Regina v. Morin

71 C.C.C. (3d) 1
Affirming 55 C.C.C. (3d) 209

Supreme Court of Canada
Lamer C.J.C., La Forest, Sopinka, Gonthier, McLachlin, Stevenson and Iacobucci JJ.

March 26, 1992

Charter of Rights — Trial within reasonable time — Systemic delay — Fourteen-month delay between date of arrest and date of trial in Provincial Court on charge of impaired driving — Lengthy delay due to limitation on institutional resources in particular jurisdiction — Guideline for institutional delay in Provincial Court to be eight to 10 months — Particular jurisdiction having experienced increase in case-load justifying institutional delay at upper range — Period of time also to be allowed for preparation of case — Accused not suffering any special prejudice — Accused's right to trial within reasonable time not infringed — Canadian Charter of Rights and Freedoms, s. 11(b).

The accused was charged with impaired driving and "over 80", contrary to s. 253 of the Criminal Code. Her first appearance in court was approximately one month after her arrest at which time her counsel requested the earliest date for trial. The date provided was some 13 months later. In the result, a period of approximately 14 1/2 months elapsed between the date of the arrest and the time when the case came on for trial. Approximately two months before the trial date, Crown counsel sent out a letter to defence counsel indicating that if the client was experiencing any particular prejudice by delay, an attempt would be made to find earlier trial dates. Defence counsel did not respond. On the trial date, the accused applied for a stay of proceedings on the basis that her right to trial within a reasonable time as guaranteed by s. 11(b) of the Canadian Charter of Rights and Freedoms had been infringed. This application was denied and following the trial the accused was convicted of "over 80". The accused then appealed to the summary conviction appeal court where her appeal was allowed and a stay of proceedings entered. An appeal by the Crown to the Ontario Court of Appeal was allowed and the conviction restored.

On appeal by the accused to the Supreme Court of Canada, held, Lamer C.J.C. dissenting, the appeal should be dismissed.

Per Sopinka J., La Forest, Stevenson and Iacobucci JJ. concurring: While the primary purpose of s. 11(b) of the Charter is the protection of the individual rights of the accused, the courts have also recognized a secondary interest of society as a whole. In determining whether the right of the accused has been denied, no mere administrative formula can be applied but rather there must be a judicial ***[page2]*** determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay. The first factor is the length of the delay and requires the court to examine the period from the charge to the end of the trial. Pre-charge delay may, in certain circumstances, have an influence on the over-all determination as to whether post-charge delay is unreasonable but of itself is not counted in determining the length of the delay. If the length of the delay is unexceptional, no inquiry is warranted and no explanation for the delay is called for unless the accused is able to raise the issue of reasonableness of the period by reference to other factors such as prejudice. If the length of delay warrants an inquiry into the reasons for the delay, then the court will first consider whether the accused has waived in whole or in part her right to complain of the delay. However, any waiver must be clear and unequivocal, with full knowledge of the rights the procedure was enacted to protect and of the effect that waiver will have on those rights. If the application by the accused is not resolved by reason of the principles of waiver, the court will then have to consider other explanations for the delay. This includes consideration of the inherent time requirements which inevitably lead to

delay. Thus the more complex the trial, the more time will be needed to prepare for trial and for the trial to be conducted once it begins. As well, there are inherent requirements which are common to almost all cases. This includes activities such as retention of counsel, bail hearings, police and administrative paperwork, disclosure and similar activities. Another inherent delay that must be taken into account is whether the case proceeds through a preliminary inquiry. Clearly, a longer time must be allowed for cases that must proceed through the preliminary hearing stage. The actions of the accused must also be considered, thus actions of the accused which are voluntarily undertaken must be taken into account in determining what length of delay is reasonable. The actions of the Crown must also be investigated.

Another factor is the limits on institutional resources. This period starts to run when the parties are ready for trial but the system cannot accommodate them. While account must be taken of the fact that the state does not have unlimited funds, the court cannot simply accede to the government's allocation of resources and tailor the period of permissible delay accordingly. There is a point in time at which the court will no longer tolerate delay based on the plea of inadequate resources. This period of time may be referred to as an administrative guideline, but is not a limitation period nor is it a fixed ceiling on delay. The guideline is the result of the exercise of a judicial discretion based on experience and taking into account the evidence of the limitation on resources, the strain imposed on them, statistics from other comparable jurisdictions and the opinions of other courts and judges, as well as any expert opinion. Comparison with other jurisdictions is, however, to be done with caution and only as a rough guide. Rapidly changing conditions within a particular jurisdiction may place a sudden and temporary strain on resources and this must be taken into account in applying the guideline. It is not, however, appropriate to use the device of a transitional period. This would impose a general moratorium on certain Charter rights and it is preferable rather to simply treat the sudden and temporary strain on resources as one factor in the over-all decision as to whether a particular delay is unreasonable. The application of a guideline will also be influenced by the presence or absence of prejudice. If the accused is in custody, for example, the period of acceptable institutional delay may be shortened to reflect the court's concern. It was appropriate for the court to suggest a period of institutional delay of between eight and 10 months as a guide to Provincial Courts. As regards institutional delay after committal for trial, the range should be an additional six to eight months. ***[page3]***

There may as well be other reasons for delay as for example, actions by the trial judge.

The final factor to be considered is prejudice to the accused. In any particular case, prejudice may be inferred simply from the length of the delay. The longer the delay, the more likely that such an inference will be drawn. On the other hand, in circumstances in which prejudice is not inferred and is not otherwise proved, the basis for an enforcement of the accused's right is seriously undermined. The purpose of s. 11(b) is to expedite trials and minimize prejudice and not to avoid trials on the merits. Action or non-action by the accused which is inconsistent with a desire for a timely trial is something that the court must consider. Apart, however, from inferred prejudice, either party may rely on evidence to show prejudice or to dispel such a finding. Conduct of the accused falling short of waiver may be relied upon to negative prejudice.

In this case, the length of delay of 14 1/2 months was sufficient to raise the issue of reasonableness. There was no waiver of time periods. As regards the inherent time requirements for the case, when the accused first appeared in court some six weeks after her arrest she had retained counsel. While counsel asked for the earliest date, it was not clear whether counsel was ready for trial. It may be inferred, however, that both Crown and defence were ready for trial within a few weeks of the first appearance and, accordingly, the inherent time requirements for the case were about two months. None of the delay was attributable to the action of the Crown. As regards the accused, while her counsel sought the earliest date available no other action was taken until the day of the trial. Because of the sudden substantial increase in case-load in the Provincial Court in the particular jurisdiction, a period for systemic delay which is in the upper range of the eight to 10-month guideline should be adopted. A period of 10 months would not be unreasonable. In any event, deviations of several months in either direction can be justified by the presence or absence of prejudice. The accused led no evidence of prejudice. While the accused was not required to do anything to expedite her trial, her inaction after receipt of the letter from the Crown must be taken into account in assessing prejudice. It appears that the accused was content with the pace with which things were proceeding and that therefore, there was little or no prejudice occasioned by the delay. In the result, the delay in this case was not unreasonable and the appeal must be dismissed.

Per Gonthier J.: In the final analysis, the decision as to whether to grant a stay of proceedings must rest on a balancing of the prejudice suffered by the accused and the societal interest in bringing the accused to trial. With respect to determination of prejudice to the accused, the onus which rests upon the Crown may be met either by direct evidence or by inference, whether it be to establish the absence of prejudice or its extent or degree. In this case, particularly having regard to the conduct of the accused in relation to the proceedings and the fact that the delay only exceeded the guideline for institutional delay to a limited extent, the court could conclude that the prejudice to be inferred as suffered by the accused was minimal and is outweighed by the societal interest in bringing her to trial.

Per McLachlin J.: In considering the factors which bear on the determination of whether or not the accused's right to trial within a reasonable time has been infringed, the court must not lose sight of the true issues at stake, namely, where the line should be drawn between conflicting interests. On the one hand is the interest of society in bringing an accused to trial. On the other side of the balance stands the right of the accused to be tried within a reasonable time. The task of the judge in deciding whether proceedings against the accused should be stayed is ***[page4]*** to balance the societal interest in seeing that persons charged with an offence are brought to trial against the accused's interests in prompt adjudication. Before staying charges, the court must be satisfied that the interests of the accused and society in a prompt trial outweigh the interests of society in bringing the accused to trial. An application for a stay of charges should be considered in two segments. The first step requires the determination of whether a prima facie or threshold case for unreasonable delay has been made out. If this threshold or prima facie case is made out, the court must proceed to a closer consideration of the right of the accused to a trial within a reasonable time, and the question of whether it outweighs the conflicting interests of society in bringing the person charged with the criminal offence to trial. Where the accused suffers little or no prejudice, it is clear that the consistently important interest of bringing those charged with criminal offences to trial outweighs the accused's and society's interest in obtaining a stay of proceedings on account of delay, because the consequences of the delay are not great. Where no inference as to prejudice can be drawn from the length of delay, or where the most reasonable inference is the other way, the accused may have to call evidence if she is to displace the strong public interest in bringing those charged with an offence to trial. In this case, the accused was able to meet the first hurdle of establishing a prima facie case. However, she failed to show that protection of her interest in a prompt trial or the ancillary public interest in prompt justice outweigh the public interest in bringing her to trial.

Per Lamer C.J.C. dissenting: The onus is on the Crown to demonstrate that the delay caused no prejudice to the accused. While the Crown had shown that the accused's liberty and fair trial interests were not affected by the delay, the Crown had not even attempted to show that her security interests had not been affected. This includes prejudice as a result of stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors. This kind of prejudice has been suffered beyond the length of time that can be legitimately supported on the basis of limited institutional resources. Accordingly, the appeal should be allowed and the stay of proceedings restored.

R. v. Askov (1990), 59 C.C.C. (3d) 449, 74 D.L.R. (4th) 355, [1990] 2 S.C.R. 1199, 79 C.R. (3d) 273, 49 C.R.R. 1, 42 O.A.C. 81, 75 O.R. (2d) 673, 113 N.R. 241, 11 W.C.B. (2d) 224; R. v. Bennett (1991), 64 C.C.C. (3d) 449, 6 C.R. (4th) 22, 7 C.R.R. (2d) 145, 46 O.A.C. 99, 3 O.R. (3d) 193, 13 W.C.B. (2d) 172 *consd*;

Cases referred to:

R. v. Hurlbert (1988), 66 C.R. (3d) 391, 5 W.C.B. (2d) 209 [affd 8 W.C.B. (2d) 808]; R. v. Conway (1989), 49 C.C.C. (3d) 289, [1989] 1 S.C.R. 1659, 70 C.R. (3d) 209, 40 C.R.R. 1, 34 O.A.C. 165, 96 N.R. 241, 8 W.C.B. (2d) 253; R. v. Stensrud (1989), 52 C.C.C. (3d) 96n, [1989] 2 S.C.R. 1115, 73 Sask. R. 160n, 44 C.R.R. 281, 103 N.R. 191, 9 W.C.B. (2d) 587; R. v. Smith (1989), 52 C.C.C. (3d) 97, [1989] 2 S.C.R. 1120, 73 C.R. (3d) 1, 45 C.R.R. 314, 63 Man. R. (2d) 81, 102 N.R. 205, 8 W.C.B. (2d) 801; Barker v. Wingo, 407 U.S. 514 (1972); R. v. Mills (1986), 26 C.C.C. (3d) 481, 29 D.L.R. (4th) 161, [1986] 1 S.C.R. 863, 52 C.R. (3d) 1, 21 C.R.R. 76, 67 N.R. 241, 58 O.R. (2d) 543n; R. v. Rahey (1987), 33 C.C.C. (3d) 289, 39 D.L.R. (4th) 481, [1987] 1 S.C.R. 588, 57 C.R. (3d) 289, 33 C.R.R. 275, 78 N.S.R. (2d) 183, 75 N.R. 81; R. v. Beason (1983), 7 C.C.C. (3d) 20, 1 D.L.R. (4th) 218, 43 O.R. (2d) 65, 36 C.R. (3d) 73, 7 C.R.R. 65; R. v. Kalanj (1989), 48 C.C.C. (3d) 459, [1989] 1 S.C.R. 1594, 70 C.R. (3d) 260, 40 C.R.R. 50, [1989] 6 W.W.R. 577, 96 N.R. 191, 8 W.C.B. (2d) 189;

Korponey v. A.-G. Can. (1982), 65 C.C.C. (2d) 65, 132 D.L.R. (3d) 354, [1982] 1 S.C.R. 41, 26 C.R. (3d) 343, 44 N.R. 103, sub nom. Korponay v. A.-G. Can.; R. v. Clarkson (1986), 25 C.C.C. (3d) 207, 26 D.L.R. (4th) 493, [1986] 1 S.C.R. 383, 50 C.R. (3d) 289, 19 C.R.R. 209, 69 N.B.R. (2d) 40, ***[page5]*** 66 N.R. 114, 16 W.C.B. 454; R. v. Tremblay (1987), 37 C.C.C. (3d) 565, 45 D.L.R. (4th) 445, [1987] 2 S.C.R. 435, 60 C.R. (3d) 59, 32 C.R.R. 381, 2 M.V.R. (2d) 289, 79 N.R. 153; R. v. Smith (1989), 50 C.C.C. (3d) 308, 61 D.L.R. (4th) 462, [1989] 2 S.C.R. 368, 71 C.R. (3d) 129, [1989] 6 W.W.R. 289, 39 B.C.L.R. (2d) 145, 99 N.R. 372, 8 W.C.B. (2d) 431

Statutes referred to:

Canadian Charter of Rights and Freedoms, ss. 11(b), 24(1) Criminal Code, R.S.C. 1970, c. C-34, s. 237(a), (b) -- now R.S.C. 1985, c. C-46, s. 253(a), (b) [rep. & sub. R.S.C. 1985, c. 32 (4th Supp.), s. 59]

Appeal by the accused from a judgment of the Ontario Court of Appeal, 55 C.C.C. (3d) 209, 76 C.R. (3d) 37, 38 O.A.C. 298, 10 W.C.B. (2d) 96, allowing an appeal by the Crown from a judgment of Murphy D.C.J., 9 W.C.B. (2d) 15, allowing an appeal by the accused from her conviction for "over 80".

A.J. Risen and R.B. Kimball, for accused, appellant.

M.D. Segal and K.L. Campbell, for the Crown, respondent.

S.R. Fainstein, Q.C., and R.J. Frater, for intervener, Attorney-General of Canada.

Lamer C.J.C. (dissenting): I have read the reasons of my colleagues, Justices Sopinka and McLachlin. With respect, I cannot agree with their disposition of this case. I would allow the appeal and restore the stay entered by Murphy D.C.J. of the summary conviction appeal court.

I agree with the principles and guidelines set out by my brother Sopinka J., except as regards proof of prejudice.

While in R. v. Smith (1989), 52 C.C.C. (3d) 97, [1989] 2 S.C.R. 1120, 73 C.R. (3d) 1, we did not decide whether prejudice is conclusively presumed or to be inferred, in R. v. Askov (1990), 59 C.C.C. (3d) 449, 74 D.L.R. (4th) 355, [1990] 2 S.C.R. 1199, the reasons of Cory J., concurred in by Dickson C.J.C. and La Forest, L'Heureux-Dubé and Gonthier JJ., and concurred in on this point in separate reasons by Sopinka and McLachlin JJ., placed "the onus on the Crown to demonstrate...that the delay caused no prejudice to the accused". Indeed, at p. 484 of his reasons, Cory J. states:

> (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." ***[page6]***
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> 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.

(Emphasis added.) My understanding of Cory J.'s reasons is that the onus is on the applicant as regards prejudice only when the applicant is seeking a remedy additional to a stay. If any ambiguity in that regard is present (and I find none) at p. 484 of his reasons the reasoning preceding this summary makes it amply clear. At p. 483 of his reasons, Cory J. states:

> 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).

While I dissented as regards the approach of Cory J. on prejudice, that approach was concurred in by six other judges. My views on the issue which I have held since R. v. Mills (1986), 26 C.C.C. (3d) 481, 29 D.L.R. (4th) 161, [1986] 1 S.C.R. 863, and throughout s. 11(b) judgments in this court, have conclusively been put to rest by Askov and I here on in feel bound by it. Furthermore, as Askov is a very recent decision of this court, I do not think it desirable that it be revisited in this case.

Both of my colleagues in their reasons, McLachlin J. somewhat more so than Sopinka J., place the onus on the accused to prove prejudice. This is a fundamental change to the position that this court has taken. While I have never changed my mind as regards my dissenting position, I will, as I should, apply Askov to the facts of this case. Leaving the onus on the Crown, it has shown that Ms. Morin's liberty and fair trial interests have not been affected. But it has not even attempted to show that her security interests have not been affected; by that I mean the kind of prejudice I described in Mills, supra, at p. 539, "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". I conclude that this kind of prejudice has been suffered beyond the length of time that can be legitimately supported on the basis of limited institutional resources.

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La Forest J. concurs with Sopinka J.

Sopinka J.: The issue in this appeal concerns the right of an accused to be tried within a reasonable time. This right is enshrined in s. 11(b) of the Canadian Charter of Rights and Freedoms which states:

> 11. Any person charged with an offence has the right
>
> (b) to be tried within a reasonable time;

Though beguiling in its simplicity, this language has presented the court with one of its most difficult challenges in search of an interpretation that respects the right of the individual in an era in which the administration of justice is faced both with dwindling resources and a burgeoning case-load. We are asked in this appeal to re-examine the problem in light of the effect on the administration of justice of our decision in R. v. Askov (1990), 59 C.C.C. (3d) 449, 74 D.L.R. (4th) 355, [1990] 2 S.C.R. 1199. Evidence presented to us indicates that between October 22, 1990, and September 6, 1991, over 47,000 charges have been stayed or withdrawn in Ontario alone. The reaction to this has been mixed. On the one hand, many applaud the result which has in their view unclogged the system of much dead wood in the form of charges that should not have been laid or, having been laid, ought to have been dropped. This, they say, will enable the system to more quickly accommodate cases that are more pressing and lessen the period during which alleged criminals are free to roam the streets while awaiting trial. On the other hand, many others deprecate what in their opinion amounts to an amnesty for criminals, some of whom were charged with very serious crimes. They assert that accused persons are discharged when they have suffered no prejudice to the complete dismay of victims who have suffered, in some cases, tragic losses.

The facts

The facts of this case are neither complicated nor in dispute. On January 9, 1988, the accused was observed by a police officer to be travelling at an excessive rate of speed. She was pulled over by the officer and showed signs of intoxication. As a result of visual observation and a series of co-ordination tests, the accused was charged with operating a motor vehicle while impaired, contrary to s. 237(a) of the Criminal Code, R.S.C. 1970, c. C-34 (now s. 253(a)). The accused was then taken to the police station and given a breathalyzer test after which she was charged with operating a motor vehicle having consumed alcohol in such a ***[page8]*** quantity that her blood-alcohol level exceeded the legal limit, contrary to s. 237(b) (now s. 253(b)) of the Code.

The accused was released from custody on the day of her arrest on a promise to appear. She next appeared in Oshawa Provincial Court on February 23, 1988. Counsel for the accused explicitly requested "the earliest possible trial date" (C.O.A., at p. 15). The trial was set for March 28, 1989. In response to a query from counsel as to whether this was "the earliest date", the presiding justice answered a simple "yes" (C.O.A., at pp. 15-6).

On her scheduled trial date, March 28, 1989, counsel for the accused brought a motion to stay the proceedings pursuant to s. 24(1) of the Charter prior to entering a plea, arguing that the 14 1/2-month delay in bringing the accused to trial infringed the accused's right under s. 11(b) of the Charter. The motion was dismissed. The accused was then convicted of the "over 80" charge and a stay was entered in regard to the impaired driving charge. On appeal to the summary conviction appeal court, the "over 80" charge was also stayed on the basis that the accused had not been tried within a reasonable time. A further appeal to the Court of Appeal for Ontario was allowed and the conviction restored.

Judgments

A. Ontario Provincial Court

Dodds Prov. Ct. J. relied heavily on the case of R. v. Hurlbert (1988), 66 C.R. (3d) 391, 5 W.C.B. (2d) 209 (Ont. H.C.J.), in which an 18-month delay prior to trial was found to be reasonable. In that case, Doherty J. (as he then was) determined that while such a long delay was prima facie excessive and warranted a further examination of other factors, the totality of the circumstances did not justify a stay. Dodds Prov. Ct. J. went on to conclude that (C.O.A., at p. 867):

> In this particular case the delay is 14 1/2 months, not 18 months. There was no expression of concern by the representative of the accused when the trial date was set except to say "is that the earliest date?" there was no declaration of prejudice at that time and none has since been shown. In all of the circumstances I feel that this case falls well within the principal [sic] discussed by Mr. Justice Doherty in Hurlbert and the motion will be refused.

The accused was subsequently found guilty of the "over 80" charge and a stay was entered on the impaired driving charge. As a result, the accused was fined $700 and her driver's licence was suspended for 15 months.

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B. District Court of Ontario

Murphy D.C.J. stated [summarized 9 W.C.B. (2d) 15] that he was bound by the then recently released reasons of this court in R. v. Conway (1989), 49 C.C.C. (3d) 289, [1989] 1 S.C.R. 1659, 70 C.R. (3d) 209. His Honour distinguished the Hurlbert case relied upon by the trial judge.

Murphy D.C.J. then applied the test for unreasonable delay as set out in Conway. He concluded that the major reason for the delay in this case was the lack of institutional resources. He rejected the suggestion by the Crown that the appellant was required to assert her right to a prompt trial under s. 11(b). Murphy D.C.J. agreed that some allowance must be made for the strain on judicial resources, but indicated that "[t]his case is perhaps unusual in its lack of complicating factors" (C.O.A., at p. 874). Given the lack of complexity of the case he could not accept that a delay of 14 1/2 months was justified. Accordingly, he concluded that the appellant had not been tried within a reasonable time. The appeal was allowed and a stay of proceedings entered. Additionally, in the

event that he was wrong on the conviction appeal, Murphy D.C.J. allowed the sentence appeal of the accused and reduced her licence suspension to 12 months.

C. Court of Appeal, 55 C.C.C. (3d) 209, 76 C.R. (3d) 37, 38 O.A.C. 298

The Court of Appeal acknowledged that the sole source of delay in this case was attributable to limits on institutional resources. In view of this court's statement in R. v. Stensrud (1989), 52 C.C.C. (3d) 96n, [1989] 2 S.C.R. 1115, 73 Sask. R. 160n, that "[t]he provincial courts of appeal are generally in a better position than this court to assess the reasonableness of their province's institutional limitations and resources" (at p. 96), the court sat as a five-member panel and invited the parties to file further material bearing upon that issue. A significant amount of additional information was filed. After reviewing portions of the material, the court noted that the problem of delay was still serious, despite initiatives by the government to address the problem.

The court then proceeded to apply the four factors referred to in R. v. Smith (1989), 52 C.C.C. (3d) 97, [1989] 2 S.C.R. 1120, 73 C.R. (3d) 1, against the facts of the case. The court first considered the issue of prejudice to the appellant and concluded that only minimal weight should be given to this factor. The appellant had suffered no actual prejudice (she neither testified nor called any witnesses) and any presumed prejudice from the delay was not ***[page10]*** significant. The court next considered waiver, concluding that the appellant had not waived any of the delay. In dealing with the issue of the length of the delay, the court indicated that in isolation, the length of the delay was excessive.

In considering the second factor discussed in Smith, supra, the court noted that with only police witnesses and a certificate of analysis, this was a "routine" case to prosecute. In fact, the police investigation was over on the day of the arrest. The court concludes that "inherent time requirements formed no part of the reason for the delay" (p. 218).

The Court of Appeal concluded that the sole reason for the delay was the limit upon institutional resources. The court considered the situation in the District of Durham and concluded that systemic delay was approaching a crisis level. The court added, however, that the government recognized the problem and was attempting to address it. It acknowledged that "the problems with the administration of justice were enormously complex and were not amenable to a quick fix or magic solution" (p. 221). In view of the efforts of the government to reduce delay, the court was willing to view systemic delay in a sympathetic manner.

Finally, the Court of Appeal considered the need for a transitional period to give the government time to discharge its burden of providing trials within a reasonable time. It held that such a transitional period was required and "[h]aving regard to the extent and intractability of the problem... the transitional period cannot be a short one" (pp. 224). The Court of Appeal added that the leeway to be given to systemic delay during the transitional period should be considerable when balancing the factors enunciated in Smith, supra. Any other conclusion "would be tantamount to an amnesty... [and] [t]hat such an amnesty is undesirable is patently obvious" (pp. 226-7).

The court concluded that taking into consideration all of the factors set out in Smith, supra, the appellant's right to be tried within a reasonable time had not been infringed. The appeal was therefore allowed, the conviction entered at trial restored, and the sentence as "modified" by Murphy D.C.J. on appeal, affirmed.

Points in issue

The major issue to be determined in this appeal is whether the accused's right to a trial within a reasonable time as guaranteed by s. 11(b) of the Charter has been infringed by the delay experienced in this case. A subsidiary issue arises if the answer to the above question is in the affirmative. That subsidiary question is whether the delay can be excused as a result of the need for a transitional ***[page11]*** period to allow the government to discharge its burden of providing trials within a reasonable time.

Jurisprudential development of s. 11(b)

The development of the jurisprudence relating to s. 11(b) is instructive in that it underscores the importance of avoiding rigidity in the interpretation of new constitutional rights early in the life of a constitutional document. The court could have simply adopted the American approach articulated in Barker v. Wingo, 407 U.S. 514 (1972), which has resulted in only the most egregious delays being proscribed. Instead, in accordance with the intent of the Charter, this court has attempted to develop a Canadian approach with due regard for the American experience. Embarking as we did on uncharted waters, it is not surprising that the course we steered has required, and may require in the future, some alteration in its direction to accord with experience.

In R. v. Mills (1986), 26 C.C.C. (3d) 481, 29 D.L.R. (4th) 161, [1986] 1 S.C.R. 863; R. v. Rahey (1987), 33 C.C.C. (3d) 289, 39 D.L.R. (4th) 481, [1987] 1 S.C.R. 588, and R. v. Conway, supra, the court developed the basic criteria for the application of s. 11(b). Not surprisingly, the broad and general language of the section gave rise to differences of opinion as to the criteria to be applied and their content. In an effort to develop a common approach which would supply some guidance but leave trial courts and courts of appeal flexibility to take into account local conditions, this court in Smith, supra, distilled the jurisprudence in Mills, Rahey and Conway into four basic criteria to be applied in determining whether delay was unreasonable. In the week preceding release of the reasons in Smith, we heard the appeal in Stensrud, supra, in which we were invited to reverse a decision of the Court of Appeal of Saskatchewan reversing the trial judge who had refused a stay. On the basis of evidence before it, the Court of Appeal found the delay to be unreasonable. Mindful of the fact that Smith was about to be released, we declined to embark on another examination of the principles underlying s. 11(b). We were satisfied that the Court of Appeal had correctly assessed the effect of limitations on institutional resources. In this regard we stated (at p. 96) that: "The provincial courts of appeal are generally in a better position than this court to assess the reasonableness of their province's institutional limitations and resources."

Finally, in Askov, we dealt with a case which came to us from the Court of Appeal for Ontario and originated in Brampton, Ontario, a notorious sore spot in relation to unreasonable delay. Applying the basic criteria in Smith, the court was unanimous that ***[page12]*** the delay was unreasonable. The court went on to suggest 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" (p. 490). It is the interpretation and application of this statement that resulted in the large number of stays and withdrawals to which I have referred.

This appeal came before the Court of Appeal for Ontario after the release of our judgments in Smith and Stensrud but before Askov. I have already indicated that the court invited the parties to provide additional evidence with respect to the situation in the District of Durham relating to institutional limitations and resources. It was in this jurisprudential and evidentiary setting that the Court of Appeal reached its decision.

The purpose of s. 11(b)

The primary purpose of s. 11(b) is the protection of the individual rights of accused. A secondary interest of society as a whole has, however, been recognized by this court. I will address each of these interests and their interaction.

The individual rights which the section seeks to protect are: (1) the right to security of the person; (2) the right to liberty, and (3) the right to a fair trial.

The right to security of the person is protected in s. 11(b) by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.

The secondary societal interest is most obvious when it parallels that of the accused. Society as a whole has an interest in seeing that the least fortunate of its citizens who are accused of crimes are treated humanely and fairly. In this respect trials held promptly enjoy the confidence of the public. As observed by Martin J.A. in R. v. Beason (1983), 7 C.C.C. (3d) 20, 1 D.L.R. (4th) 218, 36 C.R. (3d) 73 (Ont. C.A.): "Trials held within a reasonable time have an intrinsic value. The constitutional guarantee enures to the benefit of society as a whole

and, indeed, to the ultimate benefit of the accused..." (p. 41). In some cases, however, the accused has no interest in an early trial and society's interest will not parallel that of the accused.

There is, as well, a societal interest that is by its very nature adverse to the interests of the accused. In Conway, a majority of this court recognized that the interests of the accused must be ***[page13]*** balanced by the interests of society in law enforcement. This theme was picked up in Askov in the reasons of Cory J. who referred to "a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law" (p. 474). As the seriousness of the offence increases so does the societal demand that the accused be brought to trial. The role of this interest is most evident and its influence most apparent when it is sought to absolve persons accused of serious crimes simply to clean up the docket.

The approach to unreasonable delay -- the factors

The general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay. As I noted in Smith, supra, "[i]t is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable?" (p. 105). While the court has at times indicated otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be listed as follows:

1. the length of the delay;
2. waiver of time periods;
3. the reasons for the delay, including

(a) inherent time requirements of the case;

(b) actions of the accused;
(c) actions of the Crown;
(d) limits on institutional resources, and
(e) other reasons for delay, and

4. prejudice to the accused.

These factors are substantially the same as those discussed by this court in Smith, supra, at pp. 105-6, and in Askov, supra, at pp. 483-4.

The judicial process referred to as "balancing" requires an examination of the length of the delay and its evaluation in light of the other factors. A judicial determination is then made as to whether the period of delay is unreasonable. In coming to this conclusion, account must be taken of the interests which s. 11(b) is designed to protect. Leaving aside the question of delay on appeal, the period to be scrutinized is the time elapsed from the date of the charge to the end of the trial: see R. v. Kalanj (1989), 48 C.C.C. (3d) 459, [1989] 1 S.C.R. 1594, 70 C.R. (3d) 260. The length of ***[page14]*** this period may be shortened by subtracting periods of delay that have been waived. It must then be determined whether this period is unreasonable having regard to the interests s. 11(b) seeks to protect, the explanation for the delay and the prejudice to the accused.

The role of the burden of proof in this balancing process was set out in the unanimous judgment of this court in Smith, supra, as follows (at pp. 106-7):

> I accept that the accused has the ultimate or legal burden of proof throughout. A case will only be decided by reference to the burden of proof if the court cannot come to a determinate conclusion on the facts presented to it. Although the accused may have the ultimate or legal burden, a secondary or evidentiary burden of putting forth evidence or argument may shift depending on the circumstances of each case. For example, a long period of delay occasioned by a request of the Crown for an adjournment would ordinarily call for an explanation from the Crown as to the necessity for the adjournment. In the absence of such an explanation, the court

> would be entitled to infer that the delay is unjustified. It would be appropriate to speak of the Crown having a secondary or evidentiary burden under these circumstances. In all cases, the court should be mindful that it is seldom necessary or desirable to decide this question on the basis of burden of proof and that it is preferable to evaluate the reasonableness of the over-all lapse of time, having regard to the factors referred to above.

I do not read the Askov decision as having departed from this statement although portions of the reasons of Cory J. emphasized certain aspects of the evidentiary burden on the Crown.

A definition of each of these factors and their interaction follows. I will deal with them in the order that they should be considered by a trial court.

1. The length of the delay

As I have indicated, this factor requires the court to examine the period from the charge to the end of the trial. "Charge" means the date on which an information is sworn or an indictment is preferred: see Kalanj, supra, at p. 469. Pre-charge delay may in certain circumstances have an influence on the over-all determination as to whether post-charge delay is unreasonable but of itself it is not counted in determining the length of the delay.

An inquiry into unreasonable delay is triggered by an application under s. 24(1) of the Charter. The applicant has the legal burden of establishing a Charter violation. The inquiry, which can be complex (as may be illustrated by the proceedings in the Court of Appeal in this case), should only be undertaken if the period is of sufficient length to raise an issue as to its reasonableness. If the length of the delay is unexceptional, no inquiry is warranted and no explanation for the delay is called for unless the applicant is able to ***[page15]*** raise the issue of reasonableness of the period by reference to other factors such as prejudice. If, for example, the applicant is in custody, a shorter period of delay will raise the issue.

2. Waiver of time periods

If the length of the delay warrants an inquiry into the reasons for delay, it appears logical to deal with any allegation of waiver before embarking on the more detailed examination of the reasons for delay. If by agreement or other conduct the accused has waived in whole or in part his or her rights to complain of delay, then this will either dispose of the matter or allow the period waived to be deducted.

This court has clearly stated that in order for an accused to waive his or her rights under s. 11(b), such waiver must be clear and unequivocal, with full knowledge of the rights the procedure was enacted to protect and of the effect that waiver will have on those rights: Korponey v. A.-G. Can. (1982), 65 C.C.C. (2d) 65 at p. 74, 132 D.L.R. (3d) 354, [1982] 1 S.C.R. 41; R. v. Clarkson (1986), 25 C.C.C. (3d) 207 at pp. 217-9, 26 D.L.R. (4th) 493, [1986] 1 S.C.R. 383; Askov, supra, at pp. 481-2). Waiver can be explicit or implicit. If the waiver is said to be implicit, the conduct of the accused must comply with the stringent test for waiver set out above. As Cory J. described it in Askov, supra (at p. 481):

> ...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.

Waiver requires advertence to the act of release rather than mere inadvertence. If the mind of the accused or his or her counsel is not turned to the issue of waiver and is not aware of what his or her conduct signifies, then this conduct does not constitute waiver. Such conduct may be taken into account under the factor "actions of the accused" but it is not waiver. As I stated in Smith, supra, which was adopted in Askov, supra, consent to a trial date can give rise to an inference of waiver. This will not be so if consent to a date amounts to mere acquiescence in the inevitable.

In R. v. Bennett (1991), 64 C.C.C. (3d) 449, 6 C.R. (4th) 22, 46 O.A.C. 99, Arbour J.A. alluded to the problem that arises in applying the principles of waiver in respect of accused who agreed to trial dates prior to the release

of the Askov decision. Presumably, the accused could contend that in agreeing to dates they were not fully aware of their rights. No doubt this is a factor that must be considered by the court hearing the application and it is not appropriate for this court to make any general pronouncement as ***[page16]*** to whether waiver would or would not apply in the circumstances. Any alleged misapprehension of rights by reason of the apprehended state of the law before Askov must be considered in light of these reasons.

(3) The reasons for the delay

If the application by an accused is not resolved by reason of the principles of waiver, the court will have to consider the other explanations for delay. Some delay is inevitable. Courts are not in session day and night. Time will be taken up in processing the charge, retention of counsel, applications for bail and other pre-trial procedures. Time is required for counsel to prepare. Over and above these inherent time requirements of a case, time may be consumed to accommodate the prosecution or defence. Neither side, however, can rely on their own delay to support their respective positions. When a case is ready for trial a judge, court-room or essential court staff may not be available and so the case cannot go on. This latter type of delay is referred to as institutional or systemic delay. I now turn to a closer examination of each of these reasons and the role each plays in determining what delay is unreasonable.

(a) Inherent time requirements

All offences have certain inherent time requirements which inevitably lead to delay. Just as the fire-truck must get to the fire, so must a case be prepared. The complexity of the trial is one requirement which has often been mentioned. All other factors being equal, the more complicated a case, the longer it will take counsel to prepare for trial and for the trial to be conducted once it begins. For example, a fraud case may involve the analysis of many documents, some conspiracies may involve a large number of witnesses and other cases may involve numerous intercepted communications which all must be transcribed and analyzed. The inherent requirements of such cases will serve to excuse longer periods of delay than for cases which are less complex. Each case will bring its own set of facts which must be evaluated. Account must also be taken of the fact that counsel for the prosecution and the defence cannot be expected to devote their time exclusively to one case. The amount of time that should be allowed counsel is well within the field of expertise of trial judges.

As well as the complexity of a case, there are inherent requirements which are common to almost all cases. The respondent has described such activities as "intake requirements". Whatever one wishes to call these requirements, they consist of activities such as ***[page17]*** retention of counsel, bail hearings, police and administration paperwork, disclosure, etc. All of these activities may or may not be necessary in a particular case but each takes some amount of time. As the number and complexity of these activities increase, so does the amount of delay that is reasonable. Equally, the fewer the activities which are necessary and the simpler the form each activity takes, the shorter should be the delay. The respondent suggests that this court should set an administrative guideline for such an "intake period". We decline to do so on the basis of the record that is before us. The length of time necessary will be influenced by local practices and conditions and should reflect that fact. No doubt the intake period in a particular region will tend to be the same for most offences. There may, however, be a significant variation between some categories of offences, such as between summons cases and cases of arrest. This will mean that courts in a particular region will tend to hear the same evidence repeated with each s. 11(b) application. It will then become apparent that this period falls within a range of a certain number of weeks or months. A de facto administrative guideline will thus develop that will reflect conditions in that region.

Another inherent delay that must be taken into account is whether a case must proceed through a preliminary inquiry. Clearly a longer time must be allowed for cases that must proceed through a "two-stage" trial process than for cases which do not require a preliminary hearing. Equally, a two-stage process will involve additional inherent delays such as further pre-trial meetings and added court dates. An additional period for inherent time requirements must be allowed for this second stage. This period will be shorter than in the case of the one-stage trial process because many of the intake procedures will not have to be duplicated.

(b) Actions of the accused

This aspect of the reasons for the delay should not be read as putting the "blame" on the accused for certain portions of delay. There is no necessity to impute improper motives to the accused in considering this factor. Included under this heading are all actions taken by the accused which may have caused delay. In this section I am concerned with actions of the accused which are voluntarily undertaken. Actions which could be included in this category include change of venue motions, attacks on wiretap packets, adjournments which do not amount to waiver, attacks on search warrants, etc. I do not wish to be interpreted as advocating that the accused sacrifice all preliminary procedures and strategy, but ***[page18]*** simply point out that if the accused chooses to take such action, this will be taken into account in determining what length of delay is reasonable.

An example of such actions is provided by Conway, supra. In Conway, the accused made a number of requests which led to the proceedings being delayed. Those requests included a change of venue motion, changes of solicitor and a request that the accused be allowed to re-elect trial by judge alone. A further example is provided in Bennett, supra, where the accused made an election at his scheduled Provincial Court trial to be tried in the then District Court. This converted a scheduled trial into a preliminary inquiry. While the type of action of the accused in both these cases was unquestionably bona fide, each action contributed to the delay and must therefore be taken into consideration in determining whether the over-all delay suffered by the accused was reasonable.

(c) Actions of the Crown

As with the conduct of the accused, this factor does not serve to assign blame. This factor simply serves as a means whereby actions of the Crown which delay the trial may be investigated. Such actions include adjournments requested by the Crown, failure or delay in disclosure, change of venue motions, etc. An example of action of this type is provided in Smith, supra, where adjournments were sought due to the wish of the Crown to have a particular investigating officer attend the trial. As I stated in that case, there is nothing wrong with the Crown seeking such adjournments but such delays cannot be relied upon by the Crown to explain away delay that is otherwise unreasonable.

(d) Limits on institutional resources

Institutional delay is the most common source of delay and the most difficult to reconcile with the dictates of s. 11(b) of the Charter. It was the major source of the delay in Askov. As I have stated, this is the period that starts to run when the parties are ready for trial but the system cannot accommodate them. In Utopia this form of delay would be given zero tolerance. There, resources would be unlimited and their application would be administratively perfect so that there would be no shortage of judges or court-rooms and essential court staff would always be available. Unfortunately, this is not the world in which s. 11(b) was either conceived or in which it operates. We live in a country with a rapidly growing population in many regions and in which resources are limited. In applying s. 11(b), account must be taken of this fact ***[page19]*** of life. As stated by Lamer J. (as he then was) in Mills (at p. 550), and approved in Askov (at p. 478):

> "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."

How are we to reconcile the demand that trials are to be held within a reasonable time in the imperfect world of scarce resources? While account must be taken of the fact that the state does not have unlimited funds and other government programs compete for the available resources, this consideration cannot be used to render s. 11(b) meaningless. The court cannot simply accede to the government's allocation of resources and tailor the period of permissible delay accordingly. The weight to be given to resource limitations must be assessed in light of the fact that the government has a constitutional obligation to commit sufficient resources to prevent unreasonable delay which distinguishes this obligation from many others that compete for funds with the administration of justice. There is a point in time at which the court will no longer tolerate delay based on the plea of inadequate resources. This period of time may be referred to as an administrative guideline. I hasten to add that this guideline is neither a limitation period nor a fixed ceiling on delay. Such a guideline was suggested in Askov and was treated by

some courts as a limitation period. I propose therefore to examine in some detail the purpose of a guideline commencing with an examination of its role in Askov.

In Askov we were dealing with a period of delay of approximately two years subsequent to committal for trial. All of this delay was institutional or systemic delay. Applying the factors that had crystallized in Smith, supra, we concluded that the delay was clearly unreasonable. In his reasons, which in this respect were unanimous, Cory J. did go on to state (at p. 490): "...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". With respect to institutional factors, he stated (at p. 479): "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."

The purpose of the suggested period was not therefore that it was to be treated as a limitation period and inflexible. The purpose in expressing a guideline is twofold. First, as I have already ***[page20]*** indicated, it is to recognize that there is a limit to the delay that can be tolerated on account of resource limitations. Secondly, it is to avoid each application pursuant to s. 11(b) being turned into a trial of the budgetary policy of the government as it relates to the administration of justice. The flavour of such a proceeding can be appreciated by a perusal of the voluminous record before the court in this case.

A number of considerations enter into the adoption of a guideline and its application by trial courts. A guideline is not intended to be applied in a purely mechanical fashion. It must lend itself and yield to other factors. This premise enters into its formulation. The court must acknowledge that a guideline is not the result of any precise legal or scientific formula. It is the result of the exercise of a judicial discretion based on experience and taking into account the evidence of the limitations on resources, the strain imposed on them, statistics from other comparable jurisdictions and the opinions of other courts and judges, as well as any expert opinion. With respect to the use of statistics, care must be taken that a comparison of jurisdictions is indeed a comparative analysis. For example, in Askov we were given statistics with respect to Montreal in an affidavit by Professor Baar. Subsequently, it was brought to our attention that this was a misleading comparison. Evidence was led in this appeal showing that the manner in which criminal charges are dealt with in Montreal and Brampton is sufficiently dissimilar so as to make statistics drawn from the two jurisdictions of limited comparative value. Compar ison with other jurisdictions is therefore to be applied with caution and only as a rough guide. These then are the factors which enter into the formulation by an appellate court of a guideline with respect to administrative delay. I now turn to its application in the trial courts.

I have already stressed that a guideline is not to be treated as a fixed limitation period. It will yield to other factors. Rapidly changing conditions may place a sudden and temporary strain on resources. This was the situation in the District of Durham in which this case arose. Such changing conditions should not result in an amnesty for persons charged in that region. Rather, this fact should be taken into account in applying the guideline. On the other hand, when the case-load has been constant over a substantial period of time the delay envisaged by the guideline may be regarded as excessive. In this appeal, the Court of Appeal purported to apply a transitional period to accommodate the situation in Durham. While a transitional period may have been appropriate immediately after the Charter came into effect, it is not appropriate ***[page21]*** any longer. This court so held in Askov. The use of a transitional period implies a fixed period during which unreasonable delay will be tolerated while the system adjusts to a new set of rules. It imposes a general moratorium on certain Charter rights. For this reason and quite apart from the statement in Askov that the transitional period had ended, I would not find it appropriate in this case. It appears to me undesirable to impose a moratorium on Charter rights every time a region of the country experiences unusual strain on its resources. It is preferable to simply treat this as one factor in the over-all decision as to whether a particular delay is unreasonable.

The application of a guideline will also be influenced by the presence or absence of prejudice. If an accused is in custody or, while not in custody, subject to restrictive bail terms or conditions or otherwise experiences substantial prejudice, the period of acceptable institutional delay may be shortened to reflect the court's concern. On the other hand, in a case in which there is no prejudice or prejudice is slight, the guideline may be applied to reflect this fact.

In this case we are dealing with the Provincial Court. The suggested period of institutional delay ranges from six to 10 months. The respondent suggests that eight to 10 months of purely systemic delay would not be unreasonable in the Provincial Court. It admits, however, that it is aiming at institutional delay of no more than six to eight months in Provincial Court. Arbour J.A. in Bennett, supra, suggests "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, is not outside the range of reasonableness" (p. 474).

In Askov, Cory J., after reviewing comparative statistics suggested that a period in the range of six to eight months between committal and trial would not be unreasonable. Based on the foregoing, it is appropriate for this court to suggest a period of institutional delay of between eight and 10 months as a guide to Provincial Courts. With respect to institutional delay after committal for trial, I would not depart from the range of six to eight months that was suggested in Askov. In such a case this institutional delay would be in addition to the delay prior to committal. This reflects the fact that after committal the system must cope with a different court with its special resource problems. It is therefore essential to take into account the inevitability of this additional institutional delay.

A longer period of institutional delay for Provincial Courts is justified on the basis that not only do these courts dispose of the ***[page22]*** vast majority of cases, but that on average it takes more time to dispose of cases by reason of the demands placed on these courts. Statistics for 1987 submitted by the respondent show a median delay in New Brunswick of 152 days for Provincial Court and 72 days for upper courts. Delay in London, Ontario was shown to be 239 days in Provincial Court and 105 in upper courts; Toronto, St. Catharines and Ottawa showed delays of 315 to 349 days in Provincial Court and 133 to 144 days in upper courts; median delays in Brampton were 607 days for Provincial Court and 423 for upper courts. Figures for Vancouver were similar to London and for New Westminster comparable to Toronto, St. Catharines and Ottawa.

These suggested time periods are intended for the guidance of trial courts generally. These periods will no doubt require adjustment by trial courts in the various regions of the country to take into account local conditions and they will need to be adjusted from time to time to reflect changing circumstances. The Court of Appeal in each province will play a supervisory role in seeking to achieve uniformity subject to the necessity of taking into account the special conditions and problems of different regions in the province.

The application of these guidelines under the supervision of the Court of Appeal is subject to the review of this court to ensure that the right to trial within a reasonable time is being respected. In this regard I wish to reiterate what this court said in Stensrud, supra (at p. 96):

> The provincial courts of appeal are generally in a better position than this court to assess the reasonableness of their province's institutional limitations and resources. Nevertheless, they must decide applications under s. 11(b) on the basis of correct principles.

(e) Other reasons for delay

There may be reasons for delay other than those mentioned above, each of which should be taken into consideration. As I have been at pains to emphasize, an investigation of unreasonable delay must take into account all reasons for the delay in an attempt to delineate what is truly reasonable for the case before the court. One such factor which does not fit particularly well into any other category of delay is that of actions by trial judges. An extreme example is provided by Rahey, supra. In that case it was the trial court judge who caused a substantial amount of the delay. Nineteen adjournments over the course of 11 months were instigated by the judge during the course of the trial. Such delay is not ***[page23]*** institutional in the strict sense. Nevertheless, such delay cannot be relied upon by the Crown to justify the period under consideration.

Other delays that have not been mentioned may weigh against the accused, but in most cases delays will weigh against the Crown for the same reason as was discussed in the above example.

4. Prejudice to the accused

Section 11(b) protects the individual from impairment of the right to liberty, security of the person, and the ability to make full answer and defence resulting from unreasonable delay in bringing criminal trials to a conclusion. We have decided in several judgments, including the unanimous judgment in Smith, supra, that the right protected by s. 11(b) is not restricted to those who demonstrate that they desire a speedy resolution of their case by asserting the right to a trial within a reasonable time. Implicit in this finding is that prejudice to the accused can be inferred from prolonged delay. In the American concept of this principle, expounded in Barker v. Wingo, the inference is that no prejudice has been suffered by the accused unless he or she asserts the right. While the observation of Dubin C.J.O. in Bennett that many, perhaps most, accused are not anxious to have an early trial may no doubt be accurate, s. 11(b) was designed to protect the individual, whose rights are not to be determined on the basis of the desires or practices of the majority. Accordingly, in an individual case, prejudice may be inferred from the length of the delay. The longer the delay the more likely that such an inference will be drawn. In circumstances in which prejudice is not inferred and is not otherwise proved, the basis for the enforcement of the individual right is seriously undermined.

This court has made clear in previous decisions that it is the duty of the Crown to bring the accused to trial: see Askov, supra, at pp. 478, 480-2. While it was not necessary for the accused to assert her right to be tried within a reasonable time, strong views have been expressed that in many cases an accused person is not interested in a speedy trial and that delay works to the advantage of the accused. This view is summed up by Doherty J. (as he then was) in a paper given to the National Criminal Law Programme in July, 1989, which was referred to with approval by Dubin C.J.O. in Bennett (at p. 458), and echoes what has been noted by numerous commentators:

> "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 ***[page24]*** that he can escape a trial on the merits. This view may seem harsh but experience supports its validity."

As also noted by Cory J. in Askov, supra, "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" (p. 476). This right must be interpreted in a manner which recognizes the abuse which may be invoked by some accused. The purpose of s. 11(b) is to expedite trials and minimize prejudice and not to avoid trials on the merits. Action or non-action by the accused which is inconsistent with a desire for a timely trial is something that the court must consider. This position is consistent with decisions of this court in regard to other Charter provisions. For example, this court has held that an accused must be reasonably diligent in contacting counsel under Charter s. 10(b): R. v. Tremblay (1987), 37 C.C.C. (3d) 565, 45 D.L.R. (4th) 445, [1987] 2 S.C.R. 435; R. v. Smith (1989), 50 C.C.C. (3d) 308, 6 D.L.R. (4th) 462, [1989] 2 S.C.R. 368. If this requirement is not enforced, the right to counsel could be used to frustrate police investigation and in certain cases prevent essential evidence from being obtained. None the less, in taking into account inaction by the accused, the court must be careful not to subvert the principle that there is no legal obligation on the accused to assert the right. Inaction may, however, be relevant in assessing the degree of prejudice, if any, that an accused has suffered as a result of delay.

Apart, however, from inferred prejudice, either party may rely on evidence to either show prejudice or dispel such a finding. For example, the accused may rely on evidence tending to show prejudice to his or her liberty interest as a result of pre-trial incarceration or restrictive bail conditions. Prejudice to the accused's security interest can be shown by evidence of the ongoing stress or damage to reputation as a result of overlong exposure to "the vexations and vicissitudes of a pending criminal accusation", to use the words adopted by Lamer J. in Mills, supra, at p. 538. The fact that the accused sought an early trial date will also be relevant. Evidence may also be adduced to show that delay has prejudiced the accused's ability to make full answer and defence.

Conversely, the prosecution may establish by evidence that the accused is in the majority group who do not want an early trial and that the delay benefited rather than prejudiced the accused. Conduct of the accused falling short of waiver may be relied upon to negative prejudice. As discussed previously, the degree of prejudice or absence thereof is also an important factor in ***[page25]*** determining the length of institutional delay that will be tolerated. The application of any guideline will be influenced by this factor.

Application to this case

1. The length of the delay

The accused was charged on January 9, 1988, and her trial was completed on March 28, 1989. The total period of time between charge and trial was therefore approximately 14 1/2 months. For reasons which I will explain later in these reasons, the accused at no time waived her right to a trial within a reasonable time nor did she waive her right in regard to any particular time periods. The length of delay therefore totalled just over 14 1/2 months.

A delay of 14 1/2 months in bringing a case to trial can hardly be described as a model of dispatch. On the other hand, 14 1/2 months is a time period which may be excused in suitable circumstances. The length of the delay is sufficient to raise the issue of reasonableness and the inquiry must turn to the reason why it took 14 1/2 months to bring Ms. Morin to trial.

2. Waiver of time periods

Waiver must be clear and unequivocal and with full knowledge of the right one is waiving. In the circumstances of this case, it cannot be said that the accused waived any of her rights at any time. She neither explicitly waived her rights nor can one infer from her actions an intent to waive her rights. I am in agreement with the lower courts which concluded that there was no waiver in this case.

3. The reasons for the delay

(a) Inherent time requirements

The accused was charged with what is commonly referred to as "over 80" and impaired. These charges resulted from a roadside stop followed by a breathalyzer test taken at the police station. Subject to certain paperwork, the preparation of the case for the prosecution was essentially complete by the time the accused was released from custody shortly after her breathalyzer test. This was therefore not a complicated case from the perspective of the prosecution. All prosecution witnesses were police officers and all relevant testing and investigation were completed on the day of the arrest of Ms. Morin.

Although the investigation by the Crown may have been completed on the day of arrest, the case for the defence was merely beginning. This is most easily exemplified by the fact that ***[page26]*** Ms. Morin could hardly have been expected to be ready for trial, for example, the next day. She required a certain amount of time to complete preliminary matters such as consulting and retaining counsel. Additionally, counsel would have needed some time to consider and prepare her case. Equally, certain time would have been required by the prosecution to finish the required paperwork and by the judicial administration to bring the case into the system. All of these activities take time and all legitimize some delay.

Ms. Morin was before the court for her first appearance on February 23, 1988, six weeks after her arrest. At this time she had retained counsel and requested "the earliest date" for trial. By this date, it appears that most of the preliminary matters of both the prosecution and the defence had been completed. As counsel for the defence did not indicate a readiness for trial but merely a request for the earliest trial date, it is somewhat unclear whether the case for the defence was as yet ready for trial. It may be inferred, however, that both parties were ready for trial within a few weeks of the first appearance. Accordingly, the inherent time requirements for this case were about two months.

(b) Actions of the accused

At her first court appearance, the accused requested the earliest date for trial. In response to her request, she was given a trial date of March 28, 1989, fully 13 months in the future. The accused inquired as to whether this was actually "the earliest date" available and the presiding judge indicated a simple "yes". Other than this court appearance there is no action on record taken by the accused from the point of her charge until her date of trial. The inaction on the part of the accused will be considered further in assessing prejudice.

(c) Actions of the Crown

The appellant admits that there is nothing in the record to suggest that the Crown was in any way dilatory in proceeding in this matter. In fact, the appellant concedes that the Crown was anxious to get the case to trial. As discussed later in these reasons, counsel for the Crown sent a "form" letter to all defence counsel in the Durham region suggesting that earlier dates might be available for accused who were anxious for trial. While it is alleged that this letter may have been sent too late to help Ms. Morin, it does show some positive action by the Crown to expedite trial. None of the delay is therefore attributable to the action of the Crown.

[page27] (d) Limits on institutional resources

Perhaps the single most important factor in this case is the limit on institutional resources. It appears that from some time in March, 1988, until March, 1989, the parties were prepared for trial but the judicial system could not accommodate them. It is somewhat unclear whether a date in early 1989 could have been made available as a result of the letter from the Crown's office but I am prepared to infer from the totality of the facts that an institutional delay of about 12 months was involved. This time period is the time from which the parties were ready for trial until the point at which the courts were able to accommodate this case.

In considering the reasonableness of this delay, the court must consider the facts surrounding this institutional delay. It must be remembered that this appeal arises from Ontario Provincial Court and arises from a region which has experienced significant growth in recent years.

I will deal first with the consideration which must be given to the fact that we are dealing with a Provincial Court. The Ontario Provincial Court disposes of approximately 95% of criminal cases in Ontario. Evidence led by the Crown in this appeal shows that the case-load of this Provincial Court increased more than 125% from 1985/86 to 1989/90. After several years in which the case-load was stable at 80,000 cases, the case-load of the Provincial Court in Ontario increased from 80,000 to 180,000 from 1985/86 to 1989/90. This rapid increase in case-load cannot, of course, always be predicted, nor can the government respond immediately to the inevitable strain on resources. While this court has made it clear that there is no longer any general transitional period in which to allow the government to comply with its constitutional obligations to provide sufficient facilities, this does not remove the issue of changing local circumstances from consideration.

In the jurisdiction in which this case arose, the District of Durham, the increase in case-load from 1985/86 to 1990/91 was approximately 70% in adult court and an astounding 143% in youth court. This was only partially caused by a population increase of 40% during the previous decade. Thus it is not surprising that the provision of institutional resources may have lagged somewhat behind the demand. Since some time in July, 1990, however, it appears that the Durham Provincial Court has been able to dispose of cases at a more rapid rate than it has received new cases. While one cannot use institutional resources to nullify the right to be tried within a reasonable time, one also cannot use rapidly ***[page28]*** changing local conditions to compel a general amnesty. Based on the above factors, I would allow a period for systemic delay which is in the upper range of the guideline. In my view, a period in the order of 10 months would not be unreasonable. While I have suggested that a guideline of eight to 10 months be used by courts to assess institutional delay in Provincial Courts, deviations of several months in either direction can be justified by the presence or absence of prejudice.

(e) Other reasons for delay

There do not appear to be any other reasons for delay in this case beyond those already considered in these reasons.

4. Prejudice to the accused

The accused led no evidence of prejudice. The court must still consider what, if any, prejudice is to be inferred from the delay. In this regard the Crown relies on the fact that several months prior to trial, counsel in the Durham region received a letter dated January 16, 1989, from the Crown Attorney's office which stated in part (C.O.A., at p. 38):

> [i]f you wish to move any of your cases up or feel that any clients are suffering prejudice as a result of delay please give Audrey or I a shout and we'll try to locate an earlier date. Thank you for your co-operation.

[Emphasis added.] It may be unrealistic to suggest that a trial set for approximately two months from the date of this letter could have been significantly moved up but we will never know what would have happened as the accused did not request any action. While the accused was not required to do anything to expedite her trial, her inaction can be taken into account in assessing prejudice. I conclude for this reason that the accused was content with the pace with which things were proceeding and that therefore there was little or no prejudice occasioned by the delay.

Disposition

Applying the guideline to which I have referred and taking into account the strain on institutional resources, the reasons of the Court of Appeal in regard thereto and the absence of any significant prejudice, I am of the opinion that the delay in this case was not unreasonable. I have come to this conclusion without the necessity of resorting to the burden of proof.

In view of the result at which I have arrived, it is unnecessary to consider the argument of the Attorney-General of Canada that a stay is not the only remedy available for an infringement of the right protected by s. 11(b). The appellant's rights under s. 11(b) have not been violated and the appeal is dismissed.

[page29] **Gonthier J.**: I concur in the reasons of Justice Sopinka and agree with the observations of Justice McLachlin underlining that in the final analysis the decision as to granting a stay must rest on a balancing of the prejudice suffered by the accused and the societal interest in bringing the accused to trial.

With respect to the determination of prejudice to the accused, the onus which rests upon the Crown may be met either by direct evidence or by inference, whether it be to establish the absence of prejudice or its extent or degree. By reason of the circumstances outlined by Sopinka J., particularly the conduct of the accused in relation to the proceedings and the fact that the delay only exceeded the guideline for institutional delay to a limited extent, I reach the conclusion that the prejudice to be inferred as suffered by the accused was minimal and is outweighed by the societal interest in bringing her to trial.

I would accordingly dismiss the appeal.

McLachlin J.: I have read the reasons of Justice Sopinka and agree that the appeal should be dismissed. I should like, however, to add certain observations on the nature of the right to trial within a reasonable time and the practical application of the factors relevant to determining a breach of this right.

It is easy, in considering the factors which can bear on that determination, to lose sight of the true issue at stake -- the determination of where the line should be drawn between conflicting interests. On the one hand stands the interest of society in bringing those accused of crimes to trial, of calling them to account before the law for their conduct. It is an understatement to say that this is a fundamental and important interest. Even the earliest and most primitive of societies insisted that the law bring to justice those accused of crimes. When those charged with criminal conduct are not called to account before the law, the administration of justice suffers. Victims conclude that justice has not been done and the public feels apprehension that the law may not be adequately discharging the most fundamental of its tasks.

On the other side of the balance stands the right of a person charged with an offence to be tried within a reasonable time. When trials are delayed, justice may be denied. Witnesses forget, witnesses disappear. The quality of evidence may deteriorate. Accused persons may find their liberty and security limited much longer than necessary or justifiable. Such delays are of consequence not only to the accused, but may affect the public interest in the prompt and fair administration of justice.

[page30] The task of a judge in deciding whether proceedings against the accused should be stayed is to balance the societal interest in seeing that persons charged with offences are brought to trial against the accused's interest in prompt adjudication. In the final analysis the judge, before staying charges, must be satisfied that the interest of the accused and society in a prompt trial outweighs the interest of society in bringing the accused to trial.

The factors to be considered include the length of the delay, any waiver by the accused of the delay, the reasons for the delay and prejudice to the accused. But simply listing factors does not resolve the dilemma of a trial judge faced with an application for a stay on grounds of delay. What is important is how those factors interact and what weight is to be accorded to each. In this connection, we must remind ourselves that the best test will be relatively easy to apply; otherwise, stay applications themselves will contribute to the already heavy load on trial judges and compound the problem of delay.

In my opinion, the task of a trial judge considering an application for a stay of charges may usefully be regarded as falling into two segments. The first step is to determine whether a prima facie or threshold case for unreasonable delay has been made out. Here such matters as length of delay, waiver and the reasons for the delay fall to be considered. If the delay is reasonable having regard to similar cases, the application will fail. If the accused has waived his or her right to an early trial date, the application will fail. If the reasons for the delay are in large part attributable to the accused, the prima facie case will not be made out and it is unnecessary to proceed further. Where waiver or accused-caused delay are not factors, the determination of whether a prima facie or threshold case has been made out may in many cases resolve itself by reference to "norms" representing the time reasonably taken to bring the offence charged to the point of trial in all the circumstances.

If this threshold or prima facie case is made out, the court must proceed to a closer consideration of the right of the accused to a trial within a reasonable time, and the question of whether it outweighs the conflicting interest of society in bringing a person charged with a criminal offence to trial. The question is whether, on the facts of the particular case, the interest of society in requiring the accused person to stand trial is outweighed by the injury to the accused's rights and detriment to the administration of justice which a trial at a later date would inflict. The interest of society in bringing those charged with criminal offences to trial is of constant importance. The interest of the accused, on the other hand (and the ***[page31]*** correlative negative impact of delay on the administration of justice) varies with the circumstances. It is usually measured by the fourth factor -- prejudice to the accused's interests in security and a fair trial. It is the minimization of this prejudice which has been held to be the main purpose of the right under s. 11(b) of the Canadian Charter of Rights and Freedoms to be tried within a reasonable time: R. v. Conway (1989), 49 C.C.C. (3d) 289 at p. 305, [1989] 1 S.C.R. 1659, 70 C.R. (3d) 209.

An accused person may suffer little or no prejudice as a consequence of a delay beyond the expected and normal. Indeed, an accused may welcome the delay. On the other hand, an accused person can suffer great prejudice because of the delay. Where the accused suffers little or no prejudice, it is clear that the consistently important interest of bringing those charged with criminal offences to trial outweighs the accused's and society's interest in obtaining a stay of proceedings on account of delay, because the consequences of the delay are not great. On the other hand, where the accused has suffered clear prejudice which cannot be otherwise remedied, the balance may tip in the accused's favour and justice may require a stay.

How is prejudice sufficient to outweigh the important public interest in bringing those charged with criminal offences to trial to be established? The matter is essentially a question of fact, dependent on the circumstances of the case. As Sopinka J. points out, the length of delay itself in many circumstances may not support the inference of sufficient prejudice to justify a stay of proceedings. It is well known that accused persons may seek to delay trial and to use the "protective shield" of s. 11(b) as an "offensive weapon", as Cory J. put it in R. v. Askov (1990), 59 C.C.C. (3d) 449 at p. 476, 74 D.L.R. (4th) 355, [1990] 2 S.C.R. 1199. Where no inference as to prejudice can be drawn from the length of the delay, or where the most reasonable inference is the other way, the accused may have to call evidence if he or she is to displace the strong public interest in bringing those charged with an offence to trial.

In the case at bar, the accused was able to meet the first hurdle of establishing a prima facie case. The delay was longer than it should have been, given the nature of the charge and the time reasonably required for processing it. But she failed to show that protection of her interest in a prompt trial or the ancilliary public interest in prompt

justice outweighed the public interest in bringing her, a person charged with a criminal offence, to trial. The record permits no inference that her interests in security or the right to a fair trial were adversely affected. In short, the delay ***[page32]*** appears to have been of little consequence. In the absence of other evidence to establish the need for a stay, the public interest in proceeding to trial was bound to prevail. The trial judge was right to dismiss her application for a stay of proceedings.

I would dismiss the appeal.

Stevenson and Iacobucci JJ. concur with Sopinka J. Appeal dismissed.