# R. v. Trudel, 2007 CanLII 413 (ON S.C.)



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**Court File No. 90-24847G**

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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| **B E T W E E N:** | ) | |
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| HER MAJESTY THE QUEEN | )) | Julie Scott, Jason Neubauer and Carl Lem, appearing for the Respondent |
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| Respondent | ) | |
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| **-and-** | ) | |
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| RICHARD TRUDEL and JAMES SAUVÉ | ))) | Matthew Webber and Lorne Goldstein, appearing for Richard Trudel |
| | )) | Neil Weinstein and Anne Weinstein appearing for James Sauvé |
| Applicants | ) | |
| | ) | |
| | ) | Heard: December 11, 12 and 13, 2006 |

**C. McKinnon J.**

## RULING ON APPLICATION BY THE ACCUSED FOR A STAY OF PROCEEDINGS, PURSUANT TO SECTIONS 7 AND 11(b) OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

### Overview

[1] This is a case without precedent. Richard Trudel and James Sauvé are charged with murder in the first degree in relation to the shooting deaths of Michel Giroux and Manon Bourdeau, which occurred on or about January 16, 1990. The case has been referred to as the "Cumberland Murders", and is notorious in Eastern Ontario, if not elsewhere.

[2] The theory of the Crown is that Mr. Giroux was a lower level drug dealer who owed money to Mr. Stewart. Mr. Stewart ordered his execution to serve as an example to other drug dealers who failed to pay their debts. Mr. Giroux's spouse, Ms. Bourdeau, was a bystander and was executed because she might identify the killers of Mr. Giroux.

[3] Originally, Mr. Trudel and Mr. Sauvé were co-accused with Robert Stewart and Richard Mallory. All four were charged and arrested between December 19 and 22, 1990. The preliminary hearing into the charges against

the four accused took place between September 1991 and February 1994, almost 2 ½ years in duration, reputedly the longest preliminary hearing in Canadian history.

[4] The trial by jury of the four accused commenced on January 23, 1995. During the course of the trial, Mr. Stewart and Mr. Mallory were severed and Mr. Trudel and Mr. Sauvé were convicted on May 30, 1996. I was informed that the 16 month trial was the longest trial in Canadian history, until the trial of Mr. Mallory and Mr. Stewart occurred, which then became the longest trial in Canadian history (Cumberland 2). Although not relevant to the merits of this application, defence counsel informed the court that the continuing costs of the defence of the Cumberland Murders to the Ontario Legal Aid Plan have been crippling.

[5] Mr. Trudel and Mr. Sauvé appealed their convictions for first degree murder and a new trial was ordered on January 30, 2004. The new trial commenced on December 11, 2006 with the present motion. Other motions are scheduled to follow, including applications to admit the evidence of five witnesses pursuant to s. 715 of the *Criminal Code* due to the death of three witnesses and mental incapacity of two other witnesses; an order dispensing with the requirement of the consent of the Crown to permit a trial by judge alone; an application by the Crown to admit bodies of discreditable conduct evidence on the part of the accused; an application by the accused for further and better disclosure; an application by the Crown to permit evidence of investigative hearsay in relation to "other suspects"; an application by the accused to have access to the inventory of materials that had been placed before the "Kaufman Committee" in relation to the Crown's central witness, Mr. Denis Gaudreault, and a potential application by the accused to require the Attorney General to reconsider whether Denis Gaudreault should be permitted to testify in the new trial.

[6] Jury selection is scheduled to commence on April 15, 2007. Counsel are generally agreed that the retrial is anticipated to last about 8 months. Assuming this estimate is correct, the conclusion of the trial should occur in about 1 year hence, more than 17 years after the four accused were taken into

custody. For the reasons that follow, I am persuaded that this is one of those rare cases in which a stay of the proceedings is compellingly justified.

**The Legal Terrain**

[7] Section 11(b) of the *Charter* provides that:

> Any person charged with an offence has the right to be tried within a reasonable time.

[8] Section 7 of the *Charter* provides that:

> 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.

[9] Case law surrounding s. 11(b) severs pre-charge and appellate delay from consideration but includes those periods under the rubric of s. 7.

[10] In *R. v. Askov*, 1990 CanLII 45 (S.C.C.), [1990] 2 S.C.R. 1199 at para. 50 Justice Cory stated:

> …very lengthy delays may be such that they cannot be justified for any reason.

[11] In *R. v. Morin*, 1992 CanLII 89 (S.C.C.), [1992] 1 S.C.R. 771 Sopinka J. stated at paras. 27 to 30:

> The individual rights which the section seeks to protect are: (1) the right to security of the person, (2) the right to liberty, and (3) the right to a fair trial.
>
> The right to security of the person is protected in s. 11(b) by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which

> result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.
>
> The secondary societal interest is most obvious when it parallels that of the accused. Society as a whole has an interest in seeing that the least fortunate of its citizens who are accused of crimes are treated humanely and fairly. In this respect trials held promptly enjoy the confidence of the public…
>
> …as the seriousness of the offence increases so does the societal demand that the accused be brought to trial. The role of this interest is most evident and its influence most apparent when it is sought to absolve persons accused of serious crimes simply to clean up the docket.

[12] *Askov* and *Morin* require the court to weigh four factors:

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 reason for delay, and

4. prejudice to the accused

[13] The facta filed by the parties, supported by some 20 volumes of material, painstakingly recreate the history of the proceedings. I intend to paint a portrait of the proceedings with a broader brush, bearing in mind that an analysis of each stage of the history of the proceedings is necessary.

[14] In weighing and balancing the four factors set out in *Askov* and *Morin*, our Court of Appeal in *R. v. Atkinson* reflex, (1991), 5 O.R. (3d) 301 at 313, 68 C.C.C. (3d) 109 at 121 (C.A.) stated:

> The need to weigh and balance the four factors referred to above was affirmed by this court in *R. v. Bennett* 1991 CanLII 2701 (ON C. A.), (1991), 3 O.R. (3d) 193, 64 C.C.C. (3d) 449, where Arbour J. A. said at p. 208 O.R., p. 464 C.C.C.:
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> > *Askov* has frequently been given a minimalist or reductionist interpretation. When mere lip service is paid to the required balancing of the four factors, the trial within a reasonable time issue is often resolved by the mechanical computation of the systemic time required to bring the charge to trial and the six to eight months referred to in *Askov* is then given the force of a judicially developed limitation period. This isolates and over-emphasizes systemic delay and reduces the concept of reasonableness in s. 11(b) to a simplistic computation of time. This is not what the Supreme Court decision in *Askov* stands for.

[15] Some expansion on the four factors might be instructive.

1. Length of the Delay.

This is the period from the charge (the date on which an information is sworn or an indictment is preferred) to the end of the trial is examined. Although pre-charge delay in itself cannot ground a remedy under s. 11(b), it may be relevant in determining the ultimate issue of whether there has been post-charge unreasonable delay: *R. v. Young* (1984), 46 O.R. (2d) 520, 13 C.C.C. (3d) 1 (C.A.). The end of a trial need not be reached before an application to stay the proceedings may be made under s. 24(1) of the *Charter*.

2. Waiver of Delay

Delays that are waived by the accused are not counted in computing the reasonableness of delays under s. 11(b). Nevertheless in order for the delay not to be counted the waiver…"must be clear and unequivocal, with full knowledge of the rights the procedure was enacted to protect and of the effect that waiver will have on those rights…": *Morin* at para. 38. Consenting to a date that amounts to "mere acquiescence in the inevitable" is not a waiver. For a waiver to be implicit, Cory J. stated in *Askov* at para. 65:

> …there must be something in the conduct of the accused that is sufficient to give rise to an inference that the accused has understood that he or she had a s. 11(b) guarantee, understood its nature and has waived the right provided by that guarantee.

3. Reasons for the Delay

*Morin* at paras. 40 to 60 provides an explanation of the five types of delay that can occur. Briefly stated they are:

> (a) Inherent time requirements of the case – this takes into account the time required for the preparation of the prosecution case, the preparation of the defence case and the processing of the case by the court. As the number and complexity of the activities needed to prepare for trial and for the trial to be conducted increases, so does the amount of delay that is reasonable. In other words, complex cases will have longer inherent time requirements than simple cases. Delays determined to be inherent are delays that are reasonable.
>
> (b) Actions of the accused – in determining what length of delay is reasonable, the actions of the accused which are voluntarily undertaken, such as change of venue motions, adjournments which do not amount to waiver, attacks on search warrants, et cetera, are taken into account. In considering this factor, it is inappropriate to attempt to place

blame on the accused or impute improper motives.

(c) Actions of the Crown – here again, blame serves no purpose. Actions such as adjournments by the Crown, failure or delay in disclosure, change of venue motions, et cetera, are scrutinized to determine whether such delays are unreasonable. There is nothing wrong with the Crown seeking such adjournments, but such delays cannot be relied upon by the Crown to explain away delay that is otherwise unreasonable.

(d) Limits on institutional resources – this is the most common source of delay and the most difficult to reconcile with the dictates of s. 11(b) of the *Charter*. It is the period that commences when the parties are ready for trial but the system cannot accommodate them. It is not to be treated as a limitation period and inflexible. It is unrealistic to demand that the court have unlimited resources, but since the government has a constitutional obligation to commit sufficient resources to prevent unreasonable delay in the administration of justice, there is a point in time at which the court will no longer tolerate delay based on the plea of inadequate resources.

(e) Other reasons for delay – there are some reasons for delay that do not fit particularly well with any of the other categories but need to be taken into account in an attempt to delineate what is truly reasonable for the case before the court. For example, a significant number of adjournments instigated by the trial judge might be considered an “other reason for delay”.

4. Prejudice to the accused

Section 11(b) serves to protect the individual’s right of liberty, security of the person and ability to make full answer and defence resulting from unreasonable delay in bringing criminal trials to a conclusion. Hence, with

regard to ongoing deprivation of liberty, consideration is given to whether the accused is awaiting trial in custody or under restrictive bail conditions. If delay may lead to impairment of defence evidence, the period of reasonableness should be short to preclude the prejudice to a fair trial.

[16] Actual prejudice to the accused is not necessary in order to obtain a stay of proceedings under s. 11(b). Implicit is the fact that the finding of prejudice to the accused can be inferred from prolonged delay. In the absence of actual prejudice, the anxiety presumed to be experienced by the person awaiting trial has been referred to by Cory J. in *Askov* at paras. 43 and 69 as "exquisite agony" and a "presumption of prejudice to the accused resulting from the passage of time" and in the case of long delays this presumption would be "virtually irrebuttable".

[17] It is against this legal framework that the history of these proceedings must be analyzed.

**The Pre-Charge Period**

[18] The brutal murders of Michel Giroux and Manon Bourdeau occurred on or about January 16, 1990. The Crown's main witness, Denis Gaudreault, came to the attention of the investigators in early February, and by the end of February 1990 he had implicated three of the four accused, namely Stewart, Mallory and Trudel. In February 1990 a white Cadillac which could be connected to the four accused was seized and searched. The registered owner of the vehicle was James Sauvé. In May 1990 Mr. Gaudreault was advised by the investigating officer that she "felt" that James Sauvé was the shooter. Mr. Gaudreault agreed with the suggestion.

[19] On August 1, 1990 Richard Trudel was arrested as part of a drug investigation called "Project Overdue". The search of his home yielded a receipt which the Crown maintained was confirmatory of Mr. Gaudreault's accusations. The applicants argue that from August 1, 1990 until the arrest and incarceration of the accused between December 20 and 22, 1990, the case against Mr. Trudel did not change. The 6 month delay was occasioned by the investigative team gathering evidence against the co-accused and also to

permit Denis Gaudreault to continue his work on “Project Eliminator”, a drug investigation involving Robert Stewart.

[20] Evidence gathered post-arrest included extensive wiretap recordings and multiple informants who supposedly received inculpatory statements from the applicants. At the new trial none of the “post-offence informants” will be tendered as witnesses and the wiretaps do not disclose any inculpatory utterances from the accused.

[21] It is argued that the pre-charge delay prejudiced the accused by making it impossible for them to investigate and/or record their recollections or those of others as to their whereabouts on the evening of January 16, 1990.

[22] The Crown argues that the proof of alibi did not appear to be a priority to either Mr. Sauvé or Mr. Trudel. In support of that submission, the Crown points out that at the first trial Ms. Vicki Beauchamp testified as an alibi witness for Mr. Trudel, although she had not been approached by the defence until 1 month prior to her testimony in April 1996.

[23] With respect to Mr. Sauvé, on his arrest on December 20, 1990, his girlfriend Nathalie Mayer informed the investigators that she and Mr. Sauvé had been at a spaghetti dinner on the night of January 16, 1990 and both she and Mr. Sauvé’s stepfather Jacques Ayotte testified to the same effect during the trial in April 1996.

[24] In these circumstances, I am not persuaded that the argument of the applicants that they were seriously prejudiced by the pre-charge delay has been substantiated. In a case such as this, which relies almost exclusively upon informers, the pre-charge delay was reasonable in the circumstances.

**The Intake Period**

[25] For the purposes of s. 11(b), the clock started running on the date the information was sworn, December 5, 1990. On that date the four accused were charged with the murders. As noted, Mr. Trudel was already in custody, having been arrested on August 1, 1990 for trafficking in narcotics. On

September 21, 1990 he was sentenced to 15 months in prison. While in prison he was found in possession of a narcotic and sentenced to three months concurrent with the sentence being served. On April 19, 1991 he received a jail term of 4.5. years for conspiring to traffick in narcotics as a result of a separate narcotics investigation. Thus Mr. Trudel was serving sentences on matters unrelated to the murders until the statutory release on those other charges in February 1994.

[26] Following a 2 week bail hearing held before Kealey J. in June 2005, Mr. Trudel was granted bail on very strict conditions. Effectively he has been imprisoned on the murder charges alone for a period approaching 13 years.

[27] Mr. Sauvé had been convicted of manslaughter and sentenced on October 14, 1987 to 7 years in prison. The term was augmented by a sentence of 18 months consecutive for a conviction of assault with a weapon. This offence pre-dated the manslaughter. Mr. Sauvé's warrant expiry date was April 13, 1996. On April 10, 1989 Mr. Sauvé was paroled to a halfway house where he was living at the time of the murders. He received full parole on August 28, 1990. In the result Mr. Sauvé has been held in custody on the murder charges since December 1990, a period in excess of 16 years.

[28] On December 27, 1990 the four accused appeared together after some adjournments. Defence counsel made ongoing complaints about a material lack of disclosure. The accused appeared on February 25, 1991 and fixed a preliminary hearing to commence September 30, 1991 for 4 weeks. It would appear that the Crown was prepared to commence the preliminary inquiry in July, but that date was not convenient to defence counsel.

[29] The estimate of time was based on disclosure provided by the Crown which was, to borrow the words of the applicants, "a mere shadow of that which would eventually be provided to them".

[30] In mid-August four further volumes of material were provided to defence counsel. Two further volumes of approximately 400 pages were provided in the middle of September 1991, 2 weeks prior to the commencement of the preliminary inquiry. Michael Edelson, counsel for

Robert Stewart, complained about the lack of proper disclosure and informed the court that without appropriate disclosure relating to Denis Gaudreault, counsel would not be in a position to cross-examine him.

[31] The initial intake period from December 5, 1990, the date that the information was sworn, to September 1991, the date the preliminary hearing commenced, is acknowledged by the applicants as properly being classified as neutral intake time. However, they submit that the entire period, being 20 months following the date of the murders, provided the Crown sufficient time to make appropriate disclosure of the case against the accused.

**The Preliminary Hearing**

[32] The preliminary hearing commenced on September 30, 1991 and eventually concluded with committals on the charges of first degree murder on February 22, 1994, some 29 months later. A review of the transcripts discloses that virtually all of the delay was a result of the failure on the part of the Crown to provide disclosure. Initially the brief provided by the Crown was 800 pages, followed by two further packages delivered in August and September of 1991. By the conclusion of the preliminary hearing the disclosure had swelled to in excess of 20,000 pages and was still incomplete. The 2 1/2 years that passed in the course of the preliminary hearing were consumed almost entirely with problems relating to disclosure. In approximately 100 sitting days the court heard evidence from 29 witnesses. Twelve additional witnesses were examined on discovery.

[33] As witness after witness was called, disclosure relating to the individual witness was made available to defence counsel, frequently at the last moment, requiring delays of the preliminary hearing. While Crown counsel asserted that there had never been such an abundance of disclosure made in any case previously tried in the city of Ottawa, defence counsel reiterated that they were severely prejudiced by not having full disclosure in order to properly cross-examine witnesses, almost all of whom were unsavoury, possessing checkered careers and suspected ill motives to testify against the applicants. Some were in witness protection programs receiving payments to testify.

[34] Mr. Edelson insisted that disclosure was mandated by the decision of the Supreme Court of Canada in *R. v. M.H.C.*, 1991 CanLII 94 (S.C.C.), [1991] 1 S.C.R. 763 which required that all statements or utterances made by witnesses which could go to their credibility must be disclosed at law. In this case, the credibility of the Crown witnesses was the ultimate issue and given their unsavoury character, disclosure concerns were understandably paramount.

[35] On November 7, 1991 the Supreme Court of Canada released its decision in *R. v. Stinchcombe*, 1991 CanLII 45 (S.C.C.), [1991] 3 S.C.R. 326. As the preliminary hearing grinded on through 1992, disclosure complaints culminated in a decision by the defence team to apply for a remedy in the Superior Court. That application was scheduled for September 24, 1992. Mr. Edelson, in particular, had been constantly asserting that the Crown was not complying with the requirements of *Stinchcombe*, let alone the common law requirement to disclose as confirmed in *M.H.C.*

[36] The application to the Superior Court was derailed when Brian Trafford (now Mr. Justice Trafford) of the Crown Law Office in Toronto came to Ottawa and sought an adjournment of the proceedings so that he could undertake a complete review of the file, including all disclosure issues. Mr. Trafford believed the review would take 2 months and so informed the court on September 24, 1992. This was confirmed to be a Crown request for adjournment. Dates that had been set for the continuation of the preliminary inquiry were abandoned. The application in Superior Court was adjourned in consequence.

[37] The “Trafford Review” was anticipated to take until the end of March 1993. On April 5, 1993 the Crown advised the court that the review would require an additional 5 to 6 weeks to complete. On June 14, 1993 Mr. Trafford personally appeared to advise the court that the review was “substantially” complete and would likely be completed by the end of June.

[38] Approximately 20,000 pages of disclosure were provided to defence counsel at the beginning of August 1993. At this point conflict issues involving certain defence counsel had surfaced as a result of the disclosure

and once those issues were addressed, the evidence recommenced on November 8, 1993 and continued until the committal of the accused in February 1994.

[39] While it is argued on the part of the Crown that the *Stinchcombe* decision "broadsided" the preliminary hearing, I observe that in a case based upon the evidence of informers, disclosure of all aspects of the background and character of the informers and their interaction with the authorities comprises the only effective tool to test the credibility of such witnesses. While I acknowledge that the Crown was required to retrench its efforts to comply with the requirements of *Stinchcombe*, it must inevitably live with the mandates of the law. Delays occasioned cannot be laid at the feet of the accused. In my view they must be laid at the feet of the Crown, whose obligation it was to make complete disclosure. I find the disclosure adjournment of approximately 13 ½ months attributable to the Crown. The preliminary hearing used up approximately 100 days of court time. Seventy days dealt with witnesses. The balance dealt with arguments over disclosure. When we subtract the 13 ½ months of delay from the 29 months, and considering there was approximately 4 months of evidence, we are still left with a balance of approximately 12 months of delay.

[40] Some of that delay was specifically waived by the accused, being the period between October 25, 1991 and May 4, 1992. Other delays were occasioned by holidays scheduled for counsel and also for the judge and Crown counsel to attend annual seminars. This still leaves approximately 6 months of delay, which was almost exclusively occasioned by disclosure problems. In my view, this cannot be charged to the accused, nor regarded as neutral. I would charge this to the Crown who, through no fault of their own, were bound to comply with the requirements of *Stinchcombe*.

[41] In the result, I find that approximately 19 ½ months of the 29 month preliminary inquiry constituted unacceptable delay within the ambit of s. 11(b).

**From Committal To Commencement Of Trial In The Superior Court**

[42] On February 28, 1994 an indictment was sworn in the Superior Court.

The accused appeared on March 1, April 5 and May 10, 1994. On May 10, 1994 a trial date was scheduled to commence on January 9, 1995 with pre-trial motions to begin in November 1994. A pre-trial date was scheduled for June 29, 1995. On December 5, 1994 McWilliam J., the trial judge, dismissed an application brought pursuant to s. 11(b). In his reasons for dismissal, McWilliam J. stated:

> Whether or not disclosure ought to have been completed before, the evidence of Detective Constable Lamarche on this motion makes it clear that whenever it was given, hearing delays would have been necessary although, perhaps, on a more intermittent basis. Disclosure in this case was a monstrous task, and that word was used on another occasion by counsel for the applicant to describe the volume of material. Interim disclosure on November 13, 1992 and December 15, 1992 amounted to a further 2,700 pages. Mr. Trafford's observation that disclosure in this case had been "broadsided by *Stinchcombe*" was true. It was also sideswiped by the Martin Commission, of which he was a member. Police officers have a traditional view of notes. They are for us in court, and if they are not used, they are not disclosable. Formerly they were disclosed on a summary basis in willsay statements. That was the initial disclosure in this case. Full discovery of notes required a huge effort by Detectives Riddell and Lamarche involving extensive cross-referencing and editing. Based on Detective Lamarche's evidence, *I find the period of delay from the time of the application in this court on September 24, 1992 to the November 8, 1993 recommencement of the preliminary inquiry was caused by the inherent delay and the complexity of the case*… (emphasis added)
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> The only issue then remaining is whether the time taken to provide disclosure is unreasonable delay in the circumstances then existing, and in relation to the general duty to disclose and whether it ought to have been disclosed before. In the particular facts of this case I am not able to say that the Crown did not make

reasonable previous efforts to disclose. New law, and I am referring to *Stinchcombe*, may be made in the highest court, but its implications do not instantaneously trickle down to the detachment level as administrative policies. Time is a function of reasonableness. As I have already indicated, *Stinchcombe* and the Martin Commission came in the middle of the preliminary hearing. Working out their application, given all the other subsidiary issues, was bound to take time. To put the matter another way, all counsel, defence and Crown, were riding the same unruly horse in the particular facts of this case, and I suspect there were times when no one was too confident as to where and when the ride would end. From a defence point of view the conduct revealed in the transcripts is not, of course, consistent with waiver (except when Judge Belanger expressly put it to the accused) but it does suggest that for the most part the pace of the preliminary, as to the actual hearing dates arranged, proceeded at a satisfactory pace and one consistent with all other obligations of counsel, including the obligation, it seems, to discover the Crown's case to the extent of a month long cross-examination of the Crown's principal witness. Clearly no blame attaches to that particular decision. It is simply a fact manifesting defence counsel's assumed duty. In summary, the Crown did its best to disclose, and the defence did its best to expose.

I find that the systemic response to the unforeseen need for additional dates in the preliminary inquiry was reasonable considering that the inquiry continued for 100 days, more than five times its originally estimated duration, and they were arranged within a period of nine months if the one year disclosure adjournment is ignored as well as waived periods.

[43] McWilliam J. dismissed the application to stay the proceedings as previously noted.

[44] I take a different view than that of McWilliam J. as to the

characterization of the period of delay occasioned by the "Trafford Review". Justice McWilliam viewed the delay as "inherent" delay caused by the complexity of the case. As observed earlier, I view the delay as being unreasonable in the sense that it was occasioned by the requirements of *Stinchcombe* and occurred almost 18 months following the release of the decision, and 29 months after the charges were laid. In my opinion, the law cannot be applied so as to prejudice the accused's right to a trial within a reasonable time. The Supreme Court in *Stinchcombe* did not provide for a period of relief from compliance with the decision, and one should not be imputed to the prejudice of the applicants.

**The *Res Judicata* Argument**

[45] Crown counsel have submitted that the decision of McWilliam J. dismissing the application for a stay of proceedings pursuant to s. 11(b) is *res judicata* and rely primarily on the decision of the Alberta Court of Appeal in *R. v. Robinson* 1999 ABCA 367 (CanLII), (1999), 250 A.R. 201 (C.A.). A careful reading of the case discloses that the comments of McFadyen J.A. opining that a previous determination of an application brought under s. 11(b) would amount to *res judicata* were specifically disagreed with by Berger J.A. when he stated at para. 55:

> Section 24(1) should be given an expansive, liberal interpretation. Moreover, the conduct of the Crown pre-dating the first trial is properly re-evaluated in the light of the unfolding of the narrative giving rise to and concluding with the second trial. That which may have been assessed to be innocuous and benign by Dea, J. at the time of his adjudication may well have taken on a greater significance given the passage of time and intervening events at the time of Cooke, J.'s adjudication. It follows that Cooke, J. was required to consider afresh the motion for a judicial stay as well as the motion for costs. The defence was not estopped, for these reasons, from re-litigating issues heard and determined earlier by Dea, J. on a different factual footing.

[46] I find this reasoning persuasive and more in keeping with the judgment of the Supreme Court of Canada in *R. v. Duhamel*, [1984] 2 S.C.R. 555, quoting with approval from *R. v. Hilson* (1958), O.R. 665, 121 C.C.C. 139 (C. A.) holding that a ruling of one trial judge cannot bind another where a new trial is ordered. A new trial is a trial of all issues *de novo*, except as counsel might otherwise agree to be bound by rulings made by the judge in the original trial.

[47] Perhaps more germane is the fact that the s. 11(b) application was reasserted before McWilliam J. on September 5, 1995 and was dismissed. No reasons are available for the dismissal. This court cannot be bound by a decision in which reasons are unavailable.

[48] In the alternative, the Crown has argued that the decision of McWilliam J. should be viewed as "instructive". While I appreciate that Justice McWilliam is a highly respected and very experienced trial judge, I nonetheless view my task as requiring a determination of the case on the merits, based on the material filed before me on the present application.

[49] In any event, the first decision of McWilliam J. was rendered more than 12 years ago. The terrain has altered considerably. Even assuming McWilliam J.'s 1994 decision was *res judicata*, there have been such substantial delays since that time that the case demands a fresh look and, in the end, a different determination.

## The Trial

[50] The originally scheduled trial date of January 9, 1995 was adjourned to January 23, 1995, with jury selection commencing on that date and the trial commencing on January 27, 1995.

[51] All counsel are agreed that the time period between committal for trial,

February 22, 1994, and arraignment in the Superior Court, January 9, 1995, a period of 11 months, is within the permissible time frame for a case of this complexity. The applicants do not assert the delay to be unreasonable.

[52] Based on estimates of counsel, the court advised the jury that the trial would last from 6 to 8 months. In fact the trial ended on May 30, 1996, 16 months after jury selection.

[53] On agreement between counsel, the members of the jury and the court, the trial proceeded on the basis of "3 weeks on, 1 week off". However, because the trial was significantly exceeding its original estimate, prescheduled breaks were eliminated in January of 1996 with a view to quickening the pace of the trial.

[54] On July 13, 1995, following 4 months of evidence, the Crown sought an adjournment of the trial until September 5, 1995 due to medical issues affecting the prosecution team. The main Crown witness Denis Gaudreault had still not been called to testify. The application for adjournment was aggressively resisted by the defence team, citing mounting prejudice to their clients and the desire to get the matter completed as speedily as possible. The court had determined that summer holidays would be accommodated during the last 2 weeks of July and the trial was scheduled to resume on July 31. Defence argued that Assistant Crown Attorney Dandyk, who was partially familiar with the case, should be available to continue the case on July 31. With reluctance McWilliam J. granted the Crown adjournment request to continue the trial on September 5, 1995. At that point the trial had been in hiatus since July 13, 1995. No evidence had been heard for 7 weeks, and a further week had been lost as a result of conferences for the Crown and for judges. As previously noted, an application to stay the proceedings argued on September 5, 1995 was dismissed by McWilliam J., and the reasons for the dismissal are unavailable.

[55] During the month of June 1995 Robert Stewart and Richard Mallory had been severed from the trial due to solicitor/client communication problems and conflicts involving Crown witnesses.

[56] The trial recommenced on September 5, 1995. The Crown closed its case on March 27, 1996. The defence commenced April 2, 1996 and closed on April 29, 1996. The Crown called reply evidence on April 29 and 30, 1996. The jury was sent away until May 13, 1996 to await closing arguments and the charge. Both accused were convicted of first degree murder on May 30, 1996, 16 months following their arraignment in the Superior Court.

[57] Although the duration of this trial was apparently unprecedented, I cannot conclude that the delay can be deemed unreasonable. Given the nature of the case, based primarily on the evidence of unsavoury witnesses whose credibility was the overwhelming issue in the trial, unusually protracted cross-examinations were necessary.

[58] In the end, I find it appropriate to add 5 weeks to the period of unreasonable delay based on the Crown request for adjournment between July 31 and September 5. A review of the transcript reveals that McWilliam J. felt that the Crown had to put its house in order, and presumably be prepared to proceed on July 31. He adjourned the trial with reluctance and it would appear that with diligence witnesses other than Mr. Gaudreault could have been called to fill in the time frame of the adjournment. Assistant Crown Attorney Dandyk was at the time an experienced and highly competent Crown counsel, quite suited to the task of continuing the trial. This adjournment cannot be counted in any manner except in favour of the incarcerated accused, so that the elapsed total of unacceptable delay at that point totalled 21 months.

**The Appeal Period**

[59] Following conviction, both applicants sought out appellate counsel. Mr. Sauvé retained Ms. Lisa Silver and then later Mr. Frank Addario. Mr. Trudel retained Mr. Philip Campbell. Ms. Silver ordered the transcripts in October 1996. On January 4, 1999 Ms. Catherine Glaister, counsel assisting both Messrs. Addario and Campbell, wrote to the court reporters inquiring into the status of the transcripts. Ms. Glaister corresponded on numerous occasions with Ms. Gloria Neville, one of the two responsible court reporters. On July 7, 1999 Philip Campbell wrote to both Ms. Neville and Debbie Stewart, who had substituted for Ms. Neville during a portion of the trial,

asking for transcripts or a date of expected completion. Discussions with Ms. Neville and Ms. Stewart continued throughout 1999 and included a number of dates for the prospective completion of transcripts. Appellate counsel sought written undertakings from the reporters detailing when transcripts might be completed, although neither reporter provided an undertaking. One of the problems affecting Ms. Neville was that she was the reporter engaged in "Cumberland 2", the trial of Richard Mallory and Robert Stewart.

[60] It would appear from a review of the correspondence and e-mails between the reporters that each was blaming the other for the delay. Finally, an application compelling the production of the transcripts was brought before Feldman, J.A., who on January 14, 2000, ordered Ms. Stewart and Ms. Neville to complete and deliver transcripts by February 28, 2000. The transcripts were filed on March 3, 2000.

[61] Significantly, in a November 28, 1999 e-mail Ms. Neville indicated that her portions of the transcripts had been ready since 1997, but could not be provided without Ms. Stewart having completed her portions. She correctly noted that the transcripts had to have sequentially numbered pages. Ms. Stewart in her letter dated January 10, 2000 claimed that her portion of the transcripts had been completed in the second half of 1998.

[62] Although appellate delay is not to be considered under the s. 11(b) analysis, it is properly considered under s. 7. No one would seriously contend that a 4 year delay for the delivery of transcripts is acceptable institutional delay, particularly in circumstances where both reporters indicated that their transcripts were ready in 1997 and in 1998, yet not delivered until March 3, 2000.

[63] The appellants' factum was filed June 30, 2001 and the respondent's factum filed spring 2002.

[64] Other events intervened to cause delay in the appeal court. The appellants brought a fresh evidence application based on the recantations of two key witnesses from the trial. This evidence was gathered over a period of some years and related to the recantations of Scott Emmerson and Jack

Trudel. The appellants' factum regarding this fresh evidence was filed in accordance with an order of Doherty J.A. on October 16, 2002. The Crown's responding factum was filed November 21, 2002.

[65] The conviction appeal was argued between February 3 and 7, 2003. On January 30, 2004, almost exactly 1 year following, the Ontario Court of Appeal overturned the convictions of the accused and ordered a new trial: see *R. v. Sauvé and Trudel* 2004 CanLII 9054 (ON C.A.), (2004), 182 C.C.C. (3d) 321 (C.A.)

[66] The judgment of the Ontario Court of Appeal was rendered almost 8 years following the conviction of the two accused. In terms of the s. 7 analysis, the time for the delivery of the transcripts cannot be regarded as acceptable institutional delay. I find that at least 2 years of the delay in the provision of the transcripts must be regarded as unreasonably affecting the appellants' fair trial rights.

**The Crown's Application For Leave To Appeal To the Supreme Court of Canada**

[67] On June 2, 2004, just over 4 months following the decision of the Ontario Court of Appeal, an application for leave to appeal was filed by the Crown in the Supreme Court of Canada. The Crown had received an extension of time from the normal 60 day filing requirement. Both Crown and defence sought and received extensions of time for the filing of material. All filings were finally completed on November 18, 2004. A decision refusing leave to appeal was issued on January 6, 2005, some 11 months following the decision of the Ontario Court of Appeal ordering a new trial: see *R. v. Trudel*, [2004] S.C.C.A. No. 246. Given the reasons for decision of the Ontario Court of Appeal ordering a new trial, and in particular the fact of the recantation of Jack Trudel, it is hardly surprising that leave was refused.

**Return Of Proceedings To The Superior Court**

[68] While the Crown sought leave to appeal the judgment of the Ontario Court of Appeal, on April 30, 2004 the accused Richard Trudel was brought

before the assignment court in Ottawa on a defence application intended to prevent his matter from languishing while he remained in detention. Crown counsel took the position that no remand was required since the Crown was in the course of seeking leave to appeal. On June 25, 2004 Mr. Trudel again appeared before the Superior Court for a "status check". Mr. Trudel's counsel asked that the matter be adjourned to August. At the Crown's insistence the Court adjourned the matter to October 2004, based upon the submission that the case was being considered by the Supreme Court of Canada and a decision was not expected in the short term.

**The Computer Application**

[69] Some appreciation of the voluminous material involved in this case is required to appreciate the necessity of the use of computers. At the time of trial the physical material filled approximately 26 bankers boxes containing approximately 2,000 pages per box. This does not include transcripts, research or exhibits. Most of the disclosure has been reduced to electronic form. Crown counsel have had a computer program entitled "Ask Sam" to manage this information, together with a full time technical assistant to assist the Crown Attorneys to access the computerized material. In the first trial, the applicants, and at the time their co-accused, were all entitled to possess laptop computers for use in and out of court and apparently in their jail cells, so that they could adequately prepare for trial and instruct counsel.

[70] With the re-trial looming, the same accommodation was sought in May of 2004. Initially, officials at the Ottawa-Carleton Regional Detention Centre were prepared to permit the applicants access to computers, but this decision was countermanded by superiors in the Ministry, alleging security concerns. An offer was made to the applicants to permit them the use of a desktop computer located in the jail, which is also accessed by all other inmates, at restricted times following 5 p.m. for a maximum of two hours each during weekdays only. Understandably, this offer was unacceptable to the applicants and eventually an application was brought before Ratushny J., the pre-trial judge assigned to this case, and on December 3, 2004 a date was set to hear the computer application on January 25 and 28, 2005.

[71] On January 25, 2005 the case was adjourned because counsel on behalf of the Ministry was unprepared to proceed. The matter was put over to January 28, 2005 and on that date was adjourned to continue on March 3 and 7, 2005. On March 10, 2005, after a number of days of evidence, the Ministry consented to an order granting computer access rights to the applicants. The order permits the applicants to possess laptop computers purchased at their own expense, permitting a minimum of 8 hours of computer access to each of the applicants per day within the institution.

[72] A review of the material filed and the transcripts of evidence would suggest that the Ministry reversal of the decision to provide computer access made by the local staff in the Regional Detention Centre needlessly prolonged these proceedings. I find that the issue should have been resolved on an immediate basis. The opportunity to make full answer and defence in a case such as this obviously requires access on a continuing basis to a computer and the original offer made by the Ministry was appropriately deemed unacceptable by the applicants. The waste of time involved in bringing the application must be charged to the Crown.

**Disclosure Of The Crown's Case To New Counsel**

[73] At the same time as the dispute over computer access was occurring, the newly retained counsel for the applicants were requesting disclosure of the Crown's case. The Crown took the position that counsel should obtain disclosure from previous counsel. This was unacceptable to the new counsel and eventually, following a pre-trial before Ratushny J., 34 boxes of disclosure were delivered to each counsel. The delivery was made on March 23, 2005, some 14 months following the order for the new trial and some 3 months following the rejection of the application for leave to appeal by the Supreme Court of Canada.

**Mr. Trudel's Bail Application**

[74] Given the continuing delay, Richard Trudel sought bail. Crown counsel submitted that the bail hearing would take 7 to 9 days. The weeks of May 9 and May 30 were initially agreed to, but because of the last minute

withdrawal of prospective sureties, the matter was adjourned to June 20, 2005. Following a 2 week hearing Kealey J. granted Mr. Trudel bail on very strict conditions. I must assume that the Crown put their best case forward during the bail hearing. In the course of his reasons Kealey J. commented:

> In the absence of compelling current evidence to the contrary, it seems to me that the substantial passage of time here will have eliminated or extremely minimized any chance that Richard Trudel will be capable of interfering with witnesses. Not only does he have no muscle or power, but also the close scrutiny that he will be under would deter him from any such activity…
>
> The worst case scenario for Mr. Trudel would be another first degree murder conviction and my rough calculations indicate that even if that occurred, by the time the trial was over he would be looking at a matter of seven or eight years in prison before parole eligibility would be available to him…When I consider the aforesaid positive indicators together with the effects of the passage of years, earlier referred to in these reasons, and the present punitive implications for Mr. Trudel even if he were convicted, I am convinced that there does not exist a substantial likelihood that he would reoffend or interfere with the administration of justice if released and any lingering concerns in this respect that I may have are allayed by the strict terms proposed and which will be imposed…*Let me address the strength of the Crown's case. Whatever may be said about this, because the Crown now has one key witness whereas it had three to support its proposition in the first trial, its case is obviously not strengthened. It remains to be seen whether the jury at the next trial will be satisfied, beyond a reasonable doubt, so as to return a verdict of guilty as charged against Mr. Trudel based essentially on the evidence of Denis Gaudreault.*
>
> Nevertheless when I read the list of concerns and frailties identified and itemized by the Court of Appeal in its *ex post facto*

> analysis of Denis Gaudreault's testimony, *I am inclined to assess the Crown's case as weak rather than strong*…For the reasons itemized and my aforesaid view of the strength of the Crown's case it is my opinion that an informed public would not suffer any loss of confidence in the administration of justice should Mr. Trudel be accorded judicial interim release on the terms that I will describe… (emphasis added)

[75] Mr. Trudel was released to live at Tom Lamothe House run by the John Howard Society on very strict conditions, including not being permitted access to a telephone or computer or cell phone or any other telecommunication device, subject to a strict curfew and not permitted out of the house except if accompanied by a pre-approved escort. As well, police were granted an absolute right to search his room without notice.

[76] Kealey J. made his decision on July 7, 2005. The Crown appealed the decision after obtaining leave from the Chief Justice of the Ontario Court of Appeal. The appeal was finally heard on March 22, 2006 and disposed of by way of an endorsement. It is clear from the endorsement that the Ontario Court of Appeal found no merit in the appeal. Notwithstanding, significant delay totalling some 8 ½ months was occasioned by virtue of the appeal and both parties were required to put tremendous effort into ensuring the fullest record was placed before the Ontario Court of Appeal, instead of spending time preparing for the new trial.

**Proceedings Following The Trudel Bail Appeal**

[77] The case again surfaced in the Ottawa assignment court on October 7, 2005, the date to which Kealey J. had remanded the accused. On that date the parties sought a judicial pre-trial. Because of difficulties of scheduling for both Crown and defence, the date of January 5, 2006 was set for a pre-trial. It is noteworthy that the Crown informed Justice Kealey at the time of Mr. Trudel's bail hearing that the trial was anticipated to commence in February 2006.

[78] A pre-trial before Ratushny J. was held on February 10, 2006,

adjourned from January 5 at which point the Crown estimated the time required for trial as being 12 months. A further pre-trial was held on February 17, 2006. On that occasion trial time was estimated by Mr. Webber as being 8 months with 2 additional months for pre-trial motions. It is acknowledged that both Crown and defence were prepared to commence the trial in the fall, but dates were unavailable and the first available date for pre-trial motions was scheduled for January 15, 2007. Subsequently, a week of pre-trial motion time opened up in December 2006, which resulted in the argument on the present application.

[79] In the result, the delay from the order for a new trial made by the Ontario Court of Appeal on January 30, 2004 until the commencement of the pre-trial motions on the retrial, December 11, 2006, amount to a delay of some 35 months. Delay occasioned by the Trudel bail application is charged to the accused, being approximately 2 months. I would hold that the delays occasioned by the application for leave to appeal to the Supreme Court of Canada, the resistance of the computer application and providing of disclosure and the appeal of the Trudel bail, totaling 22 months, should all be laid at the feet of the Crown, which, in sum, would raise the total number of months of unreasonable delay to approximately 43 months, or 3 ½ years.

**Applying For Leave To Appeal And Section 11(b) Delay**

[80] In *R. v. Potvin*, 1993 CanLII 113 (S.C.C.), [1993] 2 S.C.R. 880, the Court held that the right to trial within a reasonable time does not apply during an appeal from a conviction because a convicted person is not a "person charged with an offence". In such instance, the appellant is a "party" to appeal and cannot complain of delay. However, if a conviction is set aside on appeal and a new trial ordered the accused reverts to the status of "a person charged" and rights under s. 11 of the *Charter* revive.

[81] The Crown has argued that the year long delay from the decision of the Ontario Court of Appeal during which time the Crown sought leave to appeal to the Supreme Court of Canada should not be calculated under the s. 11(b) analysis. The Crown relies on a decision of Eberhard J. of this court, *R. v. D.*

*D.*, [2001] O.J. No. 1781 (S.C.J.). In that case the Ontario Court of Appeal had ordered a new trial: see 1998 CanLII 14607 (ON C.A.), (1998), 129 C.C.C. (3d) 506 (C.A.). The accused then reverted to being "a person charged" triggering the applicability of s. 11(b): see *Potvin*. The Crown then applied for leave to the Supreme Court of Canada on a point of law that had originally been raised by the accused in the appeal to the Ontario Court of Appeal. Leave was granted see 2000 SCC 43 (CanLII), [2000] 2 S.C.R. 275. Eberhard J. determined that the accused was a "party" to the appeal within the framework of the decision in *Potvin*. Justice Eberhard determined that where an accused is both a "party to an appeal" and "a person charged" time under s. 11(b) does not apply.

[82] I believe the decision in *D.D.* can be distinguished from the case at bar. In *D.D.*, the application for leave was successful. In the case at bar it was not. I cannot accept the proposition that during the time that the Crown was seeking leave to appeal to the Supreme Court of Canada and ultimately barred from entry into that court, that the applicants in this case were anything but persons charged with the clock running. In any event I reject the proposition that a party to an appeal who has not initiated the appeal process can be denied the protection of s. 11(b). To determine otherwise would torture the principles set out in *Potvin.* To the extent that *D.D.* holds otherwise, I would respectfully disagree.

**Prejudice To The Accused**

[83] In *R. v. Kporwodu* 2005 CanLII 11389 (ON C.A.), (2005), 75 O.R. (3d) 190, 195 C.C.C. (3d) 501 (C.A.) at paras. 157 and 158, the Court stated:

> Section 11(b) protects an individual from impairment of his or her right to liberty, to security of the person, and to make full answer and defence. The defence has the burden of demonstrating that those interests have been prejudiced as a consequence of the Crown's failure to bring the accused to trial within a reasonable time, not as a matter of having been charged. See *R. v. Morin, supra*, at pp. 786, 788 S.C.R., pp. 12, 14 C.C.C.

> As the Crown concedes, prejudice may be inferred simply because of over-long delay. See *Morin* at p. 801 S.C.R., p. 23 C. C.C., *R. v. Satkunananthan*, 2001 CanLII 24061 (ON C.A.), [2001] O. J. No. 1019, 152 C.C.C. (3d) 321 [2001] (C.A.), at paras. 57 and 58, *R. v. Qureshi*, 2004 CanLII 40657 (ON C.A.), [2004] O.J. No. 4711, 190 C.C.C. (3d) 453 (C.A.), at para. 14, and *R. v. Seegmiller*, 2004 CanLII 46219 (ON C.A.), [2004] O.J. No. 5004, 191 C.C.C. (3d) 347 (C.A.), at para. 18. The Crown may call evidence to establish that long delay has caused no prejudice.

[84] As an example, in *Satkunananthan*, the appeal court described the inference of prejudice as "virtually irresistible" in a case where the overall delay was 44 ½ months and the impugned period of unreasonable delay was 23 months.

[85] In the present case, the delay is so inordinately long that the prejudice to the applicants is manifest. They have effectively been in custody for over 16 years, with impugned delay of 3 ½ years.

[86] At the end of the day, the trial judge is required to balance the various interests embraced by s. 11(b) and determine whether the period of delay is unreasonable: see *Morin* and *Kporwodu*. In balancing the interests consideration must be afforded to the special obligation upon the Crown to act with diligence in bringing cases to trial in the context of orders for retrial: see *R. v. Brown*, [2003] O.J. No. 5571 (S.C.J.); *R. v. Yakymiw* reflex, (1993), 68 O.A.C. 237, [1993] O.J. No. 2631 (C.A.) and *Satkunananthan*, in which the Court stated that the longer the proceeding is in the system the greater the responsibility of the Crown to expedite the hearing date to get the case on for trial.

[87] In *Kporwodu*, *supra*, a case where first degree murder charges were stayed for delays far less lengthy than in the case at bar, the Court stated at para. 2:

> Section 11(b) of the *Charter* provides that any person charged with an offence has the right to be tried within a reasonable time. As is apparent, s. 11(b) casts a wide net. People charged with simple assault are protected by it; so too are people charged with first degree murder. Paradoxically, when s. 11(b) is breached, its breadth narrows considerably. No flexibility exists; a stay of proceedings must be ordered.

[88] Balancing all the factors embraced by s. 11(b), the unreasonable delays in the case at bar totalling approximately 3 ½ years in the context of a prosecution that has lasted over 16 years cannot be excused. Independent of considerations under s. 7, a stay must be ordered.

**Section 7 – Abuse Of Process**

[89] Notwithstanding my determination that a stay is manifestly justified under s. 11(b), I believe it is appropriate to comment on the s. 7 argument.

[90] In *Potvin*, Sopinka J. pointed out that although delay occasioned by the appeal process was not reviewable under the s. 11(b) analysis, the accused is not without a remedy pursuant to s. 7 of the *Charter*. It is obvious that lengthy delays adversely affect the security of the person and that individuals can only be deprived of that security in accordance with principles of fundamental justice. Thus, in addition to the constitutional right to be tried within a reasonable time, the common law doctrine of abuse of process functions to determine whether a stay of proceedings is appropriate.

[91] In *Young*, the Ontario Court of Appeal dealt with ss. 11(b) and 7 of the *Charter* and the common law doctrine of abuse of process in determining whether the trial judge erred in staying the proceedings. At p. 551 Dubin J.A. concluded:

> I am satisfied on the basis of the authorities that I have set forth

> above that there is a residual discretion in a trial court judge to stay proceedings 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 and to prevent the abuse of a court's process through oppressive or vexatious proceedings. It is a power, however, of special application which can be exercised only in the clearest of cases.

[92] In *R. v. Jewitt*, 1985 CanLII 47 (S.C.C.), [1985] 2 S.C.R. 128, the Supreme Court of Canada specifically adopted with approval the words of Dubin J.A. in *Young*. In *R. v. O'Connor*, 1995 CanLII 51 (S.C.C.), [1995] 4 S.C. R. 411 at paras. 62, 63, 73, L'Heureux-Dube J., speaking for the Court stated:

> Conversely, it is equally clear that abuse of process also contemplates important individual interests. In "The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept" (1991), 15 *Crim. L.J.* 315, at p. 331, Professor Paciocco suggests that the doctrine of abuse of process, in addition to preserving the reputation of the administration of justice, also seeks to ensure that accused persons are given a fair trial. Arguably, the latter is essentially a subset of the former. Unfair trials will almost inevitably cause the administration of justice to fall into disrepute…
>
> In fact, it may be wholly unrealistic to treat the latter as wholly distinct from the former. This Court has repeatedly recognized that human dignity is at the heart of the *Charter*. While respect for human dignity and autonomy may not necessarily, itself, be a principle of fundamental justice (*Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (S.C.C.), [1993] 3 S.C.R. 519 at p. 592, per Sopinka J. for the majority), it seems to me that 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. It would violate the principles of fundamental justice to be deprived of one's liberty under circumstances which amount to an abuse of process and, in my view, the individual who is the subject of such treatment is entitled to present arguments under the *Charter* and to request a just and appropriate remedy from a court of competent jurisdiction.

…

As I have already noted, the common law doctrine of abuse of process has found application in a variety of different circumstances involving state conduct touching upon the integrity of the judicial system and the fairness of the individual accused's trial. For this reason, I do not think that it is helpful to speak of there being any one particular "right against abuse of process" within the *Charter*. Depending on the circumstances, different *Charter* guarantees may be engaged. For instance, where the accused claims that the Crown's conduct has prejudiced his ability to have a trial within a reasonable time, abuses may be best addressed by reference to s. 11(b) of the *Charter*, to which the jurisprudence of this Court has now established fairly clear guidelines (*Morin*, *supra*). Alternatively, the circumstances may indicate an infringement of the accused's right to a fair trial, embodied in ss. 7 and 11(d) of the *Charter*. In both of these situations, concern for the individual rights of the accused may be accompanied by concerns about the integrity of the judicial system. In addition, there is a residual category of conduct caught by s. 7 of the *Charter*. This residual category 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.

[93] The applicants submit there are two ways in which the fair trial interests of the applicants have been severely prejudiced in the case at bar, both amounting to the loss of evidence over time. First, the significant passage of time has ravaged the memory of witnesses and thus negated the ability of the defence to effectively test or challenge their evidence in cross-examination. Second, physical evidence has been lost directly as a result of the passage of time, specifically the white Cadillac alleged by Denis Gaudreault to have been the vehicle used in the murders.

[94] In the judgment of the Ontario Court of Appeal ordering the retrial of this case, *R. v. Sauvé and Trudel* at para. 29 the Court stated:

> In our view, in the end, the case depended upon Gaudreault and the extent to which the jury found support for his evidence in the testimony of Jack Trudel and Emmerson and to a lesser extent in the testimony of the Gravelles, the Nelsons and Jamie Declare.

[95] As was highlighted in the reasons of the Ontario Court of Appeal, Crown counsel in her closing address invited the jury to convict the applicants on the basis of the evidence of Emmerson and Trudel, independent of the evidence of Denis Gaudreault. With Trudel and Emmerson having recanted their testimony and the Crown in the new trial having undertaken not to call them, the Crown is now left essentially with the evidence of Denis Gaudreault and the "lesser extent" witnesses mentioned, except Sylvie Gravelle who passed away and whose evidence would be the subject of a s. 715 application.

[96] Entered as an exhibit in this application are two very thick volumes of trial testimony setting out literally hundreds of instances in which Denis Gaudreault and other witnesses have no memory of detail that might assist the trier in confirming their testimony. Mr. Gaudreault has recently made the following statements to Detective Lamarche: "They better have a nice offer for me to come back because I don't remember nothing now" (July 11, 2005);

"Let them all out, I don't remember very much, it was a long time"; and "I don't remember nothing, write that in big letters; and "I don't remember nothing definitely now." (January 6, 2006).

[97] With respect to the white Cadillac which had been in the exclusive control of the police and inexplicably destroyed since the order for retrial, Mr. Gaudreault originally claimed that the group travelled to commit the murders in a red truck and then changed his testimony to describing the vehicle as a white Cadillac. The white Cadillac was seized, searched and one issue related to gunshot residue. Obviously evidence relating to gunshot residue and any ability by the defence to test such evidence has been hopelessly compromised.

[98] Generally speaking the case law encourages the s. 7 analysis to be undertaken at the end of the trial: see *R. v. Bero* 2000 CanLII 16956 (ON C.A.), (2000), 151 C.C.C. (3d) 545 (C.A.); *R. v. Dulude* 2004 CanLII 30967 (ON C.A.), (2004), 189 C.C.C. (3d) 18 (C.A.).

[99] The case law does, however, recognize that in appropriate circumstances the court can entertain an argument for a stay at the outset of the trial. In *R. v. La*, 1997 CanLII 309 (S.C.C.), [1997] 2 S.C.R. 680 at para. 27 Sopinka J. stated:

> [The appropriateness of a stay] is often best assessed in the context of the trial as it unfolds. Accordingly, the trial judge has a discretion as to whether to rule on the application for a stay immediately or after hearing some or all of the evidence. Unless it is clear that no other course of action will cure the prejudice that is occasioned by the conduct giving rise to the abuse, it will usually be preferable to reserve on the application…

[100] In *R. v. Bero*, Doherty J.A. stated at para. 18:

> This Court has repeatedly indicated that except where the appropriateness of a stay is manifest at the outset of proceedings, a trial judge should reserve on motions such as the motion brought in this case until after the evidence has been heard.

[101] It is apparent to me, based on common sense and experience, that the memories of the key witnesses in this case have been ravaged over time and the prejudice arising from this fact is manifest now. I take judicial notice of the fact that memories of events occurring more than 16 years ago will be distorted to the prejudice of the applicants.

[102] Specifically, a review of the material filed with respect to Denis Gaudreault convinces me that the tendering of his testimony to a jury has a real potential of constituting a significant danger to the conduct of a fair trial. To borrow the words of the Ontario Court of Appeal in describing the evidence of Denis Gaudreault in *R. v. Sauvé and Trudel*, "much of it was suspect and subject to its own substantial frailties…"

[103] As the Court stated at para. 79:

> …it was shown that Gaudreault had lied under oath and had actually manufactured evidence in order to bolster his credibility. He purchased a blank disc and presented it to the police claiming it contained Stewart's drug information. He maintained this lie under oath at the preliminary inquiry. Yet, when he testified at the appellant's trial, he claimed to be telling the truth. The jury needed to understand that he and the other two principal Crown witnesses [Emmerson and Trudel] were quite capable of lying and manipulating the truth to an astonishing degree, but also present as confident and honest before the jury.

[104] Lest there be any doubt about the characterization afforded Mr. Gaudreault by the Ontario Court of Appeal, he was described as follows by Crown counsel at the commencement of the severed trial of Messrs. Mallory and Stewart:

> Now, before we head into any more detail about Mr. Gaudreault's evidence, let me stop here and place fairly and squarely before you some more facts about our witness Mr. Gaudreault. In fairness to the accused, you should know that like

> Michael Wynn, Denis Gaudreault has a criminal record. He describes himself as a lifelong criminal, that has been his occupation, if you will, for almost all his adult life. According to Mr. Gaudreault, who's now 41 years old, he may well always be a criminal, then again he may not. He's a self-confessed liar, he has certainly made a lifelong habit of lying to the police, he has lied to them many times throughout this investigation. He says that he's quite likely to lie to the police again in the future. He does not trust police as a reflex. Denis Gaudreault has been a drug dealer and a drug addict at various points in his life, and you will hear that around the time of these murders he was both of these things. He's been a thief and he's been a con. He has rarely held any legitimate employment for any length of time although I may say that he is now gainfully employed on a full-time basis. Denis Gaudreault will not present himself to you in any disguise. He is what he is and he does not apologize for it. Neither do I.
> *Excerpt of transcript of evidence October 5, 1998.*

[105] Implicit in the jurisprudence touching on s. 11(b) is the principle that fair trials are ensured when evidence is "available and fresh": see *Morin*. There is a point in time when the values enshrined in s. 11(b) merge with those under s. 7, notably when evidence is not fresh or available. Such is the situation in the case at bar, and although it is not necessary that I find a breach of s. 7 so as to order a stay, I would nonetheless deem this prosecution to be one of "the clearest of cases" mandating judicial intervention to redress breaches of *Charter* rights and, were it necessary, order a stay pursuant to s. 7.

[106] To subject the applicants to a retrial primarily based on the evidence of Denis Gaudreault after 16 years would, in my view, violate those fundamental principles of justice which underlie the community's sense of fair play and decency, and potentially bring the reputation of the administration of justice into disrepute.

[107] I acknowledge that this has been an enormously difficult case to mount on the part of the investigation team, the prosecutors and the defence. Unfortunately, however, the main reason for this is because the case depends on informer witnesses who, experience shows, constitute a decidedly grave threat to the due administration of justice.

[108] For these reasons, the charges against both applicants are stayed.

_____

C. McKinnon J.

**Released:** January 12, 2007.

**Court File No. 90-24847G**

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

HER MAJESTY THE QUEEN, Respondent

- **and –**

RICHARD TRUDEL and JAMES SAUVÉ

**Ruling on Application by the Accused for a Stay of Proceedings, Pursuant to Sections 7 and 11(b) of the Canadian Charter of Rights and Freedoms**

C. McKinnon J.

**Released:** January 12, 2007.