Regina v. Bennett *

Indexed as: R. v. Bennett (C.A.)

3 O.R. (3d) 193
[1991] O.J. No. 884
Action No. 1155/90

Court of Appeal for Ontario
Dubin C.J.O., Arbour and Osborne JJ.A.
May 31, 1991

* An appeal from the following judgment of the Ontario Court of Appeal to the Supreme Court of Canada (L'Heureux-Dubé, Sopinka, Gonthier, McLachlin and Iacobucci JJ.) was dismissed on June 5, 1992. See 9 O.R. (3d) 276 and [1992] 2 S.C.R. 168.

Charter of Rights — Trial within reasonable time — Decision of Supreme Court of Canada in "R. v. Askov" not setting national upper limit of reasonableness at six to eight months — Acceptable time limits must be set locally for each jurisdiction and adjusted periodically — Delays in District Court not equivalent to delays in Provincial Court — Canadian Charter of Rights and Freedoms, s. 11(b).

The accused was charged with assault causing bodily harm in September 1989. He appeared in Provincial Court in October 1989 and set a date for trial of June 7, 1990. On June 7, 1990, the accused elected trial by a District Court judge alone. A preliminary inquiry was commenced but not finished. It was adjourned to June 28, 1990. The accused was committed for trial and the trial was scheduled for November 15, 1990. On that date, the accused moved for a stay of proceedings on the basis of a violation of his right under s. 11(b) of the Canadian Charter of Rights and Freedoms to be tried within a reasonable time. The motion was granted. The Crown appealed.

Held, the appeal should be allowed.

Per Arbour J.A. (Osborne J.A. concurring): The accused's right to be tried within a reasonable time was not infringed.

The decision of the Supreme Court of Canada in Askov, [1990] 2 S.C.R. 1199, makes it apparent that there must be a balancing of factors, not just a mechanical computation of the period of systemic pre-trial delay. The methodology put forward in Askov invites a search for comparable jurisdictions and specifically rejects the notion of either a national standard or an upper limit of six to eight months. Delays in the District Court should not be viewed as being equivalent to delays in the Provincial Court, which, as an intake court, is a court of much greater volume than the District Court. In addition, time must be taken in Provincial Court to retain counsel, obtain legal aid, obtain disclosure, etc.

An appropriate time frame cannot be set out within which cases should be tried in the Provincial Court in

the entire province. What is acceptable systemic delay may vary greatly throughout the province. Acceptable time limits must not only be set locally but must be adjusted periodically to reflect the comparative position of that jurisdiction, at that time, to the best similar ones in the country.

While it is futile for an appellate court to set specific time limits for systemic delay in a given jurisdiction, it may be useful for the Court of Appeal to provide some guidance with respect to administrative goals (which do not translate into constitutional requirements) for the reduction of existing delays. An administrative target of trials within eight months is a reasonable and realistic goal. Whether that goal is achieved in an individual case will only be a factor to be considered in a s. 11(b) application, along with the total length of the delay, waiver and prejudice to the accused.

The accused in this case had the opportunity for a trial within eight and a half months but the trial date of June 7 was converted into a preliminary inquiry by the accused's election of a District Court judge. A longer period of time may be acceptable for a charge to reach trial in the Provincial Court than would be acceptable in the post-committal stage of a two-step trial process. A delay of eight and a half to nine months in getting a case to trial in the Provincial Court is not outside the range of reasonableness. The post-committal delay of four and a half months in this case was not unreasonable. Even if the post-committal delay was too long, the unusual circumstances which caused it -- the merger of the District Court and the High Court -- justified a longer systemic delay than would otherwise be acceptable.

In general, delays occasioned by late election or a last minute re-election should be attributed to the accused.

In cases where trial dates were agreed to prior to Askov, a flexible approach to the issue of waiver is imperative. In this case, there was no reason to interfere with the trial judge's conclusion that there was nothing resembling a waiver on the part of the accused.

The trial judge correctly concluded that there was no significant prejudice incurred by the accused which related to the delay. If an accused is being prejudiced by delay in a manner which is not readily apparent he or she bears the responsibility for taking the initiative in alleviating that prejudice.

R. v. Askov, [1990] 2 S.C.R. 1199, 75 O.R. (2d) 673, 49 C.R.R. 1, 59 C.C.C. (3d) 449, 79 C.R. (3d) 273, 74 D.L.R. (4th) 355, 113 N.R. 241, 42 O.A.C. 81; R. v. Carter (1991), 1 O.R. (3d) 790, 62 C.C.C. (3d) 541 (C.A.) [leave to appeal to S.C.C. (L'Heureux-Dube, Gonthier and Iacobucci JJ.) refused June 13, 1991], *consd*

Per Dubin C.J.O. (concurring in the result): The judgment of the Supreme Court of Canada in Askov did not prescribe a limitation period which, if exceeded, must result in automatic stays of charges.

In those cases where a date for trial for preliminary hearing was set prior to the release of Askov, agreement to the date by defence counsel is a factor which should be taken into consideration in determining whether an accused has been denied the right to a trial within a reasonable time.

For the reasons given by Arbour J.A., the trial judge erred in concluding, without regard to any other factors, that eight months in Provincial Court was unreasonable. The appeal should be allowed, the stay of proceedings set aside and the matter remitted for trial.

R. v. Askov, [1990] 2 S.C.R. 1199, 75 O.R. (2d) 673, 49 C.R.R. 1, 59 C.C.C. (3d) 449, 79 C.R. (3d) 273,

74 D.L.R. (4th) 355, 113 N.R. 241, 42 O.A.C. 81; R. v. Smith, [1989] 2 S.C.R. 1120, 45 C.R.R. 314, 52 C.C.C. (3d) 97, 73 C.R. (3d) 1, 63 Man. R. (2d) 81, 102 N.R. 205, *consd*

Other cases referred to

Barker v. Wingo, 407 U.S. 514 (1972); R. v. Antoine (1983), 41 O.R. (2d) 607, 4 C.R.R. 126, 5 C.C.C. (3d) 97, 34 C.R. (3d) 136, 148 D.L.R. (3d) 149 (C.A.); R. v. Beason (1983), 43 O.R. (2d) 65, 7 C.R.R. 65, 7 C.C.C. (3d) 20, 36 C.R. (3d) 73, 1 D.L.R. (4th) 218 (C.A.); R. v. Conway, [1989] 1 S.C.R. 1659, 40 C.R.R. 1, 49 C.C.C. (3d) 289, 70 C.R. (3d) 209, 96 N.R. 241, 34 O.A.C. 165; R. v. Fortin (1990), 75 O.R. (2d) 733 (Gen. Div.); R. v. Heaslip (1983), 7 C.R.R. 257, 9 C.C.C. (3d) 480, 36 C.R. (3d) 309, 1 O.A.C. 81 (C.A.); R. v. Jewitt, [1985] 2 S.C.R. 128, 21 C.C.C. (3d) 7, 47 C.R. (3d) 193, 20 D.L.R. (4th) 651, 61 N.R. 159, [1985] 6 W.W.R. 127; R. v. Keyowski, [1988] 1 S.C.R. 657, 32 C.R.R. 269, 40 C.C.C. (3d) 481, 62 C.R. (3d) 349, 83 N.R. 296, 65 Sask. R. 1, [1988] 4 W.W.R. 97; R. v. Mills, [1986] 1 S.C.R. 863, 58 O.R. (2d) 543 (note), 21 C.R.R. 76, 26 C.C.C. (3d) 481, 52 C.R. (3d) 1, 29 D.L.R. (4th) 161, 67 N.R. 241, 16 O.A.C. 81; R. v. Morin (1990), 1 C.R.R. (2d) D-5, 55 C.C.C. (3d) 209, 76 C.R. (3d) 37, 38 O.A.C. 298 (C.A.) [leave to appeal to S.C.C. granted (Sopinka, McLachlin and Iacobucci JJ.) January 25, 1991]; R. v. Rahey, [1987] 1 S.C.R. 588, 33 C.R.R. 275, 33 C.C.C. (3d) 289, 57 C.R. (3d) 289, 39 D.L.R. (4th) 481, 75 N.R. 81, 78 N.S.R. (2d) 183, 193 A.P.R. 183; R. v. Seaboyer; R. v. Gayme (1987), 35 C.R.R. 300, 37 C.C.C. (3d) 53, 58 C.R. (3d) 289, 20 O.A.C. 345 (C.A.) [appeal to S.C.C. (Lamer C.J.C., La Forest, L'Heureux-Dube, Sopinka, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ.) heard and judgment reserved March 26 and 27, 1991]

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 11(b), (d), 24(1)
Constitution (United States), Sixth Amendment
Highway Traffic Act, R.S.O. 1980, c. 198, s. 26 [am. 1985, c. 13, s. 3]

Authorities referred to

Time Limit Legislation in Criminal Cases (Ottawa: 1984)
Zuber, T.G., Report of the Ontario Courts Inquiry (Toronto:

Queen's Printer, 1987), p. 73

APPEAL by the Crown from an order of the General Division staying proceedings, summarized at (1990), 11 W.C.B. (2d) Paragraph461.

Murray D. Segal, for the Crown, appellant.

Michael Code, for respondent.

DUBIN C.J.O. (concurring in the result)::-- I have had the advantage of reading the very carefully considered and detailed reasons of my colleague, Madam Justice Arbour. Although I agree with her in result, and with much of her reasoning, I take a somewhat different approach to certain of the issues raised on this appeal. In particular, I take a different view of the issues common to this appeal and the other appeals which are being released simultaneously. Of special concern to me is the effect to be given to consent by defence counsel to the date set for trial in those cases where the date was set before the delivery of the judgment of

the Supreme Court of Canada in R. v. Askov, [1990] 2 S.C.R. 1199, 75 O.R. (2d) 673, 49 C.R.R. 1, 59 C.C.C. (3d) 449, 79 C.R. (3d) 273, 74 D.L.R. (4th) 355, 113 N.R. 241, 42 O.A.C. 81.

OVERVIEW

The judgment of the Supreme Court of Canada in R. v. Askov was delivered on October 18, 1990. As pointed out by Madam Justice Arbour, between October 22, 1990 and April 12, 1991, approximately 35,000 charges were stayed, dismissed or withdrawn in Ontario as a result of the interpretation given to that judgment, in some cases, by trial court judges and Crown counsel. This is one of those cases in which a stay was ordered.

The effect of the stay is tantamount to an acquittal but without a trial. As pointed out by Arbour J.A., heretofore the power to stay proceedings has only been exercised by the courts to remedy an abuse of process where " 'compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency', or where the proceedings are 'oppressive or vexatious' " and has been exercised only in the clearest cases: see R. v. Keyowski, [1988] 1 S.C.R. 657, 32 C.R.R. 269, 40 C.C.C. (3d) 481, 62 C.R. (3d) 349, 83 N.R. 296, 65 Sask. R. 1, [1988] 4 W.W.R. 97, at pp. 658-59 S.C.R., p. 271 C.R.R., p. 482 C.C.C. The power to stay a prosecution and deny the right of the Crown to put an accused on trial is a power which must be exercised judiciously and with restraint.

The staying of so many charges has had a serious impact on the administration of justice in this province and, I fear, has eroded the public's confidence in the administration of justice. While the judgment of the Supreme Court of Canada in Askov must be followed, I do not read the reasons for judgment of the majority of the court as requiring such a draconian result.

While delivering the reasons on behalf of the majority of the court in Askov, Cory J. quoted in part from a study conducted by Professor Baar, as follows at p. 1235 S.C.R., p. 702 O.R., pp. 31-32 C.R.R., p. 486 C.C.C.:

> 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.

It was on that basis that Cory J. concluded at p. 1247 S.C.R., p. 711 O.R., p. 41 C.R.R., p. 495 C.C.C.:

> Courts may frequently be requested to take such a step (grant a stay). 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.

Professor Baar's data was collected during the periods between February and May of 1982, and between August 1983 and March 1984. However, as pointed out by my colleague, Arbour J.A., between 1986 and 1990, the volume of cases exploded in this province. When the Supreme Court of Canada rendered judgment in Askov, there were approximately 160,000 charges outstanding where the trial or preliminary hearing had been set far beyond the six-month period referred to by Professor Baar. This was true not only in Brampton where the Askov case was to be tried, but also in many of the other municipalities in this province. In

addition, by reason of the new issues raised by the Canadian Charter of Rights and Freedoms, trials were becoming more complicated and lengthy.

The justice system in this province was not equipped to process the increased load of cases with such expedition. However, in more recent years the system has been undergoing a period of adjustment by increasing the number of justices and Crown counsel, and providing facilities for the orderly dealing with the increased number of pending criminal cases. As pointed out by Madam Justice Arbour, there is a province-wide effort in the provincial courts to schedule trial dates within eight months of the laying of a charge. It would appear that progress is being made towards that administrative goal and indeed these efforts must continue.

The matter was reviewed by this court in the case of R. v. Morin (1990), 1 C.R.R. (2d) D-5, 55 C.C.C. (3d) 209, 76 C.R. (3d) 37, 38 O.A.C. 298 (C.A.) [leave to appeal to S.C.C. granted (Sopinka, McLachlin and Iacobucci JJ.) January 25, 1991], referred to by Madam Justice Arbour, where the court recognized the need for a transitional period to allow the system to correct its deficiencies.

In Askov, there was a delay of 34 months between the date of the laying of the information and the date set for trial. Of those 34 months, 23 were between the date of the committal for trial and the date set for trial. The court noted that counsel for the accused had attended the trial co-ordinator's office to find out the earliest possible trial date. It was held that the accused had been denied a trial within a reasonable time and, in that context, after noting that the District of Peel had the worst average delay in Canada and indeed in North America, Cory J. added, at p. 1240 S.C.R., p. 706 O.R., p. 35 C.R.R., p. 490 C.C.C., "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".

In the many cases reviewed by this court, including the instant appeal, it appears that the trial judges often have interpreted this six- to eight-month period as if it were a statutory limitation period, such that when a trial date has been set later than six to eight months after the laying of the information, that factor alone becomes the basis upon which a stay is granted. This approach reduces the determination of whether an accused has been denied a right to be tried within a reasonable time from a judicial function to an administrative one.

Like Madam Justice Arbour, I do not read the reasons for judgment of the Supreme Court of Canada as prescribing a statutory limitation period which, if exceeded, must result in automatic stays of charges.

It is to be noted that Chief Justice Lamer, who concurred with the majority in Askov on the resolution of the appeal and with most of its reasoning, had earlier stated in R. v. Conway, [1989] 1 S.C.R. 1659, 40 C.R.R. 1, 49 C.C.C. (3d) 289, 70 C.R. (3d) 209, 96 N.R. 241, 34 O.A.C. 165, at p. 1697 S.C.R., p. 31 C.R.R., p. 299 C.C.C.:

> Before turning to the instant case, I only want to say once again that there is no magic moment beyond which a violation will be deemed to have occurred and that this Court should refrain from legislating one. In reality, however, when judges assess the situation in individual cases, they will be measuring the delays against some norm each judge considers to be prima facie the tolerable limit for the ordinary, average case. I hasten to add that a finding that the delay involved is prima facie excessive is not a condition precedent to the inquiry into reasonableness of the delay, i.e., to the weighing and balancing of the criteria elaborated above. It is simply an approximate point at which the courts may properly look to the Crown to

> explain additional delay. Such a period, of course, is no more than a reference point. It may well be that a balancing of the criteria of reasonableness will lead to a finding of a violation for lesser periods of delay. Conversely, greater periods of delay may well be held to be reasonable depending upon, once again, an assessment and a weighing of the criteria. It is the application under s. 24(1) which triggers the inquiry, not the passage of a certain period of time. The amount of time elapsed determines who of the Crown or accused the judge will call upon to explain the case being unusual.

(Emphasis added)

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

The relevant provisions of the Charter, in my opinion, are as follows:

> 11. Any person charged with an offence has the right
>
> . . . . .
>
> (b) to be tried within a reasonable time;
>
> . . . . .
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal ...
>
> . . . . .
>
> 24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The right to be tried within a reasonable time: s. 11(b)

Since the enactment of the Charter in 1982, s. 11(b) of the Charter has been the subject of intensive judicial discussion. During this time, there has been considerable disagreement as to the factors to be taken into account in ascertaining whether there has been a breach of this right.

In R. v. Antoine (1983), 41 O.R. (2d) 607, 4 C.R.R. 126, 5 C.C.C. (3d) 97, 34 C.R. (3d) 136, 148 D.L.R. (3d) 149 (C.A.), R. v. Beason (1983), 43 O.R. (2d) 65, 7 C.R.R. 65, 7 C.C.C. (3d) 20, 36 C.R. (3d) 73, 1 D.L.R. (4th) 218 (C.A.), and R. v. Heaslip (1983), 7 C.R.R. 257, 9 C.C.C. (3d) 480, 36 C.R. (3d) 309, 1 O.A.C. 81 (C.A.), Mr. Justice Martin, writing for this court, extensively reviewed these factors. He found persuasive and helpful what was stated by Mr. Justice Powell in Barker v. Wingo, 407 U.S. 514 (1972), notwithstanding the different constitutional basis upon which that judgment was founded. In that case, the Supreme Court of the United States considered the question of whether a defendant's right to a speedy trial as secured by the Sixth Amendment had been abridged. That court identified the following four factors to be considered in determining whether a defendant had been deprived of such a right:

1. length of delay;

2. the reason for the delay;
3. the defendant's assertion of the right; and
4. prejudice to the defendant.

The Supreme Court of Canada now authoritatively has held that an accused is under no obligation to assert the right to trial within a reasonable time and a failure to do so is not to be taken into consideration in determining whether an accused has been denied the right to be tried within a reasonable time. In this respect, the third consideration in Barker v. Wingo has been replaced by a consideration of whether the accused has waived the right to be tried within a reasonable time and the onus has been placed on the Crown to prove such waiver. Mere silence or lack of objection, it has been stated, cannot constitute lawful waiver. However, it has also been held that the accused's conduct must be taken into account in assessing the prosecution's explanation for delay.

In R. v. Smith, [1989] 2 S.C.R. 1120, 45 C.R.R. 314, 52 C.C.C. (3d) 97, 73 C.R. (3d) 1, 63 Man. R. (2d) 81, 102 N.R. 205, a judgment of the Supreme Court of Canada, released on December 7, 1989, Sopinka J., writing for a unanimous court, stated at p. 1136 S.C.R., p. 327 C.R.R., p. 109 C.C.C.:

> 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.

(Emphasis added)

Mr. Justice Sopinka went on to note that in that case, although counsel for the accused had agreed to the date for the preliminary inquiry after having been advised that no judge was available for an earlier date, he demonstrated his desire to move the proceedings along quickly by formally recording his objection to the delay by correspondence with Crown counsel.

In light of what was stated in R. v. Smith, supra, in those cases where a date for trial or preliminary hearing was set prior to the release of Askov, agreement to the date by defence counsel is a factor which should be taken into consideration in determining whether an accused has been denied the right to a trial within a reasonable time. I do not say that such agreement to the trial date will always be conclusive, but in my view, it should be considered along with the other factors referred to by Madam Justice Arbour.

The right to a fair trial: s. 11(d)

In this appeal, as indeed is the case in the other appeals being released at this time, there is no suggestion that the accused could not receive a fair trial on the date set for trial. There may well be cases where the failure of the Crown to proceed expeditiously with the prosecution of a case, even where defence counsel has agreed to the date for trial, will deprive the accused of his or her right to a fair trial. In those circumstances a stay would be an appropriate remedy. This is not such a case.

The breach of a Charter right: s. 24(1)

The right of any person charged with an offence to be tried within a reasonable time is not a new right.

Prior to the enactment of the Charter, a trial judge had the power to require the Crown to proceed with a trial where there had been oppressive delay, and to dismiss the charge if the Crown was unprepared to adduce evidence in support of it. Even so, the right of an accused to be tried within a reasonable time was not as fully protected then as it has been since being elevated by the Charter to a constitutional right. Further, the power to grant a stay is now encompassed by s. 24(1) of the Charter. It is the duty of the court to guard zealously all constitutional rights, including the right to be tried within a reasonable time.

However, in order to determine whether a right as guaranteed by the Charter has been infringed upon or denied and to determine the appropriate remedy, it is first necessary to determine whose right or freedom has been infringed upon or denied.

But for the majority judgment of the Supreme Court of Canada in Askov, I would have been of the view that the right to be tried within a reasonable time is the right of the individual charged with an offence, and, in order to obtain relief pursuant to s. 24(1), it would be for that individual to prove, by a balance of probabilities, the denial of his or her right.

I have great difficulty in concluding that an individual charged with an offence has been denied the constitutional right to be tried within a reasonable time where there is no evidence that the individual wanted to be tried at a date earlier than that set for trial. Such a conclusion is based on the premise that every person charged with an offence is anxious to be tried promptly and with expedition. This includes the assumption, in those cases where the accused and counsel have agreed to a trial at the first available date, that the accused desired to be tried earlier.

With the greatest respect to the contrary view, in my opinion, this premise lacks reality. Indeed, drawing from my own experience, and, I am sure, from the experience shared by counsel who practise in the criminal courts, it is unsafe to proceed on this basis.

The reality of what generally transpires is noted by Mr. Justice T.G. Zuber in his Report of the Ontario Courts Inquiry (Toronto: Queen's Printer, 1987), as follows 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.

Similarly, Mr. Justice Doherty, in a paper delivered to the National Criminal Law Program in July 1989, wrote as follows:

> 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.
>
> This unique attitude on the part of the accused toward his 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.

The above-noted sources were referred to by Cory J. at pp. 1221-22 S.C.R., pp. 691-92 O.R., p. 21 C.R.R., p. 476 C.C.C., of his judgment in Askov. Cory J. went on to say at p. 1222 S.C.R., p. 692 O.R., p. 21 C.R.R., p. 476 C.C.C.:

> 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.

It would appear that this is what has transpired in this province in many cases since the delivery of the judgment in Askov.

However, the majority of the court in Askov held that s. 11(b) of the Charter does not merely protect the individual's rights, but also encompasses a societal interest in the early disposition of criminal cases. Viewed in that light, s. 11(b) has been interpreted by many as if it stated that no person charged with a criminal offence shall be tried if it is concluded that an earlier date should have been set for trial, whether or not the person charged desired to proceed at an earlier date.

There can be no doubt that there is a societal interest in the expeditious administration of the criminal law. However, it was not thought previously that that was the interest s. 11(b) was designed to protect. That societal interest can also be protected by the duty of the Crown to proceed expeditiously with the criminal process, and the duty of the courts where adjournments are sought to prevent unreasonable delay. However, there is, I think, as a corollary to the societal interest in expeditious proceedings, a societal interest in seeing that every person charged with an offence be brought to trial to be found guilty or not guilty and if, after a fair trial in which all the rights of the accused are fully protected, the accused is found guilty, the accused should be punished.

It is also true that victims are anxious to have the trial proceed expeditiously, but I expect that victims of crime would prefer to see the accused brought to trial, even at a late date, rather than to see the accused discharged without a trial.

If the purpose of s. 11(b) is to protect the rights of an individual charged with an offence, a stay of process has been held to be the only appropriate remedy. If, on the other hand, the purpose of s. 11(b) is also to protect societal interests and the interests of victims of crime, then, with the greatest of respect, I doubt that a stay of process is the most appropriate remedy. However, if a stay is held also to be the only appropriate remedy to protect the latter interests, then serious consideration will have to be given to the manner in which trial dates in criminal cases are to be set in this province where traditionally, within reasonable limits, every effort has been made to accommodate the accused and his or her counsel.

THE CASE AT BAR

As noted earlier, I agree with Madam Justice Arbour that the learned trial judge erred in granting a stay in this case.

The date set for trial was some eight months after the respondent was charged with assault causing bodily harm. However, on the date set for trial, as was his right, the accused elected, through counsel, to be tried by a higher court. A preliminary inquiry was commenced on that date instead. Following committal for trial, a trial date was set for some five months hence. The learned trial judge granted a stay. In his reasons [at pp. 9-10], he concluded as follows:

> The decision in this case is going to turn on the eight-month delay experienced in the Provincial Division.
>
> I have given the reason for the delay. The question is, is that unreasonable? Is that delay of eight months in the Provincial Court level unreasonable in the circumstances? I would think that if Mr. Justice Cory were adjudicating on it he would say "yes". We cannot compare our jurisdiction with the County of Peel and if it takes six to eight months in the County of Peel it should not take six to eight months in the District of Algoma. I am compelled to conclude, based on the Askov case, that taking eight months to find a trial date in the Provincial Court is unreasonable.

Even without giving any weight to the agreement by defence counsel to the date set for trial and accepting, as I must, that s. 11(b) of the Charter protects not only the rights of the individual but societal interests as well, in my opinion, and for the reasons given by Madam Justice Arbour, the learned trial judge erred in concluding, without regard to any other factors, that eight months to find a trial date in Provincial Court was unreasonable.

In the result, therefore, I would allow the appeal, set aside the stay and remit the respondent for trial.

ARBOUR J.A. (OSBORNE J.A. concurring):— This Crown appeal concerns an accused's constitutional right to be tried within a reasonable time. It was heard with a series of other appeals raising issues which arose as a result of the Supreme Court of Canada decision in R. v. Askov, [1990] 2 S.C.R. 1199, 75 O.R. (2d) 673, 49 C.R.R. 1, 59 C.C.C. (3d) 449, 79 C.R. (3d) 273, 74 D.L.R. (4th) 355, 113 N.R. 241, 42 O.A.C. 81.

BACKGROUND

The right to be tried within a reasonable time, guaranteed under s. 11(b) of the Canadian Charter of Rights and Freedoms, was analyzed early by this court (R. v. Beason (1983), 43 O.R. (2d) 65, 7 C.R.R. 65, 7 C.C.C. (3d) 20, 36 C.R. (3d) 73, 1 D.L.R. (4th) 218, and R. v. Heaslip (1983), 7 C.R.R. 257, 9 C.C.C. (3d) 480, 36 C.R. (3d) 309, 1 O.A.C. 81) and subsequently by the Supreme Court of Canada (R. v. Mills, [1986] 1 S.C.R. 863, 58 O.R. (2d) 543 (note), 21 C.R.R. 76, 26 C.C.C. (3d) 481, 52 C.R. (3d) 1, 29 D.L.R. (4th) 161, 67 N.R. 241, 16 O.A.C. 81; R. v. Rahey, [1987] 1 S.C.R. 588, 33 C.R.R. 275, 33 C.C.C. (3d) 289, 57 C.R. (3d) 289, 39 D.L.R. (4th) 481, 75 N.R. 81, 78 N.S.R. (2d) 183, 193 A.P.R. 183; R. v. Conway, [1989] 1 S.C.R. 1659, 40 C.R.R. 1, 49 C.C.C. (3d) 289, 70 C.R. (3d) 209, 96 N.R. 241, 34 O.A.C. 165; and R. v. Smith, [1989] 2 S.C.R. 1120, 45 C.R.R. 314, 52 C.C.C. (3d) 97, 73 C.R. (3d) 1, 63 Man. R. (2d) 81, 102 N.R. 205).

In the last year, however, important developments have occurred. In April 1990, a five-judge panel of this court held in R. v. Morin (1990), 1 C.R.R. (2d) D-5, 55 C.C.C. (3d) 209, 76 C.R. (3d) 37, 38 O.A.C. 298 (C.A.) [leave to appeal to S.C.C. granted (Sopinka, McLachlin and Iacobucci JJ.) January 25, 1991], that systemic delay of 141/2 months in bringing a simple, routine matter to trial in the Provincial Court was to be excused in view of the efforts made by the government to correct the problems which caused systemic delay in the Provincial Court in the District of Durham. This court held that there was a need for a transitional period, not of indefinite duration, to allow the system to correct its deficiencies. On the basis of evidence

before the court of the measures already taken to address the problem, the court excused a delay which, on its face, called for an explanation.

Approximately one month before this court released its decision in Morin, the Supreme Court of Canada heard an appeal from another decision of this court [(1987), 33 C.R.R. 319, 37 C.C.C. (3d) 289, 60 C.R. (3d) 277, 22 O.A.C. 299] in Askov. The Supreme Court released its decision in that case on October 18, 1990. Without referring to Morin, the Supreme Court held that a delay of 34 months in bringing a conspiracy case to trial in the District Court was too long and violated the s. 11(b) Charter rights of the accused. Cory J., writing for the majority, held that four factors must be considered in determining whether there has been unreasonable delay: (1) the length of the delay; (2) the explanation for the delay; (3) waiver; and (4) prejudice to the accused. Cory J. noted that systemic delay will often be the most difficult to assess. For reasons to which I will return below, Cory J. concluded that the 23 months that it took to bring the case to trial after committal for trial, in the District Court of Peel, was unreasonable. The delay involved was systemic. Cory J. observed that the District of Peel had the worst delays in Canada and, indeed, in North America, and added "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" (p. 1240 S.C.R., p. 706 O.R., p. 35 C.R.R., p. 490 C.C.C.).

Statistical data prepared by the Ministry of the Attorney General disclose that between October 22, 1990, and April 12, 1991, 34,495 counts have been stayed, dismissed or withdrawn in Ontario on the basis of Askov. Of those, about 8,600 were impaired driving charges, some 6,000 were theft under $1,000, and there was a substantial number of assaults and frauds. Over 500 sexual assaults and other sexual offences were also stayed, as well as more than 1,000 drug-related charges. In addition to these 34,495 criminal offences, thousands of parking tickets and over 15,000 other provincial offences also were stayed.

In view of the staggering impact of the Askov decision, and the manifest differences of opinion among trial judges as to its application, this court scheduled several appeals from lower court decisions, which either stayed charges or denied a stay, in order to ensure that Askov is properly understood and applied throughout Ontario. This is particularly pressing in view not only of the number of cases stayed, but also of the nature of the remedy itself.

A judicial stay of proceedings is the most powerful remedy available to sanction the infringement of the constitutional rights of an accused under s. 24(1) of the Charter. Prior to the enactment of the Charter, the stay of proceedings had been developed by the courts as a sanction against abuse of process by prosecuting authorities. The guiding principles which permit staying proceedings because of an abuse of process were recently reaffirmed by the Supreme Court of Canada in R. v. Keyowski, [1988] 1 S.C.R. 657, 32 C.R.R. 269, 40 C.C.C. (3d) 481, 62 C.R. (3d) 349, 83 N.R. 296, 65 Sask. R. 1, [1988] 4 W.W.R. 97, at pp. 658-59 S.C.R., p. 271 C.R.R., p. 482 C.C.C., where Wilson J., for the court, said:

> The availability of a stay of proceedings to remedy an abuse of process was confirmed by this Court in R. v. Jewitt, [1985] 2 S.C.R. 128. On that occasion the Court stated that the test for abuse of process was that initially formulated by the Ontario Court of Appeal in R. v. Young (1984), 40 C.R. (3d) 289. A stay should be granted where "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency", or where the proceedings are "oppressive or vexatious" [1985] 2 S.C.R. at pp. 136-37). The Court in Jewitt also adopted "the caveat added by the Court in Young that this is a power which can be exercised only in the 'clearest of cases' " (p. 137).

Both at common law and under the Charter, stays of proceedings for abuse of process have been granted sparingly, and only in the "clearest of cases". A stay is tantamount to an acquittal in that it effectively brings the proceedings to a final conclusion in favour of the accused (R. v. Jewitt, [1985] 2 S.C.R. 128, 21 C.C.C. (3d) 7, 47 C.R. (3d) 193, 20 D.L.R. (4th) 651, 61 N.R. 159, [1985] 6 W.W.R. 127, at p. 148 S.C.R., p. 23 C.C.C.). By granting a stay, the court in effect stands between the accused and the state to prevent what otherwise would be the just resolution, on the merits, of an allegation of criminal conduct.

The judicial stay of proceedings, developed at common law, became one of the remedies which could be applied by a court of competent jurisdiction under s. 24(1) of the Charter. Not all courts are competent to grant a stay of proceedings (Mills, supra; R. v. Seaboyer; R. v. Gayme (1987), 35 C.R.R. 300, 37 C.C.C. (3d) 53, 58 C.R. (3d) 289, 20 O.A.C. 345 (C.A.), appeal to S.C.C. (Lamer C.J.C., La Forest, L'Heureux-Dube, Sopinka, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ.) heard and judgment reserved March 26 and 27, 1991). A stay for abuse of process is a discretionary remedy which a court may or may not find appropriate in the circumstances of a given case.

It is, however, now settled that when a violation of s. 11(b) of the Charter has been established, a stay of proceedings is the minimum remedy. This was first stated by Lamer J. dissenting (Dickson C.J.C. concurring) in Mills, supra, where he said at p. 947 S.C.R., pp. 164-65 C.R.R., p. 240 D.L.R.:

> After the passage of an unreasonable period of time, however, no trial, not even the fairest possible trial, is permissible. For a finding of unreasonable delay is, in effect, a finding of a s. 11(b) violation; to allow a trial to proceed after such a finding would be to participate in a further violation of the Charter. In effect, therefore, s. 11(b) gives an accused person the right not to be tried once an unreasonable period of time has elapsed.

(Emphasis original)

Lamer J. then concluded at p. 948 S.C.R., p. 165 C.R.R., p. 241 D.L.R., that:

> It is not necessarily the only remedy, for additional remedies may be just and appropriate in the circumstances of the case. The stay is a minimum remedy, to which others may be added ...

McIntyre J., writing for the majority in Mills, rejected the notion that a stay was the minimum available remedy. Referring to s. 24(1) of the Charter, he said at pp. 965-66 S.C.R., p. 98 C.R.R., p. 181 D.L.R.:

> It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion. No court may say, for example, that a stay of proceedings will always be appropriate in a given type of case. Although there will be cases where a trial judge may well conclude that a stay would be the appropriate remedy, the circumstances will be infinitely variable from case to case and the remedy will vary with the circumstances.

La Forest J. concurring, in Mills, expanded on the position that a minimum remedy of a stay was not appropriate, stating that "[t]he draconian remedy of a stay should be reserved for the more compelling cases" (p. 974 S.C.R., p. 102 C.R.R., p. 248 D.L.R.). He summarized his position as follows at p. 973 S.C.R., p. 101 C.R.R., p. 247 D.L.R.:

> Under s. 24(1), the power to afford a remedy for the breach of a Charter right is in terms

> discretionary. A court of competent jurisdiction may grant such remedy as it considers appropriate and just in the circumstances. To categorize unreasonable delay as jurisdictional and to make a stay the only possible judicial response to it, one must not only rewrite s. 24(1), but give the right in s. 11(b) a pre-eminence over other Charter rights which, in my view, neither the language of the Charter nor the accepted values of our society warrant.

However, the opinion of Lamer J. prevailed in Rahey, supra, where, writing for the majority, he said, at p. 614 S.C.R., p. 293 C.R.R., pp. 498-99 D.L.R.:

> Now to turn to the remedy. Again in Mills, I have explained why a stay is the minimal remedy. If an accused has the constitutional right to be tried within a reasonable time, he has the right not to be tried beyond that point in time, and no court has jurisdiction to try him or order that he be tried in violation of that right. After the passage of an unreasonable period of time, no trial, not even the fairest possible trial, is permissible. To allow a trial to proceed after such a finding would be to participate in a further violation of the Charter.

The fact that a stay of proceedings is the minimum remedy for an infringement of s. 11(b) does not change its nature. A judicial stay is a declaration of disentitlement to adjudication; for all its legitimacy, it remains a judicially created impediment to the completion of the process by which society resolves some of its conflicts. The Attorney General may decide to withdraw a charge that has not been prosecuted expeditiously. But when the state asserts its right to continue with the prosecution, in the face of an alleged infringement of the right of the accused to be tried within a reasonable time, the judiciary is called upon to act as the constitutional arbiter. In such a case, the granting of a judicial stay of proceedings because of an infringement of s. 11(b) of the Charter cannot therefore be reduced to an administrative task, another step in case management, the end of the assembly line for processing cases. It calls for the exercise of judgment by the individual judge who orders the stay.

The Supreme Court decision in Askov makes it apparent that a skilful judgment is required to support a conclusion that there has been a violation of s. 11(b) and that a stay of proceedings must be entered. Judges must balance four factors, one of which -- the reason for the delay -- requires an analysis, sometimes critical, of a system of which the judiciary is an integral part.

Askov has frequently been given a minimalist or reductionist interpretation. When mere lip service is paid to the required balancing of the four factors, the trial within a reasonable time issue is often resolved by the mechanical computation of the systemic time required to bring the charge to trial and the six to eight months referred to in Askov is then given the force of a judicially developed limitation period. This isolates and over-emphasizes systemic delay and reduces the concept of reasonableness in s. 11(b) to a simplistic computation of time. This is not what the Supreme Court decision in Askov stands for.

After reviewing the authorities, Cory J. said at pp. 1230-32 S.C.R., pp. 699-700 O.R., pp. 28-29 C.R.R., pp. 483-84 C.C.C.:

> From the foregoing review it is possible I think to give a brief summary of all the factors which 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.

(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.

Applying all factors to the facts in Askov, Cory J. concluded that s. 11(b) had been infringed. Of the three years it took for the case to reach trial, the year preceding the preliminary inquiry was attributed to the accused. The two-year delay subsequent to committal for trial was such a lengthy period that only a strong justification could excuse it. It turned out to be pure systemic delay, in a case which was not complex or

inherently difficult. Three of the appellants had been subject to lengthy periods of pre-trial custody and all were under somewhat stringent bail conditions. It could not, therefore, be said that absence of prejudice could excuse the delay.

This, in my view, is why the charges in Askov were stayed, not because they had become stale eight months after the committal for trial.

THE CASE AT BAR

This is an appeal by the Crown from the order of Stortini J. in the Ontario Court of Justice, General Division, on November 15, 1990 [summarized at 11 W.C.B. (2d) Paragraph461], staying a charge of assault causing bodily harm against the respondent because of unreasonable delay.

(a) The history of the proceedings

The respondent was charged, as a result of a fight in a hotel in the town of Bruce Mines, with assault causing bodily harm on September 24, 1989. He was brought before a justice of the peace in Thessalon that day and was released on his own undertaking, with conditions. He retained counsel and appeared in Provincial Court in Thessalon on October 5, 1989. On that date, it appeared that the earliest trial dates available would be in June 1990. The presiding judge adjourned the matter to October 19, 1989, in the hope that earlier trial dates would become available in the meantime.

On October 19, 1989, the court clerk offered the date of June 7, 1990, for a trial which the Crown estimated would take one and a half hours. That date was accepted by the defence.

On June 7, 1990, the case was called late in the day and the respondent elected trial by a District Court judge alone. Consequently, a preliminary inquiry, rather than the trial, was commenced in the Provincial Court. The Crown closed its case by 4:30 p.m. The respondent's counsel then indicated that she wished to call evidence and the matter was adjourned to June 28, 1990. On that date, the respondent was committed for trial in the District Court.

The indictment was drafted on July 5, 1990; a pre-trial conference was held on August 23, 1990. The judge presiding at the pre-trial endorsed the indictment as follows: "One day trial. Set over to next Assignment Court". However, in view of the merger of the District Court and the High Court of Justice and the regionalization of the court's administrative structure, which took place on September 1, 1990, no assignment court was held in that region in September and October, 1990.

The indictment was placed in assignment court on November 8, 1990, at which point counsel for the respondent advised the court that a motion for a stay of proceedings based on s. 11(b) would be brought on the trial date. November 15, 1990 was set as the trial date. On that date, the motion was argued and the stay was granted.

(b) The factors to be considered under s. 11(b)

(i) The length of the delay

The total time period, from the laying of the information to the ultimate trial date, was slightly over 131/2 months. This, in itself, is not shocking, or grossly excessive; nor is it a delay of such length that it could not

be justified for any reason. It is, nonetheless, of sufficient length to require an examination of the other factors which bear on the determination of reasonableness under s. 11(b).

It is easy to lose sight of the importance of the total period of delay, particularly when engaged in an examination of the causes for various components of the total delay. A case may take too long to reach the preliminary inquiry, but then may be tried very expeditiously after committal, or vice versa. Ultimately, it is the reasonableness of the total period of time that has to be assessed, in the light of the reasons that explain its constituent parts.

(ii) Explanation of the delay

(A) The conduct of the Crown

This was not a complex case; the appellant is not relying on any justification in this regard.

(B) Systemic or institutional delay

The respondent first appeared in Provincial Court two weeks after the information was laid. On that day, the matter was adjourned for another two weeks in the hope that earlier trial dates would become available. On October 19, the trial date of June 7 was set and duty counsel agreed to it. This was eight and a half months from the date the information had been sworn.

The trial judge concluded that the eight and a half month period was systemic delay, outside the range made permissible in Askov, and he ordered that the proceedings be stayed. In reaching that conclusion, the trial judge took judicial notice that the cause of the delay was the shortage of at least one judge in the Provincial Court in the District of Algoma at the material time.

Although the delay is one of eight and a half months in reaching the preliminary inquiry, the matter must be treated as a period of delay for the case to reach a trial date. The election as to the mode of trial is a prerogative of the defence. However, June 7, 1990 was set as a trial date and, by converting the trial into a preliminary inquiry, the defence waived the opportunity for trial at that time. The defence was offered a trial date some eight and a half months away and agreed to it without any indication that this would, in fact, complete only a phase of the pre-trial process.

There was no evidence upon which to adequately analyze whether a systemic delay of eight and a half months in the Provincial Court in the District of Algoma was reasonable. Cory J. in Askov remarked that the determination of what constitutes reasonable systemic delay was going to be the most difficult task. He then noted at p. 1227 S.C.R., p. 696 O.R., p. 25 C.R.R., p. 480 C.C.C.:

> 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.

In my view, the determination of what constitutes unreasonable systemic delay in the various jurisdictions across Canada cannot be avoided by using the six to eight month range that the Supreme Court in Askov said

was the outside limit for bringing a case to trial after committal in the District Court in Peel.

In the case at bar, the trial judge measured the reasonableness of the delay solely by reference to the systemic delay in the District of Peel. He said [at pp. 9-10 of his reasons]:

> If we analyze the length of delay in the case at bar, eight months in the Provincial Division and five months in the General Division, one would conclude that the five months in the General Division is not unreasonable and would be within the six to eight months suggested by Mr. Justice Cory in the Askov case. The decision in this case is going to turn on the eight-month delay experienced in the Provincial Division.
>
> I have given the reason for the delay. The question is, is that unreasonable? Is that delay of eight months in the Provincial Court level unreasonable in the circumstances? I would think that if Mr. Justice Cory were adjudicating on it he would say "yes". We cannot compare our jurisdiction with the County of Peel and if it takes six to eight months in the County of Peel it should not take six to eight months in the District of Algoma. I am compelled to conclude, based on the Askov case, that taking eight months to find a trial date in the Provincial Court is unreasonable.

There is no suggestion in Askov that the District of Peel is the national standard for measuring the reasonableness of delay, or that six to eight months is the upper limit of reasonableness, within the meaning of s. 11(b). Had this been the case, Cory J. would have said so explicitly and would not have invited the search for comparable jurisdictions referred to above.

There is a superficially attractive logic to the proposition that, if the Supreme Court has set out a time limit of six to eight months for the district (Peel) that has the worst systemic delays, all other jurisdictions should be expected to operate within some shorter time span. This assumes, wrongly in my view, that the six to eight months referred to in Askov was meant to be the upper limit of reasonableness. The six to eight months limit was set not because Peel was the worst performer in the delivery of speedy trials in the District Court, but because it was out of line with the best similarly situated communities, which Cory J. found to be some busy metropolitan districts in the Province of Quebec. The methodology put forward in Askov invites a search for comparables and specifically rejects the notion of either a national standard or, in my view, an upper limit.

The applicability of the so-called six to eight months rule in Askov to trials in Provincial Courts has been considered by Trainor J. in R. v. Fortin (1990), 75 O.R. (2d) 733 (Gen. Div.). Trainor J. concluded that the reference to six to eight months in Askov did not apply to Provincial Court trials or preliminary inquiries. The same issue arose in this court [Grange, Tarnopolsky and Labrosse JJ.A.] in R. v. Carter, released February 12, 1991 [now reported 1 O.R. (3d) 790, 62 C.C.C. (3d) 541 (leave to appeal to S.C.C. (L'Heureux-Dube, Gonthier and Iacobucci JJ.) refused June 13, 1991)], but the majority decided the case on another basis and viewed it as unnecessary to deal with that question. Grange J.A., dissenting, disagreed with the view expressed in Fortin and said [p. 800 O.R.]:

> ... the decision in Askov must be deemed to impose not only an outside limit of eight months between committal and trial, but also an outside limit of eight months between arrest and either committal or trial in the Provincial Court.

The proceedings in Carter had originated, not in Peel, as in Askov, but in Scarborough.

With the greatest respect, I do not agree with Grange J.A.'s interpretation of the applicability of Askov to

matters pending in Provincial Courts. The right to be tried within a reasonable time obviously applies in all courts, whatever their level. However, in my respectful view, the Supreme Court in Askov has not translated that right into a "six to eight months rule" to indicate the sunset period within which cases must be tried, in the Provincial Court, or anywhere else. As noted earlier, a "six to eight months rule" unduly emphasizes the systemic delay factor and precludes any judicial assessment of the other components of the right enshrined in s. 11(b) of the Charter.

Not only is there no indication that Peel and Algoma are comparable jurisdictions, but also, and much more significantly, delays in the then District Court, from indictment to trial, should not be viewed as being equivalent to delays in the Provincial Court, from information to trial, or even to preliminary inquiry.

The Provincial Court is an intake court; it is in that court, for the most part, that the matters of retaining counsel, obtaining legal aid, bail, disclosure, discussions as to mode of trial and preliminary inquiry have to be resolved. The time taken to accommodate some or all of these matters may vary considerably from case to case. The statistical information put before us in the course of this series of appeals indicates that, between October 22, 1990 and April 12, 1991, the Provincial Division disposed of an estimated 209,300 charges (of which 32,598 were stayed or withdrawn), while the General Division disposed of some 11,845 charges (of which 1,897 were stayed or withdrawn). It is thus apparent that the Provincial Court is a court of much greater volume than the then District Court, which has since become part of the Ontario Court of Justice, General Division.

In my view, under the method set out in Askov, there can be no useful comparison made between the District Court in Peel and the Provincial Court in Algoma. Moreover, conclusions about systemic delay and its unreasonableness should not rest exclusively on judicial notice. Judges should be particularly wary of relying on nothing more than their own information and perceptions as to the current state of the criminal justice system and, more significantly, of the causes of this state of affairs.

Referring to the shortage of judges identified by the trial judge in this case as the cause of the systemic delay, the respondent argued that this "shocking neglect and mismanagement" on the part of the government should weigh heavily against the appellant in balancing the factors in favour of a stay. Yet, there is evidence before us, which was apparently unavailable to the trial judge, which points to a potentially more complex cause of the delay. Exhibit 12 to the Chaloner affidavit, which was introduced in evidence in this court in Morin, as well as in the Supreme Court of Canada in Askov, and which was before us with the consent of all parties, contains a breakdown of the number of charges disposed of in the Provincial Court, in various locations, per judge day, for the month of August 1989, one month before the information was laid in this case. The range is quite remarkable and frankly, in itself, inexplicable. In Parry Sound, for example, 121 charges were disposed of in two judge days that month; this works out to 60.5 charges per judge day. At the other extreme, in Orangeville, the average disposition per judge day was 7.2, in St. Thomas 7.2 and in Sudbury 8.2. As well, Exhibit 13 to the same affidavit shows a disparity across the province in the average daily sitting hours of Provincial Court judges from January 1 to September 30, 1989, from a high of 4.7 hours in some jurisdictions, to a low of 2.4 in another. While this limited information does not assist in the determination of this case, it illustrates that the process of comparison contemplated by Askov requires the processing of sophisticated information, most of which should come in the form of admissible evidence. This is an undertaking for which the criminal adversary system is not particularly well suited.

There is nothing before us which would allow us to set out an appropriate time frame within which cases should be tried in the Provincial Court in the entire province. What is acceptable systemic delay may vary greatly throughout the province. What is appropriate in one district may not be tolerable in another and what

was a reasonable time in 1984 may no longer be so in 1991.

In Askov, Cory J. referred to two different studies by Professor Baar of Brock University. One was a study commissioned by the federal government when it was considering enacting a statutory six months limitation period for the trial of Criminal Code and other federal offences (see Time Limit Legislation in Criminal Cases, a follow-up assessment, Ottawa, 1984). Parliament never did enact such a statutory time limitation. Professor Baar's study was conducted between February and May 1982 and at intervals between August 1983 and March 1984. Professor Baar concluded that at these times no Provincial Court in Canada was normally setting cases for trial or preliminary hearing more than six months after the first court appearance.

In Ontario, at least, things have changed since the early 1980s. In 1984, there were approximately 75,000 criminal charges pending in the Provincial Courts in Ontario, and there had been little growth in the overall volume of cases from year to year. However, between 1986 and 1990, there was a rapid and dramatic increase in the volume of cases pending, from some 80,000 to almost 180,000 (see R. v. Fortin, supra, Appendix A at p. 749 O.R.). This represents an annualized counting of cases pending, rather than of new cases entering the system. Therefore, it includes all cases not disposed of at a given year end and comprises a mix of new cases and backlog. Backlog will accrue if more cases are added to the case list than are disposed of in any one year. The rate of disposition will be directly affected by a number of factors, including the rate of guilty pleas (or the converse -- the rate of trials) and the timing of guilty pleas.

It is commonly thought that the 1985 amendments to the Highway Traffic Act, R.S.O. 1980, c. 198, have contributed in a significant way to the increase in the number of cases which have remained pending in the system and which would previously have been the object of a speedy disposition. Prior to 1985, the mandatory suspension of a driver's licence upon conviction for drinking and driving offences was for a term of three months in the case of a first offence, six months for a second offence and three years for subsequent offences (s. 26). This was changed by the Highway Traffic Amendment Act, 1985, S.O. 1985, c. 13, s. 3, which came into force on December 20, 1985. These statutory changes resulted in the imposition of a one-year driving prohibition for a first conviction, a two-year driving prohibition for a second conviction, and a three-year prohibition for subsequent offences.

The considerable increase in the period of driving prohibition for a first conviction of impaired driving, for example, is thought to have led to a decrease in the rate of guilty pleas for most offences attracting the prohibition. Moreover, the suggestion has also been made that guilty pleas, if forthcoming, are delayed to the last opportunity in order for the accused to make alternative arrangements in anticipation of not being allowed to drive for at least a year. The mere delaying of guilty pleas would contribute to a backlog; any reduction in the rate of guilty pleas for offences which occupy such a considerable part of the courts' time is likely to have noticeable ripple effects on the overall delay particularly in the Provincial Courts, where most drinking and driving offences are dealt with.

There is no evidence before us to validate these widely shared assumptions and I therefore would not act upon them to rest any conclusion. However, they present a plausible, if only partial, explanation for the recent backlog.

It would be most surprising if the severe backlog experienced in some of the courts of this province were attributable to a single deficiency in human resources or in physical facilities. When searching for the reasons for delay, it is important to recognize the limited capacity of the courts to identify the real causes of the system's shortcomings. The relevant data may not be available or may not be accessible to the litigants. And yet, a proper identification of the true causes of the delay may lead to a different appreciation of its

reasonableness. The problem of understanding the true state of affairs in the impeached jurisdiction is compounded by the need to appreciate all the factors that account for the relative performance, in terms of speed of disposition, of the comparable jurisdiction.

In my view, Cory J. in Askov was well aware of the difficulty of the enterprise and, for that reason, he engaged in what he called "a rough comparison". Furthermore, even after having completed this rough exercise, Cory J. doubled the results, thereby stating clearly, once again, that the concept of reasonableness was not encapsulated in a scientific or mathematical formula but rested upon an exercise of judgment. This is also consistent with the concluding remarks of Cory J. to the effect that, although courts will frequently be asked to stay proceedings, "most regions of this country are operating within reasonable and acceptable time limits with the result that such relief will be infrequently granted" (p. 1247 S.C.R., p. 711 O.R., p. 41 C.R.R., p. 495 C.C.C.).

Acceptable time limits must thus not only be set locally, but adjusted periodically to reflect the comparative position of that jurisdiction, at that time, to the best similar one in the country.

The Chaloner affidavit, sworn on February 5, 1990, indicated that there was a great variation across the province in the time between first appearance and trial. Many districts were not providing trials within six months of first appearance. The affidavit of Clement Hill, filed on consent and sworn on March 15, 1991, shows that as of February 1991, one year after the Chaloner data, virtually all Provincial Courts in Ontario were scheduling trials within six months of first appearance. Many were able to schedule trials within three months of first appearance. It remains to be seen what the system's performance will be and how many cases will actually be disposed of, by trial or guilty plea, on the scheduled trial dates.

It seems somewhat futile for an appellate court to set specific time limits for systemic delay in a given jurisdiction. An appellate court may determine whether the lower court has properly assessed the level of systemic trial delay, by choosing a proper comparable jurisdiction at the relevant time and drawing appropriate conclusions. But the actual number of months which meet the standard of reasonableness imposed by s. 11(b) will be constantly subject to adjustment as circumstances change in that jurisdiction and in comparable ones. Some jurisdictions in Ontario which may have been comparable to Montreal, Joliette or New Brunswick in 1984 or 1987, may no longer have been so by 1990 if a sudden or massive influx of cases in Ontario was not duplicated in the jurisdiction chosen as comparable.

It may, however, be useful for this court to provide some guidance with respect to administrative goals for the reduction of existing delays. It seems that there is a province-wide effort in place to schedule trial dates, in the Provincial Courts, within eight months of the laying of the charge. These efforts must continue, in order to ensure the best protection of s. 11(b) rights. This administrative goal may not be met, in all cases, in the immediate future. Although it is a desirable target for having cases tried in Provincial Court, it does not translate into a constitutional requirement. The constitutional standard is one of reasonableness.

In view of the current situation in many Ontario jurisdictions, an administrative target of trials within eight months is a reasonable goal and, one has to hope, a realistic one. Whether that goal is achieved in an individual case will only be a factor to be considered in a s. 11(b) application, along with the total length of the delay, waiver and prejudice to the accused. Eight months may turn out to have been too ambitious, in the short run, for the high-volume Provincial Courts. It may well be that ten or even 12 months from charge to trial date would be an acceptable period of delay in a jurisdiction that would, for instance, run a fast track for cases which need to be expedited because of a special prejudice caused by the delay. In the end, judges cannot be told, once and for all, at which precise moment society has lost its entitlement to have an allegation

of crime heard and tried.

Having acknowledged that the District Court in Peel cannot serve as a proper comparison in this case, in the absence of more specific and pertinent data, I think that a longer period of time may be acceptable for a charge to reach trial in the Provincial Court than would be acceptable in the post-committal stage of a two-step trial process. Absent more telling evidence in this case, I would conclude that a delay of eight and a half to nine months in getting a case to trial in the Provincial Court, although not a model of brevity, it not outside the range of reasonableness.

The post-committal delay here was of some four and a half months and, like the trial judge, I would not view that as unreasonable. During that time, a pre-trial conference took place. The trial judge attributed this part of the delay to the disruption in the holding of assignment courts which resulted from the merger of the District Court and the High Court on September 1, 1990. Even if the post-committal delay had been too long, the unusual circumstances of merger and regionalization would justify a longer systemic delay than would otherwise be acceptable. In summarizing his views on systemic or institutional delays, Cory J. said in Askov, at p. 1231 S.C.R., p. 699 O.R., p. 29 C.R.R., p. 483 C.C.C.:

> There may be a transitional period to allow for a temporary period of lenient treatment of systemic delay.

This is a proper case for making such an allowance to temporary institutional requirements.

(C) The conduct of the accused (delay attributable to the accused)

As indicated earlier, I would be inclined to consider the delay subsequent to the date set for trial in the Provincial Court as delay attributable to the accused, in view of the election for a preliminary inquiry rather than a trial on the date set for trial. I am hesitant to do so, however, absent any evidence that an earlier election would have resulted in a preliminary inquiry being held sooner than the scheduled trial date. Local practices seem to vary in terms of the timing of arraignment and election. In general, the accused should bear the responsibility for delays occasioned by a late election or a last minute re-election. This would not be the case, however, if, for some reason, the system required or favoured a delayed election. Again, much will turn on the evidence in a given case.

(iii) Waiver

Aside from the question of the reasonableness of systemic delay, the issue of waiver has also caused difficulty in stay proceedings in the wake of Askov. The reason is readily apparent and probably will correct itself with the passage of time.

Cory J. said in Askov at p. 1228 S.C.R., p. 697 O.R., pp. 26-27 C.R.R., p. 481 C.C.C.:

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

Cory J. then referred to the statement of Sopinka J. in Smith, supra, to the effect that, absent other factors, the agreement to a set trial date by the accused or his counsel would give rise to an inference that the accused waived his right to argue subsequently that the date agreed to led to an unreasonable delay.

Problems of identifying and dealing with waiver arise in cases in which trial dates had been set before the Supreme Court decision in Askov. Before October 1990, in the District of Peel, for instance, counsel routinely agreed to trial dates in the District Court more than eight months away, on the assumption that they were always offered the first available trial date. In cases where trial dates were set after the Morin decision in April 1990, the absence of objection was also consistent with the decision of this court to allow for a transitional period. In those pre-Askov cases, a certain amount of mental gymnastics is required to determine whether there has been an informed waiver of rights which had not yet been given their fuller, more detailed and more generous definition. By acquiescing to a given trial date, were defence counsel waiving their client's rights to be tried within a time span to which they did not know they were entitled?

This problem arises from the retroactive application of Askov. The Supreme Court did not distinguish between a standard of reasonableness under s. 11(b) for cases already in the system and the standard which the government would be required to meet after being put on notice by the court as to its expected performance. As a consequence, we must now interpret the position taken by defence counsel in the light of the situation as it existed at the time. In Peel, for instance, it would be unfair to say that in all cases lawyers who consented to a trial date in the District Court 14 months after committal waived their client's right to a trial at an earlier date.

The conduct of counsel prior to Askov may assist in ascertaining whether, in a given jurisdiction, there was a subjective perception of unreasonableness in the length of time it took for cases to be tried. Acquiescence to dates and to adjournments cannot always be construed as simple resignation to the inevitable. In some instances, the acceptance of a trial date more than eight months away may indicate a recognition by counsel that such a time lapse, in all the circumstances, is not unreasonable.

It is particularly frustrating, not to mention time-consuming, to search for evidence of waiver in the pre-Askov cases, which are, of course, the only cases in which trial within a reasonable time is now being considered. No doubt the defence bar is already responding to the Askov decision and being very explicit in agreeing to dates.

It appears to be a widespread practice for counsel not to appear to set a trial date, but rather to send their clients with a letter containing a selection of dates when defence counsel is available. Typically, these letters refer to dates some distance into the future, apparently in accordance with the counsel's understanding of the dates available for trials in that jurisdiction. If nothing more, these letters seem to contain an implied admission that the case makes no claim to a priority status. However, unless the waiver is somewhat more explicit, I would take these letters as a claim for the next available court date which coincides with the expressed availability of defence counsel. As I understand it, the practice of non-appearance is encouraged, if not required, by legal aid and one would expect the Crown to alert the defence if the dates suggested were far distant from the available court dates for trial.

Therefore, in cases where dates were agreed to prior to the decision in Askov, a flexible approach to the issue of waiver is imperative. Courts will be vigilant in insuring that an accused is not allowed to escape trial by exploiting the system's difficulty in processing all cases to trial within a reasonable time. On the other hand, implied waiver cannot be used as a substitute for requiring that s. 11(b) rights be asserted.

Ultimately, the answer will depend on the facts that are presented to **the court** — often the appellate court -- on the application for a stay. In Carter, supra, for example, the transcripts revealed that defence counsel had stated that "any date" was agreeable and had consented to a trial date one year after the laying of the charge. Affidavit evidence on appeal failed to persuade the majority that defence counsel had sought the earliest available trial date. Carter was a case which arose in Scarborough; the trial date of February 22, 1989 was set on March 8, 1988. This was not only prior to Askov and Morin, but also prior to Smith, where Sopinka J. referred to counsel's acquiescence to a trial date as amounting, absent other factors, to waiver. Upon examining the affidavit evidence, Labrosse J.A. (Tarnopolsky J.A. concurring) concluded that the trial date was set, on consent, when earlier trial dates were available and that defence counsel had waived his client's right to be tried earlier. Grange J.A., dissenting, found that defence counsel had been merely resigned to the inevitable in acquiescing to the proposed trial date. The issue is essentially one of fact and the relevant evidence should be put before the judge hearing the motion for a stay.

In the case at bar, on the evidence before him, the trial judge held that there was nothing resembling a waiver on the part of the accused. I see no reason to interfere with that conclusion.

(iv) Prejudice to the accused

The trial judge properly took into account the inferred prejudice to the respondent's security interest in referring to the apprehension, concern and life disruption that the respondent must have suffered while awaiting trial. In my view, he was correct in concluding that there was no further significant real prejudice incurred by the respondent which related to the delay rather than to the mere fact that he had been charged with a criminal offence.

Pre-trial custody prolonged by systemic delay is undeniably prejudicial. Various terms and conditions of bail may be more or less onerous. Here, the respondent was immediately released on an undertaking requiring him to notify the police of any change of address, employment or occupation. This is not an onerous condition of pre-trial release. There was also a condition requiring him not to be in or near the Bayview Hotel in Bruce Mines, as the complainant apparently resided in that hotel. Since the respondent lived in Bruce Mines, the requirement of not being "near" the hotel may have been somewhat vague and unduly put the respondent at risk of a breach of condition of bail. While this is true, the respondent could have applied to have these conditions varied. Some forms of prejudice are so readily apparent, such as pre-trial custody, that the system is expected to, and does routinely, take it into account in setting early trial dates. However, if an accused is being prejudiced by delay in a less apparent way, he or she must bear the responsibility for taking the initiative in alleviating that prejudice.

This, in my view, is not inconsistent with the proposition that an accused need not assert his s. 11(b) right. An accused who claims prejudice, beyond the prejudice common to most accused and inferred from any delay, is claiming an entitlement to a speedier trial than other accused in apparently similar circumstances. The only way for the system to accommodate that claim is to hear it expressed. There comes a point, in my opinion, where an accused who is suffering a special prejudice from the delay of his trial must bring his or her plight to the attention of the prosecuting authorities and the courts.

It cannot be said in this case that the respondent suffered a prejudice of any significance as a result of the delay.

Conclusion on the four factors

Balancing all factors together, in my view the right of the accused to be tried within a reasonable time has not been infringed in this case. An overall period of some 131/2 months in bringing a charge to trial does not, in itself, amount to a violation of s. 11(b). It does, however, invite further scrutiny. It becomes immediately more acceptable when one considers that a preliminary inquiry was held during that period. Even if a systemic delay of nine months from the laying of the charge to the committal for trial was somewhat long -- and I am not satisfied on the evidence here that it was too long -- when all the reasons for the delay are considered and weighed with the minimal prejudice and the acceptable overall time frame, in my view, the systemic delay alone does not lead to a conclusion of unreasonableness. To hold otherwise would be to give determinant weight to systemic delay, to the exclusion of the other factors set out in Askov.

For these reasons, I would allow the appeal, set aside the stay of proceedings and remit the matter for trial.

Appeal allowed.