedy is just and appropriate under s.24(1). The power granted in s.24(1) is in terms discretionary, and it is by no means automatic that a stay of proceedings should be granted for a violation of s.7. On the contrary, I would think that the remedy of a judicial stay of proceedings would be appropriate under s.24(1) only in the clearest of cases. In this way, the threshold for obtaining a stay of proceedings remains, under the Charter as under the common law doctrine of abuse of process, the "clearest of cases".

[19] The final point that arises from all of these cases is that there is both a necessary mutuality of interests as between society and the individual accused and an opposition of interests. In *O'Connor* (at page 35), L'Heureux-Dubé J. wrote that "one often cannot separate the public interests in the integrity of the system from the private interests of the individual accused." Why? Because "conducting a prosecution in a manner that

contravenes the community's basic sense of decency and fair play and thereby calls into question the integrity of the system is also an affront of constitutional magnitude to the rights of the individual accused." On the other hand, society has an interest in the effective prosecution of crimes while, obviously, an accused person has an interest in not being prosecuted. There is therefore an inescapable balancing of societal and individual interests to determine if, as said in *Conway* (above), the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases. That balancing of interests must by necessity be fact-specific.

Analysis:

[20] The issue put before me is simply this: In the circumstances of this case, would a third trial on these charges so offend the public's sense of fair play and decency as to warrant a stay of proceedings?

[21] Counsel, in recognition of the fact-specific nature of the issue, placed before me many cases. In some prosecutions were halted; in others they were allowed to proceed. There are cases where stays were entered due to some type of prosecutorial misconduct and cases where there was no misconduct. Stays have been entered where there have been repeated trials due to successive appeals. Stays have been entered even where a new trial was ordered (as in *R. v. Jack* (1997), 117 C.C.C. (3d) 43 (S.C.C.), where the accused was facing the prospect of a fourth trial on a murder charge). Stays have been entered where the charges are extremely serious (such as murder) and where the charges are relatively minor. Stays have been entered in cases alleging, as in this case, long-term sexual abuse by persons in positions of trust. There is no type of case which by its nature cannot be stayed. But all these cases merely reflect what was referred to in *O'Connor* (above) as the panoply of diverse circumstances that could result in a prosecution contravening our sense of justice and endangering the integrity of the justice system.

[22] In this case there is no suggestion of prosecutorial misconduct or some oblique motive in continuing the prosecution. Applicant's counsel does suggest, however, that the Crown has failed to fully evaluate or appreciate its prospects of obtaining any different result in a third trial. Counsel argued that there is no reason to believe that a third jury is going to "do a better job" (in counsel's words) than the previous two juries. He submitted that each jury took an oath and each tried their utmost to discharge that oath. Therefore, in the absence of new evidence (and there is none here), there is no reason to think that a third jury will arrive at any different result.

[23] The strength of the Crown's case and the prospect of a third hung jury are certainly factors to consider. In the absence of evidence to the contrary, I think a court can rely on Crown counsel's integrity as public officers that they have made the necessary assessment of the evidence to determine if there is a "reasonable prospect of conviction". This is the criterion noted under the heading of "The Decision to Prosecute" in the *Prosecution Policy of the Attorney General of Canada* issued in 1993.

[24] Applicant's counsel placed before me letters from several senior counsel practising in various parts of Canada, including the Northwest Territories, giving their comments as to the rarity of a third trial on the same charge. I have disregarded these primarily because, if they wish to state the fact that third trials are rare, then they are superfluous and, if they wish to offer an opinion as to whether there should be a third trial, then it is opinion evidence for which no foundation has been laid. Nevertheless I can take notice of the fact that holding a third trial on the same charge is an extremely rare occurrence. But there is nothing in law to necessarily prevent it. Also, I can take notice of the fact that hung juries are rare. In the United States, on average, in those jurisdictions which maintain the unanimous verdict rule, only 5.6% of all jury trials end in hung juries: see J. Abramson, *We, the Jury - The Jury System and the Ideal of Democracy* (1994), page 201. In Canada, according to the last statistical study I know of which was conducted twenty years ago, hung juries are even more rare of an occurrence. The Law Reform Commission of Canada, in its Working Paper No. 27 entitled *The Jury in Criminal Trials* (1980), found that only 1.02% of jury cases tried resulted in a hung jury. It is, of course, pointless to speculate as to why any jury cannot reach a verdict. There may be a myriad of reasons but I think experience tells us that it is usually because the case is weak. To have two hung juries may suggest a very weak or confusing case.

[25] Applicant's counsel also placed before me evidence as to the prejudice suffered by the applicant. He has suffered anxiety, depression and personality changes. His business has been adversely affected and, of course, there is the significant financial burden of this litigation. He feels shunned by the community as a result of the attention given to the trial and gossip within the community. There have been adverse emotional consequences to his family members. None of this was challenged by the Crown. Instead, Crown counsel argued that these are the usual stresses and strains present in every criminal prosecution.

[26] In the affidavit evidence from the applicant and his family members, there are references to the publicity that this case has already generated in the community. The concern is that the applicant may be unable to receive a fair trial since potential jurors may have already made up their minds. As applicant's counsel put it, the jury is a

microcosm of the community and the fact that two juries could not agree may be indicative of a polarization, and a predetermination, of opinions in the broader community. It seems to me, however, that there are other possible remedies for this particular concern (such as a change of venue) short of halting the prosecution altogether.

[27] Both counsel referred extensively to the case of *R. v. Keyowski* (noted above), both at the appellate level and at the Supreme Court of Canada level. Applicant's counsel referred to the dissenting judgement at the appellate level for purposes of outlining the analytical approach to be used in this case. Crown counsel referred to the Supreme Court decision because, in her submission, the case before me is indistinguishable from that in *Keyowski*.

[28] The issue in *Keyowski* was whether the accused should stand trial for the third time on a charge of criminal negligence causing death. The accused had struck two young girls with his motor vehicle. The first trial resulted in a hung jury. A second trial resulted in a hung jury. At that trial the Crown called 15 witnesses who were not called at the first trial. The Crown then gave notice of its intentions to hold a third trial. The accused applied for an order staying the proceedings. The trial judge granted the stay ruling that to allow the Crown to proceed to a third trial would violate the principles of fundamental justice which underlie the community's sense of fair play and thus would be an abuse of process. The Crown appealed. Less than two years had elapsed from the charge to the stay.

[29] The appeal was heard by a five-judge panel of the Saskatchewan Court of Appeal (reported at 28 C.C.C. (3d) 553). A majority of four judges allowed the appeal and directed a new trial. One judge, Bayda C.J.S., dissented. The majority relied on the fact that there was no "persuasive and cogent evidence that the Crown officers in initiating or continuing the proceedings a third time have misconducted themselves or have done something improper" (at page 567). They held, in the words of Vancise J.A. (at page 568): "In the absence of evidence that the legal officers of the Crown were guilty of prosecutorial misconduct or proceeded for some ulterior motive, in short that the proceedings were oppressive, the continuation of the trial on the indictment is not an abuse of process."

[30] Bayda C.J.S., in his dissenting opinion, noted that to posit Crown misconduct as a prerequisite to a stay for abuse of process would make the doctrine meaningless. In such a situation there would be no limit to the number of trials. He held that abuse of process can occur without any blameworthiness whatever attaching to the Crown (at page

556). He also outlined a non-exhaustive list of factors which he said should go into the process of balancing individual and societal interests (at page 557):

> (1) How many previous opportunities has the Crown had to present its case to a jury on the charge in issue?
>
> (2) How serious is the charge in terms of loss of life, injury, loss of property? Is the mental element of the charge one of intent or recklessness?
>
> (3) How strong is the Crown's case? Are the chances reasonably good that a fresh jury will reach a verdict? Has the Crown overcharged?
>
> (4) Would the failure to proceed with the trial before a fresh jury create a danger to the public by reason of the accused's character and background? How strong is the possibility of a repetition of the offence by the accused?
>
> (5) What punishment in terms of incarceration, emotional stress, pangs of conscience, loss of dignity and self-respect, loss of income, legal costs and the like, has the accused undergone to this point?
>
> (6) Has the prosecution generally shown fairness and competence in handling the proceedings?
>
> (7) What length of time has elapsed since the proceedings were first instituted?
>
> (8) What is the physical and mental health of the accused and what is his ability to withstand another trial?
>
> (9) What are the views of the complainant?

As Bayda C.J.S. went on to note, this analytical approach is premised on a distinction between an abuse of power of the Crown and an abuse of process of the court.

[31] At the Supreme Court of Canada, the court, in a unanimous judgement authored by Wilson J., affirmed the majority's decision to direct a new trial. It, however, disagreed with the majority on the need for evidence as to prosecutorial misconduct. It adopted the dissenting view of Bayda C.J.S. that misconduct need not be demonstrated to trigger application of the abuse doctrine. It also implicitly accepted the analytical approach suggested by Bayda C.J.S. in his list of factors to consider. Wilson J. wrote (at page 483):

> While I disagree with the majority of the Court of Appeal that prosecutorial misconduct must be demonstrated in order to give rise to an abuse of process, I nevertheless agree with their conclusion that a new trial was properly ordered in this case. The appellant has, in my view, failed to demonstrate that this is one of those "clearest of cases" which would justify a stay. The charge is a serious one. The proceedings have not occupied an undue amount of time. The accused has not been held in custody, and, while he has undoubtedly suffered substantial trauma and stigma from the proceedings and the attendant publicity, he is probably not distinguishable in this respect from the vast majority of accused. A third trial may, indeed, stretch the limits of the community's sense of fair play but does not of itself exceed them. In these circumstances, and having regard to the seriousness of the charge, I think that the administration of justice is best served by allowing the Crown to proceed with the new trial. (emphasis added)

[32] In analyzing the present case using the factors identified by Bayda C.J.S., I start from the premise that there is no absolute rule of law prohibiting the Crown, in exercising its discretionary powers in the public interest, from proceeding to a third trial on the Indictment against the applicant. I think, however, that most reasonably-minded people would think that at some point "enough is enough", so to speak. The question is whether this is that point. The Crown has had two previous opportunities to present its case and, in both cases, the jury has been unable to agree. It seems to me, therefore, that the problem is one internal to the evidence, not some external cause (such as mistakes by the trial judge in his or her instructions to the jury). But, it also seems to me that there must have been something in the evidence to convince at least one of the jurors in each trial.

[33] I want to explain the last comment. A trial requires acceptance of evidence by the jury so as to pass the requirement of proof beyond a reasonable doubt. Anything less results in a doubt which should result in an acquittal. If all of the jurors have a doubt as to whether to convict or acquit then that doubt must be exercised in favour of the accused. A hung jury means that at least one of the jurors was ready to convict in the face of eleven who had a doubt, or, it means that one was not prepared to convict when the eleven others were. Either way, at least one juror must have been prepared to convict.

[34] The charges are serious involving as they do allegations of sexual abuse of young people by a person in a position of trust. The alleged facts, however, do not place these charges in the upper level of the continuum of seriousness for such offences. The case should not be complex in a legal sense but, undoubtedly, it is difficult for any juror since it is essentially a credibility contest.

[35] There is nothing new in the evidence to be presented at a third trial. Applicant's counsel pointed to this as a distinguishing factor between this case and *Keyowski.* There the Crown called 15 new witnesses. But that was at the second trial. There is nothing in the reports of *Keyowski* to indicate that the evidence was not going to be the same at the third trial.

[36] Is there a reasonably good chance that a third jury will be able to reach a verdict? This is a difficult factor to consider since all types of unmeasurable dynamics are in play in a credibility case (a juror's assessment of a witness' demeanour being the most obvious one). But, there is nothing inherent in the case to suggest that a third jury would be incapable of coming to an agreement. These types of cases go before juries all the time in this jurisdiction.

[37] Bayda C.J.S., at the Court of Appeal in *Keyowski*, put great store in what he called the "conventional" view in England that a second hung jury is tantamount to an acquittal and therefore the Crown will drop the prosecution. From a practical point of view there is much sense in this. But the ultimate question remains as to whether *this* prosecution, in *these* circumstances, violate those fundamental principles of justice which underlie the community's sense of fair play and decency. As Wilson J. stated in *Keyowski*, a third trial may stretch the limits of the community's sense of fair play but a third trial does not *per se* exceed them. This was also the result in the *Conway* case (noted previously). There the accused was convicted at his first trial of murder. He appealed successfully and a new trial was ordered. There was a hung jury at his second trial. At the opening of his third trial he successfully applied for a stay of proceedings on the basis of abuse of process and unreasonable delay. The Supreme Court of Canada reversed and held that (a) there was no abuse just because it was a third trial on the same charge, and (b) there was no unreasonable delay, notwithstanding that 5 years had elapsed since the charge was laid, since the time taken was inherent in the trial, appeal and retrial of a murder charge.

[38] The fourth factor enumerated by Bayda C.J.S. is whether the failure to proceed with the trial would create a danger to the public because of the applicant's character and background. There is nothing in this case to suggest that. His only previous conviction for an offence is dated and unrelated.

[39] In terms of the effect of the prosecution on the applicant and his family, I am sure that he and they have suffered emotionally and financially. However, he has never been in custody during this entire proceeding. Being on bail is certainly living under some restriction but he has not been deprived of his liberty. To paraphrase Wilson J. in *Keyowski*, while undoubtedly the applicant has suffered trauma and stigma from these proceedings, it is sad but true that in this respect he is probably not distinguishable from the vast majority of accused persons. There is no evidence that the applicant could not, physically or mentally, withstand a third trial.

[40] Bayda C.J.S. listed as a factor the views of the complainants. I have no evidence on that point but I think I can assume that the Crown would not have decided to put the complainants through the rigours of a third trial without first consulting them. The stress and anxiety on them in having to go through another trial must also be intense.

[41] The final major factor to consider is the length of time that has elapsed. The charges relate to incidents that allegedly occurred anywhere from seven to fifteen years ago. The charges were laid almost three years ago. Applicant's counsel acknowledged that the traditional analysis respecting unreasonable delay (as a violation of s.11(b) of the Charter) is not applicable to this case. The lapse of time is a factor to consider as part of the abuse of process argument.

[42] The issue of unreasonable delay in the constitutional sense has features that overlap with the abuse of process doctrine. It has been held that s.11(b) of the Charter has as its primary purpose the protection of the individual rights of the accused. Therefore, there is a balancing that must be done as between the interests of the accused and society's interest in effective law enforcement: *R. v. Morin* (1992), 71 C.C.C.(3d) 1 (S.C.C.), at pages 12-13. Questions of prejudice, misconduct, seriousness of the charges, and others, are also factors to consider in a s.11(b) analysis.

[43] In this case, no issue can be taken on the time period between the charge and the first trial or between the first and second trials or the time since the second trial. None of those time periods, either separately or cumulatively, would trigger a s.11(b) argument in and of themselves in the context of a trial and retrial. Also, none of those periods are such where responsibility could be assigned to either the Crown or defence for any delay. The lapse of time since the charge is due simply to an inherent aspect of the criminal process, the inability of the trier of fact to reach a decision. This is not something for which blame can be ascribed. The applicant has a right to trial by judge and jury. He chose that forum. The jury was unable to decide. So, as a matter of law, the Crown has a right to retry him before another jury. All that takes time.

[44] The lapse of almost three years since the charge is relevant, however, to the overall consideration of abuse of process. So too, in my opinion, is the lapse of time since the offences allegedly occurred. Applicant's counsel referred me to the recent decision of the Ontario Court of Appeal in *R. v. Codina*, [1999] O.J. No. 249. In that case the appellant had been tried once on charges of knowingly inducing, aiding or abetting someone to contravene a provision of the Immigration Act. The appellant's acts occurred some 11 or 12 years ago. She was convicted and then successfully appealed. She was tried again and convicted again. The Court of Appeal allowed her appeal again. Instead of sending it back for a new trial however (a third one on the charge), the court stayed proceedings. Goudge J.A. wrote (at parag. 39):

> The event giving rise to the charge took place well over eleven years ago. The appellant has been prosecuted twice without success. The charge, while important, is not among the most serious. In the circumstances, it is appropriate that these proceedings be stayed and I would so order.

[45] Counsel recognize, as do I, that pre-charge delay is not relevant to a determination of unreasonable delay under s.11(b) of the Charter: *R. v. Carter* (1986), 26 C.C.C. (3d) 572 (S.C.C.). It may, however, be relevant on a s.7 fundamental justice analysis. There is nothing in the bare fact that offences allegedly occurred some years ago that would raise an abuse of process. But the lapse of time is nevertheless still a factor, along with all other relevant factors, to consider in the overall balancing process that a court is required to undertake. A lapse of seven to fifteen years is serious enough but we regularly see cases of much longer ancestry. And there has been no suggestion that the applicant's right to make full answer and defence has been compromised merely because of the lapse of time.

[46] When I consider all of these factors, as well as the governing principles, I cannot conclude that this is one of those clearest of cases that justifies use of the court's power to stay proceedings. I may very well think, as I expect many reasonable citizens think, that there may not be much point in going through another trial. I may think that perhaps the Crown should consider two attempts at securing a conviction as enough (especially where as here there are no far-reaching or complex legal issues at the core of the case). But that is not the test. The test is whether the community's sense of fair play and decency is so outraged as to cross the threshold of amounting to an insult to the fundamental principles of justice. I am sure, as Wilson J. put it in *Keyowski*, that a third trial in this case may "stretch" the limits of the community's sense of fair play, but like her in that case, I cannot conclude that this case exceeds those limits. I cannot draw a

meaningful distinction between this case and *Keyowski*. I cannot say that the mere fact of holding a third trial has tainted these proceedings to such a degree as to make the continued prosecution of the applicant so unfair that it is contrary to the interest of justice. Hence I conclude that the application must be dismissed.

Conclusion:

[47] The application for a judicial stay of proceedings is dismissed. Needless to say this decision does not preclude the Crown from re-evaluating its position at any time. At this point, however, the decision to proceed or not is with the Crown.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, NT, this
3rd day of May 1999.

Counsel for the Applicant: Robert H. Davidson, Q.C.
Counsel for the Respondent: Bernadette Schmaltz