Indexed as:

R. v. Askov

Elijah Anton Askov, Ralph Hussey, Samuel Gugliotta and Edward Melo, appellants;
v.
Her Majesty The Queen, respondent.

[1990] 2 S.C.R. 1199

[1990] S.C.J. No. 106

File No.: 20560.

Supreme Court of Canada

1990: March 23 / 1990: October 18.

Present: Dickson C.J.* and Lamer C.J. and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and McLachlin JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO (142 paras.)

* Chief Justice at the time of hearing. ** Chief Justice at the time of judgment.

Constitutional law -- Charter of Rights -- Trial within a reasonable time -- Delay of almost two years in bringing case to trial following committal -- Delay resulting chiefly from institutional problems -- Whether right to be tried within reasonable time infringed -- Canadian Charter of Rights and Freedoms, s. 11(b).

Appellants were charged with conspiracy to commit extortion in November 1983. A, H and M were also charged with several related offences and detained in custody for almost six months before being released on recognizances. G was released on a recognizance shortly after his arrest. All counsel agreed on a date early in July 1984 for the preliminary hearing, but it could not be completed until September. A trial was then set for the first available date, in October 1985. The case could not be heard during that session, and was put over for trial to September 1986, almost

two years after the preliminary hearing. When the trial finally began, appellants moved to stay the proceedings on the ground that the trial had been unreasonably delayed. The trial judge found that the major part of the delay following appellants' committal stemmed from institutional problems and granted the stay. The Court of Appeal found: (1) no misconduct on the part of the Crown; (2) no indication of any objection by the appellants to any of the adjournments; and (3) no evidence of any actual prejudice to the appellants. It accordingly set aside the stay and directed that the trial proceed.

[page1200]

Held: The appeal should be allowed and a stay of proceedings directed.

Per Dickson C.J. and La Forest, L'Heureux-Dubé, Gonthier and Cory JJ.: Under s. 11(b) of the Charter, any person charged with an offence has the right to be tried within a reasonable time and this right, like other specific s. 11 guarantees, is primarily concerned with an aspect of fundamental justice guaranteed by s. 7. The primary aim of s. 11(b) is to protect the individual's rights and to protect fundamental justice for the accused. A community or societal interest, however, is implicit in the section in that it ensures, first, that law breakers are brought to trial and dealt with according to the law and, second, that those on trial are treated fairly and justly. A quick resolution of the charges also has important practical benefits, since memories fade with time, and witnesses may move, become ill or die. Victims, too, have a special interest in having criminal trials take place within a reasonable time, and all members of the community are entitled to see that the justice system works fairly, efficiently and with reasonable dispatch. The failure of the justice system to do so inevitably leads to community frustration with the judicial system and eventually to a feeling of contempt for court procedures.

The court should consider a number of factors in determining whether the delay in bringing the accused to trial has been unreasonable: (1) the length of the delay; (2) the explanation for the delay; (3) waiver; and (4) prejudice to the accused. The longer the delay, the more difficult it should be for a court to excuse it, and very lengthy delays may be such that they cannot be justified for any reason. Delays attributable to the Crown will weigh in favour of the accused. Complex cases, however, will justify delays longer than those acceptable in simple cases. Systemic or institutional delays will also weigh against the Crown. When considering delays occasioned by inadequate institutional resources, the question of how long a delay is too long may be resolved by comparing the questioned jurisdiction to others in the country. The comparison of similar and thus comparable districts must always be made with the better districts, not the worst. The comparison need not be too precise or exact; rather, it should look to the appropriate ranges of delay in determining what is a reasonable limit. In all cases it will be incumbent upon the Crown to show that the institutional delay in question is justifiable. Certain actions of the accused, on the other hand, will justify delays. A waiver by the accused [page1201] of his rights will justify delay, but the waiver must be

informed, unequivocal and freely given to be valid.

Here, the delay of almost two years following the preliminary hearing was clearly excessive and unreasonable. The Crown did not show that the delay did not prejudice the appellants, and nothing in the case was so complex or inherently difficult as to justify a lengthy delay. This trial was to be heard in a judicial district notorious for the time required to obtain a trial date and figures from comparable districts demonstrate that the situation there is unreasonable and intolerable.

Per McLachlin J.: Cory J.'s reasons were agreed with and comments were made on the process of determining whether a trial has been unreasonably delayed. Section 11(b) is designed to serve the interests of society generally, as well as those of the accused and the prosecution. Two elements must be assessed under s. 11(b): the length of the delay, and its reasonableness. If the delay is prima facie excessive, it is necessary to go on to consider whether it is nonetheless reasonable. Reasonableness may depend on a variety of factors, including the prejudice caused by the delay. Absent waiver, a certain prejudice in a long-delayed trial may be inferred if not rebutted by the Crown. Here, the delay was prima facie excessive and unreasonable and entitled the accused to the benefit of s. 11(b).

Per Sopinka J.: Cory J.'s reasons were agreed with, subject to Lamer C.J.'s comments on the purported societal interest in s. 11(b).

Per Wilson J.: Cory J.'s reasons were agreed with except on two issues. Section 11(b) of the Charter protects only the accused's interest in a speedy trial, not the societal interest. Nor does the section protect an accused from prejudice arising from the simple fact of being charged, but only from prejudice arising from the Crown's failure to try him or her within a reasonable time. The former is accepted as a necessary incident of our justice system. The latter is not.

Per Lamer C.J.: Cory J.'s reasons were mostly agreed with, subject to two qualifications. While society may have an interest in the functioning of the criminal justice system, this interest is not what s. 11(b) is designed to protect. Further, because of the very nature of our criminal justice system, there exists an irrebuttable presumption of prejudice to the accused from the moment the charge is laid. The accused need not demonstrate [page1202] any further manifestations of prejudice beyond the kind presumed in order to establish an infringement of s. 11(b).

Cases Cited

By Cory J.

Considered: Mills v. The Queen, [1986] 1 S.C.R. 863; R. v. Rahey, [1987] 1 S.C.R. 588; R. v. Conway, [1989] 1 S.C.R. 1659; R. v. Smith, [1989] 2 S.C.R. 1120; referred to: Barker v. Wingo, 407 U.S. 514 (1972); R. v. Antoine (1983), 5 C.C.C. (3d) 97; Re Regina & Beason (1983), 7 C.C.C. (3d) 20; R. v. Heaslip (1983), 9 C.C.C. (3d) 480; R. v. Dennis (1984), 14 D.L.R. (4th) 205; R. v. Belton (1982), 3 C.C.C. (3d) 427; R. v. Perry (1984), 14 C.C.C. (3d) 5; Re Kott & The Queen

(1983), 7 C.C.C. (3d) 317; Korponay v. Attorney General of Canada, [1982] 1 S.C.R. 41; Park v. The Queen, [1981] 2 S.C.R. 64.

By McLachlin J.

Referred to: Barker v. Wingo, 407 U.S. 514 (1972).

By Wilson J.

Distinguished: Barker v. Wingo, 407 U.S. 514 (1972); referred to: R. v. Rahey, [1987] 1 S.C.R. 588.

By Lamer C.J.

Considered: Mills v. The Queen, [1986] 1 S.C.R. 863; referred to: R. v. Turpin, [1989] 1 S.C.R. 1296.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 10(b), 11(b), (d), (h), 24.
Criminal Code, R.S.C., 1985, c. C-46, s. 599.
United States Constitution, Sixth Amendment.

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Howland, W.G.C. "Reports on the Administration of Justice in Ontario on the Opening of the Courts for 1990" (1990), 24 L. Soc. Gaz. 5.
Zuber, T.G. Report of the Ontario Courts Inquiry. Toronto: Queen's Printer, 1987.

APPEAL from a judgment of the Ontario Court of Appeal (1987), 37 C.C.C. (3d) 289, 60 C.R. (3d) 277, 33 C.R.R. 319, 22 O.A.C. 299, setting aside the stay of proceedings granted by Judge Bolan. Appeal allowed.

[page1203]

Michael Code, for the appellant Askov.
Clayton Ruby, for the appellant Hussey.
David McCombs and David E. Harris, for the appellant Gugliotta.
Joseph Bloomenfeld, for the appellant Melo.
W. Brian Trafford, Q.C., and Susan Chapman, for the respondent.

Solicitors for the appellants Askov and Hussey: Ruby & Edwardh, Toronto.
Solicitors for the appellant Gugliotta: Carter, McCombs & Minden, Toronto.
Solicitors for the appellant Melo: Bloomenfeld, Garton, Toronto.
Solicitor for the respondent: W. Brian Trafford, Toronto.

The judgment of Dickson C.J. and La Forest, L'Heureux-Dubé, Gonthier and Cory JJ. was delivered by

1 **CORY J.**:-- Section 11(b) of the Canadian Charter of Rights and Freedoms provides that any person charged with an offence has the right to be tried within a reasonable time. What constitutes an unreasonable delay of a trial must be determined on this appeal. In order to reach a conclusion it will be necessary to consider and apply criteria or factors which should be used to ascertain if a delay is unreasonable and in particular, to consider the consequences of so-called institutional delays.

Factual Background

2 All the appellants, Askov, Hussey, Melo and Gugliotta, were charged with conspiracy to commit extortion against Peter Belmont. As well, Askov, Hussey and Melo were jointly charged with the offences of possession of a prohibited weapon, possession of a weapon for a purpose dangerous to the public peace, pointing a firearm and assault with a weapon. Hussey was also charged with criminal negligence in the operation of a motor vehicle.

3 Peter Belmont operated an agency in Montréal which supplied "exotic" dancers to licensed premises in Ontario. He had once been in the business of supplying dancers to establishments in the Toronto region and wished to do so again. The appellant Melo had by then established himself as the supplier of exotic dancers in that district. As a result of his intrusion into what had become Melo's preserve, Belmont alleged that he was harassed by the appellants. He said he had been requested by them to pay a large commission for the privilege of operating in Toronto. Belmont [page1204] informed the police of the threats that had been made to him. As part of their investigation into these allegations, the police assigned an undercover officer to act as driver and bodyguard for Belmont.

4 Belmont and his "bodyguard" met the appellants at a bar in Hamilton on November 5, 1983. At this meeting Belmont refused the suggestion that he would pay a 50 per cent commission to Melo and Gugliotta for his operations in the Toronto area. On November 12 Belmont and his bodyguard visited a tavern in Concord, Ontario. When they left they were pursued and stopped by a vehicle driven by Hussey with Melo and Askov as passengers. Melo and Askov, brandishing a sawed-off shotgun and a knife, got out of their car, came over to Belmont and threatened him.

5 Luckily for Belmont, the police had the area under surveillance and were monitoring the events as they occurred. They quickly moved in and arrested Melo and Askov at the scene. Hussey fled in the car, but later turned himself in to the police and was charged on November 14. Gugliotta was apprehended on November 30.

6 It is necessary to set out the proceedings following the arrest in some detail. The appellants Melo, Askov and Hussey were initially denied bail. They were detained in custody for almost six months. On May 7, 1984, they were each ordered to be released on a recognizance of $50,000. Gugliotta was released on December 2, 1983 shortly after his arrest on a recognizance of $20,000. The terms of release for all the appellants involved reporting to the police and abstention from communicating with their co-accused. These conditions were varied from time to time to permit more freedom of movement for the appellants. All the applications which were made for more lenient bail conditions were granted. Nonetheless, the appellants remained under considerable restraint.

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7 Askov was re-arrested on an unrelated charge on October 1, 1984.

8 With three of the accused in custody, the Crown, in a commendable manner, was prepared as soon as December 1983 to set an early date for the preliminary hearing. However, at the request of the appellants the matter was put over to February 14, 1984 when all counsel agreed on a date in the first week of July for the preliminary hearing to be held. At this time it was specifically indicated that an earlier date could be arranged if a request was made by the appellants, but none was forthcoming. When the preliminary hearing commenced on July 4, 1984, it could not be completed because another preliminary had been set for a later day in the same week. As a result, the preliminary hearing could not be completed until September 21, 1984, some ten months after the arrests.

9 On October 1, 1984, the appellants appeared before Judge Keenan presiding in the assignment court. A trial date was set for the first available date which was October 15, 1985, more than a year away and nearly two years from the date of the initial arrests. Despite what seems far too lengthy a delay, an earlier date could not be set due to other cases which had priority either because the accused was in custody or because the offence date was earlier than that of the case at bar. On October 25, 1985, when it was apparent that the case simply could not be heard during that session, counsel for all the appellants and the Crown appeared and the case was put over for trial to September 2, 1986. When the trial finally began on that date, counsel for the appellants moved to stay the proceedings on the grounds that the trial had been unreasonably delayed. The stay was granted by order of Judge Bolan, the senior judge of the District Court of the Judicial District of Peel. The Crown appealed the order of Bolan Dist. Ct. J. to the Court of Appeal, which set aside the

stay and directed that the trial proceed.

[page1206]

The Positions of the Courts Below

The District Court

10 Bolan Dist. Ct. J., presiding at the trial, found that a period of thirty-four months to bring a case to trial was prima facie excessive. He stated:

> ... two years in bringing a case to trial once it is in District Court is too long, unless, of course, there are exceptional circumstances. And in this case, there are none.

He noted that a portion of the delay prior to the committal of the appellants was attributable to them and did not take into consideration any delay prior to the committal for trial. He found that the major part of the balance of the delay was the result of institutional problems. He found the delays to be unreasonable and attributable to a "chronic shortage of institutional resources in the Judicial District of Peel". He observed:

> I am satisfied that the reason for the delay was caused by the insufficient institutional resources in the Judicial District of Peel. Even if more judges had been available for the jury sittings of October 15, 1985, there would have been no courtrooms in which to hold the trials. It is obvious that this jurisdiction lacks sufficient resources to meet the demands and administer the criminal justice system with minimal delay. This has caused a systematic delay in the administration of justice. It was this way when I came here in 1981 and it continues to be this way today [September 1986]. Even this month cases which are to be set for trial are set for September and October of 1987. Those responsible for the proper administration of justice have known about this systematic delay for at least five years; yet nothing has been done about it.
>
> . . .
>
> In my view there has been an unreasonable delay in bringing this case on for trial and the delay has been caused by the chronic shortage of institutional resources in the Judicial District of Peel.

11 Bolan Dist. Ct. J. found that the appellants had not waived their right to a trial within a reasonable time. While no objections to the delay had earlier been raised by appellants' counsel, he

determined that consent to a delay and hence waiver could not be inferred from their silence. Further, even if they had insisted upon their rights, the institutional limitations on trials could not have been overcome. [page1207] On each occasion the earliest possible trial dates had been allotted to them. Even if an earlier date had been given to them, it could only have been accomplished at the expense of another accused waiting for trial.

12 The trial judge also found that the appellants had been prejudiced by the delay on the basis of the six months spent in custody by three of the appellants and as well by the restrictive conditions imposed by the orders for interim release.

The Court of Appeal

13 In carefully considered reasons, the Court of Appeal reviewed the decisions of this Court in Mills v. The Queen, [1986] 1 S.C.R. 863, and in R. v. Rahey, [1987] 1 S.C.R. 588. From those cases were derived the factors which it considered should be taken into consideration and they were applied to the case at bar. The Court of Appeal decided that the appellants' rights under s. 11(b) had not been infringed. It found (1) that there was no misconduct on the part of the Crown resulting in the delay or any part of it; (2) that there was no indication of any objection by any of the appellants to any of the adjournments; (3) that there was no evidence of any actual prejudice to the appellants caused by the delay. This conclusion was reached primarily on the basis that any hardship that may have existed in the bail terms was cured when the orders were varied whenever such a request was made by the appellants.

14 The Court of Appeal found that "perhaps the most important factor" in reaching its decision that there had been no breach of the Charter was the conduct of the appellants when the final adjournment was granted and the last trial date set. At that time, although some of the appellants announced that they were ready to proceed on the first scheduled date, not any of them objected to the one year adjournment and no allegation that any prejudice had been suffered as a result of the delay was advanced. In the opinion of the Court of Appeal the appellants should have objected to this [page1208] delay even if they thought such an objection was futile. It was found that the silence seemed to be a deliberate move aimed at concealing the intention of the appellants to seek the Charter-based remedy of a stay later in the proceedings. The Court determined that there had been no breach of the Charter right to a trial within a reasonable time and as a result it was unnecessary to consider the appropriate remedy which might have been ordered pursuant to s. 24 of the Charter.

15 It is significant that the opinion of the Court of Appeal, as to the most important factor in the decision, was based upon an incomplete transcript of the day's proceedings before the Assignment Court Judge.

Judicial Consideration of the Principle of Providing a Trial Within a Reasonable Time

The United States

16 In the United States the Sixth Amendment ensures that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial". The United States Supreme Court considered the issue in Barker v. Wingo, 407 U.S. 514 (1972). In that case Barker, who was charged with murder, was brought to trial five years after the murder was committed. The delay was caused by the necessity of trying an accomplice beforehand. This prerequisite trial was extremely complicated; the accomplice was tried no less than six times. During this ongoing process, Barker initially had agreed to continuances or adjournments. He only began to assert his right to a speedy trial three and one-half years after the charges were laid.

17 The court held that a flexible approach should be taken to cases involving delay and that the multiple purposes or aims of the Sixth Amendment must be appreciated. Powell J., giving the reasons for the court, recognized the general concern that all persons accused with crimes should be treated according to fair and decent procedures. He particularly noted that there were three individual interests which the right was designed to protect. They were:

[page1209]

(i) to prevent oppressive pre-trial incarceration;
(ii) to minimize the anxiety and concern of the accused; and
(iii) to limit the possibility that the defence will be impaired or prejudiced.

18 However, Powell J. went on to observe that unlike other constitutional rights which only have an individual interest, the right to a speedy trial involved the added dimension of a societal interest. He found that a delay could result in increased financial cost to society and as well, could have a negative effect upon the credibility of the justice system. Further, it was noted that a delay could work to the advantage of the accused. For example, the fostering of a delay could become a defence tactic designed to take advantage of failing memories or missing witnesses or could permit the accused to manipulate the system in order to bargain for a lesser sentence. Specifically, he stated at p. 521 that the right to a speedy trial was:

> ... a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate. As a consequence, there is no fixed point in the criminal process when the State can put the defendant to the choice of either exercising or waiving the right to a speedy trial.

19 In order to balance the individual right and the communal aspect of the Sixth Amendment, the

U.S. Supreme Court adopted an approach of ad hoc balancing "in which the conduct of both the prosecution and the defendant are weighed" (p. 530). The balancing is undertaken by reference to four factors identified by Powell J. as the test for infringement of the right to a "speedy trial". They are as follows:

(i) the length of the delay;
(ii) the reason for the delay;
(ii) the accused's assertion of the right; and
(iv) prejudice to the accused.

The first factor is the triggering mechanism or threshold determination of the excessiveness of the [page1210] delay. If that delay appears prima facie excessive, the Court must then consider the three remaining factors to determine whether the accused has been deprived of the Sixth Amendment right.

Position in Canada Subsequent to the Passing of the Charter

20 Immediately following the passage of the Charter, the approach taken by the U.S. Supreme Court in Barker v. Wingo, supra, was widely approved and adopted. See R. v. Antoine (1983), 5 C.C.C. (3d) 97 (Ont. C.A.), Re Regina & Beason (1983), 7 C.C.C. (3d) 20 (Ont. C.A.), R. v. Heaslip (1983), 9 C.C.C. (3d) 480 (Ont. C.A.) and R. v. Dennis (1984), 14 D.L.R. (4th) 205 (N.W.T.C.A.). However, that approach was not universally followed: see e.g. R. v. Belton (1982), 3 C.C.C. (3d) 427 (Man. C.A.), R. v. Perry (1984), 14 C.C.C. (3d) 5 (N.B.C.A.), and Re Kott & The Queen (1983), 7 C.C.C. (3d) 317 (Que. C.A.).

Mills v. The Queen

21 The issue was first considered by this Court in Mills v. The Queen, supra. Lamer J. in his dissenting reasons called into question the appropriateness of adopting the American approach in the Canadian setting.

22 In that case the preliminary inquiry was not begun until nineteen months after the arrest and one month after the proclamation of the Charter. Mills moved for a stay based on the contention that the rights guaranteed to him under s. 11(b) of the Charter had been infringed. The Crown conceded that ten months of the delay was due to its negligence. The outcome of the case turned upon the resolution of the question whether the court conducting a preliminary inquiry was a "court of competent jurisdiction" so as to empower a provincial court judge to hear and determine Charter questions. This Court was unanimously of the view that a provincial court judge sitting on a preliminary hearing was not a court of competent jurisdiction capable of granting a remedy under s. 24(1). The majority further expressed the opinion that such a provincial court judge was not even capable of determining under s. 24(1) whether a [page1211] Charter violation had occurred for the purpose of excluding evidence pursuant to s. 24(2). The minority would have granted such power to the provincial court judge.

23 In his dissenting reasons, Lamer J., as he then was, with Dickson C.J. concurring, set forth the basis for determining whether or not the delay of a trial was unreasonable. Although he favoured a flexible balancing test, he rejected the approach taken in Barker v. Wingo, supra. His difference with the reasoning in that case was grounded on the proposition that in the context of the Canadian Charter, the s. 11(b) right was by its very nature an individual right and that the provision did not have a collective or societal dimension. It was his opinion that the societal interest in prompt and effective prosecution of criminal cases found no expression in s. 11(b), although that interest may have been incidentally satisfied by the provision. At page 918 he stated:

> ... the fundamental purpose of s. 11(b) is to secure, within a specific framework, the more extensive right to liberty and security of the person .... The purpose of s. 11(b) can, in other words, be ascertained by reference to s. 7 of the Charter .... Hence, the focus for the analysis and proper understanding of s. 11(b) must be the individual, his or her interests and the limitation or infringement of those interests.

24 It was his opinion that the "liberty interest" inherent in s. 11(b) addresses the protection of the physical freedom of the accused against unduly lengthy pre-trial detention. The "security of the person interest" recognizes the need for the protection of more than just the physical integrity of the accused thereby providing a safeguard against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation". These vexations were described as the "stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction". In Lamer J.'s opinion all these are strictly individual rights. Any societal interest in a fair trial and any prejudice to the accused's ability to make full answer and defence as a result of [page1212] delay was, in his opinion, embodied in the s. 11(d) right to a fair trial.

25 As a result of this expressed view of the purpose of s. 11(b), Lamer J. developed a different balancing test than that set out in Barker v. Wingo. Since there was no need to balance any interest of society, the test did not need to take into account the conduct of the parties, particularly that of the accused. As well, actual prejudice to the accused did not need to be considered, as actual prejudice is also a component of society's interest in a fair trial. For Lamer J. the four factors to be considered in determining the reasonableness of any given delay were the following:

> (i) the growing impairment of the interests of the accused by the passage of time;
> (ii) any waiver of a time period;
> (iii) the time requirements inherent in the nature of the case and
> (iv) institutional resources.

26 He noted that the impairment of the liberty interest of the individual accused can be easily ascertained where there is pre-trial detention or the release of the accused pending trial is made

subject to bail conditions. With regard to the impairment of the security of the person, Lamer J. found that an objective standard was needed to avoid placing the burden of demonstrating subjective suffering on the accused. The proper approach in his view was to recognize that the potential for prejudice arising from delay forms the basis of the right, but at the same time to acknowledge that actual prejudice need not be and indeed is not relevant to establishing a s. 11(b) violation. This position is the basis for the following two propositions which are set forth at p. 926:

> First, prejudice is part of the rationale for the right and is assured by the very presence of s. 11(b) in the Charter. Consequently, there exists an irrebuttable presumption that, as of the moment of the charge, the accused suffers a prejudice the guarantee is aimed at limiting, and that the prejudice increases over time.
>
> Second, actual prejudice is, therefore, irrelevant when determining unreasonable delay. Actual prejudice will, [page1213] however, be relevant to a determination of appropriate relief .... Prejudice to the liberty and security of the person, the former objectively ascertainable and the latter presumed, must be kept to a minimum if the presumption of innocence is to be respected.

27 On the question of waiver, Lamer J. expressed the opinion that "[d]elay which is requested, caused by, or consented to, by the accused should normally be excluded from consideration" except in circumstances where the accused's delay was caused by a previous state delay, that is to say a key defence witness had moved during the period of a delay caused by the Crown. It was emphasized that silence on the part of an accused is not sufficient to constitute a waiver. Rather, it must be expressed and informed.

28 With regard to inherent time requirements, it was the view of Lamer J. that the resolution of the issue should be based upon a determination of the period normally required for the preparation and completion of a particular case. That time was to be based upon the assumption that adequate institutional resources and facilities were available. Then having regard to the number and complexities of the charges and the number of accused, a comparison should be made between the "normal" period and the actual delay in the particular case.

29 Lastly, on the matter of institutional delay, Lamer J. recognized that in Canada great deference must be given to the decisions made by regional authorities regarding the local situation resulting from the wide differences which exist between jurisdictions in their terrain, including differences in population and financial resources. However, that deference must have some limitations. If some reasonable limits were not imposed, the lack of institutional resources could all too easily become an ever present excuse for allowing prolonged and unacceptable delays in those jurisdictions which had past histories of long delays. To take such an approach would legitimize both current and future delays. It was said that the appropriate gauge for comparison should be those jurisdictions that have good records for prompt trials and fewer indications of systemic delays. These [page1214]

jurisdictions would provide the appropriate standard because they had obviously balanced the demands of the system and the allocation of the available resources in order to administer criminal justice with a minimal delay.

30 In order to give the governments of those jurisdictions which required time to allocate resources to speed the trial of criminal actions, Lamer J. would provide for a "transitional period". During this period courts could more readily excuse delays caused by institutional limitations. Such a transitional period was found to be necessary in light of the finality of the remedy of the stay of proceedings.

31 Wilson J., also in dissent on the jurisdictional issue, accepted the general analysis set out by Lamer J. pertaining to s. 11(b) except with regard to the issue of prejudice. She was of the opinion that there should be no irrebuttable presumption of prejudice. Rather, actual prejudice was a factor to be considered in each case. She put forward her position in these words at p. 967:

> What the accused has to demonstrate under s. 11(b), in my opinion, is that he has suffered an impairment of his liberty and security interests as a result of the Crown's failure to bring him to trial within a reasonable time, not as a result of the Crown's having charged him.

She expressed the view that this requirement flows from a "fair trial" interest which is in certain contexts more apposite to an analysis under s. 11(b) than s. 11(d). That is to say, it is implicit in her reasons that one of the underlying goals of s. 11(b) is a collective interest in ensuring that delays do not impair fair trials and more specifically that the accused should not be deprived by the delay of the right to make full answer and defence. Such a deprivation would result in a prejudice flowing from the delay itself and not from the mere fact of being charged with a criminal offence. Therefore, in her view, a stay should be granted only in those cases where the delay actually prejudiced the accused or adversely affected the ability of an accused to obtain a fair trial.

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R. v. Rahey

32 The Court next examined the application of s. 11(b) in R. v. Rahey, supra. Rahey was charged with six counts of making false returns in his income tax forms and one count of wilful income tax evasion. His trial before a provincial court judge began six months after he was charged. In the eleven-month period which followed the closing of the Crown's case there were no fewer than nineteen adjournments, all initiated by the trial judge. For nine of these adjournments, Rahey made no objection. When the judge ordered further adjournments, he contended that they constituted a violation of his s. 11(b) Charter rights. He brought an application to stay before the Supreme Court

of Nova Scotia and later an appeal to this Court where a stay of proceedings was granted.

33 Four judges delivered written reasons. Lamer J., with Dickson C.J. concurring, restated his position in Mills, but extended the "transitional period" to include the period up to the issuance of the reasons in Rahey. Wilson J., with Estey J. concurring, maintained her position set forth in Mills and referred again to the necessity of focussing on the prejudice resulting from the unreasonable delay and not upon the prejudice flowing from the charge. Le Dain J., with Beetz J. concurring, supported the approach taken by the U.S. Supreme Court in Barker v. Wingo and by the Ontario Court of Appeal in Beason and Heaslip. He agreed with Wilson J. that the "fair trial" interests are a part of the s. 11(b) Charter rights. Le Dain J. would have required that the accused show prima facie unreasonableness before the Court proceeded to the second step of investigating the reasons for delay and the third step of determining whether there was actual prejudice to the accused. La Forest J., with McIntyre J. concurring, adopted a position that fell between the approaches of Wilson J. and Lamer J. He recognized that the fair trial interest was a consideration to be taken into account and as a result that prejudice to the accused does not arise automatically.

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R. v. Conway

34 In R. v. Conway, [1989] 1 S.C.R. 1659, Conway sought to obtain from this Court a stay of proceedings to prevent a third trial which would take place more than five years after the initial charge of murder had been laid.

35 Conway was charged with first degree murder in connection with the stabbing death. Some sixteen months after he was charged, the accused was tried and convicted of the included offence of second degree murder. An appeal was taken and one year later a new trial was directed by the Court of Appeal. It was agreed that there was no time lost during the period from the launching of the appeal until the order was given by the Court of Appeal directing a new trial. Conway then had difficulty finding a counsel to represent him at the second trial. It was conceded that the problem arose in no small part from Conway's own actions. After a long series of motions brought by Conway for adjournments and changes of venue, a second trial was held which resulted in a mistrial. At the opening of the third trial the accused applied for a stay based on abuse of process and unreasonable delay. A stay was granted by the trial judge, but overturned by the Court of Appeal.

36 L'Heureux-Dubé J., writing for the majority of a panel of five judges, which included Dickson C.J. and La Forest J., dismissed the appeal and rejected the stay. She held that the overall delay did not prevent the accused from obtaining a fair trial. She recognized that while there was agreement as to the general approach to be used, that is to say, that there had to be a balancing of a number of

factors, there was still disagreement on what factors should be considered. She concluded that the Court should take a flexible and functional approach to the issue of delay. The factors that she found should be considered included prejudice suffered by the accused; whether or not there had been a waiver by the accused; the inherent time requirements in the trial and appeal; and the limitations on institutional resources. The critical factor in the decision was the conduct of the [page1217] accused Conway who was responsible for much of the delay. It was held that the rest of the delay was justified by the inherent time requirements of the case. Further, it was noted that it was impossible to conclude that the accused had been prejudiced.

37 Lamer J., in separate reasons, concluded that the actions of the accused constituted a waiver during the transitional time period which he had referred to in his reasons in Mills and Rahey. Since the case was pre-Rahey, in his view it should be decided on the law which was applicable before the Rahey decision. He would therefore have refused the stay.

38 Sopinka J., in dissent, found that the delay was prima facie unreasonable. In his opinion it was incumbent on the Crown to justify the delay. He concluded that once the accused had established a prima facie case, the onus of proving reasonableness shifted to the Crown.

R. v. Smith

39 The facts in R. v. Smith, [1989] 2 S.C.R. 1120, are relatively straightforward. Smith was charged with theft. The preliminary inquiry could not be scheduled until over a year had passed from the time he was charged. The institutional reasons which caused this delay arose from the scheduling of the preliminary hearing for four days in August, at a time when the provincial court judges were on holiday. The preliminary hearing could not be rescheduled until late in December because the investigating officer was unavailable before that date. Once again the scheduled December date came within a holiday period for provincial court judges and a further adjournment was required. When the case finally came to trial, an application was brought for a stay which was granted.

40 In this Court, Sopinka J., writing for all members of the Court, upheld the stay. He recognized that there was still a considerable disagreement as to the factors that should be taken into account on the balancing process and also with regard to the composition of the constituent components of the [page1218] prejudice issue. However, he was of the view that the problem did not have to be dealt with in light of the facts of the case. Rather, using the "flexible and functional" approach set forth in Conway, the case could be readily decided "on the basis of principles that have been accepted in" Mills, Rahey and Conway. At page 1131, he identified the four factors that must be weighed under this approach:

(1) the length of the delay;
(2) the reason for the delay, including limits on institutional resources and the inherent time requirements of the case;
(3) waiver of time periods; and,

(4) prejudice to the accused.

Sopinka J. duly noted that there was disagreement among members of the Court as to how these factors were to be weighed in the balancing process and as well as to the constituent components of the fourth factor, namely prejudice to the accused.

41 On the facts of Smith, Sopinka J. determined that the length of time was longer than could be justified particularly in light of the cause of the delays. He found that there had been no waiver by the accused and that there were no institutional limitations which could justify the delay. On the issue of prejudice to the accused, he stated at pp. 1138-39:

> Having found that the delay is substantially longer than can be justified on any acceptable basis, it would be difficult indeed to conclude that the appellant's s. 11(b) rights have not been violated because the appellant has suffered no prejudice. In this particular context, the inference of prejudice is so strong that it would be difficult to disagree with the view of Lamer J. in Mills and Rahey that it is virtually irrebuttable. It is a more difficult question in contexts in which greater resort is made to this factor because the case is otherwise closer to the line. In such circumstances, the accused may wish to bolster the presumption that there is prejudice by leading evidence that there has been unusual prejudice by reason of special circumstances. On the other hand, the Crown may wish to assert that a delay which is not excessively beyond the norm should be excused because there has been minimal prejudice. Should the accused or the Crown in such circumstances be precluded from arguing or leading evidence to show what the actual [page1219] prejudice was? This is a question that will have to be resolved, but that is not necessary to a decision in this case.
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> . . .
>
> [W]hether prejudice is conclusively presumed or to be inferred, the appellant has satisfied any requirement in connection with this factor.

42 The foregoing review may assist in defining the factors which should be taken into consideration on an application for a stay of proceedings. However, before that step is undertaken, it is necessary to determine what may be distilled from the cases as to the purpose or aim of s. 11(b).

Purpose of s. 11(b)

43 I agree with the position taken by Lamer J. that s. 11(b) explicitly focusses upon the individual interest of liberty and security of the person. Like other specific guarantees provided by s. 11, this paragraph is primarily concerned with an aspect of fundamental justice guaranteed by s. 7 of the Charter. There could be no greater frustration imaginable for innocent persons charged with an offence than to be denied the opportunity of demonstrating their innocence for an unconscionable

time as a result of unreasonable delays in their trial. The time awaiting trial must be exquisite agony for accused persons and their immediate family. It is a fundamental precept of our criminal law that every individual is presumed to be innocent until proven guilty. It follows that on the same fundamental level of importance, all accused persons, each one of whom is presumed to be innocent, should be given the opportunity to defend themselves against the charges they face and to have their name cleared and reputation re-established at the earliest possible time.

44 Although the primary aim of s. 11(b) is the protection of the individual's rights and the provision of fundamental justice for the accused, nonetheless there is, in my view, at least by inference, a community or societal interest implicit in s. 11(b). That community interest has a dual dimension. First, there is a collective interest in ensuring that those who transgress the law are brought to [page1220] trial and dealt with according to the law. Second, those individuals on trial must be treated fairly and justly. Speedy trials strengthen both those aspects of the community interest. A trial held within a reasonable time must benefit the individual accused as the prejudice which results from criminal proceedings is bound to be minimized. If the accused is in custody, the custodial time awaiting trial will be kept to a minimum. If the accused is at liberty on bail and subject to conditions, then the curtailments on the liberty of the accused will be kept to a minimum. From the point of view of the community interest, in those cases where the accused is detained in custody awaiting trial, society will benefit by the quick resolution of the case either by reintegrating into society the accused found to be innocent or if found guilty by dealing with the accused according to the law. If the accused is released on bail and subsequently found guilty, the frustration felt by the community on seeing an unpunished wrongdoer in their midst for an extended period of time will be relieved.

45 There are as well important practical benefits which flow from a quick resolution of the charges. There can be no doubt that memories fade with time. Witnesses are likely to be more reliable testifying to events in the immediate past as opposed to events that transpired many months or even years before the trial. Not only is there an erosion of the witnesses' memory with the passage of time, but there is bound to be an erosion of the witnesses themselves. Witnesses are people; they are moved out of the country by their employer; or for reasons related to family or work they move from the east coast to the west coast; they become sick and unable to testify in court; they are involved in debilitating accidents; they die and their testimony is forever lost. Witnesses too are concerned that their evidence be taken as quickly as possible. Testifying is often thought to be an ordeal. It is something that weighs on the minds of witnesses and is a source of worry and frustration for them until they have given their testimony.

46 It can never be forgotten that the victims may be devastated by criminal acts. They have a special interest and good reason to expect that criminal [page1221] trials take place within a reasonable time. From a wider point of view, it is fair to say that all crime disturbs the community and that serious crime alarms the community. All members of the community are thus entitled to see that the justice system works fairly, efficiently and with reasonable dispatch. The very reasonable concern and alarm of the community which naturally arises from acts of crime cannot be

assuaged until the trial has taken place. The trial not only resolves the guilt or innocence of the individual, but acts as a reassurance to the community that serious crimes are investigated and that those implicated are brought to trial and dealt with according to the law.

47 The failure of the justice system to deal fairly, quickly and efficiently with criminal trials inevitably leads to the community's frustration with the judicial system and eventually to a feeling of contempt for court procedures. When a trial takes place without unreasonable delay, with all witnesses available and memories fresh, it is far more certain that the guilty parties who committed the crimes will be convicted and punished and those that did not, will be acquitted and vindicated. It is no exaggeration to say that a fair and balanced criminal justice system simply cannot exist without the support of the community. Continued community support for our system will not endure in the face of lengthy and unreasonable delays.

48 Further, implicit support for the concept that there is a societal aspect to s. 11(b) can be derived from the observation that the last thing that some wish for is a speedy trial. There is no doubt that many accused earnestly hope that the memory of a witness will fail and that other witnesses will become unavailable. This factor was noted by the Honourable T. G. Zuber in his Report of the Ontario Courts Inquiry (1987), at p. 73:

> It is, however, the observation of this Inquiry that those accused of crime and their counsel are often disinterested in trial within a reasonable time. Delay is perceived not as a factor which will impair the ability of the accused to present a defence but rather a factor which will erode the case for the prosecution.

[page1222]

Doherty J. wrote to the same effect in a paper delivered to the National Criminal Law Program in July 1989. He wrote:

> Many accused do not want to be tried at all, and many embrace any opportunity to delay judgment day. This reluctance to go to trial is no doubt a very human reaction to judgment days of any sort; as well as a reflection of the fact that in many cases delay inures to the benefit of the accused. An accused is often not interested in exercising the right bestowed on him by s. 11(b). His interest lies in having the right infringed by the prosecution so that he can escape a trial on the merits. This view may seem harsh but experience supports its validity.
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> This unique attitude on the part of accused toward this right often puts a court in a position where it perceives itself as being asked to dismiss a charge,

> not because the accused was denied something which he wanted, and which could have assisted him, but rather, because he got exactly what he wanted, or at least was happy to have -- delay. A dismissal of the charge, the only remedy available when s. 11(b) is found to have been violated, sticks in the judicial craw when everyone in the courtroom knows that the last thing the accused wanted was a speedy trial. It hardly enhances the reputation of the administration of justice when an accused escapes a trial on the merits, not because he was wronged in any real sense, but rather because he successfully played the waiting game.

As these comments from distinguished jurists indicate, the s. 11(b) right is one which can often be transformed from a protective shield to an offensive weapon in the hands of the accused.

49 I believe the inferred societal interest should be considered in conjunction with the main and primary concept of the protection of the individual's right to fundamental justice. This is closer to the views expressed by Wilson J. in Mills, supra. At some level, the conduct of and prejudice to the accused must be examined. Although it must be recognized that the primary goal of s. 11(b) is the protection of the individual's interest in fundamental justice, nevertheless that same section contains a secondary and inferred societal interest that should not be ignored. If the recognition of both the primary individual interest and the inferred [page1223] society interest is accepted as the true aim of s. 11(b), then I think the various factors which should be taken into consideration in determining whether there has been an unreasonable delay can be clarified and set forth in a consistent test.

Factors to be Taken Into Account in Determining Whether or not There has Been an Infringement of s. 11(b)

(i) The Length of the Delay

50 It is clear that the longer the delay, the more difficult it should be for a court to excuse it. This is not a threshold requirement as in the United States, but rather is a factor to be balanced along with the others. However, very lengthy delays may be such that they cannot be justified for any reason.

(ii) Explanation for the Delay

51 This category referred to by Sopinka J. in Smith, supra, may be usefully subdivided with the aspects of systemic delay and conduct of the accused amplified.

(a) The Conduct of the Crown (or Delay Attributable to the Crown)

52 Generally speaking, this category will comprise all of the potential factors causing delay which flow from the nature of the case, the conduct of the Crown, including officers of the state, and the inherent time requirements of the case. Delays attributable to the actions of the Crown or its

officers will weigh in favour of the accused. For example, the nineteen adjournments initiated by the trial judge in Rahey or the unavailability of judges because of holidays in Smith are examples where the actions or the lack of actions of Crown officers weighed against the state in the assessment of the reasonableness of the delay.

53 It is under this heading that the complexity of the case should be taken into account. Complex cases which require longer time for preparation, a greater expenditure of resources by Crown officers and the longer use of institutional facilities will [page1224] justify delays longer than those that would be acceptable in simple cases.

(b) Systemic or Institutional Delays

54 On a more specific level, the question of delays caused by systemic or institutional limitations should also be discussed under the heading of delays attributable to the Crown. This factor will often be the most difficult to assess. A careful and sensitive balancing will be required in order to properly assess the significance of this aspect of delay. First, let us consider the problem from the point of view of society. Section 11(b) applies to all Canadians in every part of our land. In a country as vast and diverse as ours, the institutional problems are bound to differ greatly from province to province and from district to district within each province. Differences of climate, terrain, population and financial resources will require different solutions for the problem of providing adequate facilities and personnel. Lack of financial resources may require imaginative answers to difficult problems, including the provision of temporary facilities. The problems presented and the solutions required will vary between heavily populated centres such as Toronto and Montréal and the sparsely populated districts bordering on Hudson Bay.

55 Wise political decisions will be required with regard to the allocation of scarce funds. Due deference will have to be given to those political decisions as the provisions of courtroom facilities and Crown Attorneys must, for example, be balanced against the provision of health care and highways. Yet solutions must be found as indeed they have been in many jurisdictions outside Ontario. Similarly situated communities can provide a rough comparison and some guidance as to what time period constitutes an unreasonable delay of the trial of an accused person. That comparison should always be made with the more efficient of the comparable jurisdictions.

56 The right guaranteed by s. 11(b) is of such fundamental importance to the individual and of [page1225] such significance to the community as a whole that the lack of institutional resources cannot be employed to justify a continuing unreasonable postponement of trials. In Mills, supra, Lamer J. noted at p. 935:

> In an ideal world there would be no delays in bringing an accused to trial and there would be no difficulties in securing fully adequate funding, personnel and facilities for the administration of criminal justice. As we do not live in such a world, some allowance must be made for limited institutional resources.

However, the lack of institutional facilities can never be used as a basis for rendering the s. 11(b) guarantee meaningless. In the same case, Lamer J. gave clear warning of the dangers that would ensue from permitting the lack of institutional resources to constitute an acceptable excuse for unreasonable delays. At page 935 he stated:

> It is imperative, however, that in recognizing the need for such a criterion we do not simply legitimate current and future delays resulting from inadequate institutional resources. For the criterion of institutional resources, more than any other, threatens to become a source of justification for prolonged and unacceptable delay. There must, therefore, be some limit to which inadequate resources can be used to excuse delay and impair the interests of the individual. [Emphasis added.]

57 It must be remembered that it is the duty of the Crown to bring the accused to trial. It is the Crown which is responsible for the provision of facilities and staff to see that accused persons are tried in a reasonable time.

58 This same view was expressed by Martin J.A. in Beason, supra. In that case the Ontario Court of Appeal considered a delay of forty months, nine months of which was occasioned by a shortage of courtrooms in Toronto. Martin J.A. stated at p. 42:

> An accused has no duty to bring himself to trial. The Crown has that duty. I am further of the view that the unavailability of court-room facilities or personnel cannot justify a delay of this inordinate length in a simple case such as this.

59 Where inordinate delays do occur, it is those who are responsible for the lack of facilities who [page1226] should bear the public criticism that is bound to arise as a result of the staying of proceedings which must be the inevitable consequence of unreasonable delays. Members of the community will not and should not condone or accept a situation where those alleged to have committed serious crimes are never brought to trial solely as a result of unduly long delays. It is a serious consequence with potentially dangerous overtones for the community. It is right and proper that there be criticism of the situation when it occurs.

60 The response to the question of "how long is too long" as it applies to institutional delay will always be difficult to fashion in our country. The question must be answered in light of the particular facts of each case. There can be no certain standard of a fixed time which will be applicable in every region of the country. Nonetheless, an inquiry into what is reasonable in any region should not be taken in isolation and must, of necessity, involve a comparison with other jurisdictions. Consideration must be given to the geography, the population and the material resources of the province and district. The comparison of similar and thus comparable districts must always be made with the better districts and not with the worst. In Mills, supra, Lamer J. expressed his views on this issue in the following words at pp. 935-36:

> ... the courts must refrain from simply drawing an average between the worst and the best in the country, that is, between those areas where delays are longest and those which offer the best examples of promptness. The appropriate models are those jurisdictions [page1227] which have the greater degrees of promptness, or the lesser amounts of systemic delay. They are examples of the appropriate accommodation between demands on the system and allocation of available resources.
>
> It is no answer to say that demands on the system may be less in some areas than in, to give an example, a congested urban centre. The point is that there has been in such jurisdictions an allocation of sufficient resources to meet the demands and administer the criminal justice system with minimal delay. Greater delays in other areas may simply mean that sufficient resources have not been allocated to deal adequately with current demands. The measure of what is possible in adjusting resources to demands comes from those jurisdictions which have the lesser amounts of systemic delay. That is the measure which must serve for all jurisdictions.
>
> Such a criterion has the obvious advantage of being anchored in reality. It does not seek to impose an arbitrary standard, such as a fixed ceiling, e.g. four months or five months, on excusable delay but looks to what has in fact been accomplished in various jurisdictions. It is those very jurisdictions which have been most successful in minimizing systemic delay which thus set the measure of what is possible, rather than the courts in abstracto. Additionally, this approach is more flexible than would be fixed ceilings, all the while establishing an objective, national standard. It would reduce discrepancies between different parts of the country and ensure that "unreasonable delay in run-of-the-mill criminal cases cannot be justified by simply asserting that the public resources provided by the State's criminal-justice system are limited and that each case must await its turn" (Barker v. Wingo, supra, per White J., Brennan J. concurring, at p. 538).

61 To summarize, when considering delays occasioned by inadequate institutional resources, the question of how long a delay is too long may be resolved by comparing the questioned jurisdiction to the standard maintained by the best comparable jurisdiction in the country. The comparison need not be too precise or exact. Rather, it should look to the appropriate ranges of delay to determine what is a reasonable limit. In all cases it will be incumbent upon the Crown to show that the institutional delay in question is justifiable.

(c) The Conduct of the Accused (or Delay Attributable to the Accused)

62 As Lamer J. so cogently observed in Mills, it is a fundamental precept of our criminal justice system that it is the responsibility of the Crown to bring the accused to trial. Further, the right to be tried within a reasonable time is an aspect of fundamental justice protected by s. 7 of the Charter. It follows that any inquiry into the conduct of the accused should in no way absolve the Crown from its responsibility to bring the accused to trial. Nonetheless, there is a societal interest in preventing an accused from using the guarantee as a means of escaping trial. It should be emphasized that an inquiry into the actions of the accused should be restricted to discovering those situations [page1228] where the accused's acts either directly caused the delay (as in Conway), or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial. These direct acts on the part of the accused, such as seeking an adjournment to retain new counsel, must of course be distinguished from those situations where the delay was caused by factors beyond the control of the accused, or a situation where the accused did nothing to prevent a delay caused by the Crown.

63 In addition, since the protection of the right of the individual is the primary aim of s. 11(b), the burden of proving that the direct acts of the accused caused the delay must fall upon the Crown. This would be true except in those cases where the effects of the accused's action are so clear and readily apparent that the intent of the accused to cause a delay is the inference that must be drawn from the record of his or her actions.

(iii) Waiver

64 While the question of waiver could be discussed under factor (ii)(c) above (Delay Attributable to the Accused), for reasons of clarity, I prefer to examine the issue separately.

65 The accused should not be required to assert the explicitly protected individual right to trial within a reasonable time. It is now well established that any waiver of a Charter right must be "clear and unequivocal ... with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process". See Korponay v. Attorney General of Canada, [1982] 1 S.C.R. 41, at p. 49. The failure of an accused to assert the right does not give the Crown licence to proceed with an unfair trial. Failure to assert the right would be insufficient in itself to impugn the motives of the accused as might be the case with regard to other s. 11 rights. Rather 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. Although no particular magical incantation [page1229] of words is required to waive a right, nevertheless the waiver must be expressed in some manner. Silence or lack of objection cannot constitute a lawful waiver. The matter was put in these words by Dickson J., as he then was, in Park v. The Queen, [1981] 2 S.C.R. 64, at pp. 73-74:

> No particular words or formula need be uttered by defence counsel to express the waiver and admission. All that is necessary is that the trial judge be

> satisfied that counsel understands the matter and has made an informed decision to waive ... Although no particular form of words is necessary the waiver must be express. Silence or mere lack of objection does not constitute a lawful waiver.

If the Crown is relying upon actions of the accused to demonstrate waiver, then the onus will lie upon the Crown to prove that a specific waiver can be inferred. It may well be that the setting of trial dates and the agreement to those dates by counsel for the accused may be sufficient to constitute waiver. This possibility was noted by Sopinka J. as stated in Smith, supra, at p. 1136:

> Agreement by an accused to a future date will in most circumstances give rise to an inference that the accused waives his right to subsequently allege that an unreasonable delay has occurred. While silence cannot constitute waiver, agreeing to a future date for a trial or a preliminary inquiry would generally be characterized as more than silence. Therefore, absent other factors, waiver of the appellant's s. 11(b) rights might be inferred based on the foregoing circumstances.

66 In sum, the burden always rests with the Crown to bring the case to trial. Further, the mere silence of the accused is not sufficient to indicate a waiver of a Charter right; rather, the accused must undertake some direct action from which a consent to delay can be properly inferred. The onus rests upon the Crown to establish on a balance of probabilities that the actions of the accused constitute a waiver of his or her rights.

[page1230]

(iv) Prejudice to the Accused

67 The different positions taken by Members of the Court with regard to the prejudice suffered by an accused as a result of a delayed trial are set forth in Mills and Rahey. Perhaps the differences can be resolved in this manner. It should be inferred that a very long and unreasonable delay has prejudiced the accused. As Sopinka J. put it in Smith, supra, at p. 1138:

> Having found that the delay is substantially longer than can be justified on any acceptable basis, it would be difficult indeed to conclude that the appellant's s. 11(b) rights have not been violated because the appellant has suffered no prejudice. In this particular context, the inference of prejudice is so strong that it would be difficult to disagree with the view of Lamer J. in Mills and Rahey that it is virtually irrebuttable.

Nevertheless, it will be open to the Crown to attempt to demonstrate that the accused has not been prejudiced. This would preserve the societal interest by providing that a trial would proceed in those cases where despite a long delay no resulting damage had been suffered by the accused. Yet, the existence of the inference of prejudice drawn from a very long delay will safely preserve the pre-eminent right of the individual. Obviously, the difficulty of overcoming the inference will of necessity become more difficult with the passage of time and at some point will become irrebuttable. Nonetheless, the factual situation presented in Conway serves as an example of an extremely lengthy delay which did not prejudice the accused. However, in most situations, as Sopinka J. pointed out in Smith, the presumption will be "virtually irrebuttable".

68 Furthermore, the option left open by Sopinka J. in the Smith case whereby accused persons who have suffered some additional form of prejudice are permitted to adduce evidence of prejudice on their own initiative in order to strengthen their position in seeking a remedy under s. 24(1) of the Charter is consistent with the primary concern of protecting the individual's right under s. 11(b).

69 From the foregoing review it is possible I think to give a brief summary of all the factors which [page1231] should be taken into account in considering whether the length of the delay of a trial has been unreasonable.

(i) The Length of the Delay.

The longer the delay, the more difficult it should be for a court to excuse it. Very lengthy delays may be such that they cannot be justified for any reason.

(ii) Explanation for the Delay.

(a) Delays Attributable to the Crown.

Delays attributable to the action of the Crown or officers of the Crown will weigh in favour of the accused. The cases of Rahey and Smith provide examples of such delays.

Complex cases which require longer time for preparation, a greater expenditure of resources by Crown officers, and the longer use of institutional facilities will justify delays longer than those acceptable in simple cases.

(b) Systemic or Institutional Delays.

Delays occasioned by inadequate resources must weigh against the Crown. Institutional delays should be considered in light of the comparative test referred to earlier. The burden of justifying inadequate resources resulting in systemic delays will always fall upon the Crown. There may be a transitional period to allow for a temporary period of lenient treatment of systemic delay.

(c) Delays Attributable to the Accused.

Certain actions of the accused will justify delays. For example, a request for adjournment or delays to retain different counsel.

There may as well be instances where it can be demonstrated by the Crown that the actions of the accused were undertaken for the purposes of delaying the trial.

[page1232]

(iii) Waiver.

If the accused waives his rights by consenting to or concurring in a delay, this must be taken into account. However, for a waiver to be valid it must be informed, unequivocal and freely given. The burden of showing that a waiver should be inferred falls upon the Crown. An example of a waiver or concurrence that could be inferred is the consent by counsel for the accused to a fixed date for trial.

(iv) Prejudice to the Accused.

There is a general, and in the case of very long delays an often virtually irrebuttable presumption of prejudice to the accused resulting from the passage of time. Where the Crown can demonstrate that there was no prejudice to the accused flowing

> from a delay, then such proof may serve to excuse the delay. It is also open to the accused to call evidence to demonstrate actual prejudice to strengthen his position that he has been prejudiced as a result of the delay.

I believe that the factors that I have set out in large measure are substantially the same as those enunciated by L'Heureux-Dubé J. in Conway and Sopinka J. in Smith. The aim of this test is to provide a method based upon the underlying purposes of s. 11(b) which will permit courts to balance the applicable substantive factors in a consistent manner. It bears repeating that the balance between the explicit, individual protection and the implicit, societal aspect of s. 11(b) is addressed by placing the onus on the Crown to demonstrate that any action of the accused deliberately caused the delay or constituted waiver, or that the delay caused no prejudice to the accused.

[page1233]

Application of the Principles to the Case at Bar

70 As the disposition of this case will ultimately turn on the factors headed (ii) Explanation for the Delay, particularly (b) Systemic or Institutional Delay and (c) Delays Attributable to the Accused; and (iii) Waiver, I need but briefly deal with the factors titled (i) The Length of the Delay and (iv) Prejudice to the Accused.

(i) The Length of the Delay

71 No matter what standard of measure is used or what test is applied, the trial in this case has been inordinately delayed. Even when the first period of delay of approximately one year prior to the preliminary hearing is discounted as being in large part attributable to the request for adjournments by the appellants, there remains a delay period of almost two years. The experienced trial judge who has presided for many years in Peel District described the delay as "clearly excessive and unreasonable". It is interesting to note that the delay at issue in Mills was nineteen months, in Rahey eleven months, and in Smith one year. Although the period of delay in Conway is comparable to that of this case, it must be remembered that in that case the delay was directly attributable to the actions of Conway.

72 The period of delay in the case at bar is so lengthy that unless there is some very strong basis for justifying the delay, which becomes clear from an examination of the other factors, then it would be impossible for a court to tolerate such a delay.

(iv) Prejudice to the Accused

73 The trial judge found that the appellants had been prejudiced by the delay. In support, he noted the lengthy period of incarceration for three of the appellants and the restrictions contained in the bail terms. Those conditions of bail included curfews, a direction not to associate with the co-accused and a system of regular reporting to the police. There has been no attack on these findings. Consequently, it is impossible to say that the Crown discharged the burden that rested upon it [page1234] to show that the delay caused no prejudice to the appellants. As a result, the prejudice suffered by the appellants weighs against the Crown and cannot be used to excuse the length of delay.

(ii) Explanation for the Delay

(a) Delays Attributable to the Crown

74 It is clear that delays cannot be attributable to any action of the Crown. At no time did the Crown make any requests for adjournments or take any step that delayed the trial of the action in any way.

75 There is nothing in the case that is so complex or inherently difficult that it would justify a lengthy delay. It is true that the case involves a charge of conspiracy. However, the proof would consist of what was seen and heard by the witnesses, particularly the undercover officer. It is reasonable to assume that the victim and the police officers were ready and capable of testifying on relatively short notice. There was no need for any lengthy investigation or the retention of and discussions with expert witnesses. There was not any aspect of this case that could even remotely be considered to be an exceptional circumstance that would justify a lengthy delay.

(b) Systemic or Institutional Delay

76 This trial was to be heard in Brampton, in the District of Peel in Ontario. This district has long been notorious for the inordinate length of time required to obtain a trial date. The delays are said to be caused by lack of facilities. The evidence submitted contains a study done by Prof. Carl Baar, Director of the Judicial Administration Program at Brock University. From the research and comparative studies that he has undertaken, Professor Baar has concluded that the Peel District (referred to as Brampton by Professor Baar) experiences extremely long delays that are out of the ordinary compared to the rest of Ontario, the rest of Canada or the United States. He notes that the situation has arisen partly as a result of rapid urban growth and the presence of a very large [page1235] international airport which generates a great many drug-related offences. He also finds that a shortage of court space and judges are significant factors which contribute to the lengthy delays. His research indicates that comparatively speaking it is without doubt one of the worst districts in Canada, if not the worst, in terms of delays between committal and trial. Ontario can take no pride in this situation and must indeed bear the responsibility for it. Professor Baar writes:

[page1236]

> If Canadian courts were required to set cases for trial within six months, they could almost universally do so. No Provincial Court in Canada is normally setting cases for trial or preliminary hearing more than six months after first appearance. Of the five provinces with county courts, only one location in one province routinely sets criminal cases for trial more than six months after committal: Ontario's Peel County Court in Brampton. That court has set trial dates a full ten months ahead, perhaps the longest delay in Canada.

77 Justice Zuber also concluded that Peel District was the worst in the province. He wrote in his report that the unhappy situation in certain districts in Ontario (including Peel) is aggravated by the fact that there is not a system in place whereby an early second trial date is guaranteed in those situations where the first trial date is missed. See Zuber Report, supra, at p. 54 and pp. 190-93.

78 To make matters worse, the situation in Peel District appears to have deteriorated from the time this case was initiated. In his report, which is subsequent to Professor Baar's study, Justice Zuber notes that his inquiry on the issue of delay revealed that Peel District had the greatest backlog in the province with a waiting period of one year regardless of the anticipated length of the trial. The conclusion that the situation continued for some time to deteriorate is supported both by the materials filed with the affidavit of Richard F. Chaloner, Deputy Attorney General of Ontario, and by the most recent study undertaken by Professor Baar.

79 It is apparent that the situation in Peel District has been in a deplorable state for many years. Something is terribly wrong. As Justice Zuber noted the situation is "enormously complex" and there is no "magic solution" or "quick fix". Nonetheless, something must be done. Urgent attention to the situation is required. The response of the Government of Ontario has been neither overwhelming nor particularly successful. A program known as the Delay Reduction Initiative instituted by the Government is summarized in the Chaloner affidavit at pp. 21-22 as including:

> (a) the formulation of a delay reduction strategy based on the principles of co-operative management and caseflow management, in accordance with the experience in other jurisdictions, the delay reduction literature, and the recommendations of Mr. Justice Zuber;
> (b) the establishment in late 1988 of six delay reduction pilot projects in the areas of the Province which then had the most serious delay problems;
> (c) the provision of trial co-ordinators and computerized trial information systems for the six projects;
> (d) upon a review and analysis of the plans submitted by the local delay reduction committees, the provision of funding for 13 additional judges, 24 Crown Attorneys, support staff and facilities improvements;

(e) funding for additional Crown Attorneys to conduct an intensive review of the existing inventory of cases in each of the areas to determine the status of the "backlogged" cases, to take the initiative in contacting defence counsel to discuss the cases which will proceed, and to arrange for the bringing forward of cases capable of early resolution;

(f) an ongoing analysis of the impact of additional resources in the areas to which they have been provided and a monitoring of the increases in efficiency in the operation of individual Provincial Courts as a result of the local initiatives adopted and implemented;

(g) a directive to Crown Attorneys requiring full disclosure of the Crown's case to, inter alia, encourage early assessment and resolution of cases, or more accurate estimates of time requirements;

[page1237]

(h) initiating legislative changes to provide a pool of part-time provincial judges available on a per diem basis to increase the number of courts disposing of cases;

(i) the introduction, upon proclamation of the Courts of Justice Amendment Act, 1989, of a system of regional court management which will allow regional senior judges to allocate judicial resources more effectively throughout their regions, and to concentrate those resources in the locations with the most serious delay problems.

80 Peel District (referred to as Brampton District in the affidavit) was one of the six areas where the delay reduction programs were instituted. These programs stressed more efficient use of the region's available facilities rather than the provision of additional resources. However, in the case of Peel District the program alone is obviously insufficient. The most recent statistics set forth in the Chaloner affidavit for the period from October 1988 to December 1989 clearly indicate that in four of the six target areas, including Peel District, there is no visible long-term trend towards improvement of the mean average time of case delays. For the Districts of Peel, Barrie, Newmarket and Oshawa these programs have had little or no long-term effect on reducing the period of delay, although it appears to have achieved some degree of stability in that the situation is no longer worsening. However, the delay periods remain completely unacceptable.

81 The only conclusion which can be drawn from an analysis of the material filed is that the problem of systemic delay in Peel has not and cannot be resolved simply by introducing a more efficient caseflow management system. More resources must be supplied to this district perhaps by

way of additional Crown Attorneys and courtrooms. This conclusion cannot come as a surprise. The problem has existed for many years, back at least as far as 1981. At this point it is worth repeating the words of the trial judge:

> I am satisfied that the reason for the delay was caused by the insufficient institutional resources in the Judicial District of Peel. Even if more judges had been available for the jury sittings of October 15, 1985, there would have been no courtrooms in which to hold the trials. It is [page1238] obvious that this jurisdiction lacks sufficient resources to meet the demands and administer the criminal justice system with minimal delay. This has caused a systematic delay in the administration of justice. It was this way when I came here in 1981 and it continues to be this way today [September 1986]. Even this month cases which are to be set for trial are set for September and October of 1987. Those responsible for the proper administration of justice have known about this systematic delay for at least five years; yet nothing has been done about it.
>
> . . .
>
> In my view there has been an unreasonable delay in bringing this case on for trial and the delay has been caused by the chronic shortage of institutional resources in the Judicial District of Peel. [Emphasis added.]

Obviously the problems to which Bolan Dist. Ct. J. referred have not yet been resolved. It is pertinent to note the observations of the Honourable W. G. C. Howland in his recent "Reports on the Administration of Justice in Ontario on the Opening of the Courts for 1990" (1990), 24 L. Soc. Gaz. 5, at p. 7. There he observed that there was a need for more provincial court judges to remedy the situation. He stated:

> The Attorney General had undertaken delay-reduction pilot projects in each of six regions comprising members of the judiciary, the Crown attorney, representatives of the Federal Department of Justice, of Legal Aid and of the defence bar. These Task Forces have proved to be of positive assistance in persuading the Attorney General of the need to make additional appointments and not merely to fill vacancies. [Emphasis added.]

82 The extent and gravity of the problem in Peel is brought home by reference to the comparative study done in 1987 by Professor Baar. The study illustrated that in Canada, New Brunswick and Quebec were best able to bring their cases to trial within the thirty to ninety-day range. In terms of the time taken to completely dispose of a case from committal to disposition, the median total time in New Brunswick's lower courts (provincial courts) was 152 days. The median total time in upper courts (s. 96 courts) was 72 days. By comparison, in Ontario the best district was London with a median total time of 239 days and the median upper court time of 105 days. Toronto, Ottawa [page1239] and St. Catherines were all close together with median total times of between 315 and

349 days, and upper court times between 133 and 144 days.

83 Professor Baar wrote that "[b]y all measures used in the study, Brampton District Court was significantly slower than any other location studied: median total time was 607 days and median upper court time was 423 days." Nor can any comfort be drawn by comparison to the United States. Professor Baar concluded that the Peel District is generally substantially slower than the slowest United States jurisdictions. Further, he noted that the delay in the present case was longer than ninety per cent of all cases in terms of median total time among those heard even in Peel District. This case therefore represents one of the worst from the point of view of delay in the worst district not only in Canada, but so far as the studies indicate, anywhere north of the Rio Grande.

84 If it should be argued that the statistics from New Brunswick cannot represent a basis for comparison, then surely those from Quebec can and do provide a guide for comparison. A review of the recent statistics kept by the courts in Montréal, Longueuil and Terrebonne by comparison reveals how very unsatisfactory and intolerable is the state of affairs in Peel.

85 At Montréal, for the 5 1/2 month period beginning January 8, 1990, the delay between the date of remitting a case for trial at the next assize and the date of trial is 82 1/2 days. This figure includes the time for all trials save one which was remitted by the Court of Appeal for a second trial. If from this figure are deducted those cases where the defence either requested an adjournment or brought a motion such as certiorari, the time was 60 days.

86 In the District of Terrebonne, taking into account all the cases before the Superior Court, the delay between remission for trial and trial is [page1240] 91.5 days. If one case with exceptional circumstances is deleted, the waiting period drops to 86 days.

87 In the District of Longueuil, the waiting period for trial is 90.5 days. Once again, if the exceptional cases are deleted, the waiting period drops to 66.75 days.

88 The average time in the three districts to commence a trial is 84.3 days and if from the total there is deducted those cases where a second trial was directed or the defence requested an adjournment, the waiting period is only 63.5 days.

89 Making a very rough comparison and more than doubling the longest waiting period to make every allowance for the special circumstances in Peel would indicate that a period of delay in a range of some six to eight months between committal and trial might be deemed to be the outside limit of what is reasonable. The usual delays in Peel are more than four times as long as those of busy metropolitan districts in the province of Quebec and the delay in this case is more than eight times as long. The figures from the comparable districts demonstrate that the Peel District situation is unreasonable and intolerable.

90 The delay in this case is such that it is impossible to come to any other conclusion than that the s. 11(b) Charter rights guaranteed to the individual accused have been infringed. As well, the

societal interest in ensuring that these accused be brought to trial within a reasonable time has been grossly offended and denigrated. Indeed the delay is of such an inordinate length that public confidence in the administration of justice must be shaken. Justice so delayed is an affront to the individual, to the community and to the very administration of justice. The lack of institutional facilities cannot in this case be accepted as a basis for justifying the delay.

91 I am well aware that as a consequence of this decision, a stay of proceedings must be directed. This is, to say the least, most unfortunate and regrettable. It is obvious that the charges against the appellants are serious. Extortion and threatened [page1241] armed violence tear at the basic fabric of society. To accede to such conduct would constitute a denial of the rule of law and an acceptance of a rule that unlawful might makes right. The community has good reason to be alarmed by the commission of serious crimes. There can be no doubt that it would be in the best interest of society to proceed with the trial of those who are charged with posing such a serious threat to the community. Yet, that trial can only be undertaken if the Charter right to trial within a reasonable time has not been infringed. In this case that right has been grievously infringed and the sad result is that a stay of proceedings must be entered. To conclude otherwise would render meaningless a right enshrined in the Charter as the supreme law of the land.

92 I would note in passing that the delay cannot be justified on the basis that it came within a "transitional period" necessitated by the passage of the Charter. Judge Bolan indicated that the problem went back at least to 1981. Further, Lamer J. in Mills and Rahey gave a clear indication that there was a specific cut-off point after which the transition period could not be used as a justification for delay. This case has long since passed by that cut-off point. This is not to say the consideration of a transitional period should always be precluded in the future. The consideration of a transitional period might well be required by the changing conditions in a particular district. For example, if an international airport were to be built in another judicial district, it would be sensible to consider a transitional period to overcome the institutional delays in that district arising from a substantial increase in cases to be tried.

93 This conclusion should not be taken as a direction to build an expensive courthouse at a time of fiscal restraint. Rather, it is a recognition that this situation is unacceptable and can no longer be tolerated. Surely an imaginative solution could be found that would rectify the problem. For example, courtroom space might be found in other nearby government buildings. Or perhaps an interim solution could be achieved by the installation [page1242] of portable structures similar to those used in the school system. If the children who represent the most precious resource of the nation can be taught in portable classrooms, then as a temporary solution trials can take place in similar accommodation.

94 Arguments can always be raised as to why interim solutions should not be used. Yet, imaginative cooperation can surely resolve these problems. If temporary structures cannot be used for criminal cases for reasons of security, then the criminal trials might proceed in the courthouse while the civil cases are heard in the nearby government buildings or portable buildings.

95 Another temporary solution might be to encourage changes of venue. Section 599 of the Criminal Code, R.S.C., 1985, c. C-46, provides:

> 599. (1) A court before which an accused is or may be indicted, at any term or sittings thereof, or a judge who may hold or sit in that court, may at any time before or after an indictment is found, on the application of the prosecutor or the accused, order the trial to be held in a territorial division in the same province other than that in which the offence would otherwise be tried if
>
> (a) it appears expedient to the ends of justice;
>
> . . .
>
> (3) The court or judge may, in an order made on an application by the prosecutor under subsection (1), prescribe conditions that he thinks proper with respect to the payment of additional expenses caused to the accused as a result of the change of venue.

Both the interest of the individual accused and the inferential societal interest would be served by a change of venue if it resulted in a trial taking place within a reasonable time. If such were the result, then the change of venue would certainly be "expedient to the ends of justice" and fall within the category of changes envisioned by the section. The section itself provides the guarantees that any changes of venue will not prejudice the accused and ensures that appropriate arrangements will be [page1243] made in order to secure the fair transfer of persons and resources from one jurisdiction to another. In those situations where a change of venue could be fairly and effectively completed, and yet is rejected by an accused, such a refusal would weigh against the accused in determining whether there had been an unreasonable delay.

96 These tentative suggestions may very well be unworkable. But some solution must be found to eradicate this malignant growth of unreasonable trial delay that constitutes such an unacceptable blight upon the administration of justice in Peel District.

(c) Delay Attributable to the Accused

97 In order to consider this factor, it is necessary to examine the conduct of the accused in order to ascertain whether it was such that it excused the delay by in effect bringing it about. At the outset, I would repeat that in this case it is clear that there was no direct action on the part of the appellants which resulted in any delay apart from that which occurred prior to the preliminary hearing. The appellants certainly neither took nor were responsible for any direct action that caused the subsequent two-year delay which in itself is unacceptable. Therefore, the question of delay as a consequence of direct acts of the appellants need not be considered.

98 However, the two-year delay period must be reviewed to ascertain whether the appellants either waived their right to complain of the unreasonable delay or brought it about by their actions. It is the conduct of the appellants during the course of the two-year delay which found disfavour with the Court of Appeal. Indeed for that court this conduct was "perhaps the most important factor" which justified the delay in the case at bar. The Court of Appeal was of the view that the conduct of the appellants amounted to using the tactic of delay for their own advantage. I cannot agree with that conclusion, but I have reached this decision on the basis of evidence that was not presented to the Court of Appeal.

[page1244]

99 The Court of Appeal found that the following actions of the appellants were indicative of abuse of the right to trial within a reasonable time.

(1) the accused had a concealed plan aimed at waiting until the delay was unreasonable before bringing their motion;
(2) that facilities may have existed to accommodate an earlier trial for the accused; and
(3) that the accused expressed no concern or objection as regards the delay.

These conclusion differed from those of the trial judge, who found that the parties could not have been given an earlier trial date. He stated:

> ... even if they [the appellants] would have asked for earlier trial dates, how could they have been accommodated? In this jurisdiction when a trial date is given, it is the next available date. We do not have the luxury of being selective in giving our trial dates. We look at the list in front of us and give the next trial date which is available. In both instances in this case, it was about one year down the line. And furthermore, what right does one accused have to a speedy trial over someone else who is ahead of him, except, of course, if the accused is in custody. In my view, he does not.

This conclusion of the trial judge is firmly supported by the evidence contained in the complete transcript. The transcript demonstrates that: (1) counsel attended the trial coordinator's office to find out the earliest possible date and were told that it was June, 1986; (2) the judge presiding at the Assignment Court noted that this information was incorrect and told counsel that, with the exception of a week in April, the earliest trial date available was September, 1986; (3) at the Assignment Court the Crown called five priority cases ahead of the case at bar, for placement in that free week in April. These priority cases were either older cases than the one at bar or involved a detained accused; and (4) the Crown estimated that the case at bar would take two weeks while the

free days in April amounted to only one week.

[page1245]

100 The difference of opinion between the trial judge and the Court of Appeal can be readily understood in light of the explanation that the Court of Appeal was only provided with a partial transcript of the day's proceedings in the Assignment Court. It is the complete transcript filed in this Court that makes it apparent that the trial judge was correct in his assessment that there was no other trial date available.

101 The words of the Assignment Court Judge must be placed in context and viewed in light of what he had said earlier in relation to other cases while counsel for the appellants were present. The Crown was properly giving priority to other cases and it was absolutely clear that it was impossible to fix an earlier date for the trial of the case at bar. This fact, made known to all in the courtroom by the judge, made it utterly futile for counsel for the appellants to complain about the delay to the Assignment Court Judge. Quite simply, the appellants had no choice as to the date of their trial; they were assigned the earliest possible date.

102 The complete transcript also reveals that there was no evidence to even support a finding that the appellants had a concealed plan to wait until the delay was unreasonable before complaining or bringing a motion. Indeed, the transcript of the proceedings of the Assignment Court indicates that in the presence of counsel for the appellants, while dealing with one of the "priority cases", there was an objection registered by counsel in that case as to the delay in the trial. To that objection the Assignment Court Judge replied:

> All right. I have recorded your objection, Mr. Willoughby, but I don't propose to do anything other than to set a new trial date, without prejudice to your rights to move to seek whatever remedy you consider might be available to you. [Emphasis added.]

He then went on to advise counsel of the court's available dates:

> There are some dates that have become available because of the change in some scheduling, but other than that we are dealing with matters in September of [page1246] 1986 as being first times that are available. [Emphasis added.]

103 In summary, a review of the complete transcript of the proceedings in the Assignment Court makes it very clear that there was nothing in the conduct of the accused which could indicate that they were deliberately attempting to use the provision in an improper manner. It is always the responsibility of the Crown to bring the accused to trial. The onus rests always with the Crown to

establish that a delay was occasioned by direct actions of the accused as in Conway or that the actions of the accused manifested a deliberate or calculated tactic undertaken to delay the trial.

(iii) Waiver

104 A consideration of the waiver issue requires that answers be given to two questions. The first is whether the appellants specifically waived their rights to a trial within a reasonable period. The second is whether their actions during the course of the proceedings were tantamount to waiver. Once again, the two-year period must be reviewed to ascertain whether the appellants either waived the delay explicitly or through their actions. I believe that there is nothing in the actions of the accused which could lead to the conclusion that the appellants waived their s. 11(b) rights.

105 The first question can be readily answered. On the facts of this case there was no explicit waiver of their rights by the appellants. The only remaining issue then is whether the actions of the appellants were such as to allow the court to draw the clear inference that they were in effect waiving their rights. In the opinion of the Court of Appeal there was just such conduct on the part of the accused.

106 The term "waiver" indicates that a choice has been made between available options. When the entire record of the proceedings on the occasion when the last trial date was fixed is read, it becomes crystal clear that the appellants had no choice as to the date of the trial. The first available dates were given and allotted to these appellants. Unless some real option is available, there can be no choice exercised and as a result waiver is impossible.

[page1247]

107 The silence of the appellants or their failure to raise an objection to a long delay is certainly not enough in the circumstances to infer waiver. Rather, the onus rests upon the Crown to demonstrate that the actions of the accused amounted to an agreement to the delay or waiver of their right.

108 In summary, the appellants did not specifically waive their s. 11(b) rights. Neither can it be inferred from their actions that they waived those rights.

Conclusion

109 The foregoing review indicates that there is no basis upon which this delay can be justified and as a result, a stay of proceedings must be directed. Courts may frequently be requested to take such a step. Fortunately, Professor Baar's work indicates that most regions of this country are operating within reasonable and acceptable time limits with the result that such relief will be

infrequently granted. However, in situations such as this where the delay is extensive and beyond justification there is no alternative but to direct a stay of proceedings.

110 In the result, the appeal is allowed and a stay of proceedings is directed.

The following are the reasons delivered by

111 LAMER C.J.:-- I agree with Justice Cory's resolution of this appeal and with most of his reasons. However, with respect, I am unable to accept his position that one of the objectives of s. 11(b) of the Canadian Charter of Rights and Freedoms is the protection of a societal interest in speedy trials. I also respectfully disagree that prejudice suffered by the accused resulting from the delay is a factor to be considered when determining the "reasonableness" of the delay.

Societal Interest

112 As I stated in my reasons in Mills v. The Queen, [1986] 1 S.C.R. 863, at pp. 917-18, reasons in which Dickson C.J. and Wilson J. concurred, and in which I still firmly believe, while society may have an interest in the efficient functioning of the [page1248] criminal justice system, this interest is not what s. 11(b) is designed to protect:

> Section 11(b) enunciates an individual right to be tried within a reasonable time for all persons charged with an offence. I wish to emphasize at the outset that this right is, in its nature, an individual right and has no collective rights dimension. While society may well have an interest in the prompt and effective prosecution of criminal cases, that interest finds no expression in s. 11(b), though evidently, incidental satisfaction. The section is primarily concerned with ensuring respect for the interests of the individual. Effective enforcement of this Charter right, which may from time to time see the guilty go free, will nevertheless also benefit society as a whole. It will ensure, in addition to respect for individual rights, the prompt prosecution and determination of criminal cases, a result which will be welcomed by the innocent and regarded with aversion by many of the guilty. But the societal benefit resulting from the prompt prosecution of criminal cases, though of great importance, is a by-product of the section; it is not its object.

113 Wilson J. made this distinction between interests served by a particular aspect of the criminal justice system and the interests protected by the Charter in her decision in R. v. Turpin, [1989] 1 S.C.R. 1296. That decision involved s. 11(f) of the Charter, the right to a trial by jury. Wilson J. recognized that although a jury serves both societal and individual interests, the rights guaranteed under s. 11 of the Charter are only designed to protect individual persons charged with an offence. After citing the above passage from my reasons in Mills, Wilson J. stated, at p. 1311:

> This conclusion seems a sound one. The state can legitimately advance its

> interests in jury trials through legislation, e.g. the impugned provisions of the Criminal Code, but those interests are not embraced in a section of the Charter designed to protect the individual.

Prejudice

114 Cory J. adopts the consideration of "prejudice" from Wilson J.'s position in Mills, at p. 967:

> There may, indeed, be an irrebuttable presumption in favour of prejudice flowing from the fact of an accused's being charged with a criminal offence but that is not [page1249] protected by s. 11(b) of the Charter. The prejudice arising from anxiety, stress and stigmatization by family and friends also exists where the accused is tried within a reasonable time. What the accused has to demonstrate under s. 11(b), in my opinion, is that he has suffered an impairment of his liberty and security interests as a result of the Crown's failure to bring him to trial within a reasonable time, not as a result of the Crown's having charged him.

115 In Mills, I took the position that because of the very nature of our criminal justice system, a certain degree of prejudice, including, at p. 920, "stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction", will inevitably be imposed upon an individual charged with a criminal offence and will thereby infringe the rights of liberty and security of the person. Therefore, there exists an irrebuttable presumption of prejudice from the moment the charge is laid.

116 One of the objectives of s. 11(b) is to guarantee a disposition of the charge within a reasonable period of time which will put an end to this inevitable prejudice. It is not simply the trial which is the objective, but instead the termination of the entire process which is causing the anxieties and infringing the rights of liberty and security of the person. If the completion of the trial and the disposition of the charge are unreasonably delayed, the prejudice which is presumed from the moment the charge is laid can grow to eventually constitute an infringement of s. 11(b):

> Although, to some extent, these negative consequences are unavoidable, one of the purposes of s. 11(b) is to limit the impact of such forms of prejudice to the accused by circumscribing the time period within which they may occur. In other words, while some such prejudice to the accused may be seen as a cost of the very right to a hearing, a fortiori a public one, it must nevertheless be kept to a minimum by a speedy determination of criminal responsibility. Hence, in my view, such forms of prejudice leading to impairment of the security of the person may, in and of themselves, constitute a violation of s. 11(b) if allowed to foster over-long. [Mills, at pp. 920-21.]

[page1250]

117 The accused need not demonstrate any further manifestations of prejudice beyond the kind presumed in order to establish a restriction of s. 11(b). If there has been additional prejudice, it could be considered when deciding on a remedy under s. 24(1), but is irrelevant for the determination of a s. 11(b) infringement. As I stated in Mills, at p. 926:

> The proper approach, in my view, is to recognize that prejudice underlies the right, while recognizing at the same time that actual proven prejudice need not be, indeed, is not, relevant to establishing a violation of s. 11(b).
>
> This approach is predicated upon two propositions. First, prejudice is part of the rationale for the right and is assured by the very presence of s. 11(b) in the Charter. Consequently, there exists an irrebuttable presumption that, as of the moment of the charge, the accused suffers a prejudice the guarantee is aimed at limiting, and that the prejudice increases over time.
>
> Second, actual prejudice is, therefore, irrelevant when determining unreasonable delay. Actual prejudice will, however, be relevant to a determination of appropriate relief as will be hereafter explained. Prejudice to the liberty and security of the person, the former objectively ascertainable and the latter presumed, must be kept to a minimum if the presumption of innocence is to be respected.

118 While Wilson J. admits that prejudice arises upon being charged with a criminal offence, she reasons that such prejudice exists whether or not one is tried within a reasonable time. This is not the prejudice from which s. 11(b) is designed to protect the accused. Instead, the accused must show an impairment of liberty and security interests resulting from the delay and not simply from having been charged. One such prejudice, according to Wilson J., is an impairment to the ability to make full answer and defence to the charge.

119 In Mills, I rejected the American approach which included prejudice to the accused's right to a fair trial as a factor to be considered in assessing the infringement of the right to a speedy trial. My reasoning was based on the differences in structure between the American Sixth Amendment and s. 11 [page1251] of the Canadian Charter of Rights and Freedoms. Under the Charter, the right to a fair trial is guaranteed by s. 11(d) and is distinct from the protection afforded by s. 11(b), at p. 922:

> The distinction between the two rights is fundamental. The "fair hearing" and "fundamental justice" provisions of ss. 11(d) and 7 require that a wider and,

> to some extent, different range of factors be considered in the analysis of the delay: the conduct of the Crown may be properly considered, timely assertion by the accused of his right and disclosure of the nature of the impairment thereto may be required, remedial relief will be more varied and the length of time elapsed will generally be a less critical factor than under s. 11(b), and is to be considered in a different light, given the difference of purpose for so doing. Indeed, a trial might well be considered unfair because matters were brought to trial too fast.

120 Wilson J. did not make this distinction and allowed factors affecting the fairness of the trial also to be considered under s. 11(b), at p. 969:

> I agree with the appellant that one of the factors to be considered in deciding whether or not the delay is unreasonable under s. 11(b) is whether the accused's ability to make full answer and defence to the charge has been impaired by it. This may be described as the legal as opposed to the psychological and sociological effect of the delay. The right to make full answer and defence has always been viewed as a cornerstone of the justice system and a delay which has the effect of eroding it cannot in any sense of the term be considered reasonable. I disagree with my colleague that this is purely a s. 11(d) consideration and cannot be a factor under s. 11(b). We cannot treat paras. (a) to (i) as a number of watertight compartments. They represent a series of rights which any person charged with an offence has, but there is nothing to say that they are mutually exclusive. Quite the contrary. They draw life, as my colleague has been at pains to point out, from the s. 7 liberty and security interests which run through them like a common thread.

121 Based on this "prejudice" consideration, if the delay actually served to benefit the accused, Wilson J. would apparently be less inclined to find [page1252] a restriction of s. 11(b). It seems difficult to understand how a delay which would otherwise be "unreasonable" becomes "reasonable" simply due to unforeseeable and fortuitous consequences.

122 Making prejudice affecting the fairness of the trial a relevant consideration for s. 11(b) sets a precedent which could have dangerous consequences for the scope of other Charter rights. For example, s. 10(b) of the Charter guarantees the right, upon arrest or detention, to be informed of the right to retain and instruct counsel without delay. Suppose an individual is arrested and there is considerable delay in advising him or her of the right to retain counsel. Even if the individual later states that had he or she been promptly informed of the right to retain and instruct counsel, he or she would not have done so because of financial considerations, the rights guaranteed under s. 10(b) have still been restricted. This person may not have suffered any prejudice, but surely his or her rights have been infringed. Of course, lack of prejudice would be a consideration when fashioning a remedy under s. 24(1) or when applying s. 24(2). But the absence or presence of prejudice is not, in

my respectful view, in any way relevant to the initial issue of Charter breach.

The following are the reasons delivered by

123 WILSON J.:-- I have had the benefit of reading the reasons of my colleagues Chief Justice Lamer and Justices Sopinka, Cory and McLachlin and wish to comment briefly on only two issues.

124 I agree with the reasons of Lamer C.J. on the issue of whether s. 11(b) of the Charter protects a societal as well as an individual interest in a speedy trial. I remain of the view that it protects only the accused's interest. If the government wishes to restrict the accused's right to a speedy trial for societal reasons, e.g. on grounds of lack of institutional resources, it is free to do so through appropriate legislation. Then a balancing of the [page1253] societal and individual interests in speedy trials will be carried out under s. 1 of the Charter.

125 In Barker v. Wingo, 407 U.S. 514 (1972), relied on by Cory J., the United States Supreme Court had to deal with the issue under the Sixth Amendment with no comparable provision to our s. 1. It therefore found that both interests were covered by that Amendment and conducted the balancing under it. As has been pointed out by this Court on a number of occasions, the differences in the structures of our respective constitutional documents must be kept in mind when relying upon U.S. authorities.

126 On the question of the relevance of prejudice to the accused on the reasonableness or otherwise of the time taken to bring the accused to trial, I remain of the view that just as s. 11(b) does not protect the societal interest in speedy trials although such an interest clearly exists, likewise s. 11(b) does not protect against prejudice arising from the simple fact of a charge being laid, although again such prejudice clearly exists. It is an inevitable consequence of our system of justice that innocent people may from time to time be charged and suffer the social stigma of the charge until their innocence is proved at trial. We accept this. We cannot restore the accused to the status quo ante, much as we would like to in these cases. But at least we can ensure that that period of stigma is brought to an end as soon as is reasonably possible by the guarantee of trial within a reasonable time so that the accused has the opportunity to clear himself if he can. The Charter, in my view, protects the accused against the prejudice arising from the Crown's failure to do so.

127 This Court has held on numerous occasions that the onus is on a person invoking the Charter to establish a violation of his or her rights. An accused under s. 11(b) must establish that he or she has not been tried within a reasonable time. One of the elements by means of which he or she [page1254] may try to prove the unreasonableness of the delay in bringing him or her to trial is by showing that he or she has been prejudiced by the delay, not the prejudice that everyone suffers as a consequence of being charged -- that prejudice will be there even if the accused receives a speedy trial -- but the prejudice that is directly attributable to the lapse of time.

128 It is not, in my view, appropriate to say, as does my colleague Cory J., that it should be inferred that an unreasonable delay causes prejudice but that this inference may be overcome by the

Crown. The question we are trying to answer is: was the delay unreasonable? And the existence of prejudice is being considered in order to answer that question because that is what the accused is advancing in support of his allegation that he has not been tried within a reasonable time. We cannot, in my opinion, beg this question. Moreover, it does not trouble me to place this onus on an accused. In hard cases, i.e. in cases where delay is present when compared with the time it normally takes to get to trial but is not inordinate, the presence or absence of prejudice to the accused may well be the determining factor among those being weighed. A stay of proceedings on a serious criminal charge is not a trivial matter and I believe it is entirely appropriate that an accused should bear this onus.

129 Regarding the reasons of Lamer C.J. on the issue of prejudice, I would respectfully submit that his analogy with a s. 10(b) violation is unsound. To my mind it is not instructive to compare the two types of violation when assessing the relevance of prejudice to the accused. First of all, there are important differences in the wording of the two provisions. In my view, the internal qualification of "reasonableness" in s. 11(b) makes the issue of prejudice to the accused a significant consideration in determining what constitutes a breach. The wording of s. 10(b) contains no such qualification.

130 Secondly, the type of conduct by state officials that gives rise to a breach is different in each case. Law enforcement officials either do or do not inform a detained person of his rights pursuant to [page1255] s. 10(b). On the other hand, assessing whether or not a pre-trial delay is unreasonable presents no such "either/or" choice for the courts. Criminal cases are processed more or less quickly. There is a continuum between very short and unduly long delays and at some point in the continuum the delay becomes unreasonable. Unlike a breach of s. 10(b) which either did or did not happen, the courts in a borderline claim under s. 11(b) are forced to decide where the delay lies on the continuum and whether it has passed the point of being "reasonable". In so doing, they must balance the various factors referred to by Cory J., which include, in my view, possible prejudice to the accused from the delay.

131 Finally, the remedies available to an individual whose rights have been infringed are distinct. A violation of the s. 10(b) right to be informed upon arrest or detention of the right to retain and instruct counsel without delay can be remedied by excluding the illegally obtained evidence from the criminal proceeding under s. 24(2) of the Charter and carrying on with the trial. It is under this latter provision that consideration can be given to any prejudice suffered by the accused as a result of the s. 10(b) breach. When appropriate, that prejudice can be neutralized by excluding the evidence. On the other hand, since a stay of proceedings is the only possible remedy for a violation of s. 11(b), we require the accused to satisfy the court not just that a delay has occurred but that it has been unreasonably long. In my opinion, the presence of prejudice is relevant to whether the accused can meet the onus that this section places on him or her.

132 It also seems implicit in Lamer C.J.'s portrayal of my position on this issue that I perceive prejudice as a virtually essential element of a s. 11(b) claim. [page1256] This is not my view. I have

always maintained that prejudice to the accused is just one of the several factors that need to be weighed in assessing a claim under s. 11(b). The absence of prejudice is not necessarily fatal to such a claim. La Forest J., I believe, shares this view: see, for example, R. v. Rahey, [1987] 1 S.C.R. 588, at p. 646.

133 Subject to the foregoing comments I agree with the result reached by Cory J. and with a substantial part of his reasons.

The following are the reasons delivered by

134 SOPINKA J.:-- I have had the benefit of reading the reasons for judgment prepared in this appeal by Chief Justice Lamer and Justice Cory. I am of the view that this appeal must be allowed for the reasons given by Cory J., with the exception of his reference to a societal interest. In this respect, I agree with Lamer C.J.'s comments concerning the purported societal interest in s. 11(b) of the Canadian Charter of Rights and Freedoms.

The following are the reasons delivered by

135 McLACHLIN J.:-- I agree in substance and result with the reasons of Justice Cory. I wish to add only the following comments relevant to the process of determining whether a trial has unreasonably been delayed.

136 Like Cory J., I see s. 11(b) of the Canadian Charter of Rights and Freedoms as designed to serve both the interests of the accused and the interests of the prosecution, as well as the interests of society generally. This requires adoption of a balancing approach such as that which has prevailed in the United States, "in which the conduct of both the prosecution and the defendant are weighed": Barker v. Wingo, 407 U.S. 514 (1972), per Powell J., at p. 530.

137 Two elements must be assessed under s. 11(b). The first is the length of the delay. The second is its reasonableness.

138 The length of the delay is to be determined by the norms usually prevailing in similar jurisdictions, as Cory J. suggests. The question at this stage is whether the delay is prima facie excessive. If it is not, it is unnecessary to pursue the analysis further. If it is, it is necessary to go on to consider [page1257] whether the delay is reasonable, notwithstanding its length.

139 The reasonableness of the delay may depend on a variety of factors. One is the prejudice caused by the delay. Absent waiver, a certain prejudice in a long-delayed trial may be inferred if not rebutted by the Crown; additional prejudice, such as impairment of the right to a fair trial due to the disappearance of witnesses, may further militate in the accused's favour. Against this must be balanced factors related to the cause of the delay. Was it caused by the prosecution? If so, was the delay attributable to factors inherent in the case? Was the case one of particular difficulty? Were there unavoidable factors, such as geography or unavailability of a witness, which arguably justify

the delay? Are there unavoidable and justifiable systemic delays? On the other hand, was the delay in whole or in part caused by the accused? Did the accused agree to all or part of the delay? Did the accused waive his right to trial within a reasonable time? The ultimate question in each case is whether, after considering all relevant factors, the prima facie excessive delay can be justified as reasonable.

140 The factors to be considered will often pull in opposite directions. Thus, it is impossible to dictate in advance how the balancing is to be done in each case. Yet certain parameters can be suggested. The accused will rarely be entitled to the benefit of s. 11(b) where the Crown can show that the accused caused the delay or has suffered no prejudice as a consequence of the delay. On the other hand, lengthy and avoidable delay caused entirely by the Crown's sloppiness or inattention, or by unjustified delays in the legal system, will frequently entitle an accused to the benefit of s. 11(b).

141 In this case, the delay is prima facie excessive; indeed it is grossly excessive. We must therefore proceed to the second stage of the analysis to ask [page1258] whether it is reasonable. The trial judge found that the accused had been prejudiced by the delay. As for the cause of the delay, the defence neither caused the delay nor agreed to it; I agree with Cory J. that failure to protest the delay should not be determinative against the accused in this case. Here the prosecution caused the delay. That delay was not due to inherent difficulties in the case but to systemic or institutional causes. Notwithstanding ample time since the advent of the Charter to increase the ability of the courts in Peel County to process their heavy trial lists within a reasonable time, this has not been done. Taking these factors together, the result is clear. The delay cannot be justified; it is unreasonable.

142 I would allow the appeal and direct a stay of proceedings.

qp/i/qlcvd