*Indexed as:*
**R. v. Gray**

**Between**
**Her Majesty the Queen, and**
**Robert St. George Gray, Wayne George Goodwill, Derek Thomas McFadden, Donald Gary McKay and Terrance Frederick Watts**

[1995] B.C.J. No. 1890

43 C.R. (4th) 52

28 W.C.B. (2d) 221

Vancouver Registry No. CC910548

British Columbia Supreme Court
Vancouver, British Columbia

**Oppal J.**

Heard: January 27-31, February 3-5, 11-14, 18-21, May 11, 14-15, 19-20, 25, 27-29, June 16, 29, July 6, September 3, October 10, November 11, 1992, January 11, February 8, 26, June 29, October 14, 28, December 13, 1993, January 17, February 8, March 9, 19, June 27, September 19 and 21, 1994.
Judgment: filed September 1, 1995.

(35 pp.)

*Civil rights -- Trials, due process, fundamental justice and fair hearings -- Speedy trial, accused's right to -- Abuse of process -- Failure of Crown to make timely disclosure -- Remedy -- Stay of proceedings.*

The accused applied for a stay of proceedings of their trial on charges of conspiracy to traffic in a narcotic. The accused alleged that their right to be tried within a reasonable period of time had been breached. The arrests came after a reverse sting operation involving police undercover officers,

informants and agents. The plan was hatched by K, a Dutch drug dealer and informant who approached Dutch police with a scheme to catch Canadian drug dealers. The most controversial aspect of the plan called for the Canadian police to supply the hashish. This appeared to be the first time that Canadian police actually conveyed drugs to prospective traffickers, albeit with the objective of arresting the traffickers and seizing their funds. The accused were alleged to have conspired between May 1 and June 9, 1989. On June 20, 1989, the Crown conveyed the first set of particulars to the defence. They were lacking in detail. Throughout these proceedings, the defence experience great difficulty in receiving full disclosure as to what had transpired in the Netherlands. It was not until August that defence counsel became aware of the existence of K, although they still did not know his precise role in the scheme. The trial began in Provincial Court in November 1989 and continued intermittently with a number of adjournments. It was not until July 20, 1990 that the Crown finally sent a major disclosure package to defence counsel, but it was not until November 1990, that the full extent of K's actual role became apparent to the Crown. Because material evidence relating to K had been deliberately withheld from the defence, the trial in Provincial Court was converted to a preliminary inquiry. In May 1991, the accused were committed to stand trial in this court. The trial finally commenced in January 1992. However, the proceedings consisted largely of defence motions for particulars. The Crown was having difficulty obtaining particulars from the police. One ruling requiring the Crown to supply particulars of conversations between the police and the Crown was appealed to the Ontario Court of Appeal, and leave was sought, but denied, to appeal to the Supreme Court of Canada. Further will say statements were delivered to the defence in February and May 1994. A trial date of September 1994 was set. From the date of arrest to the anticipated date of trial, 64 months would have elapsed.

HELD: The application was allowed and the stay was granted. The stay was justified on the grounds of both delay and abuse of process. The delay in this case was both unreasonable and unjustified. The vast majority of the delay was clearly attributable to the Crown by virtue of its lack of disclosure. It was no answer for the Crown to say that since disclosure had now substantially been made, the case could proceed, five years after the commencement of the proceedings. In dealing with the issue of abuse, the court noted that the Crown had conceded that the police deliberately refused to disclose the role of K. This was one of those cases in which the principles of justice underlying the community's sense of fair play and decency had been offended.

**Statutes, Regulations and Rules Cited:**

Canada Evidence Act, s. 37.
Canadian Charter of Rights and Freedoms, 1982, ss. 7, 11(b), 24(1).
Narcotic Control Act.

Counsel for the Crown: E. Reid, Q.C. and D. Fitzsimmons.
Counsel for the accused Gray: D. Martin.
Counsel for the accused Goodwill: M.K. Woodall.

Counsel for the accused McFadden: P. Hart.
Counsel for the accused McKay: P.M. Bolton, Q.C.
Counsel for the accused Watts: K. Westlake.

---

**OPPAL J.**:--

INTRODUCTION

**1** The accused made an application under s. 24(1) of the Charter and under the common law for an order for a stay of proceedings. The application was based primarily on allegations of material non-disclosure by the Crown. The non-disclosure resulted in delay. The accused alleged their right to be tried within a reasonable period of time has been breached. The accused also alleged misconduct on the part of the police and the Crown. I allowed the defence application. When I granted the order I told counsel I would provide written reasons.

**2** These proceedings have had a long and chequered history. On June 9, 1989 the five accused, who are Canadians, and two Dutch nationals were arrested and charged with conspiracy to traffic in a narcotic. They were alleged to have conspired between May 1 and June 9, 1989. The accused elected to be tried in the Provincial Court, where the trial began on November 27, 1989. However, on April 22, 1991, after numerous delays and allegations of non-disclosure, the trial was converted into a preliminary inquiry. On May 2, 1991 the accused were committed for trial. The indictment was filed in this Court on May 22, 1991. The trial commenced in January 1992. When I finally issued the order staying the proceedings on September 21, 1994, aside from some commission evidence which was heard in the Netherlands, evidence had yet to be presented in this Court.

POLICE INVESTIGATION

**3** The circumstances of this case are most unusual. The accused were charged after what has been called an elaborate "reverse sting operation". The accused have alleged that the R.C.M.P. were involved in the trafficking of narcotics. Defence counsel have made serious allegations about the conduct of the R.C.M.P. and the Crown. At one stage the controversy surrounding this case became the subject of comments in the Dutch Parliament.

**4** I will review the evidence in more detail. The investigation which led to these proceedings was commenced in early March 1989 when Staff Sergeant Dirk Doornbos, an R.C.M.P. liaison officer stationed in The Hague, the Netherlands, received information from the Dutch police relating to drug trafficking in Canada and the Netherlands. An informant had approached the police with information concerning the activities of drug dealers who operated in the Netherlands and Canada. Apparently the initial information which was provided to Sergeant Doornbos was somewhat

incomplete and unreliable.

**5** The information which the Dutch police provided to Doornbos came from one Andre Kollen. Kollen, a resident of Breda, the Netherlands, was well-known to the police as both an informer and a drug trafficker.

**6** On May 1st, Sergeant Doornbos and Kollen met in Breda. Kollen provided Sergeant Doornbos with the names of Canadian and Dutch nationals who were apparently involved in drug trafficking in Canada and the Netherlands. According to police operational plans, the purpose of the meeting was to devise a scheme to apprehend drug dealers in Canada and to seize their funds.

**7** Kollen testified at a hearing for taking commission evidence in the Netherlands that the purpose of his meeting with Sergeant Doornbos was to determine "if there were any possibilities in doing an undercover operation". He said the purpose of the operation was to arrest people in Canada for selling or buying drugs. He said, "We made a scenario." Kollen indicated that the idea came "from all the people who were there" at the meeting. According to police documents the purpose of the meeting was to devise a scheme "to set up an operation to arrest Canadian drug dealers in Canada".

**8** Staff Sergeant Doornbos, Kollen and the two Dutch police officers met again the following day. At that time the specifics of the plan were discussed. Kollen said that he would contact Fransje Jonker-Smit and her son, Happy Jonker, both of whom were heavily involved in the trafficking of narcotics in the Netherlands. Mrs. Jonker-Smit had known the accused Derek McFadden with whom she had had previous dealings. The R.C.M.P. believed that McFadden was a major trafficker of cannabis in Western Canada. According to their documents, in 1988 he had travelled to the Netherlands in order to purchase hashish.

**9** The plan, which became known as "Operation Dutch", was most extraordinary. It called for the Jonker family to go to Canada to pose as sellers of drugs. Kollen would tell the Jonkers that the drugs would be available in Canada. Mrs. Jonker-Smit and her son would then contact the accused who were apparently known by the police as traffickers of drugs in this country. The most controversial aspect of the plan called for the police to supply the hashish. I will deal with this issue more fully in due course.

**10** Kollen told Mrs. Jonker-Smit that he knew people in Vancouver who were capable of supplying large amounts of hashish. He also told Mrs. Jonker-Smit and her son that there was a shipment of narcotics which would be arriving in Canada and that the Jonkers' role would be to sell the narcotics to Canadian dealers. The Jonkers would be "facilitators" or "middlemen". Kollen testified that it was his idea to approach the Jonkers.

**11** It should be noted that there was no actual shipment of narcotics coming to Canada. Rather, the R.C.M.P. would be supplying the drugs, obtained from the Drug Enforcement Agency of the United States, in order to arrest the traffickers in Canada. The plan also called for Sergeant Larry Silzer and Corporal Al Haslett to pose as the suppliers of the drugs to the accused. Thus, neither the

accused nor the Jonkers were aware of the true identities of Silzer and Haslett.

**12** On May 6, 1989 Happy Jonker arrived in Vancouver. The R.C.M.P. immediately put him under surveillance. The police noted that Jonker was met at the airport by the accused McFadden. Jonker then called his mother in the Netherlands and advised her that he had met McFadden and that the latter had shown him $1 million in order to purchase 2,000 kilos of hashish.

**13** On May 19th, pursuant to the plan, Sergeant Murray Dauk, who was stationed in Vancouver as a part of the plan, called a pay telephone in Vancouver and spoke to a male who identified himself as "Happy". In accordance with conversations he had with Kollen, he identified himself by the code name "Canuck". The call was obviously prearranged. Jonker advised Dauk that his people had $2-3 million cash in order to purchase hashish. Further telephone conversations took place between Dauk and Jonker. Dauk was obviously passing himself off as Kollen's Canadian supplier.

**14** Sergeant Doornbos kept both Silzer and Haslett informed of developments in the Netherlands. On May 24th Silzer contacted Sergeant Doornbos and a discussion ensued relating to protecting the identity of their source (Kollen).

**15** On May 24th Sergeant Silzer telephoned Happy Jonker in order to arrange a meeting. The following day Silzer and Haslett, both of whom were working in undercover capacities as sellers of drugs, met with McFadden and Jonker. During this meeting the sale of $2.2 million worth of cannabis resin at a price of approximately $1,400 per pound was discussed. McFadden demanded that Silzer and Haslett provide them with a sample of the cannabis. On June 6th Silzer complied with this request and gave Jonker a one pound sample of cannabis resin. Incidentally, that one pound sample was never recovered. Later that day Jonker telephoned Silzer and told him that he wanted to purchase 1,000 pounds at that time and an additional 1,000 pounds the following day.

**16** Kollen's role and his relationship to the police became better defined in May 1989. On May 18th, Sergeant Dauk, of the Vancouver R.C.M.P. Drug Squad, contacted Kollen directly. The purpose of the communication was to advise Kollen that McFadden had been in Holland looking for a shipment of drugs. It is important to note that on May 26th Sergeant Silzer spoke directly to Kollen. Kollen told Silzer of the details of the proposed transaction, including a proposed meeting with the accused. Silzer also confirmed the price of the narcotics with Kollen. According to Silzer's notes, "it was decided that Silzer would give a sample of the hash and that the accused would give $1 million up front. That is, three days after the delivery of the hash. The remainder of the money would follow. Silzer advised the source that he had met the accused and confirmed the prices." Kollen also advised Silzer that his source had told him that the accused thought that Silzer and Haslett were "either cops or setting them up to rob them".

**17** The police kept Kollen informed of developments throughout the investigation. In his report of May 28th, Sergeant Dauk concluded that the source (Kollen) "whose motives are monetary and seeking revenge" had "orchestrated the whole operation". On June 3rd Kollen signed a letter of agreement with the R.C.M.P. He was eventually paid Can. $40,000 for his services.

**18** On May 30th Inspector Kary, of the R.C.M.P. Drug Enforcement Division in Ottawa, expressed concern over Kollen's role and his subsequent participation. It was apparent to Inspector Kary that Kollen was an R.C.M.P. agent and that he eventually would be required to testify in court.

**19** After further telephone negotiations between Silzer and Jonker on the evening of June 8th, a meeting took place at a pub on McDonald Street in Vancouver. Haslett attended and met Mrs. Jonker-Smit, who had arrived in Canada, Happy Jonker and the accused Gray, McKay and Watts. The parties left the pub and went to a vehicle in a nearby parking lot. McKay then showed the officers three bundles of money. The officer said that he observed fifty $100 and $1000 Canadian dollar bills. The parties discussed the actual delivery of the drugs. At a second meeting held later that evening in a restaurant, Haslett and Silzer met with the Jonkers, Gray and Watts. Watts said they were prepared to proceed with a $700,000 cash payment. The parties agreed to meet at the Airport Inn in Richmond in order to conclude the transaction.

**20** On the afternoon of June 9th, Haslett met McKay in the parking lot of the hotel. The accused Goodwill was also present. Goodwill and Haslett then went to a storage facility where Haslett displayed approximately 2000 pounds of cannabis resin to Goodwill. In the meantime, Watts and McKay delivered the equivalent of approximately $731,000 in Canadian and U.S. funds to Silzer in the hotel. McKay and Watts were arrested immediately. The arrests of the others, including the Jonkers, followed shortly thereafter.

**21** There were two aspects of this investigation that caused the police particular concern. The first related to the role of Kollen. The second related to the police distributing one pound of narcotics to the accused. In regard to Kollen, it was clear to everyone that he was an agent and an informer. Under normal circumstances agents and informers in criminal investigations pose extraordinary problems for the police in that questions of credibility and security must be assessed. Moreover, the law relating to disclosure requires that persons who are charged with criminal offences receive full and comprehensive disclosure so as to enable them to make full answer and defence.

**22** In this case, the general concern relating to informers was heightened by Kollen's unique role in the investigation. It was clear to everyone that Kollen was not an ordinary informer. He was not a member of a conspiracy who had come forward to testify against his co-conspirators. The police knew that Kollen had "orchestrated the whole operation". He had gone to the Dutch police with the original plan. He had also recruited the Jonkers. He had gone so far as to instruct Sergeant Silzer on the logistics of "the meet" between the undercover police officers and the prospective purchasers of the narcotics, the accused. Moreover, the police kept Kollen apprised of the developments of the investigation. Thus, the significance of Kollen cannot be over-emphasized.

**23** Kollen had also made it clear to the police that he would not come to Canada to testify. An R.C.M.P. briefing note dated June 1, 1989 recognized the problems associated with Kollen's unwillingness to testify. The note contains reasons as to why "sources" are being required to testify. The R.C.M.P. were aware that his evidence would be necessary to in order to provide reasonable

and probable grounds for commencing an investigation, to provide full answer and defence, and to rebut any allegations of entrapment.

**24** The second issue of concern to the police related to the police distribution of the one pound of hashish to the accused. As far as drug investigations in Canada are concerned, this appears to be the first time that the police had actually conveyed drugs to prospective traffickers, albeit with the objective of arresting the traffickers and seizing their funds. Again, the operational plan makes it clear that the investigation for this reason was most extraordinary. The police obviously were concerned about the propriety of such investigative means. This concern was expressed in an R.C.M.P. memorandum dated May 30, 1989. It reads, in part, as follows:

> "The approach of this investigation is unique and innovative in that it is not an investigational technique that has been readily followed in the R.C.M.P. in the past. With Bill C-61 now available to Police Agencies, it is felt that it is timely to proceed with a case of this nature, and the circumstances as outlined in our Operational Plan, appear to be consistent with a scenario that will allow us the opportunity to put before the Courts a suitable case which would not bring the administration of justice into disrepute.
>
> Two concerns that become immediately evident with this investigation would be (a) the Police are trafficking in narcotics and (b) entrapment. In defence of our actions, the investigators have outlined our views in relation to both of these subjects. It appears obvious that there is no criminal intent on behalf of the Police to traffic in narcotics nor is there any entrapment in relation to this major importing-trafficking organization. The steps we are taking are merely reasonable steps to curtail the activities of a criminal organization who would continue with or without our involvement. It is felt that the Court could easily be shown, through our conversations with the accused persons and the actions displayed by them, that it would be unreasonable to assume that entrapment was a defence as the targets are known drug traffickers and have clearly demonstrated their actions in the past. It could also be shown, as we have documented, that bona fide investigations in relation to the principle target MCFADDEN, have been conducted. The steps that we are proposing to take in our Operational Plan do not violate the steps articulated in the recent decision of Regina vs. MACK which clearly outlines that entrapment only takes place when:
>
> a) the authorities provide a person an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry;
> b) although having such a reasonable suspicion or acting in the course of a

bona fide inquiry, they go beyond providing an opportunity and induce the commission of an offence.

It is our view that the Police methods in relation to this Operational Plan are consistent with uncovering criminal conduct that is simply not capable of being detected through traditional law enforcement techniques. In summation and in short, the targets will commit these offences with or without our Operational Plan being completed."

**25** A further R.C.M.P. report dated June 15, 1989, reads as follows:

"C) PRECEDENT SETTING CASE

THIS WAS THE FIRST TIME IN CANADA WHEREBY U/C [undercover] OPERATORS POSED AS TRAFFICKERS OF HASHISH AND WERE ALLOWED TO HAND OVER A 'SAMPLE' TO THE TARGETS. THIS CASE WILL NO DOUBT BE DECIDED IN SUPREME COURT OF CANADA AND IMPORTANT POSITIVE COURT RULINGS ARE EXPECTED.

HOWEVER, THIS KIND OF CASE MEETS THE A.D.P. SECTION'S MANDATE AND THE GOALS SET UP BY THE SOLICITOR GENERAL WHO DEMANDS THAT POLICE INVESTIGATIONS AIM AT SEIZING CRIMINALS' MONIES AND POSSESSION. CONTINUING INVESTIGATION INTO THE 'NETWORK' OF THE ACCUSED SHOULD ALSO RESULT IN FURTHER SEIZURES."

**26** The R.C.M.P. were obviously concerned about the legality of this investigative technique. Accordingly, they sought legal advice from the Department of Justice. However, it was clear that the police did not wish to disclose the full extent of their investigation to their lawyers. The operational plan states that Mr. Purdy, of the Vancouver office of the Department of Justice, "was given a brief scenario in relation to our set of circumstances. He agreed in principle with this scenario, but I should stress that he was making further inquiries with the DOJ in Ottawa". The concerns and opinions expressed in the plan can best be summarized as follows:

1. That Crown counsel be given only a brief scenario as "I do not feel he should become involved as this is an R.C.M.P. decision".
2. That prior agreement was to be obtained from the Department of Justice before the hash sample was given to the accused.
3. That such a plan will require approval from authorities in Ottawa.

4. That such a plan would amount to trafficking under the Narcotic Control Act.
5. In the event the plan is carried out, that members of the R.C.M.P. receive immunity from prosecution under the Narcotic Control Act.
6. The case will no doubt be decided in the Supreme Court of Canada and "important positive court rulings are expected".

COURT PROCEEDINGS

1. Provincial Court Proceedings

**27** On June 20, 1989 the Crown conveyed the first set of particulars to the defence. The particulars were in the form of a narrative. They were most general. They made no reference to the fact that the investigation had its origins in the Netherlands, or to any involvement of Dutch nationals or police. On July 12th Mr. Bolton, counsel for the accused McKay, in a letter to the Crown asked if there were any civilian informers involved in the investigation. He also asked for the names and criminal records, if any, of such informers. There was no reply to this request.

**28** It is an understatement to say that throughout these proceedings the defence experienced great difficulty in receiving full disclosure as to what had transpired in the Netherlands. In August defence counsel became aware of Kollen, although they were unaware of his precise role in the scheme. Kollen had made it clear that he would not come to Canada to be a witness in any legal proceedings. As a result, Mr. Westlake went to the Netherlands in order to interview him. It is not in dispute that Kollen misled Mr. Westlake as to his role in the investigation. Thus, at the conclusion of the interview, Mr. Westlake was none the wiser as to what had taken place in the Netherlands and what precise role, if any, Kollen played in the overall operation.

**29** In his evidence in the Provincial Court, Sergeant Doornbos agreed that he told Kollen that he should tell the lawyer, "I don't know anything about this thing, I don't want to see you." Sergeant Doornbos said that he was concerned about Kollen divulging his identity, but that he left the ultimate decision of whether to cooperate with the lawyer up to Kollen. Sergeant Doornbos's report said that Kollen "wove a complicated tale" to Mr. Westlake.

**30** During cross-examination in the Provincial Court Sergeant Silzer was asked, "Do you know Andre Kollen?" He replied, "No." He was then asked if he had a conversation with Kollen. Again he replied, "No." The Crown has conceded that Sergeant Silzer's answers were untrue.

**31** The trial in Provincial Court began on November 27, 1989 before the Honourable Judge Groberman. The trial continued on an intermittent basis with a number of adjournments and continuations. Defence counsel made a series of applications for better particulars.

**32** It was not until July 20, 1990 that the Crown finally sent a major disclosure package to defence counsel which included a police chronology and 26 "will say" statements. It is interesting to

note that in Sergeant Doornbos's "will say" statement no mention was made of any dealings with Kollen. Rather, the statement referred to information coming from the Dutch National Police that a Dutch national was intending to come to Canada to mediate the purchase of a large quantity of narcotics.

**33** It was not until November 20, 1990 that the Crown became fully aware of Kollen's actual role. The R.C.M.P. had recognized as early as August 1989 that Kollen would be required as a witness.

**34** Accordingly, in February 1990 the Assistant Deputy Minister of Justice sought the assistance of the Dutch Government in the prosecution of the case. In a diplomatic note he specifically requested that the Dutch police provide copies of their reports and notes, the Canadian authorities be allowed to interview the police and Kollen, and that "each of these people will be required as witnesses in the court proceedings in Canada recommencing in September of 1990."

**35** The Dutch Government refused this request. Questions were raised in the Dutch House of Parliament relating to the conduct of R.C.M.P. officers as undercover agents on Dutch soil. The Dutch Minister of Justice conducted an investigation and concluded that proper Dutch authorities should have been informed of the undercover operation which resulted in the arrest of two Dutch nationals. The Dutch authorities refused to cooperate while the charges against the Jonkers remained outstanding. The Canadian Government had taken the position that nothing improper was done during the course of the investigation. Thus, there was no basis upon which to recommend that the charges against the Dutch nationals be dropped. However, Canadian authorities finally acceded to this request when the charges were "suspended" in November 1991.

**36** During the course of the trial in the Provincial Court, the defence sought the production of the operation plan in order to determine Kollen's role. Judge Groberman refused to order the Crown to produce the plan. However, on April 22, 1991, he allowed a defence motion to re-elect the mode of trial to judge and jury. He said:

> "Defence counsel elected trial based on a total misconception of the role of the informant, a key player in this case. His real role did not come to light until S/S Doornbos testified, well into the trial. Had defence counsel known of his actual role, the election would have been for preliminary inquiry."

The accused were committed to stand trial in this Court on May 2, 1991.

2. Supreme Court Proceedings

**37** A number of pre-trial conferences were held in this Court between October 1991 and January 10, 1992. The Crown produced the operational plan which had been the subject matter of an application in the Provincial Court. The trial finally commenced on January 20, 1992. However, the proceedings were characterized largely by defence motions for better particulars. No evidence was ever called in this Court.

**38** It appeared that the Crown was having difficulty securing material from the police. On January 28, 1992, Mr. Butcher, Crown counsel, advised the Court:

> "One of the reasons that has led the Crown to ... take this position is that yesterday I advised your Lordship, among other things, that there no debriefings in the possession of the Crown of the witness Kollen. That was based on instructions given to me. ... This morning I learned that that information may not be accurate. There may in fact be debriefings in the possession of the R.C.M.P. in Holland in a file there, and we are having that file couriered to Canada for our review."

**39** The most contentious application related to the defence demand for particulars of any legal advice obtained by the police from the Crown. The defence argued that the advice and communications between the Crown and police were relevant in light of the police disbursement of narcotics to the accused. The Crown argued that the advice and conversations were confidential and therefore not admissible. After lengthy arguments I ordered that the Crown disclose to the defence the particulars relating to conversations between the police and the Crown. The contents of the operational plan had made it apparent that the police investigation was most extraordinary and the police were concerned about the legality of the investigation. The proceedings were adjourned briefly so that the Crown could comply with the order.

**40** When the order for disclosure had not been complied with, Mr. Martin, counsel for the accused Gray, sent a further letter to the Crown on March 27, 1992. The Crown responded to Mr. Martin's letter by stating that an objection to the disclosure of that evidence would be made under s. 37 of the Canada Evidence Act. On May 10th the Assistant Commissioner of the R.C.M.P. filed a certificate objecting to the disclosure of information and legal advice obtained by the R.C.M.P. from Crown Counsel. The certificate stated that disclosure would be contrary to the public interest and, specifically, will result in other police agencies, both domestic and foreign, refusing to share information or provide assistance for fear that that information will be disclosed in the courts. The application was adjourned another week because Mr. Wruck, a Department of Justice lawyer who would appear for the R.C.M.P., was not available. After further interruptions, the arguments on that motion finally concluded on May 26th. On May 27th I dismissed the objection under s. 37. The Crown sought time to consider its position and eventually appealed the ruling.

**41** After two adjournments, the Court of Appeal heard the matter on January 25 and 26, 1993. The Court dismissed the appeal on February 5, 1993. However, on February 9, 1993 the R.C.M.P. sought leave to appeal to the Supreme Court of Canada. That Court dismissed the R.C.M.P. application for leave to appeal, without reasons, on October 14, 1993.

**42** On February 7, 1994 the Crown delivered the "will say" statements of Mr. Purdy and Chief Superintendent Falkingham. The remaining "will say" statements were delivered to the defence on May 15, 1994. The defence has argued that this disclosure was inadequate in that the Crown still

had not produced the verbatim statements of the witnesses.

**43** The case became further complicated when Sergeant Silzer was charged with the theft of drug monies in a case unrelated to this matter. The Crown said that under the circumstances they would not call him as a witness.

**44** A new trial date for September 19, 1994 was set. It is not in dispute that from the date of arrest to the anticipated date of the completion date of trial, sixty-four months would have elapsed.

ACCUSED'S APPLICATION FOR A STAY OF PROCEEDINGS

**45** I will summarize in general terms the relative positions of the parties on this motion. The accused have put forth two main arguments. They are related. First, it said that their right to be tried within a reasonable period of time under s. 11(b) of the Charter has been breached. Specifically, it is argued that the non-disclosure of Kollen appreciably lengthened the proceedings. It is said that if full disclosure had been made, the trial would have completed in the Provincial Court by October 1990. Second, it is said that an abuse of the Court's process has occurred by virtue of the wilful withholding of material particulars by the Crown. It is also argued that this an aggravated case, in that the police deliberately misled not only the accused but also the Crown.

**46** The Crown has made the following concessions:

(1) Kollen was an agent of the R.C.M.P.

(2) This fact was properly recognized on May 30, 1989 by Inspector Kary, a senior member of the R.C.M.P., prior to final approval being given to the operation.

(3) The R.C.M.P. and the Crown are, for this purpose, indivisible. The Crown therefore knew or should have known that Kollen was an agent at the time of the arrest of the accused persons.

(4) This fact was not properly recognized by the R.C.M.P. in Vancouver, who deliberately refused to disclose the role of Kollen. By November 20, 1989, Crown counsel had recognized that Kollen's role was that of an agent. Crown counsel, however, was unable to obtain full details of Kollen's involvement until September 1990.

(5) Kollen's involvement should have been disclosed to the defence shortly after the arrest of the accused on June 9, 1989, and in any event, long before the commencement of the "Preliminary Inquiry".

**47** However, the Crown has argued that since disclosure has now been made there is no impediment to a fair trial on the merits of the case. The Crown argued that a stay of proceedings ought to be granted only when a fair trial cannot be held or is impossible. It is further said that there has been no appreciable prejudice to any of the accused and, in any event, not all of the delays are attributable to the Crown. It is also argued that there has been waiver on the part of the accused.

THE LAW

**48** A stay of proceedings is a stopping or arresting of judicial proceedings by the direction or order of a court. As defined in Black's Law Dictionary, 5th ed. (1979), it is a kind of injunction with which a court freezes its proceedings at a particular point, stopping the prosecution of the action altogether, or holding up some phase of it. See R. v. Jewitt (1985), 47 C.R. (3d) 193 (S.C.C.), at p. 203.

**49** The specific legal issues in this application are inter-related. It is alleged that the non-disclosure by the Crown has led to unreasonable delay. It is also alleged that the wilful nature of the non-disclosure, together with the conduct of the Crown, constitutes an abuse of process.

Disclosure

**50** It is settled law and a fundamental principle of justice that the Crown is under an obligation to provide full disclosure to an accused so that the latter may make full answer and defence.

**51** There is a general duty on the Crown to disclose all relevant information which advances its case, especially all evidence which may assist the accused, even if the Crown does not propose to adduce it. While the obligation is not absolute, the general principle is that information ought not to be withheld if there is a reasonable possibility that the withholding of the information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege. See R. v. Stinchcombe (1992), 68 C.C.C. (3d) 1, 9 C.R. (4th) 277.

Delay

**52** Section 11(b) of the Charter states that a person charged with a criminal offence has the right to be tried within a reasonable time. What is reasonable will depend upon the circumstances of each particular case. The seminal case on delay is R. v. Askov (1990), 79 C.R. (3d) 273, 59 C.C.C. (3d) 449 (S.C.C.). The Court held that a determination of whether a delay is reasonable will depend upon its length, the explanation, if any, and waiver and prejudice to the accused. In addition, the Court stated that while the primary objective of s.11(b) is to protect the rights of an accused, there is also a societal interest involved in ensuring that an accused person is tried within a reasonable time.

**53** The Supreme Court further considered this section in R. v. Smith, [1989] 2 S.C.R. 1120, 73 C.R. (3d) 1, and R. v. Morin (1992), 12 C.R. (4th) 1. In Morin the Court expanded somewhat upon the factors which ought to be considered. The Court stated that in determining the reasons for the delay a court ought to consider the following:

> "(a) Inherent time requirement of the case,
> (b) actions of the accused,
> (c) actions of the Crown,
> (d) limits on institutional resources, and

> (e) other reasons for delay; ..." (p. 13)

**54** Obviously there is no precise formula from which a court is able to determine whether a delay in unreasonable. Rather, the process requires a careful weighing of all relevant factors with the particular circumstances of any case. In describing this process, Sopinka J., at p. 13 (C.R.), stated:

> " The judicial process referred to as 'balancing' requires an examination of the length of the delay and its evaluation in light of the other factors. A judicial determination is then made as to whether the period of delay in unreasonable. In coming to this conclusion, account must be taken of the interests which s. 11(b) is designed to protect. Leaving aside the question of delay on appeal, the period to be scrutinized is the time elapsed from the date of the charge to the end of the trial. See R. v. Kalanj, [1989] 1 S.C.R. 1594, 70 C.R. (3d) 260, [1989] 6 W.W.R. 577, 48 C.C.C. (3d) 459, 40 C.R.R. 50, 96 N.R. 191. The length of this period may be shortened by subtracting periods of delay that have been waived. It must then be determined whether this period is unreasonable having regard to the interests s.11(b) seeks to protect, the explanation for the delay and the prejudice to the accused."

**55** In Smith, supra, the Court stated that it was incumbent upon the Crown to offer an explanation in circumstances where a long period of delay has resulted from a Crown request for an adjournment. At p. 1133 (S.C.R.), Sopinka J. stated:

> "In the absence of such an explanation, the Court would be entitled to infer that the delay is unjustified."

ABUSE OF PROCESS

**56** This Court has a discretion both at common law in its inherent jurisdiction and under s. 7 of the Charter to enter a stay of proceedings where there has been an abuse of the Court's process. In Jewitt, supra, the Court clarified the principles relating to the granting of a stay of proceedings where there has been an abuse of process. In adopting the reasoning in R. v. Young (1984), 46 O.R. (2d) 520, 40 C.R. (3d) 289 (O.C.A.), the Court, at p. 202, stated:

> "There is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those 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.

Subsequently, in R. v. Keyowski (1988), 62 C.R. (3d) 349, 40 C.C.C. (3d) 481 (S.C.C.), Wilson J. in effect stated that there were two types of abuse. At p. 350 (C.R.), she stated:

> "... A stay should be granted where 'compelling an

> accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency'... *or* where the proceedings are 'oppressive or vexatious'... " (emphasis added)

**57** More recently, in R. v. O'Connor (1994), 29 C.R. (4th) 40 (B.C.C.A), the Court discussed the distinction between the common law doctrine of abuse of process and a breach of s.7 of the Charter. The Court answered a question which had remained unanswered in Keyowski, supra, by stating that:

> "... it is impossible to treat the common law doctrine as though it has been subsumed in s. 7 of the Charter. There may well be a substantial overlap in the circumstances which would justify a remedy under either, ..."
>
> (p. 69)

**58** The Court went on to discuss applicable guidelines when a court is faced with concurrent applications under both the common law doctrine and s. 7. Further, at pp. 69-70, the Court stated:

> " Firstly, the answer will assist in an understanding of where the line that separates an abuse of process from a Charter violation is to be drawn in cases of non-disclosure. In the context of the present law relating to the Crown's duty of disclosure in criminal cases, it cannot be that all failures in such duty will result in what the law recognizes as an abuse of process. A determination of what it is, in a disclosure context, that distinguishes a true abuse of process from a 'mere' Charter violation will assist in a determination of whether the result reached by the trial judge in this case was right as a matter of law.
>
> Secondly, if it is concluded that the trial judge erred in his application of the common law doctrine, it will be necessary to consider whether a similar form of relief was otherwise available to the respondent. There would be no point in ordering a new trial in this case if the same result ought to have prevailed under s.24 of the Charter."

**59** The Court went further and stated that in cases of interference with the right to make full answer and defence there must be an intent on the part of the Crown in order to conclude that there has been an abuse of process. (See p. 79.)

**60** It is apparent from the authorities that a stay of proceedings ought to be granted only in the clearest of cases. For there is a societal interest in ensuring that criminal cases ought to be tried on their merits.

CONCLUSION

**61** The stay of proceedings is justified on the grounds of both delay and abuse of process.

**62** The delay in this case was both unreasonable and unjustified. The accused were arrested in June 1989. They elected to be tried in the Provincial Court. Had proper disclosure been made, the case in all likelihood would have been completed by October 1990. However, because material evidence relating to the informer Kollen was deliberately withheld from the defence, the trial in the Provincial Court was converted to a preliminary inquiry. In making this unusual order, Judge Groberman, an experienced trial judge, expressed his frustration by stating that the defence had proceed under a misconception as to the role of Kollen.

**63** After a number of pre-trial conferences which were held presumably to expedite matters in dispute, the trial finally commenced in this Court on January 10, 1992. However, the proceedings in this Court consisted almost entirely of a series of motions by the defence for better particulars. In fact, aside from the commission evidence which was taken in the Netherlands, no evidence was ever called during the lengthy proceedings in this Court.

**64** I found it somewhat disturbing that after the February 18, 1992 ruling was made ordering the disclosure of legal advice received by the R.C.M.P., it was not until May 10th that the Crown or the R.C.M.P. filed a certificate under s.37 of the Evidence Act and thereby raised essentially the same objections which were made in February. Of course, those rulings were appealed by the Crown until the Supreme Court of Canada finally put the matter to rest but not until October 1993.

**65** Counsel in their thorough submissions have attempted to analyze the various delays and attribute them to one side or the other. I think it can be safely said that while some of the delay is attributable to the availability of defence counsel, the vast majority of the delay is clearly attributable to the Crown by virtue of its lack of disclosure. As early as July 12, 1989, Mr. Bolton had specifically asked if there any informers that the Crown was relying on. It is no answer for the Crown to argue that since disclosure has now substantially been made, the case can proceed, five years after the commencement of the proceedings. The Supreme Court of Canada in the aforementioned authorities has emphasized the societal interest for trials to be completed within a reasonable time.

**66** In O'Connor, supra, the Crown had failed to make full disclosure. The learned trial Judge entered a stay of proceedings. The Court of Appeal, in allowing a Crown appeal and granting a new trial, suggested a proper course of action may have been to adjourn the proceedings. In response to this reasoning, it should be noted that there were numerous adjournments in this case so that particulars may be provided.

**67** As the Supreme Court said in Morin, supra, the process in determining whether a delay is reasonable requires a balancing of the various factors. In the circumstances of this case the delay is clearly unreasonable.

**68** In dealing with the issue of abuse, it should be noted that the Crown has conceded that the police deliberately refused to disclose the role of Kollen. The Crown has also conceded that Sergeant Silzer did not tell the truth when he testified in the Provincial Court that he did not know Kollen. It was clearly known by everyone involved that Kollen's extraordinary role would have to be disclosed. It was well-known by the police that he had "orchestrated the whole operation".

**69** This case was most unusual, for reasons I have already mentioned. However, it was not a difficult case. While the circumstances were unusual, they were not at all complex and there is no good reason why full and complete disclosure was not made at an early date.

**70** No reasonable person could object to the initial objective of the police investigation, which was to arrest drug dealers in Canada. The criminal justice system attempts to create a balance between the need for police to conduct their investigations on the one hand, and the need to protect the rights of individual citizens who are presumed to be innocent on the other hand. It cannot be over-emphasized that the Crown has a duty to provide all material particulars to the defence. The reasons why the Crown has this duty are many and obvious, the most important of which is to prevent wrongful convictions.

**71** Much has been said about the propriety or otherwise of the police providing a sample of narcotics to the accused. The defence alleged that the police were "trafficking in drugs". The police position was that the drugs were distributed with a bona fide intent in the course of an investigation in order to apprehend known drug traffickers. Since the trial did not come to its natural conclusion, I am not in a position to criticize this novel investigative technique.

**72** The circumstances of this case fall within the definition of abuse as set out in Jewitt, supra, and O'Connor, supra. This is one of those cases in which the principles of justice which "underlie the community's sense of fair play and decency" have been offended. Moreover, to use the words in O'Connor, supra, this is not a case of a "mere" Charter violation.

**73** In conclusion, I must say I have been most troubled by the circumstances relating to this case. It was only after much anxious reflection that I concluded that the proceedings ought to be stayed. The case has had a most unsatisfactory conclusion. Criminal prosecutions should not end in this fashion. It is in the public interest that criminal cases be decided on their merits. Accordingly, it was with considerable concern and regret that a stay of proceedings was granted.

OPPAL J.

cp/d/mrz/dcj/DRS/DRS/DRS/qlcct