Indexed as:

R. v. Sander

Between
Regina, Appellant, and
Stephen Sander, Respondent

[1995] B.C.J. No. 790

58 B.C.A.C. 115

7 B.C.L.R. (3d) 189

98 C.C.C. (3d) 564

30 C.R.R. (2d) 359

27 W.C.B. (2d) 243

Vancouver Registry No. CA019185

British Columbia Court of Appeal
Vancouver, British Columbia

McEachern C.J.B.C., Legg and Finch JJ.A.

Heard: March 1 and 2, 1995.
Judgment: April 12, 1995.

(19 pp.)

Civil rights -- Trials, due process, fundamental justice and fair hearings -- Criminal and quasi-criminal proceedings -- Right to a speedy trial -- Denial of right -- Remedies -- Stay of proceedings.

This was an appeal by the Crown from a stay of proceeding against the accused for delay under section 11(b) of the Canadian Charter of Rights and Freedoms. The judge held that a two-year delay occasioned by the Crown's attempt to obtain disclosure under section 37 of the Canada Evidence Act was unreasonable. The Crown argued the judge erred in holding there had been a breach of the

accused's rights under section 11(b). The accused had been charged under the Income Tax Act. The judge had found the Crown had improperly invoked section 37.

HELD: The appeal was dismissed. The judge was bound to come to the conclusion the section 37 proceedings were not meritorious. That was not to say that all unsuccessful proceedings were unmeritorious. The delay was not an inherent part of the case but was the result of the Crown's conduct. It was unnecessary to consider the accused's fresh evidence application.

Statutes, Regulations and Rules Cited:

Canada Evidence Act, s. 37.
Canadian Charter of Rights and Freedoms, 1982, s. 11(b), 24.
Criminal Code, R.S.C. 1985, c. C-46, s. 687.
Income Tax Act, s. 231.3.

Counsel for the (Crown) Appellant: Johannes Van Iperen, Q.C.
Counsel for the Respondent: Thomas R. Berger, Q.C. and David Martin.

Reasons for judgment were delivered by Finch J.A.

1 **FINCH J.A.**:-- The Crown appeals a judicial stay of proceedings, ordered by Provincial Court Judge Cronin on 14 July 1994, for breach of the accused's right to be tried within a reasonable time, as guaranteed by s.11(b) of the Canadian Charter of Rights and Freedoms. The judge held that a delay of almost two years, attributable to the Crown's unsuccessful attempts to avoid an order for disclosure, by invoking the procedures provided for in s.37 of the Canada Evidence Act, was unreasonable. The Crown asserts a number of errors on the part of the learned Provincial Court judge, but essentially the issue is whether the judge erred in holding that the accused's right under s.11(b) had been violated.

2 In June 1990, investigators for Revenue Canada obtained and executed search warrants issued under s.231.3 of the Income Tax Act. In November 1990, the Federal Court of Appeal held, in an unrelated case, that s.231.3 of the Income Tax Act was of no force and effect. In March 1991, Revenue Canada obtained a warrant under s.687 of the Criminal Code. In the interval, from November 1990 to March 1991, the documents previously seized were not returned to the accused.

3 On 14 June 1991, the respondent was charged with six counts of offences under the Income Tax Act. The Crown elected to proceed by way of indictment, and the accused elected to be tried in Provincial Court. On 30 March 1992, the accused made a request for disclosure pursuant to R. v. Stinchcombe, [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1, including disclosure of documents relating to

the admissibility of evidence obtained pursuant to the search warrants. The Crown made partial disclosure on 6, 10, and 15 April 1992. On 22 April 1992, the issue of the Crown's obligation to make further disclosure was argued in Provincial Court. The Crown took the position that information relating to the issuance of the search warrants, and legal advice from the Department of Justice to Revenue Canada, were protected by solicitor and client privilege. The Crown did not put forward public interest immunity, or the provisions of s.37 of the Canada Evidence Act, as justifications for the non-disclosure of the requested material at the April 22nd hearing.

4 Following argument, Cronin P.C.J. made an order for disclosure, including particulars of legal advice received by Revenue Canada from the Department of Justice, with respect to the retention and re-seizure of the documents. At the time of the disclosure order, the trial voir dire had been scheduled to commence on 8 June 1992. It was subsequently adjourned by consent to 14 September 1992.

5 On 8 June 1992, Crown counsel notified the Provincial Court that it would "object" to the disclosure ordered previously, relying on public interest immunity under s.37 of the Canada Evidence Act, including "solicitor-client privilege". On 18 June 1992, the Crown filed the certificate contemplated by s.37, and then applied in the Supreme Court of British Columbia to have its objection ruled upon. The accused applied at the same time to have s.37 of the Canada Evidence Act declared unconstitutional. Those applications were heard in Supreme Court Chambers on different dates. The Crown's application under s.37 was heard on 24 August 1992. The judge reserved his decision, and the 14 September 1992 trial date was adjourned. On 18 September 1992, the judge upheld the Crown's objection to disclosure (as reported at 96 D.L.R. (4th) 85 (B.C.S.C.)). The accused's application to have s.37 declared unconstitutional was argued before the same judge on 23 October 1992. He again reserved judgment, and rendered reasons on 22 December 1992 (as reported at 76 B.C.L.R. (2d) 53 (S.C.)), dismissing the accused's constitutional challenge to s.37.

6 The accused appealed both orders. The appeals were heard in the Court of Appeal on 8 June 1993. Judgment was reserved. On 10 December 1993, the Court asked counsel to address three further questions that had not been argued at the hearing. Written submissions were filed by both sides.

7 On 4 May 1994, the Court of Appeal filed written reasons (as reported at 91 B.C.L.R. (2d) 145 (C.A.)), holding that the non-disclosure order granted by the Supreme Court of British Columbia should be set aside, and the Crown was required to disclose to the accused all of the material requested. The Court also held that s.37(1) of the Canada Evidence Act was not unconstitutional.

8 With respect to the proceedings launched by the Crown under s.37, Mr. Justice Macfarlane, for the majority, said at pp. 50-51:

> Thus, in my opinion, s.37 may be applied to grant public interest immunity in respect of legal communications between a lawyer and another, when both are functioning in a government environment, and despite the fact that a claim for

solicitor-client privilege might not prevail at common law.

I do not view the availability of a claim at common law for solicitor-client privilege as being a basis for construing the phrase "a specified public interest" as excluding communications between a government lawyer and an agency of government. As I have said, solicitor-client privilege and public interest immunity are separate doctrines, with separate rules, serving different interests. Moreover, privilege is not at the heart of public interest immunity.

The authorities indicate that pursuing one claim does not exclude the other. The problems experienced in this case arise from failing to separate the two claims, and in dealing with the s.37 application as if it was a review of the disclosure order made at trial. Furthermore, if the provisions of s.37(3) had been employed, the application at trial for disclosure should have been objected to immediately, with a request for an adjournment to allow the Crown to pursue the s.37(1) application. If that procedure had been employed, and if the proper considerations had been advanced on the s.37(1) application the confusion could have been avoided.

I conclude that communications between government persons and their legal advisors may be protected by an order under s.37 of the Canada Evidence Act. In this case, however, the s.37 judge erred in proceeding as if the issue was solicitor-client privilege and as if he had jurisdiction to review the order of the trial judge. I am unable to construe his reasons as indicating a proper appreciation of the considerations which might give rise to an order under s.37. Accordingly, I would set the order aside, and dismiss the application under s.37.

9 In separate reasons, concurring in the result, Mr. Justice Wood said at p. 63:

From reading the reasons given by the trial judge on April 22, 1992, it is clear that the Crown's original objection to disclosure was based on a common law claim of solicitor-client privilege. The trial judge rejected that claim. Whether he was right or wrong in that regard is not now an open question, for as was pointed out by this Court in R. v. Gray (1993), 79 C.C.C. (3d) 332, 39 W.A.C. 208, 18 W.C.B. (2d) 437, there can be no interlocutory appeal from his ruling.

Notwithstanding the interlocutory immutability of the trial judge's ruling, however, the certificate of James D. Bissell, Q.C., specified solicitor-client

> privilege as one of the public interest grounds upon which the Crown objected to disclosure of the information in question.
>
> Furthermore, it is apparent from the reasons of the judge below that he treated the s.37 application as a review of the trial judge's ruling. He first concluded that a claim of solicitor-client privilege was the only basis upon which the Crown's petition under s.37 could succeed....

10 And at p. 75:

> I have already pointed out that in his reasons given following the first stage of argument, the judge below dismissed all claims of public interest immunity. In light of the conclusions I have reached, I am of the view that he erred when he gave effect to a claim of solicitor-client privilege as though it were an objection to disclosure certified under s.37(1) of the Canada Evidence Act. I am also of the view that he had no jurisdiction, under that section, to review the ruling made by the trial judge with respect to that common law claim. Given his rejection of the public interest immunity claims, it follows that the judge below ought to have dismissed the s.37(1) objection of the Crown and ordered disclosure of the material in question.

11 After this disposition by the Court of Appeal on 4 May 1994, the accused applied on 6 and 7 July 1994 in Provincial Court for a stay of proceedings, arguing his right under s.11(b)of the Charter to be tried within a reasonable time had been breached. On 14 July 1994, Cronin P.C.J. gave oral reasons granting the judicial stay of proceedings from which this appeal is brought.

12 In his oral reasons for judgment, the learned Provincial Court judge held that, by invoking s.37 of the Canada Evidence Act, the Crown had caused a delay in the case against the accused of two years. He attributed that two year delay to the Crown, relying on R. v. Philip (1993), 60 O.A.C. 391, 80 C.C.C. (3d) 167. He held the delay was unreasonable because the Crown invoked s.37 of the Canada Evidence Act in error, and thereby led the Supreme Court judge into error. The Crown, in effect, used the s.37 proceeding in the Supreme Court as a means of interlocutory appeal against the disclosure order made in Provincial Court on 22 April 1992, a purpose for which s.37 was not intended. Although the Crown acted in good faith, its mistaken use of s.37 confused the issue. The resulting two year delay was unreasonable. The Provincial Court judge found that the accused had suffered prejudice as a result of that delay. He said the only appropriate remedy, in the circumstances, was to grant a stay of proceedings, citing Rahey v. The Queen, [1987] 1 S.C.R. 588, 39 D.L.R. 489.

13 The learned Provincial Court judge said that, but for the s.37 application, the trial would have been completed by about October 1992. The Crown accepts, for the purposes of this appeal, that the delay attributable to the s.37 proceedings was about two years. The total time elapsed from the

charge on 14 June 1991, to the end of the anticipated trial date in October 1994, would have been about forty or forty-one months. The Crown also agrees that the length of delay in this case is sufficient to raise an issue under s.11(b) of the Charter.

14 The factors to consider on whether the s.11(b) right has been infringed are set out in the judgment of Mr. Justice Sopinka in R. v. Morin, [1992] 1 S.C.R. 771, at 787-788, 71 C.C.C. (3d) 1:

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

15 On this appeal, the Crown says:

> (1) The delay resulting from the s.37 application was an "inherent time requirement" of the case;
> (2) Although, with the benefit of hindsight, the position taken by the Crown on s.37 was wrong, its conduct was reasonable and justifiable because the evidentiary issue was complex, there was no clear authority on point, and the Crown acted in good faith;

(3) The accused's constitutional challenge to s.37 was a factor contributing to the delay; and
(4) The accused adduced no evidence of prejudice, he has been on bail throughout, all of the evidence is still available, and the accused can still have a fair trial.

16 In this case, I find it convenient to discuss the first two issues together.

(1) Inherent time requirement, or (2) Conduct of the Crown:

17 The Crown asserts that the delay caused by the s.37 application and appeal was an "inherent time requirement of the case". It says the s.37 application was justifiable because the evidentiary issue was complex, there was no clear guiding authority, and the Crown acted in good faith.

18 In Morin (supra), Sopinka J. discussed what he meant by the phrase "inherent time requirement". He referred to the complexity of the case, intake requirements (such as "... retention of counsel, bail hearings, police and administrative paperwork, disclosure, etc." (my emphasis) (p. 792)), and time required for a preliminary inquiry. The examples given suggest that he used "inherent" to refer to those necessary practical and procedural steps that will be taken by counsel in the reasonable preparation for trial of the particular case.

19 Very shortly after Morin (supra) was decided, the Supreme Court of Canada gave judgment in R. v. S.D., [1992] 2 S.C.R. 161; 72 C.C.C. (3d) 575, rev'g (1991), 9 O.R.(3d) 287, 66 C.C.C. (3d) 173 (C.A.). In that case, the delay resulted from an initially successful application by the Crown to transfer young offenders to adult court. The young offenders subsequently succeeded in an appeal against the transfer order. Delays resulting from those steps were held to be not unreasonable.

20 Sopinka J., for the Court, said at p. 162 S.C.R.:

> We agree with the conclusion of Catzman J.A. in the Court of Appeal that the time required for an application for transfer to adult court and appeals relating thereto is part of the inherent time requirements of a case under the Young Offenders Act. The application for transfer must, however, be made within a reasonable time and pursued meritoriously and in good faith. In this case, the trial judge found that the application could not have reasonably proceeded faster. As did Catzman J.A., we see no reason to disturb this finding.

21 This passage suggests that in deciding whether delay caused by a step taken was part of the inherent time requirement of the case, it is appropriate to consider whether the step was taken in a timely way, in good faith and, meritoriously.

22 This passage expresses approval of what was said by Catzman J.A., who dissented in the Ontario Court of Appeal. He said, at pp. 179-180 C.C.C.:

> I consider that the time expended in the adjudication of the propriety of a transfer order, pursued meritoriously and in good faith, should be reckoned as enlarging the inherent time requirements of the case. In the circumstances of the present case, I am not prepared to differ with the youth court judge's finding that the transfer application could not reasonably have proceeded faster, and I share his view that no fault can be ascribed either to the prosecution for bringing such an application or to the defence for twice seeking a review of the transfer order that was made. The appellants do not contend that the balance of the time that elapsed in bringing the case to trial constituted unreasonable delay within the contemplation of s.11(b) of the Charter. It follows, in my view, that the constitutional right of the appellants to be tried within a reasonable time was not violated, and that their appeal cannot succeed on that ground.
> (my emphasis)

23 In my view, Sopinka J.'s references to the reasonable timeliness of the conduct resulting in delay, to the "good faith" of the party invoking the procedure, and to the "meritorious" pursuit of the conduct, substantially qualify the meaning of "inherent time requirements of the case".

24 A rather different view of the matter was taken by the Ontario Court of Appeal in R. v. Philip (supra). There the Court interpreted Morin (supra) to mean that the bona fides of the party causing the delay was not a relevant consideration. Doherty J.A., for the Court, said at p. 173 C.C.C.:

> The trial judge also erred in giving the delay caused by the R.C.M.P. added weight because he regarded the conduct of the R.C.M.P. as "indefensible". Section 11(b) is not concerned with assigning blame, but only with the cause of delay. Once it is determined that Crown conduct caused delay, that delay is counted against the Crown. It does not, however, take on additional weight because the conduct is regarded as blameworthy or otherwise "indefensible". The s.11(b) inquiry is concerned with the effect of Crown conduct on the progress of the proceedings, not the bona fides of that conduct....
>
> The trial judge was clearly more concerned with the legitimacy of the position taken by the R.C.M.P. than he was with the length of the delay caused by the assertion of that position. He said, referring to the R.C.M.P. privilege claim:

> However, it is the method chosen and its subsequent abandonment which has given rise to the arguments favouring a stay of proceedings.
>
> This passage lends validity to the appellant's submission that the trial judge imposed the stay, in part at least, to denounce the conduct of the R.C.M.P. Assuming his condemnation of that conduct was appropriate, it should not have figured into his determination of the respondent's s.11(b) claim.

25 The reference in that passage to Morin (supra), is no doubt a reference to those parts of the judgment of Mr. Justice Sopinka dealing with the actions of the accused and of the Crown, where he says that attributing the cause of delay to one party or another is not done to assign blame.

26 The Crown also relied on R. v. Lapointe (1989), 49 C.C.C. (3d) 117 (B.C.C.A.). In my view, this case is distinguishable. Lapointe was an appeal from the County Court on a trial de novo. It was not an interlocutory appeal. The Crown was exercising a right of appeal provided by statute.

27 Counsel for the respondent says that ordinarily any attempt to set aside an interlocutory order would have to await the outcome of the trial. There is no right of appeal against such an order, unless expressly provided for in the Criminal Code or other statute.

28 Counsel points out that a s.37 objection cannot be invoked by Crown counsel at trial, or even on instructions of the Attorney General of Canada. There must be an objection by a Minister or "other person interested", certified orally or in writing, stating a specific public interest claimed by the Minister or other official.

29 Where the trial is in Provincial Court, an application under s.37 operates to interrupt the trial, to remove to another court the determination of an issue ordinarily determined by the trial judge. The judge hearing the s.37 application examines the documents to see whether the trial judge should see them.

30 Counsel for the respondent also points out that a proceeding under s.37 does not relate to a privilege. A claim of privilege is made at trial, and the trial judge rules on it. There is no weighing of interests once the privilege is asserted and established.

31 Moreover, an appeal from the s.37 judge, whether the trial is in a Provincial Court or a Superior Court, lies as of right.

32 The use of s.37 invokes an objection which departs markedly from ordinary disclosure principles.

33 My review of the cases cited above persuades me that, in deciding whether some aspect of

delay is an inherent time requirement of the case, it is necessary to look at the conduct which caused that delay, and to determine whether that conduct was necessary, reasonable, meritorious, and undertaken in good faith. Delay caused by conduct having those characteristics will usually be "inherent" in this context but there may be cases where, notwithstanding the best of intentions, and a valid legal position, the Crown might still have to give way in recognition of the requirements of Charter s.11(b). On the other hand, if the conduct in question can properly be described as unnecessary, unreasonable, without merit, or done without good faith, then the resulting delay cannot be said to be an inherent requirement of the case.

34 In this case, the delay occurred in the disclosure process of a prosecution which involved many documents. Specifically, the delay resulted from the Crown's attempt to invoke public interest immunity as the basis of non-disclosure, and to use the process available under s.37 of the Canada Evidence Act as a means of reviewing the Provincial Court judge's order for disclosure. The Provincial Court judge found that the Crown acted in "good faith". I take that to be a finding that the responsible Crown agent acted in the honest belief that the documents should not be disclosed.

35 However, the learned Provincial Court judge also found that the Crown's conduct was mistaken and confused. After quoting from the reasons for judgment of Mr. Justice Macfarlane and Mr. Justice Wood in this Court, the Provincial Court judge said this:

> In my opinion, what the Court of Appeal is saying there is the Crown, by the manner in which it pursued Section 37, it confused; not Mr. Justice Collver; it confused these two claims. It welded them together into one. It misled the judge, with no malice, of course, in good faith. Nobody's suggesting anything but good faith in this case. It made a mistake. It pursued the claim incorrectly. It confused the issue. It led Mr. Justice Collver into the position where he, in fact -- and nobody used these words, he didn't say he was acting as a Court of Appeal. He didn't say he was reviewing my order. He didn't say he was dealing with a de novo, but in effect, that's what happened. And he was led into that because the Crown confused the issue by dealing with solicitor-client privilege as it if was a specified public interest immunity. And the Crown, in my opinion now, cannot complain because he dealt with them in that manner. Because that's the manner in which the Crown pursued it.

36 Later in his reasons, he said the Crown had "improperly" invoked s.37, and that the resulting proceedings were "misguided".

37 In sum, although the judge did not apply "meritorious" as a test, it seems to me his conclusion was that the Crown's conduct was "unmeritorious", and that even though it acted in good faith, the resulting delay was not an inherent requirement of the case. That, if I may say with respect, is a conclusion to which the judge was bound to come, having regard for this Court's earlier comments about the s.37 proceedings.

38 As presently advised, I do not think the "merits" of the conduct causing delay, are to be determined solely on the eventual outcome of that conduct. There may be cases where an unsuccessful application or argument could described as "meritorious". I would leave that difficult question for another day. In this case, it is enough to say that although the Crown's s.37 application was undertaken in good faith, it was misconceived and based on a mistaken view of the law.

39 In those circumstances, it cannot be said that the two year delay, attributable to the s.37 application and appeal, was an inherent time requirement of the case. It was the result of the Crown's conduct.

(3) The accused's constitutional challenge to s.37:

40 The Crown contends that the accused's constitutional challenge to s.37, and the subsequent appeal, contributed to the delay resulting from its s.37 application.

41 I do not think there is merit in this argument. The accused's application to challenge the constitutionality of s.37 was clearly in response to the Crown's application to invoke s.37. No doubt, some additional delay was caused by the accused's application to have s.37 declared unconstitutional in the Supreme Court, and on the appeal to the Court of Appeal. However, none of that delay would have occurred if the Crown had not, in the first place, commenced its s.37 application.

42 I would not give effect to this argument.

(4) Prejudice:

43 On the hearing of this appeal, counsel for the respondent sought leave to introduce fresh evidence as to prejudice. The fresh evidence is in affidavits showing that the Crown has continued to disclose documents for which privilege was originally claimed until as recently as the week preceding this hearing; and that these protracted proceedings have had adverse effects on the respondent's business and health. In my view, it is not necessary to consider the fresh evidence.

44 In Morin (supra), Sopinka J. said that the longer the delay, the more likely an inference of prejudice will be drawn. Here, the additional delay caused by the s.37 application was about two years. The total time elapsed from the laying of the charge to the time proceedings were stayed was about forty months. It was, to my mind, clearly open to the Provincial Court judge to infer substantial prejudice to the accused in the circumstances.

Conclusion:

45 In Morin (supra), Mr. Justice Sopinka said that in determining whether an accused's right to be tried within a reasonable time was infringed, a judicial determination was required, balancing the interests which the section was designed to protect against factors which inevitably lead to, or

otherwise cause, the delay.

46 In this case it is conceded that the length of delay raises a s.11(b) issue, and there is no argument that any part of the two year delay in issue was the result of waiver. The reasons for the delay were fully canvassed by the Provincial Court judge, and in my view, he considered and weighed all the relevant factors.

47 In my view, he was correct in attributing the two year delay to the Crown, in concluding that it was not the result of an inherent time requirement of the case, and in inferring prejudice. He was accordingly correct in his view that the respondent's rights under s.11(b) had been violated.

48 I would dismiss the Crown's appeal.

FINCH J.A.

McEACHERN C.J.B.C.:-- I agree.
LEGG J.A.:-- I agree.

cp/d/mrz/DRS/DRS/DRS/qlhjk