Regina v. Pusic et al.

[Indexed as: R. v. Pusic]

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[1996] O.J. No. 3329
No. CRIMJ(P) 6061/95

Ontario Court (General Division),
Hill J.,

September 20, 1996

Charter of Rights and Freedoms — Trial within reasonable time — Two years from time charges laid to committal for trial — About 14 months of period caused by intolerable institutional delay — Delay in large part occasioned by insufficient judicial resources and courtroom facilities — Unexplained delays in making disclosure — No waiver by accused — Accused's right to trial within reasonable time violated — Charges stayed — Canadian Charter of Rights and Freedoms, s. 11(b).

The accused, together with a number of other people, were charged with a number of offences arising out of an investigation into the theft and sale of tractor trailers loaded with commercial goods. The Crown alleged that the value of the goods found in possession of the accused was over $250,000. The accused Pusic was also charged in relation to the sale of two handguns to an undercover officer. The remaining two accused brought an application to have the charges against them stayed on the basis that their right to be tried within a reasonable time had been infringed.

Held, the application should be granted.

The factors to be considered in determining whether the period between the laying of criminal charges and their trial are well-established as the result of decisions from the Supreme Court of Canada and the Court of Appeal for Ontario. The court must apply a flexible approach and avoid the mechanical application of the guidelines established by the Supreme Court of Canada, and must balance all of the relevant factors in its assessment of the reasonableness of the entire period of pre-trial delay. The length of the delay in this case is 37 months, which all parties agree is sufficient to require an assessment of its reasonableness.

The Crown does not allege any waiver on the part of the accused, and their agreement to various dates given by the court amounted to acquiescence to the inevitable in the circumstances of this case.

The next issue to be considered is the determination of the inherent time requirements of the case. There was an eight-count indictment and the disclosure material was approximately four inches thick. The one-witness preliminary inquiry took about four days. There are no wiretaps involved in the case and the Crown estimates that it will call about three witnesses, including the undercover officer as the main prosecution witness. It was estimated that the trial would take from one-and-a-half to two weeks. Originally there were six accused, although three accused pleaded guilty at the outset of the preliminary inquiry. This was not an unduly complex case. The Crown estimated that disclosure would be available in October, but for reasons

which were not explained, full disclosure was not made until November. As a result the scheduled pre-trial could not proceed as defence counsel were only given the disclosure on the day set for the pre-trial. Throughout this period the accused expressed concern about the delays in obtaining the disclosure. The Crown conceded that a large part of the initial delay of about six months was attributable to the Crown. A new pre-trial date was set but it did not proceed as counsel for one of the accused was ill. The new date for the pre-trial was two months later, apparently as a result of systemic delay.

The five-day preliminary inquiry was set for about eight months from the set date appearance. Therefore, the preliminary inquiry started about 15 months after the charges were laid. It takes longer for the system to provide an unbroken period of five days, and in the circumstances, the eight-month period from the set date to the preliminary inquiry was not unacceptable. Three of the accused pleaded guilty and charges against a fourth were withdrawn on the first day of the preliminary inquiry. This procedure took up about one-half of the first day set for the preliminary inquiry. The preliminary hearing judge had personal commitments which resulted in the loss of another two days out of the five days set aside for the hearing. As the five days set for the hearing had been decreased to two-and-a-half days, the preliminary hearing was not completed during the week originally set aside. The earliest date at which the system could provide for two full days to continue the hearing was more than eight months after the start of the preliminary inquiry. In the interim, counsel for Pusic retired and he retained new counsel. The preliminary inquiry concluded during the time allotted, thereby completing the provincial court proceedings about two years after the charges were laid. Applying the principles of analysis established by the jurisprudence to the provincial court proceedings results in the conclusion that about 11 months of the delay in that court was due to factors other than the inherent time requirements of the case and acceptable institutional delay.

The accused did not argue that the intake phase of the General Division was excessive. Before the trial date was set, counsel for the accused advised the presiding judge that a s. 11(b) application might be brought. Despite this statement, the Crown made no effort to give this case priority to "leap frog" over other cases which had less delay. It was estimated that the trial would take about one month, which represents a significant commitment of resources. However, at the time of this case there were no facilities available, in terms of judges and jury courtroom to accommodate a fast track court for cases which had experienced considerable delay. At the time of this trial there were five jury courtrooms, four of which were in use. The fifth jury courtroom was available, but there was no judge available to conduct a trial in this courtroom.

An examination of the institutional resources and systemic delay in Peel since the Supreme Court of Canada in R. v. Askov reveals that there has been no expansion of jury courtrooms in Peel since 1976. Plans to build a new courthouse were announced but they were postponed indefinitely in September 1995. The General Division has the same number of judges in the Region in 1996 as it did in 1990. A comparative analysis of General Division judges to population ratio between five other areas in the province and Peel Region demonstrates that Peel is well behind in judicial resources. In three of these areas (Essex, Middlesex and Simcoe) the judge to population ratio is more than two-and-a-half times as high as Peel is, and it is about twice as high in Hamilton-Wentworth. In the final area, Ottawa-Carleton, the ratio is also lower than in Peel. Since 1990 there have been three new courtrooms added to the provincial court roster and the complement of provincial court judges has been increased by three.

From 1978 to the present the population of Peel Region has increased by almost 115 per cent and, since 1990, it is up about 25 per cent. A further factor which affected the resources required for Peel Region is the presence of Canada's busiest airport within its boundaries. There has been a substantial increase in consumer use of the airport since 1990. A third terminal opened in that year. The airport is the source of a large number of drug charges. Statistics from Peel Regional Police have indicated that about 2.5 per cent more charges

were laid in 1995 than in 1994.

In this case the insufficiency of courtrooms and judges in the provincial court contributed to the delay. The Supreme Court of Canada has stated that a guideline for acceptable systemic delay in the General Division is six to eight months. In May of 1996, about one-third of charges in the General Division in Peel have been outstanding for more than eight months, and about 14 per cent have been outstanding for a year. Judges cannot ignore the extent to which institutional (governmental) recklessness exists with respect to the s. 11(b) rights of accused persons in Peel Region.

In such a case in which there is such a substantial period of pre-trial delay the inference of prejudice is virtually irresistible. The effect of stress on the accused of awaiting a trial and the extent to which the accuracy of witnesses' memories will fade over time are demonstrated in this case.

The period of 14 months of delay which is attributable neither to the accused nor to tolerable institutional delays is unreasonable. The societal interest in having a trial on the merits in this case does not outweigh the infringement of the accused person's individual rights and the charges are stayed.

Cases referred to

R. v. Allen, Ont. Gen. Div., Webber J., June 6, 1994; 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, 42 O.A.C. 81, 113 N.R. 241, revg 33 C.R.R. 319, 37 C.C.C. (3d) 289, 60 C.R. (3d) 277, 22 O.A.C. 299 (C.A.); R. v. B. (J.G.), [1993] 3 S.C.R. 643, 85 C.C.C. (3d) 112; R. v. Bennett, [1992] 2 S.C.R. 168, 9 C.R.R. (2d) 195, 74 C.C.C. (3d) 384, 138 N.R. 388, affg (1991), 3 O.R. (3d) 193, 7 C.R.R. (2d) 145, 64 C.C.C. (3d) 449, 6 C.R. (4th) 22, 46 O.A.C. 99, 9 O.R. (3d) 276n (C.A.); R. v. Bosley (1992), 18 C.R. (4th) 347 (Ont. C.A.); R. v. Brassard, [1993] 4 S.C.R. 287, 85 C.C.C. (3d) 287, 58 Q.A.C. 261, 160 N.R. 247; R. v. CIP Inc., [1992] 1 S.C.R. 843, 9 C.R.R. (2d) 62, 71 C.C.C. (3d) 129, 12 C.R. (4th) 237, 135 N.R. 90; R. v. Collins (1995), 30 C.R.R. (2d) 298, 99 C.C.C. (3d) 385, 40 C.R. (4th) 273, 183 N.R. 285 (S.C.C.); 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, 34 O.A.C. 165, 96 N.R. 241; R. v. Court (1995), 23 O.R. (3d) 321, 99 C.C.C. (3d) 237, 29 C.R.R. (2d) D-1 (C.A.); R. v. Frazer, [1993] 2 S.C.R. 866, 16 C.R.R. (2d) 283, 83 C.C.C. (3d) 126, 155 N.R. 220; R. v. Gillanders, Ont. Gen. Div., Howden J., June 3, 1993; R. v. Hill (1996), 36 C.R.R. (2d) 119 (Ont. C.A.); R. v. Kalanj, [1989] 1 S.C.R. 1594, 40 C.R.R. 50, 48 C.C.C. (3d) 459, 70 C.R. (3d) 260, 96 N.R. 191, [1989] 6 W.W.R. 577; R. v. MacMillan (1991), 3 O.R. (3d) 588, 65 C.C.C. (3d) 321, 6 C.R. (4th) 87 (C.A.); R. v. Mills, [1986] 1 S.C.R. 863, 21 C.R.R. 76, 26 C.C.C. (3d) 481, 52 C.R. (3d) 1, 29 D.L.R. (4th) 161, 16 O.A.C. 81, 58 O.R. (2d) 543n; R. v. Morin, [1992] 1 S.C.R. 771, 8 C.R.R. (2d) 193, 71 C.C.C. (3d) 1, 12 C.R. (4th) 1, 134 N.R. 321; R. v. Nuosci, [1993] 4 S.C.R. 283; R. v. Oliver, Ont. C.A., File No. C15201, November 29, 1994; R. v. Padfield (1992), 13 C.R.R. (2d) 92, 79 C.C.C. (3d) 53, 18 C.R. (4th) 364 (Ont. C.A.); R. v. Palmer (1991), 4 O.R. (3d) 252, 67 C.C.C. (3d) 75 (C.A.); R. v. Potvin, [1993] 2 S.C.R. 880, 16 C.R.R. (2d) 260, 83 C.C.C. (3d) 97, 23 C.R. (4th) 10, 105 D.L.R. (4th) 214, 155 N.R. 241, affg (1992), 74 C.C.C. (3d) 111 (Ont. C.A.); R. v. Rogalsky, [1995] 4 S.C.R. 48, 102 C.C.C. (3d) 575, 137 Sask. R. 230, 189 N.R. 82, 107 W.A.C. 230; R. v. Sharma, [1992] 1 S.C.R. 814, 8 C.R.R. (2d) 222, 71 C.C.C. (3d) 184, 12 C.R. (4th) 45, 134 N.R. 368; 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; R. v. White (1991), 3 O.R. (3d) 247, 64 C.C.C. (3d) 479, 7 C.R.R. (2d) D-1 (C.A.); Rahey v. R., [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, 78 N.S.R. (2d) 183, 75 N.R. 81, 193 A.P.R. 183

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 11(b), 24(1)
Criminal Code, R.S.C. 1985, c. C-46, ss. 520, 548, 625.1(2) [enacted R.S.C. 1985, c. 27 (1st Supp.), s. 127]

APPLICATION for a stay of proceedings.
Frank D. Crewe, for applicant, Josip Pusic. S. Jay Passi, for applicant, Hrvoje Juric.
D.G. Carruthers, for the Crown, respondent.

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HILL J.: —

A. OVERVIEW

The applicants have made application pursuant to s. 24(1) of the Canadian Charter of Rights and Freedoms for the remedy of a stay of proceedings on account of a submitted breach of s. 11(b) of the Charter.

Section 11(b) provides that:

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

The court has been informed that between March 1993, and May 1993, there was an undercover operation commenced by the Peel Regional Police Service Intelligence Bureau. This project, later called Project Quest, was initiated by Constable Maurice together with a confidential informant. The investigation focused on the theft and sale of tractor trailer loads of various commercial products in the Peel Region.

Constable Maurice and the confidential informant, pursuant to an initial contact with an individual by the name of Hughes, eventually became acquainted with the applicants before this court, Pusic and Juric, and several others.

It is the position of the Crown that through the contact made through the confidential police informant and Mr. Hughes, Juric and Pusic (and others) were subsequently found to be in possession of two separate tractor trailer loads of merchandise which had allegedly been stolen. One of these tractor trailer loads consisted of Robin Hood and various other food stuffs which were apparently purchased by Constable Maurice for $11,800 in cash, which was given by Officer Maurice to Hughes (value of product, $76,000). The second tractor trailer load of merchandise consisted of Sears Craftsman products, which it is the position of the Crown were valued at $230,000.

In addition to these charges, it is alleged that Mr. Pusic sold two handguns to undercover officer Maurice during the same time period.

Initially, some summary presentation of the chronology of events within the litigation is warranted.

March-May 1993	-- dates of the offences alleged against the applicants arrest made arising out of operation QUEST
July 27, 1993	-- applicants were arrested -- Pusic, represented by Mr. Herman, released on own recognizance in the amount of $20,000 without deposit -- Juric, represented by Mr. Bartels, detained following a judicial interim release hearing
August 3, 1993	-- applicants and four co-accused appeared before court to set a date for a judicial pre-trial in the Ontario Court of Justice (Prov. Div.) -- case adjourned to Sept. 7/93 to set a date for pre-trial

August 20, 1993 -- Juric released on a s. 520 bail review on his own recognizance without deposit in the amount of $50,000
-- Juric represented by Mr. Stein

September 7, 1993 -- case adjourned to Sept. 8/93 to be spoken to
-- Crown anticipates disclosure availability by Oct. 4, 1993

September 8, 1993 -- case adjourned to Oct. 4/93 to set a date for pre-trial
-- all 6 accused have retained counsel
-- Crown indicates disclosure to be available within 2 weeks

October 4, 1993 -- Pusic adjourned to Nov. 9/93 for pre-trial -- Juric adjourned to Oct. 27/93

October 27, 1993 -- Juric remanded to Nov. 9/93 for pre-trial

November 9, 1993 -- pre-trial scheduled for 2:00
-- pre-trial not held
-- pre-trial adjourned to Nov. 30/93
-- disclosure provided to all accused on this date

November 30, 1993 -- pre-trial scheduled for 9:30 a.m.
-- pre-trial not held
-- pre-trial adjourned to Jan. 26/94 at 9:30 a.m.

January 26, 1994 -- pre-trial held
-- on judge and jury elections being signified by accused, preliminary inquiry dates set for Oct. 31 through Nov. 4th, 1994 (5 days)

July 22, 1994 -- Juric's application for a bail variation pursuant to s. 520 of the Code allowed in the Ontario Court of Justice (Gen. Div.)

October 31, 1994 -- preliminary inquiry begins
-- presiding judge indicates to counsel that for personal scheduling reasons only 3 days will be available this week for conduct of the preliminary inquiry

-- during morning of Oct. 31, the case is resolved respecting 4 co-accused of the applicants
-- in afternoon of Oct. 31, preliminary inquiry commenced with respect to applicants

November 1, 1994 -- preliminary inquiry continued and adjourned to Nov. 3

November 3, 1994 -- preliminary inquiry continued
-- inquiry adjourned to Nov. 8/94 to be spoken to for a continuation date before the presiding judge

November 8, 1994 -- case adjourned to July 25, 1995 at 9:30 a.m. for continuation with July 26 set as a second back-up day if required
-- this is last date upon which Mr. Herman represented Mr. Pusic as Mr. Herman retired in July of 1995

July 25, 1995 -- preliminary inquiry completed
-- no submissions made by counsel for the applicants respecting committal
-- accused committed for trial and remanded to August 18, 1995 assignment court in General Division
-- Mr. Crewe retained as counsel for Mr. Pusic, but due to a conflict, Pusic represented by Mr. Grys on this date

August 18, 1995 -- both applicants appear before General Division Assignment Court
-- trial dates unable to be set because counsel appearing as agent for counsel for Mr. Juric not possessing trial dates
-- case remanded to Sept. 28/95 for judicial pre-trial and for pre-trial justice to set trial date

September 28, 1995-- judicial pre-trial conducted
-- counsel indicating that a s. 11(b) Charter application was likely at the outset of trial
-- counsel jointly estimating that trial would take approx. 4 weeks with a 1 week voir dire followed by 3 weeks of actual trial time
-- trial date set for the sittings commencing June 3/96

case not called at the outset of the June 3/96 sittings

June 3, 1996	-- case not called at the outset of the June 3/96 sittings
June 7, 1996	-- case spoken to on Friday, June 7 not having been called during the week of June 3/96 -- case remanded to Sept. 9/96 sittings for trial
September 9, 1996	-- case called for trial -- case remanded for 1 week to permit applicants to perfect their s. 11(b) motion in accordance with Rule 27 and to permit the Crown/respondent to file material -- Crown counsel indicating it would be calling approx. 4 witnesses and all counsel of view that trial would last approx. 1 1/2 to 2 weeks

B. THE S. 11(b) CHARTER RIGHT

The primary purpose of s. 11(b) is to protect the individual rights of the accused to liberty, security of the person and to a fair trial.

There is a secondary societal interest in having cases tried on their merits -- a matter important to the maintenance of respect for the administration of justice.

The instant application requires a judicial balancing with an examination of the delay and its evaluation in light of other factors in order to determine whether the delay is reasonable.

Reasonableness is of course a question of degree: Rahey v. R., [1987] 1 S.C.R. 588 at p. 632, 33 C.C.C. (3d) 289 at p. 320, per Wilson J. As Lamer J. (as he then was) observed in R. v. Conway, [1989] 1 S.C.R. 1659 at p. 1693, 49 C.C.C. (3d) 289 at p. 296, reasonableness is an elusive concept which cannot be juridically defined with precision and certainty.

In considering the applicants' assertion of constitutionally intolerable delay, one must of course consider the overall lapse of time: R. v. Conway, supra, at p. 1674 S.C.R., p. 307 C.C.C., per L'Heureux-Dubé J.; R. v. Bennett (1991), 3 O.R. (3d) 193 at p. 211, 64 C.C.C. (3d) 449, per Arbour J.A. (affirmed [1992] 2 S.C.R. 168, 74 C.C.C. (3d) 384).

The court's approach must recognize that the standard of reasonableness is a flexible concept. Mathematical formulae do not drive the assessment of reasonableness. A functional balancing is appropriate having regard to the recommended approach enunciated in R. v. Morin, [1992] 1 S.C.R. 771 at pp. 787-88, 71 C.C.C. (3d) 1 at p. 13, per Sopinka J. considering:

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.

C. THE LENGTH OF THE DELAY

The length of delay is generally regarded as the elapsed time between the charge or laying of the information to the end of the trial: R. v. Kalanj, [1989] 1 S.C.R. 1594, 48 C.C.C. (3d) 459; R. v. Morin, supra, at pp. 787-88 S.C.R., pp. 13-14 C.C.C., per Sopinka J.

On occasion, the relevant time period is described as the time between charge and when the case is called for trial: R. v. Hill, Ont. C.A. (unreported -- Court File C22126), June 19, 1996 [now reported 36 C.R.R. (2d) 119] at p. 3 [p. 121 C.R.R.], per curiam.

In the instant case, by agreement of counsel, the relevant time period may be described as July 27, 1993 (date of charge) to September 9, 1996 (scheduled second trial date).

This is a period of approximately 37 months.

All counsel agree that this is an exceptional delay clearly raising the issue of reasonableness.

In turn then, such an inordinate delay demands judicial scrutiny in the context of the particular circumstances of the litigation and the governing s. 11(b) Charter jurisprudence.

Some delay is of course inevitable in the conduct of criminal proceedings: R. v. Smith, [1989] 2 S.C.R. 1120 at p. 1131, 52 C.C.C. (3d) 97 at p. 105, per Sopinka J.

As a general observation, it is to be noted however that the longer the delay, the more difficult it should be for a court to excuse it: R. v. Askov, [1990] 2 S.C.R. 1199 at p. 1223, 79 C.R. (3d) 273 at p. 300, per Cory J.; R. v. CIP Inc., [1992] 1 S.C.R. 843 at p. 859, 71 C.C.C. (3d) 129 at p. 141, per Stevenson J.

D. WAIVER OF TIME PERIODS

The existence of a waiver by the accused respecting a time period in the litigation may contribute to shortening the length of delay under scrutiny.

A waiver must be clear and unequivocal with full knowledge of the rights the procedure was enacted to protect and of the effect waiver will have on those rights: R. v. Morin, supra, at p. 790 S.C.R., p. 15 C.C.C., per Sopinka J.

The notion of waiver contemplates a choice has been made between available options. Where no real choice or option exists there can be no waiver: R. v. Askov, supra, at p. 1236 S.C.R., p. 310 C.R., per Cory J.

It is not the s. 11(b) right which is being waived but merely the inclusion of a specific time period or periods in the overall assessment of reasonableness: R. v. Conway, supra, at p. 1686 S.C.R., p. 316 C.C.C., per L'Heureux-Dubé J.

An accused person is not obliged to assert his/her constitutionally protected right to trial within a reasonable time: R. v. Askov, supra, at p. 1228 S.C.R., p. 304 C.R.

A waiver may be explicit or implicit.

An explicit waiver ordinarily involves express advertence to the delay issue.

An implicit waiver engages the court in determining whether it is fair to infer from the accused's conduct, generally through the agency of counsel, that the delay is acceptable.

Silence or a lack of objection cannot constitute a lawful waiver: R. v. Askov, supra, at p. 1229 S.C.R., p. 305 C.R.

The setting of dates in the litigation and agreement to those dates may be sufficient to constitute waiver: R. v. Askov, supra, at pp. 1229 and 1232 S.C.R., p. 305 and 307 C.R., per Cory J. In R. v. Smith, supra, at p. 1136 S.C.R., p. 109 C.C.C. Sopinka J. stated:

> 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.

The onus is upon the Crown to prove or establish waiver: R. v. Askov, supra, at pp. 1229 and 1246 S.C.R., pp. 305 and 318 C.R., per Cory J.

Agreement to a date within the proceeding in question does not constitute waiver where the agreement can be reasonably and fairly characterized as mere acquiescence in the inevitable: R. v. Morin, supra, at p. 790 S.C.R., p. 15 C.C.C., per Sopinka J.

Acquiescence to dates and adjournments cannot always be construed as simple resignation to the inevitable: R. v. Bennett, supra, at p. 200, per Arbour J.A. It has also been observed that agreement to suggested dates cannot be characterized as acquiescing in the inevitable in the absence of evidence to that effect: R. v. Nuosci, [1993] 4 S.C.R. 283 at p. 284, per Sopinka J.; R. v. Brassard, [1993] 4 S.C.R. 287 at p. 287, 85 C.C.C. (3d) 287 at p. 288, per L'Heureux-Dubé J.

Crown counsel did not submit any waiver had occurred on the part of the applicants.

In the instant case, I am unable to attribute any waiver to either applicant. I am unable to identify any delays voluntarily requested, caused or consented to by the accused.

It may be that certain actions of the accused respecting the progress of the litigation stand to be taken into account as actions of the accused explaining the delay or as contextualizing any claim of prejudice.

E. REASONS FOR THE DELAY -- THE RELEVANT FACTORS

(1) Inherent time requirements of the case

All criminal cases have certain inherent time requirements which inevitably lead to delay: R. v. Morin, supra, at p. 791 S.C.R., p. 16 C.C.C., per Sopinka J.

Not uncommon in the provincial court is the need for time to process the charge, to retain counsel, to apply for bail, to prepare and distribute disclosure materials and other pre-trial procedures such as the holding of a pre-trial conference.

This case exhibits many of these features which legitimize some delay on their account.

These intake steps occasion inherent time requirements.

Where a case proceeds through a preliminary inquiry and a trial in the Ontario Court of Justice (General Division), this two-stage process itself involves an inherent delay and the necessity for some further in-take procedures in the superior court. In R. v. Morin, supra, at p. 793 S.C.R., p. 17 C.C.C., Sopinka J. noted:

> 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.

To like effect are the observations of Doherty J.A. in R. v. B. (J.G.) (1993), 85 C.C.C. (3d) 112 (Ont. C.A.) at p. 115 (affirmed [1993] 3 S.C.R. 643, 85 C.C.C (3d) 112 at p. 117).

It is necessary to consider the nature of the case itself. The complexity of a case is of course relative in the sense of its measure against a standard of the criminal litigation passing before the courts. All other things being equal, the more complicated the case, the longer to prepare for trial and to conduct the trial: R. v. Morin, supra, at pp. 791-92 S.C.R., p. 16 C.C.C., per Sopinka J.

In the instant case, there is an eight-count indictment. The disclosure material is approximately four inches in thickness consisting primarily of material from two witnesses. A one-witness preliminary inquiry was held over four days. A transcript of about 350 pages resulted from this proceeding.

Crown counsel has indicated that he intends to call an undercover officer as the principal prosecution witness to be followed by about three other witnesses. This is not a case where any wiretap evidence exists.

A trial in this matter is now expected to last about one-and-a-half to two weeks.

In R. v. Potvin (1992), 74 C.C.C. (3d) 111 (Ont. C.A.) (affirmed [1993] 2 S.C.R. 880, 83 C.C.C. (3d) 97) at p. 121 Osborne J.A. observed:

> A longer delay in any case (complex or not) which requires a one-week preliminary hearing and a two-week trial will be justified than will be justified in a case requiring less preliminary

hearing and trial time.

A case involves preparation time for both the preliminary inquiry and the trial. In other words, one must assume a reasonable time to be required to get a case up for trial: R. v. Conway, supra, at p. 1712 S.C.R., p. 331 C.C.C., per Sopinka J. (in dissent in the result).

In the instant case, at least initially, six persons were charged arising out of the same matter. Quite rightly, there has been no criticism of the Crown for attempting to have these individuals jointly tried. As a general rule, where accused are alleged to be involved in a joint enterprise, they should be tried together: R. v. Court (1995), 23 O.R. (3d) 321 at p. 342, 99 C.C.C. (3d) 237 at p. 259 (C.A.), per curiam.

Certain consequences flow from the conduct of a multiple accused case. Further copies of disclosure materials must be reproduced. The respective schedules of defence counsel must be accommodated to some reasonable degree. In this regard, I note the statement of Sopinka J. in R. v. Rogalsky, [1995] 4 S.C.R. 48 at p. 49, 102 C.C.C. (3d) 575 at p. 576, as apposite to minor aspects of the instant case:

> The long period of the adjournment of four months was necessitated in order to accommodate the schedules of counsel. In this respect, we adopt the following passage from the reasons of Cameron J.A. [95 C.C.C. (3d) 41 at p. 55, 36 C.R. (4th) 215, 81 W.A.C. 271]: The Crown, of course, was prepared to continue . . . [b]ut that was not convenient to defence counsel. And so the judge, though he had the power to override their wishes and forge ahead, adjourned until April 12th to accommodate them.

In my view, the applicants are not involved in a case of any undue complexity. There do not appear to be, as I am advised, any special features or circumstances to this case.

(2) Actions of the parties

The assignment of responsibility for delays occasioned by the respective parties is not an exercise centred upon fault-finding.

It is appropriate however to look to any direct acts of the accused, voluntarily undertaken, which caused any delay(s): R. v. Askov, supra, at p. 1227 S.C.R., p. 304 C.R., per Cory J.

Similarly, conduct on the part of the prosecution occasioning delays must be assessed to the Crown and, in effect, not available to excuse the relevant delay. In this regard, for example, identifiable delays in disclosure have attracted the attention of the courts: R. v. Collins (1995), 99 C.C.C. (3d) 385 at p. 389, 30 C.R.R. (2d) 298 (S.C.C.), per Sopinka J.; R. v. MacMillan (1991), 3 O.R. (3d) 588 at p. 593, 65 C.C.C (3d) 321 at p. 326 (C.A.), per Carthy J.A.

Where the prosecution seeks to give a priority to other cases in the system, the consequences of its conduct may be assessed accordingly: R. v. Askov, supra, at p. 1244 S.C.R., p. 317, per Cory J.

There may be circumstances in the history or course of the litigation where it is incumbent on the prosecution to select a hearing date more commensurate with an accused's right to be tried within a reasonable time: R. v. Smith, supra, at p. 1135 S.C.R., p. 109 C.R., per Sopinka J.

(3) Limits on institutional resources

It has been recognized that this is the most common cause or source of delay. This is delay from the time the parties are ready to take a step but the system is unable to accommodate them.

We do not have the luxury of a system which can provide instant access to litigants, in terms of courtrooms, judges and jury panels. Some institutional or systemic delay must be tolerated in recognition of the limited resources available. This situation of tolerance itself has limits or the s. 11(b) protection would be entirely eviscerated. Whatever the competition for fiscal resources, the government has a constitutional obligation to try an accused within a reasonable time. In the words of Sopinka J. (in dissent in the result) in R. v. Conway, supra, at p. 1713 S.C.R., p. 332 C.C.C., "a crowded trial calendar is not the accused's fault and it should not be charged against his constitutional right".

Guidelines described in some of the s. 11(b) jurisprudence may be instructive in considering what delay is constitutionally tolerable on account of institutional delay.

I note the October 18, 1990 statement of Cory J. in R. v. Askov, supra, at p. 1237 S.C.R., p. 311 C.R.:

> The only conclusion which can be drawn from an analysis of the material filed is that the problem of systemic delay in Peel has not and cannot be resolved simply by introducing a more efficient caseflow management system. More resources must be supplied to this district, perhaps by way of additional Crown attorneys and courtrooms. This conclusion cannot come as a surprise. The problem has existed for many years, back at least as far as 1981.

It states the obvious, it seems to me, to observe that to the extent that inadequate resources inform any of the delay in this case, it cannot be said that Peel is in a transitional period of any kind respecting its resources.

(4) Other reasons for delay

Other reasons may contribute to the delay which are not excusable in considering the reasonableness of delay.

It has been observed that the actions of trial judges may properly be assessed here as opposed to the strict institutional analysis: R. v. Morin, supra, at p. 800 S.C.R., p. 22 C.C.C., per Sopinka J. This statement regarding the application of the Charter to the conduct of the judiciary is consistent with Rahey v. R., supra.

In the instant case, certain conduct of the judge presiding at the preliminary inquiry, more fully described infra, may properly be discussed in the context of "other reasons for delay".

F. REASONS FOR THE DELAY -- ANALYSIS OF THE DELAYS

In this case, the passage of time falls to be considered in the context of the following delays:

1. July 27, 1993 to Jan. 26, 1994
2. Jan. 26, 1994 to Oct. 31, 1994
3. Nov. 8, 1994 to July 25, 1995
4. July 25, 1995 to June 3, 1996
5. June 3, 1996 to Sept. 9, 1996

(1) July 27, 1993 to January 26, 1994

Counsel are agreed that this period of time, the "front end" of the criminal litigation, necessarily has inherent time requirements arising from a multiplicity of steps, for example, bail, retaining counsel, disclosure and a judicial provincial court pre-trial designed to focus and eliminate issues and to generate a realistic estimate as to required court time for the preliminary inquiry or trial.

All accused had, it seems, retained counsel by September 8, 1993 and initial judicial interim release orders had been made as of this date.

The pace of the production of disclosure materials by the prosecution became a concern early on. On September 7, 1993, Crown counsel stated to the court that she anticipated that full disclosure would be available by October 4, 1993.

All counsel in the provincial court, and before me, agreed that defence counsel required the disclosure materials in order to consult with their clients and to properly prepare for the pre-trial.

A further appearance of the accused was made on September 8, 1993. On both September 7 and 8, 1993, statements were made by defence counsel indicating some dissatisfaction that the disclosure materials had not been produced. At the conclusion of the September 8, 1993 appearance, it was agreed that the case be remanded to October 4, 1993 to set a pre-trial date on that occasion on the basis that it was expected that disclosure would be made to the defence two weeks from September 8, 1993.

On October 4, 1993, defence counsel disclosed to the court that disclosure had not as yet been received. Crown counsel requested that the case be held down while she consulted a Crown counsel who could provide meaningful information respecting the disclosure issue. After a brief recess, Crown counsel advised the court that three volumes of disclosure material were being prepared for each accused's counsel and that two further weeks would be required to complete this function.

On October 4, 1993, the court set November 9, 1993 as a target date for the pre-trial on the representation of the Crown that disclosure would be in the hands of the defence within two weeks, thereby leaving counsel sufficient time to consult their clients and prepare for the pre-trial in an informed manner.

The defence were ultimately provided disclosure materials on the very morning of November 9, 1993 when they were to appear for the pre-trial. This development necessitated an adjournment of the pre-trial to November 30, 1993.

In none of the transcripts or other material provided to this court is there any indication as to why the disclosure materials were not completed within the time periods described by Crown counsel on September 7, September 8 and October 4, 1993.

On November 30, 1993 the pre-trial did not proceed. A Crown counsel was prepared to conduct the hearing but a counsel for a number of the accused was ill. Counsel before me agreed that it would have been pointless to conduct a partial pre-trial on November 30, 1993 or to proceed in the absence of some accused being represented by counsel. Before this court, the Crown and counsel for the applicants have described the loss of the November 30, 1993 date as a neutral event.

The pre-trial was rescheduled to January 26, 1994 -- a further delay of about two months. Defence counsel for Juric indicated that counsel had earlier dates for the pre-trial.

The court nevertheless provided the January date without further comment.

By the time of the January 26, 1994 pre-trial, the case had been in the provincial court for about half a year and no date had been set for a preliminary inquiry.

Mr. Carruthers, on the part of the Crown, concedes that this period of delay is excessive and that while the entire delay is not the Crown's responsibility, a large part of the time is properly attributable to the Crown.

Counsel for the applicants submit that the inherent time requirements attributable to the intake process excuse the July 27, 1993 to October 4, 1993 and the November 9 to November 30, 1993 time periods leaving about three months of delay occasioned by delayed disclosure.

In this case, the defence requested disclosure in a timely fashion and continued to voice dissatisfaction with the delays in disclosure production.

Considering the nature of the case, the position of the defence respecting disclosure, the nature of disclosure material described to me, and the lack of any explanation for the delays in light of the representations of Crown counsel in the provincial court regarding expected completion dates for disclosure, the Crown bears responsibility for delay occasioned by its failure to make disclosure on or about October 18, 1993 (just under three months from arrest) and the consequential loss of the November 9, 1993 date.

The disclosure delay situation was compounded by the apparent systemic failure of the provincial court on November 30, 1993 failing to provide an expeditious pre-trial date for a case already in the system for four months. On November 9, 1993, the court responded with the setting of a pre-trial date within three weeks. There is no explanation as to why a two-month delay was occasioned in setting the eventual pre-trial date.

In my view, a period of about two-and-a-half months of delay had occurred by January 26, 1994 which is properly the responsibility of the Crown and the judicial system.

(2) January 26, 1994 to October 31, 1994

There is no evidence before the court as to how soon after the pre-trial counsel would have been prepared to proceed to the preliminary inquiry. In every case, there exists the need to prepare and to accommodate the existing court schedules of counsel for the co-accused. It is simply unrealistic to think that counsel could have conducted a preliminary inquiry within a few weeks of January 26, 1994.

On January 26, 1994, the court worked from dates provided by the trial co-ordinator. All counsel involved estimated that a five-day block of time was required for the preliminary inquiry. The exchange between the court and counsel on this date suggests that the court could have scheduled such a block of time no earlier than October 17, 1994. Because of the accommodation of the schedules of counsel for the defence, an agreement was reached as to the October 31, 1994 date with the court stating:

> Okay, everybody agrees then, so that on consent these matters are all adjourned to October the 31st in courtroom number 20, 9:30 a.m. for preliminary inquiry. It is marked through November the 4th in that courtroom.

On this occasion, all counsel, including the Crown, expressed the view that an earlier date had been hoped for.

The date set for the preliminary inquiry was over nine months after the pre-trial and in excess of 15 months after the case entered the system.

The statements of the defence on earlier occasions, and on January 26, 1994, reflect a desire to have had the case proceed at a more expeditious pace. I am unable to see any waiver or actions of the accused fairly suggestive of acceptance of the delay.

The Crown submits that the delay in the commencement of the preliminary inquiry is within acceptable limits and points to the guideline of eight to ten months as to tolerable institutional delay in the provincial court referred to in R. v. Morin, supra, at p. 799 S.C.R., p. 21 C.C.C., per Sopinka J.

As I understand the position of the applicants, had the accused actually had the benefit of the preliminary inquiry completing on November 4, 1994, the systemic delay from January to October 1994 could not be characterized as unreasonable.

Time was required in this case for counsel to prepare for the preliminary inquiry and to identify dates convenient to all counsel. The system was not being asked to produce a day or two but an unbroken five-day block of court time in the busy provincial court calendar.

Given that this case, by January 26, 1994, was already proceeding at an intolerably slow pace, sufficient to be apparent to all, it is unfortunate that the preliminary inquiry could not have been scheduled to an earlier date. Nevertheless, the institutional delay from the end of January to the October 31, 1994 date is not, in the circumstances, unacceptable.

(3) November 8, 1994 to July 25, 1995

On October 31, 1994 the first half of the day was exhausted with the mechanics of four co-accused of the applicants being removed from the litigation. Charges were withdrawn against one accused and three pled guilty to various charges.

The judicial officer presiding at the preliminary inquiry (hereinafter referred to as the judge) stated at 12:30 p.m. on October 31, 1994:

> It is usual in these jurisdictions that specials are set for one or two days, as I am sure you may well know. As a result of my error I traded a chambers day with Judge [A.] some time ago, about six weeks ago, and of course these matters are set in this jurisdiction six or seven months in advance. I have a meeting on Friday with the Deputy Minister of Justice in Ottawa and I simply cannot break this date that I have traded with Judge [A.] which means that we [are] going to lose two of the five days, which as, I'm sure you're aware, in this jurisdiction causes a great deal of difficulty, not only for clients but for you and for the Crown, and for the administration of justice. It is my fault and all I can do is apologize most profusely. But if you could narrow the issues that will certainly assist.

The preliminary inquiry proceeded against the applicants for the balance of the October 31, 1994 date. The Crown witness on the inquiry, Constable Maurice, was examined in-chief for the remainder of the day.

Also on October 31, 1994, Mr. Stein, counsel for Juric, indicated an interest in further disclosure regarding a confidential informant. Mr. Herman agreed on behalf of Pusic. Crown counsel indicated that he had no

intention of calling the informant at the preliminary inquiry although he would at trial. The prosecutor further submitted to the court that there may be certain issues of informer privilege arising from the requests of defence counsel. The defence indicated their expectation that the Crown would have called the witness and submitted a desire to further their clients' interests at the inquiry by having the informer available for examination.

At a point, the following exchange transpired before the "informer as witness" issue was deferred:

> COUNSEL FOR JURIC: I was under the impression, Your Honour, that having been given 100 pages of this man's information in disclosure he was going to be made available as a witness. Nobody indicated he wasn't to be made available. In fact, I think at some point in time there were discussions concerning this matter. There was discussion that this matter would take a week, not solely because of the officer but because this informant would be provided. That was the impression we were under.
>
> CROWN COUNSEL: Well, I can indicate to the Court that was never communicated and this one officer will take three, possibly four days.
>
> **THE COURT**: I'm going to ask counsel to discuss the matter further. If there's not a resolution to bring the matter before me. There is certainly no hurry in the sense that the officer will take at least three and perhaps four days and we will be breaking on Wednesday. So, under those circumstances I would ask that you bring it before me if there's not a resolution that's acceptable to both.

On November 1, 1994, for the entire day, the examination-in-chief of Constable Maurice continued including the playing of some police surveillance tapes.

November 2, 1994 was lost because of the judge's personal scheduling difficulties.

On November 3, 1994, counsel for Juric indicated to the court that while he was no longer seeking additional disclosure regarding the confidential informant, he had not abandoned his consideration of calling the informer as a witness. On this date, the examination-in-chief of the witness, Maurice, continued during the morning with Pusic's counsel's cross-examination commencing, on this the third and last available day of the inquiry, at 2:20 p.m. before the court recessed at 4:25 p.m. When the court day ended, counsel for Pusic, Mr. Herman, was still cross-examining. At a point during the afternoon, Mr. Stein, Juric's counsel, conducted a brief, out-of-sequence, cross-examination respecting a surveillance videotape which was set up.

As November 4, 1994 had been lost because of the judge's personal scheduling difficulties, on November 3 the case was remanded to November 8, 1994 to set continuation dates. A part of the exchange in this regard was as follows:

> **THE COURT**: Perhaps we could just pick a date to go over to then, Mr. Herman. It's 4:15. I have a note from madam clerk indicating that the trial coordinator would want the matter to go over to sometime in November to set a date to continue. Is there a date in the near future that all three counsel can have their availability in my court?
>
> MR. STEIN (counsel for Juric): For the purpose of setting a date, Your Honour
>
> . . . . .
>
> MR. HERMAN (counsel for Pusic): Is there no way of doing it today?

THE COURT: Apparently not, Mr. Herman. I gather that there's going to be some difficulty obtaining as much time as you need.

MR. HERMAN: Well, you had indicated at the beginning of the week something like May or June and I had indicated to the clerk earlier today that any two days in May or June was fine with me.

THE COURT: Perhaps if we could just get a general indication of when we're looking at? That was my guess but

. . . . .

CLERK OF THE COURT: It could be July, Your Honour.

. . . . .

THE COURT: It could be July?

CLERK OF THE COURT: It could be.

THE COURT: And July would be okay for you as well, Mr. Herman?

MR. HERMAN: I have no problem with a date that far off as far as agreeing to be available, I have no problem with that at all. I didn't have any problem with May or June.

The case was remanded to November 8, 1994 on the understanding that an articling student would appear for both counsel with available dates in May, June and July of 1995.

On November 8, 1994, the court was informed that the earliest dates the trial coordinator could provide were July 25 and 26, 1995. Indeed, no two separate days were available prior to these July dates.

The judge, obviously concerned about the delay, requested the student inquire of counsel for Juric as to whether he required the police informant and further, whether he could inform the court and the trial coordinator at an early date:

> . . . because if only another hour and a half or two hours is required for the constable then the matter is entirely different. We would probably provide a date in January.

The student, at this point, asked that the case be held down allowing her an opportunity to attempt to contact counsel for Mr. Juric. After a recess, the student indicated: "I do believe we require all our witnesses." In the end, July 25 and 26, 1995 were set as the dates obtained from the trial coordinator.

In July 1995, Mr. Pusic's counsel, Mr. Herman, retired from the practice of law. Mr. Crewe was retained in July by Mr. Pusic. In early July 1995, Mr. Herman informed Mr. Crewe that the preliminary inquiry in this case was continuing with cross-examination on behalf of Mr. Pusic to be followed by expected cross-examination by Juric's counsel. Mr. Crewe was informed by Mr. Herman that it had been his understanding that Juric's counsel would be calling the confidential informant and further that he intended to have the prosecutor call the owners of the stolen property regarding identification of the stolen property.

The preliminary inquiry was set to resume on July 25, 1995, at 9:30 a.m. Mr. Crewe, on account of his very recent retainer and a scheduling conflict, had Mr. Grys appear as his agent at the proceeding. Mr. Grys stated

to the court:

> Frank Crewe will be his [Pusic's] counsel and I am substituting for Mr. Crewe today and tomorrow if need be.

Mr. Grys continued the cross-examination of Constable Maurice. Mr. Stein cross-examined the officer as well.

Counsel for the applicants called no witnesses and elected to make no submissions resisting committal.

Court adjourned, it seems some time between 12:30 and 1:00 p.m. with the applicants remanded to appear before the General Division assignment court on August 18, 1995.

The applicants were of the view that their preliminary inquiry had a scheduled call upon the five days of court time October 31, 1994 to November 4, 1994.

Through scheduling difficulties of the assigned judge, 40 per cent of this time was unavailable with the loss of November 2 and 4, 1994. In addition, half of October 31, 1994, was dedicated to eliminating four of the six co-accused from the case. Effectively, two and a half days of the five remained.

Crown counsel has submitted that the decisions of counsel for the applicants regarding the preliminary inquiry caused delay or elongation of the proceeding, in particular their projection that court time would be required for the defence to call a witness or witnesses. In turn, it is said that such delay is not properly assigned to the Crown which sought to discharge its burden of persuasion pursuant to s. 548 of the Criminal Code, R.S.C. 1985, c. C-46, by calling one witness only.

While this is a superficially attractive approach to the unfolding of events, I am not satisfied that, in all of the circumstances, the said characterization is appropriate.

One would expect that the five days agreed to be necessary in January of 1994 might be lessened by the removal of certain accused and their legal representatives. Nevertheless, on October 31, 1994, counsel for Juric was of the impression that five days would be required for the preliminary inquiry and Crown counsel foresaw Constable Maurice's testimony lasting three or four days. Therefore, this is not an instance of a case scheduled for a certain period ballooning to a lifespan significantly in excess of the estimate as has occurred from time to time: see R. v. Oliver, Ont. C.A., Court File C15201, November 29, 1994.

By the end of November 3, 1994, the officer had been in-chief for about two days and the unfinished defence cross-examination had consumed in the neighbourhood of two hours only.

The loss of preliminary inquiry days during the week of October 31, 1994, was as a direct result of the assigned judge's dilemma with scheduling. This is perhaps then an example of "other reasons" for delay.

The system did not, and perhaps could not, respond by reassignment of another judge to the case for the entire week of October 31, 1994.

The inquiry was adjourned for nearly nine months. In respect of this delay a number of findings are relevant.

The judge's November 8 offer of a date in January 1995, a two- to three-month delay, was a probable

solution were the continuation of the inquiry to be one-and-a-half or two hours. On November 8, 1994, I accept that counsel legitimately remained of the view that more time was required, as originally anticipated, to complete the inquiry.

It was only in July 1995, when Mr. Crewe was retained, that there was a change in the defence strategy for Pusic which would not involve the calling of further witnesses as had been the apparent stratagem of predecessor counsel, Mr. Herman. I am unprepared to find that counsel for the applicants did not hold a bona fide belief in November of 1994, and for some time, that the continuing cross-examination of Constable Maurice, and whatever was necessary to complete the preliminary inquiry, would occupy more than a couple of hours.

I note that, in any event, on July 25, 1995, in the neighbourhood of three hours of court time was utilized to complete the inquiry.

The earliest that one whole day of provincial court time was available after November 8, 1994 was July 25, 1995. There appears to have been no adequate mechanism in the provincial court to "run a fast track for cases which need to be expedited" as that expression was employed by Arbour J.A. in R. v. Bennett, supra, at p. 218.

In my view, the applicants, in consenting to the lengthy adjournment to July of 1995, were acquiescing in the inevitable. Further, they found themselves in the unenviable position of conducting a continuing proceeding before the judicial officer who had contributed in large measure to their clients' predicament. In this regard, the conduct of an accused person in acquiescing to a judicially generated delay must be viewed differently: R. v. Rahey, supra, at p. 613 S.C.R., p. 306 C.C.C., per Lamer J. (as he then was), at p. 625 S.C.R., p. 313 C.C.C., per Wilson J., at p. 649 S.C.R., p. 333 C.C.C. per La Forest J.

In the end result, through a combination of the assigned judge's alteration of his schedule after the preliminary inquiry had been set for five consecutive days, and, institutional or systemic delay, some eight-and-a-half months of inexcusable delay (November 5, 1994 to July 25, 1995) transpired.

In the end result, this case left the provincial court two days short of the two-year anniversary of its arrival in that court. In my view, approximately 11 months of this delay must be attributed to causes other than the inherent time requirements of the case and acceptable institutional delay.

(4) July 25, 1995 to June 3, 1996

The applicants appeared before the General Division assignment court on August 18, 1995. The court was prepared to set pre-trial and trial dates but the agent for counsel for Juric had no trial dates to provide. As a result, the judicial pre-trial mandated by s. 625.1(2) of the Code was scheduled for five weeks later -- September 28, 1995. It would have been pointless to set a trial date without accommodating the schedules of counsel for both accused.

The applicants do not complain of the duration of this intake phase to the General Division following committal for trial.

The unfortunate consequence of the failure to set a trial date on the assignment court date was that an opportunity was lost to acquire a trial date earlier than that ultimately assigned.

On September 28, 1995, the applicants, through counsel, before the trial date was set, informed the justice presiding at the pre-trial that a s. 11(b) application was possible. At the pre-trial, counsel estimated the need for about one month of trial time.

The Crown made no attempt to have the court leap-frog the case into its already set calendar in priority to cases which had experienced less delay. Nor was any attempt made to sever the weapons charges, faced by Pusic alone, in order to effect some acceleration of the pace of this aspect of the case. The trial was set for the sittings of June 3, 1996. The following exchange occurred on this occasion:

> MS. BRIDGE (CROWN COUNSEL): Further to the pre-trial Your Honour, I think that we are going to set a trial date with respect to this matter.
> **THE COURT**: Yes, and this is promising that the entire trial and any necessary voir dires will take approximately four hearing weeks. That's correct, Mr. Crewe?
> MR. CREWE: I believe that that's a fair estimate, Your Honour.
> **THE COURT**: All right, so the trial date then will be set for the sittings of June 3rd, 1996, and I am going to endorse on the record the estimate of the trial time.
> MR. CREWE: And I understand from pre-trial discussions Your Honour, that that is the earliest date available for a trial of this length.
> **THE COURT**: Of that duration, that's correct. Exactly.

It is unclear when counsel would have been prepared to go to trial in terms of how early they would have been prepared to proceed and the soonest date their respective schedules could have accommodated. The delay occasioned by these inherent time requirements of the case are reasonable delay. By September, 1995, even assuming the preliminary inquiry transcript to have been ordered in whole or in part, on the evidence before me, that transcript had not been received.

It is not reasonable to suggest that, from the applicants' perspective, this case was ready to go October 1, 1995.

I note that the scheduling of a one-month block of trial time for a jury trial is a significant commitment of resources. This is different than slipping a three-day case into an existing list.

The June 3, 1996 date was approximately eight months from the pre-trial. Looked at in isolation, in light of the above observations, the experience in the General Division of securing a June 3 trial date cannot attract a great deal of criticism. There is every indication that, had the applicants been prepared to set the trial date at the assignment court, the system would have generated a trial at the outer limit of the six- to eight-month guideline from committal to trial spoken of in R. v. Askov, supra, at p. 1240 S.C.R., p. 313 C.R., per Cory J.

The applicants legitimately submit that isolated or piecemeal analysis of periods of delay can distort the s. 11(b) Charter analysis. Context for delay must be drawn from the entire circumstances including the prior history of the litigation.

It must be recognized that the resources, in terms of jury courtrooms and judges, did not exist in the General Division of Peel, at the relevant time, to set an earlier trial date or to alleviate the delay predicament of a specific case with a history of delay problems. No fast track court existed to accommodate hardship cases.

This trial was not tried at the June 3, 1996 sittings. As a matter of conventional court scheduling, more

trials are assigned to a week of sittings than can be tried based on the experiential knowledge that not all cases will in fact go to trial and the perpetual pressure in a jurisdiction with strained resources to provide trials within a reasonable time. Such scheduling can never be a mathematically certain exercise. In fact, at the June 3 sittings, 38 per cent of the matters scheduled for trial were dealt with other than by being tried or adjourned to further trial dates. Unfortunately, the June 3, 1996 sittings of the court, when compared to weeks of temporally proximate sittings, fared the worst in terms of cases set for trial not being reached.

The Peel Crown Attorney's Office prioritized the instant case as the fourth matter to be called from the provincial list of cases. A continuing homicide case occupied one of the General Division's five jury courtrooms. This case had been estimated for six weeks of court time commencing April 1, 1996. The delayed progress of the case impinged on the courtroom and judicial resources available for the June 3, 1996 sittings. Two federal cases (narcotics) commenced in respect of in-custody accused using a second and third jury courtroom. It seems that a fourth jury courtroom was occupied with a jury case of a higher priority than the Pusic and Juric matter. Other available justices in Brampton were presiding on continuing judge-alone trials, civil motions and summary conviction appeals. The fifth jury courtroom was, it seems, available but without a justice available to preside. It appears unlikely, in any event, that the instant case had been assigned sufficient priority to have been tried commencing at the June 3, 1996 sittings had the judicial resources been available. There has been no suggestion that some modification of the state of the intra-regional deployment of existing judicial resources could reasonably have been expected to solve the problem in Brampton.

I know nothing of the history of the cases afforded higher priority by the Crown than this case. There is no suggestion before me that there was anything improper at all in the Crown giving priority to other cases on account of legitimate factors in the history of those cases. The court in turn appears to have accepted this priority assessment and this case was not tried on the scheduled trial date.

On June 7, 1996, with the concurrence of the Crown, the indictment was endorsed as follows:

> Not reached. New trial date set for September 9th, 1996, to be in priority to other multi-week cases that the Crown presently has on that list or subsequent lists.

(5) June 3, 1996 to September 9, 1996

In the end result, an additional three-month delay was occasioned -- the product of the case's assigned priority and institutional delay.

Certainly, of the 11 -month period following the September 28, 1995 pre-trial, at least the latter three months of this period must be considered unacceptable.

G. INSTITUTIONAL RESOURCES/SYSTEMIC DELAY -- THE REGION OF PEEL

In this case, there has been an inordinate amount of systemic delay retarding acceptable progress of the litigation. The court received some evidence, by agreed facts and in exhibit form, relevant to the causes of the court calendar congestion and related subject-matter.

At the outset, I note that it is not necessary to the determination of the s. 11(b) issue in the instant case, to identify the underlying causes of the institutional or systemic delay. Indeed, the judicial forum is ill-suited to the multi-dimensioned inquiry with the almost innumerable variables which may have relevance to a comprehension of systemic delay. In this regard, I adopt the observation of Arbour J.A. in R. v. Bennett,

supra, at pp. 216-17:

> 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 . . .

For years, and still today, most of the provincial courtrooms in Peel are housed in a restored factory building on Clarence Street in Brampton. In 1990, the year the Askov case was decided, there were seven provincial courtrooms available for the conduct of preliminary inquiry or trial matters in criminal cases involving adult offenders (including drug cases). In 1992, three additional courtrooms for such purposes were installed on Kennedy Road in Brampton.

Additional judges of the Ontario Court of Justice (Provincial Division) preside in three additional courtrooms for such criminal matters as young offender cases, intake court matters and duty court (adjournments, pre-trials, guilty pleas). During the period of 1990 to January of this year, the number of provincial court judges assigned to Brampton criminal courts increased from ten to thirteen.

In 1967, the current Ontario Court of Justice (General Division) courthouse for Peel was opened with a life expectancy of 20 years. By 1972, with doubts existing as to that estimate, plans were underway to increase courtroom space at the courthouse. With further construction in 1976, there were three non-jury courtrooms and five jury courtrooms available. An additional two courtrooms, in a second building, were constructed in 1976 but in recent times have been required for the Small Claims Court and the Provincial Court (Family Division). Since 1976, there has been no expansion of the courtroom resources of the main courthouse.

The court was informed that the future of a planned new and consolidated courthouse for the Region of Peel has been on hold since September of 1995. The project appears to have been suspended indefinitely.

At the time of the Askov decision, there were 20 justices assigned to the Central West Region which includes the Region of Peel. When the September 28, 1995 assignment court was held in this case, there were 19 justices of the court. Today, there are 20 justices of which ten are assigned to Peel. There is limited circuiting within the region as the complement of justices attempt to attend to all of the court business for the judicial centres within the region.

There is some evidence before me that the Region of Peel has a much higher population to judge ratio than other urban judicial centres in Ontario.

CENTRE	POPULATION	JUDGES
Essex	339,230 (1994)	9 (1995)
Middlesex	381,506 (1994)	14 (1995)
Hamilton-Wentworth	464,972 (1996)	17 (1995)

Ottawa/Carlton	730,000 (1996)	15 (1995)
Simcoe	312,000 (1994)	7 (1995)
Brampton	903,400 (1996)	10 (1996)

The scheduling of criminal cases is of course governed to a significant degree by the courtroom space and judicial officers available.

Since 1978, the population of Peel has increased dramatically from about 421,618 to a projected 1996 population base of 903,400 or an increase of nearly 115 per cent. From the beginning of 1990 to the present, the population has increased by about 25 per cent.

It is important, in understanding the feeder group for the criminal courts in Peel, that Canada's busiest airport, the Toronto or Pearson International Airport, is within this jurisdiction. Therefore, above the current 903,400 population base there exists a transient population within Peel, on a daily basis, at this airport facility. In 1990, 22 million passengers used the facility, an increase of 38 per cent since 1986. Since 1990, a third terminal has been constructed and the consumer use of the airport has continued to increase. In R. v. Askov, supra, at p. 1235 S.C.R., p. 309 C.R., Cory J. noted the evidence in that case that the airport "generates a great many drug-related offences".

From 1990 onward, the number of peace officers employed by the Peel Regional Police Service has remained relatively stable. This police force is the major, though by no means the exclusive, investigative agency operating within the region. While there have been variations, year to year, in the total number of criminal charges laid by the Peel Police, I note, comparing 1994 and 1995 (the last full year for which statistics exist), that, in 1995, there was an increase of about 730 charges or an increase of about 2.5 per cent. It is questionable whether a court system, as exists in Peel, already stretched to the limits, has the flexibility to accommodate such an increase without a further threat to the system's capacity to provide speedy trials within constitutionally tolerable limits.

The facts in the instant case as to institutional delay in the provincial court suggests that a contributing factor may well be that not enough courtrooms and judicial resources are available.

I acknowledge that other, potentially relevant factors, are not before the court such as the details of any diversion projects, variations over time in guilty plea rates, prosecutor to judge ratios, average trial length variations, etc.

A Supreme Court of Canada administrative guideline of a range of six to eight months between committal and trial, as the outside limit of what is reasonable, is neither a limitation period or a tariff. It is, however, an instructive device for measuring the constitutional state of the inventory of cases before this court.

There is startling evidence before me that, as of May 31, 1996, in the General Division for Peel, nearly one-third of the outstanding criminal indictments exceeded eight months in age at this court level. Of the total number of pending indictments, over 14 per cent exceeded one year in the General Division.

Adduced in this court was further evidence (exhibits 7 and 10) that, in the General Division in Peel, in the 1995-1996 time period, there was a markedly higher indictment to judge ratio of newly added indictments than in several other large urban centres in Ontario.

Such material and information as the court has before it, raises a real question of the level of courtroom and judicial resources committed to Peel. The judicial rebuke of the dilemma in Peel was unequivocal in the Askov decision. Alarming signals of institutional endangerment of constitutional rights have emerged in this case. To the extent that there exists institutional (governmental) recklessness with respect to the s. 11(b) rights of accused persons in Peel, arising from insufficient resources, this cannot be condoned by the courts.

H. PREJUDICE

(1) The legal framework

It is the duty of the Crown to bring an accused person to trial. This requires that the prosecution apparatus and the government strive to expedite trials to minimize the prejudice inherent in delay in the disposition of criminal litigation.

There is no constitutional imperative upon the accused to bring him- or herself to trial. The protection of s. 11(b) of the Charter is not restricted to those who demonstrate a desire for a speedy resolution by asserting the s. 11(b) right: R. v. Morin, supra, at p. 801 S.C.R., p. 23 C.C.C., per Sopinka J.

However, conduct of the accused individual, short of waiver, may be relied upon to negative the existence of prejudice in a particular case. In R. v. Morin, supra, at p. 802 S.C.R., p. 24 C.C.C. Sopinka J. observed:

> 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. . . . 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.

Everyone suffers prejudice as a result of being charged: R. v. Askov, supra, at p. 1254 S.C.R., p. 282 C.R., per Wilson J. This is inherent in the process itself. The prejudice of concern in the s. 11(b) analysis is not prejudice associated with the laying of criminal charges but the prejudice arising from the "delay" in processing or disposing of the charges: Rahey v. R., supra, at p. 624 S.C.R., p. 312 C.C.C., per Wilson J. and at p. 633 S.C.R., p. 321 C.C.C., per La Forest J. In other words, the focus is prejudice flowing from a situation "prolonged" by delay: R. v. Bennett, supra, at p. 222, per Arbour J.A.

A court may infer or presume the existence of prejudice or it may be otherwise proven: R. v. CIP Inc., supra, at p. 861 S.C.R., p. 143 C.C.C., per Stevenson J.; R. v. Smith, supra, at p. 1138 S.C.R., p. 111 C.C.C., per Sopinka J. The inference of prejudice from a very long delay becomes nearly irrebuttable: R. v. Askov, supra, at p. 1230 S.C.R., p. 306 C.C.C., per Cory J.; R. v. Morin, supra, at p. 801 S.C.R., p. 23 C.C.C., per Sopinka J. In R. v. Conway, supra, at p. 1715 S.C.R., p. 334 C.C.C., Sopinka J. (dissenting in the result) observed that unreasonable delay is virtually synonymous with prejudice to security interests.

While it has been observed that the absence of prejudice caused by delay is not necessarily fatal to a claim of s. 11(b) infringement (R. v. Askov, supra, at p. 1255 S.C.R., p. 283 C.R., per Wilson J.), it would be the rare case where the violation would be established in the absence of prejudice of more than a de minimis nature. In this regard, I note the statement of Sopinka J. in R. v. Morin, supra, at p. 801 S.C.R., p. 23 C.C.C.:

> 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.

A similar sentiment was expressed in R. v. Potvin, supra, at p. 122, per Osborne J.A.

In R. v. Morin, supra, at p. 801 S.C.R., p. 23 C.C.C., Sopinka J. stated:

> 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.

The security of the person interest involves the need to minimize the anxiety, concern and stigma inherent in the exposure to pending criminal proceedings. In R. v. Mills, [1986] 1 S.C.R. 863 at pp. 919-20, 26 C.C.C. (3d) 481 at pp. 538-39, Lamer J. (as he then was) (Dickson C.J.C. and Wilson J. concurring), in dissent (on the court of competent jurisdiction issue), stated:

> Additionally, under s. 11(b), the security of the person is to be safeguarded as jealously as the liberty of the individual. In this context, the concept of security of the person is not restricted to physical integrity; rather, it encompasses protection against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation": Amsterdam, ibid, at p. 553. These include 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. These forms of prejudice cannot be disregarded nor minimized when assessing the reasonableness of delay.

This expression of the security interest was it seems adopted in R. v. CIP Inc., supra, at p. 862 S.C.R., pp. 143-44 C.C.C., per Stevenson J. In R. v. Conway, supra, at p. 1689 S.C.R., p. 319 C.C.C., L'Heureux-Dubé J. noted that the plight of the accused's family in terms of their emotional and financial situation is not per se relevant to the s. 11(b) inquiry -- it was the accused's situation which was relevant. In R. v. Rahey, supra, at p. 617 S.C.R., p. 314 C.C.C., Le Dain J. rejected the notion that the effect of delay on the accused's business was a circumstance to be afforded weight in assessing the prejudice caused by the delay. Other authorities have been more accepting of the notion of causally related economic prejudice: R. v. Bosley (1992), 18 C.R. (4th) 347 (Ont. C.A.) at p. 357, per Doherty J.A.; R. v. Allen, Ontario Court of Justice (General Division) (Webber J.), June 6, 1994, at pp. 9-10; R. v. Gillanders, Ontario Court of Justice (General Division) (Howden J.), June 3, 1993 at p. 3.

Section 11(b) of the Charter is also designed to minimize the exposure of an accused person to restrictions on his or her liberty whether in terms of pre-trial incarceration or the effect of judicial interim release conditions. In the latter instance, the concern has been bail terms described as "restrictive" (R. v. Morin, supra, at p. 786 S.C.R., p. 12 C.C.C., per Sopinka J.; R. v. Frazer, [1993] 2 S.C.R. 866 at p. 869, 83 C.C.C. (3d) 126 at p. 128, per McLachlin J.) or as "stringent" (R. v. White (1991), 3 O.R. (3d) 247 at p. 250, 64 C.C.C. (3d) 479 at p. 482 (C.A.), per Dubin C.J.O.; R. v. Bennett, supra, at p. 209, per Arbour J.A.). A measure of the prejudice experienced by an accused person may be whether he or she has made any effort to have one or more of the bail conditions varied: R. v. Sharma, [1992] 1 S.C.R. 814 at p. 828, 71 C.C.C. (3d) 184 at pp. 195-96, per Sopinka J.; R. v. B. (J.G.), supra, at p. 117, per Doherty J.A.; R. v. Bennett, supra, at p. 222, per Arbour J.A.; R. v. Palmer (1991), 4 O.R. (3d) 252 at p. 256, 67 C.C.C. (3d) 75 at p. 80 (C.A.), per Carthy J.A. (in dissent in the result).

The constitutional guarantee to trial within a reasonable time seeks to further the fair trial interests of an

accused person. In this regard, for example, it has been observed that witnesses' memories are likely to be more reliable closer to the relevant event (R. v. Askov, supra, at p. 1220 S.C.R., p. 298 C.R., per Cory J.) and that there is a priority in holding a criminal trial while the evidence is available and fresh (R. v. Morin, supra, at p. 786 S.C.R., p. 12 C.C.C., per Sopinka J.) and that in a prosecution where viva voce testimony plays a central role it is open to infer that the passage of time will dull memories (R. v. Rahey, supra, at p. 623 S.C.R., p. 312 C.C.C., per Wilson J.). While it seems that prejudice to the fair trial right may not be a sine qua non for a finding of prejudice (R. v. Rahey, supra, at p. 645 S.C.R., p. 330 C.C.C., per La Forest J.; R. v. Conway, supra, at p. 1716 S.C.R., pp. 334-35 C.C.C., per Sopinka J.), its existence or non-existence may, in some cases, be of particular significance in weighing the s. 11(b) factors: R. v. Padfield (1992), 79 C.C.C. (3d) 53 at p. 62, 13 C.R.R. (2d) 92 (Ont. C.A.), per Doherty J.A.

(2) The prejudice in this case

By any account, the delay, in excess of three years, in bringing the instant case to trial may be aptly characterized as a very long delay.

Dates scheduled for the preliminary inquiry and the trial were swallowed by congested court calendars.

In my view, the inference of the existence of prejudice on account of delay is virtually irresistible. The psychological stress and anxiety of pending criminal charges prolonged by a period of intolerable delay must be evident to all.

The delay in question has undoubtedly contributed to the lessening of the accuracy of the memories of witnesses in this case.

Beyond these forms of general prejudice, the applicants sought to establish the existence of additional prejudice, on account of delay, by offers of proof.

The applicant, Pusic, has been required to report to the police throughout the currency of his judicial interim release. The more frequent reporting terms were varied on application within a period of acceptable delay in bringing this matter to trial. Nevertheless, the monthly reporting is a factor to be considered including its impact on disruption of the applicant's out-of-town work schedule.

When this case was not tried within a two-year period, Pusic was required to change counsel for reasons beyond his control. The applicant was in no way prejudiced in my view in his ability to make full answer and defence by the loss of his original counsel of choice. However, there was, in fact, a real financial prejudice occasioned by the need for newly retained counsel to learn the case already prepared by Mr. Herman.

The applicant, Pusic, has provided evidence that he has experienced stress from the long pending charges. He has further indicated in his affidavit that his recollection of the events which transpired in 1993 has faded. This evidence stands uncontradicted.

The applicant, Juric, secured amelioration of the harsh effect of many of his original bail conditions through the vehicle of variation applications within the period of delay occasioned simply by the laying of the charges. The applicant has, however, been the subject of a bail reporting condition throughout his period of release.

The applicant has provided uncontradicted evidence that the inordinate delay in disposing of the charges

has caused him considerable stress and that the delay has caused much of his recollection of the events under consideration to have faded.

I am of the view that the other items of alleged prejudice proffered by Juric do not survive the requisite degree of persuasion assigned the applicant.

In my view, there is no conduct on the part of the applicants which can fairly be characterized as consent or voluntary acceptance of the prejudice I have described capable of excusing the delay. Indeed, Crown counsel did not suggest such action or conduct on the part of the applicants.

I. CONCLUSIONS

The identified delay in this case of 14 months (2 + 8 + 3), more or less, which can be attributed neither to the applicants nor to tolerable institutional delay, is unreasonable.

This delay is too long by a significant margin.

In light of the prejudice to the applicants occasioned by this delay, two individuals who are presumed to be innocent, the unreasonableness of the delay is patent.

Crown counsel, quite responsibly, acknowledged that if constitutionally intolerable delay, as alleged, was identified in the provincial court, the overall delay would be unreasonable and prejudice properly inferred.

I have considered whether the societal interest component of the s. 1 Charter right, in the balance, and in all of the circumstances of this case, warrants the denial of a stay of proceedings. It does not.

J. DISPOSITION

The charges against the applicants are stayed.

Application allowed.