Indexed as:

R. v. Smith

Michael Harold Smith, appellant;
v.
Her Majesty The Queen, respondent.

[1989] 2 S.C.R. 1120
[1989] S.C.J. No. 119
File No.: 21058.

Supreme Court of Canada

1989: May 24, 25 / 1989: December 7.

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

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Constitutional law — Charter of Rights — Court of competent jurisdiction — Superior court — Fifteen-month delay between the laying of the charge and the date set for the commencement of the preliminary inquiry — Accused alleging a violation of his Charter right to be tried within a reasonable time — Application for an order to stay the proceedings made before a superior court judge prior to the preliminary inquiry — Whether superior court should have declined to exercise jurisdiction to decide the application — Canadian Charter of Rights and Freedoms, s. 24.

Constitutional law — Charter of Rights — Trial within a reasonable time — Fifteen-month delay between the laying of the charge and the date set for the commencement of the preliminary inquiry — Whether accused's right to be tried within a reasonable time infringed — Canadian Charter of Rights and Freedoms, s. 11(b).

The accused was charged with theft on January 22, 1987 and the preliminary inquiry was subsequently scheduled for August. The Crown was informed in June, however, that no special sittings would be conducted by provincial judges during the months of July or August and that the investigating officer would not be available to assist with the conduct of the inquiry except in December or after April 1988. Both the Crown and defence counsel agreed to conduct the preliminary inquiry in December. But, once again, they were informed that no judge was available at this time. They then agreed to reschedule the preliminary inquiry to May 1988. Defence counsel wrote to the Crown on July 6, 1987 to confirm these arrangements and to express his concern about the "excessive delay". On December 21, 1987, he brought an originating notice of motion before the superior court of the province seeking an order [page1121] staying the proceedings on the ground that the delay in commencing the preliminary inquiry infringed the accused's right to be tried within a reasonable time guaranteed by s. 11(b) of the Canadian Charter of Rights and Freedoms. The application was granted but the judgment was set aside by the Court of Appeal. This appeal is to determine (1) whether the superior court judge correctly exercised his discretion not to decline jurisdiction to entertain the accused's application; and (2) whether the accused's s. 11(b) right was violated.

Held: The appeal should be allowed.

(1) Jurisdiction

Where practicable, trial courts should deal with allegations of s. 11(b) violations. This preference for trial court jurisdiction is premised largely on the fact that trial courts are not restricted to affidavit evidence and can rely on viva voce evidence so as to more fully explore and consider the facts underlying an allegation of unreasonable delay. In the circumstances of this case, however, the superior court judge properly exercised his discretion in refusing to decline jurisdiction to hear and decide the accused's application. The preliminary inquiry was only scheduled to begin in May 1988 and, in any event, the presiding judge would not have had jurisdiction to consider an alleged s. 11(b) infringement. If the preliminary inquiry had resulted in a committal for trial, another date would have had to have been set for trial, further delaying the opportunity for the accused to assert his s. 11(b) right. Throughout this period any impairment to the accused's interests would continue to increase.

While the accused's s. 11(b) application was anticipatory in respect of the period of time between the date of his application and the scheduled commencement of the preliminary inquiry, the superior court judge properly considered the application on the basis that the time had already elapsed. The date for the preliminary inquiry was fixed and could not, at the behest of the accused, be moved up.

(2) Trial Within Reasonable Time

To determine whether an accused's right under s. 11(b) of the Charter has been infringed, a court must balance the following factors in coming to a conclusion: (1) the length of the delay; (2) the reason for the delay, including limits on institutional resources and the inherent time requirements of the case; (3) waiver of time periods; and (4) prejudice to the accused. As with other Charter guarantees, the individual claiming an infringement [page1122] of his rights must persuade the court that the circumstances fall within the scope of protection of the specific Charter provision. Under section 11(b) of the Charter, the scope of protection is demarcated by the reasonableness of the total lapse of time.

In this case, the Court must conclude that the accused's right to be tried within a reasonable time has been infringed. The fifteen-month delay between the laying of the charge and the scheduled commencement of the preliminary inquiry was substantially longer than can be justified on any acceptable basis. The principal reason for the delay was not an institutional limitation but the desire by the Crown to schedule the hearing at a time when the investigating officer could assist the Crown for the duration of the hearing. While such a desire is understandable, it must not be permitted to override an individual's s. 11(b) right. When no judge was available in December, it was incumbent upon the Crown to select a hearing date more commensurate with the accused's s. 11(b) right. The convenience of the investigating officer should have been secondary to the expeditious conduct of the preliminary inquiry.

The agreement between counsel to the May 1988 date for the preliminary inquiry was not a waiver for the delay prior to December 21, 1987. Inaction or acquiescence on the part of an accused, short of waiver, cannot result in a forfeiture of an accused's s. 11(b) right. The accused, while his conduct must be taken into account in assessing the prosecution's explanation for delay, is under no obligation to press the case on and so relieve the Crown of its obligations under s. 11(b). Further, the actions of the defence counsel, apart from agreeing to a date, rebut any possible inference of waiver. He demonstrated his desire to move the proceedings quickly and clearly expressed his objection to the excessive delay in his letter of July 6, 1987. The defence counsel's objection was met by inactivity by the Crown. He also demonstrated that he neither caused nor acquiesced in the postponement of the hearing to May 1988. The defence counsel has thus displaced an inference of waiver, which would generally arise when an individual agrees to a postponement.

Finally, to the extent that a finding of prejudice is necessary in this case, the superior court judge has [page1123] found that there was actual prejudice. Although he took into consideration some factors that were irrelevant, there was sufficient relevant evidence to support his finding.

Cases Cited

Considered: Mills v. The Queen, [1986] 1 S.C.R. 863; R. v. Rahey, [1987] 1 S.C.R. 588; *referred to*: R. v. Conway, [1989] 1 S.C.R. 1659; R. v. Kalanj, [1989] 1 S.C.R. 1594.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 11(b), 24.
Criminal Code, R.S.C. 1970, c. C-34, s. 294(a) [rep. & sub. 1972, c. 13, s. 23; rep. & sub. 1974-75-76, c. 93, s. 25].

APPEAL from a judgment of the Manitoba Court of Appeal (1988), 54 Man. R. (2d) 24, 42 C.C.C. (3d) 193, allowing an appeal from a judgment of Darichuk J. (1988), 53 Man. R. (2d) 92, granting an application for a stay of proceedings. Appeal allowed.

John Menzies and Alan J. Semchuk, for the appellant. E.P. Phillip Schachter, for the respondent.

Solicitors for the appellant: Johnston & Company, Dauphin.
Solicitor for the respondent: The Attorney General of Manitoba, Winnipeg.

The judgment of the Court was delivered by

¶ 1 **SOPINKA J.**:— This appeal is from a judgment of the Manitoba Court of Appeal (1988), 54 Man. R. (2d) 24 allowing an appeal from the decision of Darichuk J. of the Manitoba Court of Queen's Bench (1988), 53 Man. R. (2d) 92. Darichuk J. ordered a stay of proceedings by reason of unreasonable delay in commencing a preliminary inquiry relating to a charge of theft of a sum exceeding $1,000 contrary to s. 294(a) of the Criminal Code, R.S.C. 1970, c. C-34. The sole issue in this appeal is whether the delay in commencing the preliminary inquiry infringed the appellant's right to be tried within a reasonable time contrary to s. 11(b) of the Canadian Charter of Rights and Freedoms.

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The Facts

¶ 2 The appellant was employed as a driver/salesman delivering dairy products to customers of Modern Dairies Ltd. in Dauphin, Manitoba from April 1982 until December 13, 1984. As a result of a complaint by the Dauphin Consumer Co-Op Limited, one of the Modern Dairies' customers, a police investigation was commenced which resulted in the termination of the appellant's employment and an information being sworn on January 7, 1985, alleging that the appellant had committed the offence of theft over $200 from the Dauphin Consumers Co-Op Limited contrary to s. 294 of the Criminal Code.

¶ 3 Four months later, on May 15, 1985, a trial was conducted and on June 25, 1985, the appellant was acquitted of the charge against him. The appellant then proceeded with a grievance against his employer in connection with his dismissal. An arbitration was held in March 1986, at which time the grievance was settled by the parties. Prior to the arbitration hearing Modern Dairies engaged auditors to examine the accounts of the appellant for the year 1984. This audit was completed in February 1986. On the basis of this report the Commercial Crime Section of the R.C.M.P. was contacted.

¶ 4 After an investigation lasting approximately eleven months, a new information, which forms the basis of this appeal, was laid on January 22, 1987. The appellant was charged with theft from his employer of a sum in excess of $1000 contrary to s. 294(a) of the Criminal Code. The Crown alleges that the appellant improperly diverted funds from Modern Dairies' cash customers.

¶ 5 Upon swearing the information, Constable Schnell of the R.C.M.P. obtained a summons returnable in Dauphin on February 17, 1987. The matter was first remanded to March 3, 1987, and was subsequently remanded to March 17, 1987, after a demand for particulars. The case was further remanded to April 14, 1987. During April, J. A. Menzies and E. P. Schachter, counsel for the appellant and respondent respectively,

attempted to confirm a date for the preliminary inquiry. They [page1125] confirmed the dates of August 10-14, 1987, with Peter Chomiak, the Deputy Registrar of the Dauphin Provincial Judges Court (Criminal Division). On April 28, 1987, this hearing date was set in court.

¶ 6 On June 25, 1987, the Crown Attorney, Mr. Schachter, was informed by the secretary to Chief Provincial Judge Gyles that no special sittings would be conducted by Provincial Judges during the months of July or August. The Crown Attorney was advised that Constable Schnell, the investigating officer, would not be available to assist with the conduct of the inquiry except during the week of December 16-23, 1987, or after April 1988. Constable Schnell was to be assigned to full-time university studies for a year, greatly restricting his availability to assist the Crown over a week-long preliminary inquiry. On June 26, Mr. Schachter and Mr. Menzies agreed to conduct the preliminary inquiry on December 16-23, 1987. This date was again confirmed with the Deputy Registrar in Dauphin. Once again, however, the secretary to the Chief Provincial Judge stated that no judge was available at this time. The problem in both cases was that the hearing was scheduled during a holiday period.

¶ 7 On June 29, 1987, a new date of May 9-13, 1988, was agreed upon by Mr. Schachter and Mr. Menzies. On July 6, Mr. Menzies wrote to Crown Attorney Schachter confirming these arrangements but expressing some reservations about the "excessive delay". This date was confirmed in Provincial Court on July 7, 1987. At that time an agent on behalf of the appellant also stated that a letter had been written by Mr. Menzies to Mr. Schachter regarding the delay and that the matter would likely be taken up at a later date.

Previous Proceedings

¶ 8 On December 21, 1987, the appellant brought an originating notice of motion in the Court of Queen's Bench for Manitoba seeking an order staying the proceedings on the grounds of a [page1126] s. 11(b) Charter violation. On January 19, 1988, Darichuk J. conducted a hearing of the appellant's application and an order staying the proceedings was issued on March 15, 1988.

¶ 9 Darichuk J. cited at some length from the decisions of this Court in Mills v. The Queen, [1986] 1 S.C.R. 863, and R. v. Rahey, [1987] 1 S.C.R. 588, which both addressed the question whether it is appropriate to deal with an alleged Charter violation by way of application prior to trial. Applying the principles in these cases, and based on the circumstances of this appeal and the fact that the judge presiding at the preliminary inquiry would not have jurisdiction to deal with a s. 11(b) argument, Darichuk J. concluded that his residual jurisdiction to consider the matter should be exercised.

¶ 10 Darichuk J. cited a number of passages from this Court's decisions in Mills and Rahey with regard to the appropriate test for determining whether a violation of s. 11(b) has been established. Based on affidavit evidence, Darichuk J. concluded that the pending criminal charge adversely affected the appellant's security interests. The appellant's loss of employment, the stress and embarrassment to himself and his family, the disruption in his new employment and the time and expense associated with the proceedings were all listed as relevant factors by Darichuk J. In addition, Darichuk J. observed that the passage of time had prejudiced the appellant's ability to mount a full and fair defence.

¶ 11 When Darichuk J. balanced this impairment to the appellant's interests against any waiver of time periods, time requirements inherent in the nature of the case and institutional resources, he concluded that the actual impairment in this case could not be justified. With the exception of the initial brief delay to obtain particulars, the appellant did not request, cause, contribute to, or acquiesce in any delay. In fact, Darichuk J. held that the letter of the appellant's counsel, Mr. Menzies, of July 6, 1987, expressing concern over the proposed May hearing date erased any inference of waiver.

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¶ 12 Darichuk J. held that much of the delay was systemic and not attributable to either counsel, and that part of the delay was a result of insufficient institutional resources. However, the Crown was held to have protracted this delay by seeking to schedule the preliminary inquiry to accommodate the investigating officer whose

availability was extremely limited. Since this officer would have been available for part of the hearing to give his own evidence, and another officer could have attended the entire hearing to assist the Crown, Darichuk J. concluded that the attempt to accommodate this officer could not justify the length of the delay that resulted.

¶ 13 Huband J.A., speaking for a unanimous Court of Appeal, allowed the appeal and ordered that the matter be remitted to Provincial Court. Huband J.A. recognized that much of the delay was due to the Crown's desire to schedule the hearing at a time when Constable Schnell would be able to assist with the inquiry. The Court of Appeal concluded that it was within the proper bounds of their judicial discretion to conclude that the circumstances of this case did not comprise an unreasonable delay in conducting the appellant's preliminary inquiry. Huband J.A. held (at p. 25):

> I will not try to list every element that might be taken into account. But I would emphasize that the accused is not under confinement pending his trial. He is employed. He says he will be embarrassed when required to seek time off from his employer to attend the preliminary inquiry, but he would face that embarrassment even if the hearing had been scheduled for an early date. There is no suggestion that the delay had prejudiced him, except for the obvious fact that a criminal charge will be hanging over him for a substantial period of time.

¶ 14 Huband J.A. acknowledged that the convenience of the investigating officer should have been secondary to the timely conduct of the preliminary inquiry, but that there was no intentional delay on behalf of the Crown. As well, it was incumbent upon the appellant to protest more strenuously against the delay and even ask that better arrangements be made. The Court of Appeal concluded that although an appellate court should not ordinarily [page1128] interfere with a discretionary decision of a trial court, in this case the finding of the motions judge did not depend upon findings of credibility and it was appropriate to set the order of the motions judge aside.

The Issues

¶ 15 There are two issues to be resolved:

(a) Jurisdiction: did the learned motions judge correctly exercise his discretion not to decline jurisdiction to entertain the application to dismiss; and,
(b) Unreasonable Delay: was the learned motions judge right in holding that the appellant's s. 11(b) right to be tried within a reasonable time had been violated?

(a) Jurisdiction

¶ 16 There are two jurisdictional issues raised on the facts of this case, both having to do with the exercise of the motions judge's discretion to determine the appellant's s. 11(b) application. First, the appellant initiated these proceedings by way of an application of originating notice of motion several months before the scheduled commencement of the preliminary inquiry. The appellant's s. 11(b) application is, therefore, anticipatory in respect of the period of time between the date of his application and the scheduled commencement of the preliminary inquiry. However, in the circumstances of this case, since the date for the preliminary inquiry was fixed and could not (at the behest of the accused) be moved up, the motions judge properly considered the appellant's s. 11(b) application on the basis that the time had already elapsed.

¶ 17 The second jurisdictional issue concerns the motions judge's decision not to decline jurisdiction on the basis that the judge presiding at the scheduled preliminary hearing would not have been jurisdictionally competent to determine the s. 11(b) issue. In both Mills and Rahey this Court addressed the question of which levels of court could constitute courts of competent jurisdiction under s. 24 of the Charter with full remedial [page1129] capacity in respect of Charter violations. There was total agreement in Mills that a preliminary inquiry judge was not a court of competent jurisdiction for a claim for relief under s. 24(1) of the Charter. In Mills, Lamer J. at pp. 891-96 (dissenting on other grounds) held that as a general rule the trial court is to be the preferred source of original and supervisory jurisdiction in dealing with allegations of Charter violations. La Forest J. adopted a similar approach in Mills at pp. 976-77. This preference for trial court jurisdiction is

premised largely on the fact that trial courts are better equipped for considering viva voce evidence and are not restricted to affidavit evidence. However, Lamer J. (with whom Dickson C.J. concurred) noted that a superior court could in appropriate circumstances exercise its jurisdiction so long as the applicant was able to meet the burden of demonstrating that the trial court would not be a more appropriate forum.

¶ 18 In Rahey, Lamer J. again noted that superior courts should generally decline jurisdiction to address allegations of Charter violations, though they possess a general supervisory jurisdiction to decide such applications. Lamer J. (Dickson C.J. concurring) held at pp. 603-4:

> In Mills, it was also decided that the superior courts should have "constant, complete and concurrent jurisdiction" for s. 24(1) applications. But it was therein emphasized that the superior courts should decline to exercise this discretionary jurisdiction unless, in the opinion of the superior court and given the nature of the violation or any other circumstance, it is more suited than the trial court to assess and grant the remedy that is just and appropriate. The clearest, though not necessarily the only, instances where there is a need for the exercise of such jurisdiction are those where there is as yet no trial court within reach and the timeliness of the remedy or the need to prevent a continuing violation of rights is shown, and those where it is the process below [page1130] itself which is alleged to be in violation of the Charter's guarantees.

La Forest J. went further and held that only the trial judge has jurisdiction unless there is no trial judge or the trial judge is disqualified for some reason such as involvement in the delay.

¶ 19 Both Wilson J. and Estey J. in Rahey appear to agree with the approach adopted by Lamer J. on this point.

¶ 20 I agree that, where practicable, trial courts should deal with allegations of s. 11(b) violations. It is clearly preferable that a court be able to rely upon viva voce evidence so as to more fully explore and consider the facts underlying an allegation of unreasonable delay. A court examining the extent of the prejudice suffered as a result of delay, or the reasons for any delay, can only benefit from the more detailed factual background that emerges as a result of a full trial on the issue. In this appeal, the motions judge was cognizant of this general preference for deferring to trial courts. Darichuk J. concluded, however, that this case was one in which the residual jurisdiction of the court ought to be exercised.

¶ 21 Although the motions judge did not detail the factors that led him to this conclusion, I am of the opinion that he exercised a sound discretion in refusing to decline to hear and decide the application. The preliminary inquiry was not scheduled to begin for roughly four months and the presiding judge would not have had jurisdiction to consider an alleged s. 11(b) infringement in any event. If the scheduled preliminary inquiry had resulted in a committal for trial, then another date would have had to have been set for trial, further delaying the opportunity for the appellant to assert his right to be tried within a reasonable time. Throughout this period any impairment to the appellant's interests would have continued to increase. Therefore, I am of the view that the motions judge was right in addressing the issue of unreasonable delay.

[page1131]

(b) Unreasonable Delay

¶ 22 This Court has striven in three cases to lay down a test to determine whether s. 11(b) has been violated. The cases are Mills, supra, Rahey, supra, and R. v. Conway, [1989] 1 S.C.R. 1659. In addition, the question of the relevance of pre-charge delay was addressed in R. v. Kalanj, [1989] 1 S.C.R. 1594. While there are points of disagreement, there is substantial agreement as to the basic elements of the test.

¶ 23 The words of the section are simple:

> 11. Any person charged with an offence has the right

. . .

(b) to be tried within a reasonable time;

¶ 24 It is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable? If this were simply a function of time, the matter could be easily resolved. Indeed a sliding scale of times could be developed with respect to specified offences which could be adjusted because of the special circumstances of the case. But it is not simply a function of time, but of time and several other factors. What those basic factors are is not the subject of disagreement. There appears to be general agreement that the Court must weigh or balance the following factors in coming to a conclusion:

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

¶ 25 There is disagreement as to the mechanics in balancing these factors and the constituent components of (4), prejudice. There are different views as to whether the prejudice relevant for the purposes of s. 11(b) exists only in impairment of the accused's liberty and security interests, or may be found also in prejudice to the accused's fair trial interests. Furthermore, with respect to the security [page1132] interests, Lamer J., in Rahey, with the Chief Justice concurring, was of the view that there is an irrebuttable presumption that the accused suffers prejudice from delay (at p. 609) while Wilson J. preferred the view that prejudice was to be inferred by the court (at p. 623).

¶ 26 As for the mechanics, there is disagreement as to the procedure in balancing these factors. In Conway, supra, I adopted the approach proposed by Le Dain J. in Rahey (at p. 616) and suggested that the accused was obliged to make out a prima facie case of unreasonable delay before the prosecution was called upon for an explanation. That did not find favour with the majority in that case.

¶ 27 I agree with the following statement by L'Heureux-Dubé J. in Conway, at pp. 1674-75 and 1676:

> However, as with other Charter guarantees, the individual claiming an infringement of his or her rights must persuade the court that the circumstances fall within the scope of protection of the specific Charter provision. Under s. 11(b) of the Charter, the scope of protection is demarcated by the reasonableness of the total lapse of time. It may be that a de facto shift of the burden of proof occurs in the minds of individual judges in the overall assessment of reasonableness.
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> . . .
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> Given the importance of the facts in individual cases where an unreasonable interval of time is alleged, I am of the view that a more flexible or functional approach is appropriate.

¶ 28 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 [page1133] 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 overall lapse of time having regard to the factors referred to above. I believe that this is the type of flexibility referred to by my colleague in her reasons quoted above.

¶ 29 In my opinion, this appeal can be resolved on the basis of principles that have been accepted in the three cases referred to. The motions judge was able to come to a determinate conclusion without resort to the burden of proof and it is not necessary to attempt to address that subject in this case.

¶ 30 Although the order in which the various factors are dealt with may not be of vital importance, I will deal with them in the order that they are stated above.

(1) The Length of the Delay

¶ 31 The respondent conceded that a six-month delay between the laying of the charge and the date of a preliminary hearing was "about normal" for this type of charge. The period between the date the charge was laid (January 22, 1987) and the dates scheduled for the preliminary hearing (August 10-14, 1987) was about a month longer than the norm. The respondent did not seek to justify the subsequent delay of approximately nine months on the basis of time required for preparation.

(2) The Reason for the Delay

¶ 32 I have already stated that the respondent did not seek to justify the delay by reference to the inherent time requirements of the case. Rather the following two explanations, which might be generally classified as falling under the heading "institutional delays", were proffered. The first two dates proposed were during holiday periods in which no judge was available. For reasons that were not [page1134] made known to this Court, a Provincial Court judge from Winnipeg was to conduct the hearing rather than a local Provincial Court judge. Clearly, some allowance will be made for the fact that demands on the system of judicial administration will occasionally delay proceedings. In the absence, however, of an explanation as to the necessity of having the case tried by a judge from Winnipeg rather than a local judge, the delay cannot be justified on this basis.

¶ 33 In any event, the principal reason for the delay was not this institutional limitation, but the desire by the Crown to schedule the hearing at a time when the investigating officer, Constable Schnell, could assist the Crown for the duration of the hearing. A letter from the R.C.M.P. Commercial Crime Branch on July 6, 1987, suggests that the May date was set to accommodate Constable Schnell. That letter from Inspector Moorlag to the Manitoba Attorney-General's Department reads as follows:

> As you may recall, Mr. SCHACHTER is prosecuting the above noted matter which was subject of an investigation conducted by Cst. SCHNELL.
> This matter was originally scheduled for preliminary hearing for the week of August 10th-14th at Dauphin. It is my understanding that it was necessary to cancel this sitting and a new date is to be set. In view of this change, I wish to advise you that Cst. SCHNELL is being temporarily reassigned to full time University studies for the academic year, 1987/88. Mr. SCHACHTER has been advised of this and has indicated he would take this into consideration by attempting to have the matter remanded to some time after April 30th, 1988. Should this not be possible, I wish to advise that Cst. SCHNELL will not be available to assist in the prosecution of this case due to the inherent demands of full time University studies.
> He, of course, will be available to provide his evidence. During Cst. SCHNELL's absence, this file will be reassigned to another member for monitoring purposes. Although this member would not be intimately familiar with the case, he would be available to act in an assisting capacity.

¶ 34 The Crown understandably desired the attendance and assistance of the investigating officer. [page1135] However, such a desire on the part of the Crown must not be permitted to override an individual's s. 11(b) Charter rights. While I agree with the Court of Appeal that no improper motives can be ascribed to the Crown, this is not necessary for the success of a s. 11(b) application. The above letter indicates that Constable Schnell would have been available to provide evidence but simply would not have been available for the duration of the

hearing if it were scheduled during the school term. As well, the same letter indicates that another member of the Commercial Crime Branch of the R.C.M.P. would be assigned the case. This suggests that the Crown cannot justify this delay on the ground that it required the presence of Constable Schnell. While it is not necessary to decide the point, perhaps the Crown was justified in attempting to accommodate the investigating officer when the date was first moved to December. However, when no judge was available at this time, it became incumbent upon the Crown to select a hearing date more commensurate with the appellant's right to be tried within a reasonable time. The convenience of the investigating officer should have been secondary to the expeditious conduct of the preliminary inquiry.

(3) Waiver of Time Periods

¶ 35 The respondent contends that by agreeing to the May 1988 date for the preliminary inquiry, the appellant cannot attribute to the Crown any delay prior to the filing of the originating motion on December 21, 1987. This argument is premised upon the assumption that the appellant had waived his right to assert that the delay prior to December 21 forms part of the total delay.

¶ 36 Huband J.A. in the Court of Appeal appears to have accepted this contention. He held (at p. 26):

> In my opinion, the failure of the accused to protest promptly the adjournment of the preliminary hearing to May, 1988, in more strenuous terms, is a major factor in the equation. Section 11(b) of the Charter is not to be [page1136] used to ambush the prosecution. If a date is set which is too far in the future, there is some responsibility on the part of an accused to ask the court to make better arrangements and to give warning that unless those arrangements are made, a claim of unreasonable delay will be advanced.

¶ 37 If this statement is intended to mean that inaction or acquiescence on the part of the accused, short of waiver, can result in a forfeiture of an accused's s. 11(b) rights, then I do not agree with it. Admittedly an accused's conduct must be taken into account in assessing the prosecution's explanation for delay. There is no obligation, however, on the part of the accused to press the case on, which relieves the Crown of its obligations under s. 11(b).

¶ 38 Nor can I agree with the argument of the respondent, that there has been any waiver of the appellant's s. 11(b) rights. Admittedly, Mr. Menzies, on behalf of the appellant, did agree to the dates of May 9-13, 1988, for the preliminary inquiry after Mr. Schachter informed him that no judge was available for the December dates. 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.

¶ 39 In my opinion, apart from agreeing to a date, the other actions of Mr. Menzies on behalf of the appellant rebut any possible inference that he waived his s. 11(b) rights in relation to the period up until December 21, 1987. Rather than demonstrating waiver of his rights, the appellant demonstrated his desire to move the proceedings along quickly. On July 6, 1987, Mr. Menzies agreed to a request made by Mr. Schachter to dispense with the requirement that the original investigator of the matter appear at the scheduled August hearing [page1137] since the investigator was scheduled to be on vacation at that point. Of greater importance is a letter from Mr. Menzies to Mr. Schachter dated July 6, 1987 which was a direct result of their agreement to the postponement of the [page1138] hearing until May 1988. The text of that letter is as follows:

> Thank you for your letter of June 30th, 1987 [confirming the May 1988 hearing date]. I will attempt to have Mr. Smith present on July 7th, 1987, in order to set the new date with regard to this matter.
> I wish to express my concern and my client's surprise and deep regret that this matter cannot proceed to Preliminary Hearing before Monday, May 9th, and the following week. It seems to me an excessive delay and I wish to register my objection at this point.

¶ 40 It would be difficult for the appellant to inform the Crown more clearly that he was not waiving his s. 11(b) rights. The appellant's objection to the delay was met by inactivity by the Crown. As well, on July 7, 1987, agents for both the appellant and respondent appeared in Provincial Court to set the date for the hearing. The transcript reads as follows:

> Mr. PETERSON [agent for the respondent]: With regards to Mr. Smith, your Honour, this matter had been set. The Commercial Crime Section out of Winnipeg is handling this matter from our department. It was originally set for preliminary hearing in August but, apparently, there was no judge available for that entire week out of Winnipeg. So, believe it or not, the new date they have agreed on is May 9 to May 13, 1988. Apparently they are providing the judge for a week out of Winnipeg, and that is the soonest they can get a judge for a week.
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> . . .
>
> Mr. SEMCHUK [agent for the appellant]: I can advise your Honour that Mr. Menzies has written to Mr. Schachter regarding the undue delay in this matter, but that will be something to be taken up at a later date, no doubt.
>
> The COURT: I should think so.

¶ 41 The appellant has demonstrated that he neither caused nor acquiesced in the postponement of the hearing to May 1988. Though Mr. Menzies agreed to the dates, the appellant has displaced an inference of waiver, which would generally arise when an individual agrees to a postponement. Therefore, I cannot agree with the conclusion of Huband J.A. that the appellant had failed to discharge his responsibilities herein.

(4) Prejudice

¶ 42 Having found that the delay is substantially longer than can be justified on any acceptable basis, it would be difficult indeed to conclude that the appellant's s. 11(b) rights have not been violated because the appellant has suffered no prejudice. In this particular context, the inference of prejudice is so strong that it would be difficult to disagree with the view of Lamer J. in Mills and Rahey that it is virtually irrebuttable. It is a more difficult question in contexts in which greater resort is made to this factor because the case is otherwise closer to the line. In such circumstances, the accused may wish to bolster the presumption that there is prejudice by leading evidence that there has been unusual prejudice by reason of special circumstances. On the other hand, the Crown may wish to assert that a delay which is not excessively beyond the norm should be excused because there has been minimal prejudice. Should the accused or the Crown in such circumstances be precluded from arguing or leading evidence to show what the actual prejudice was? This is a question that will have to be resolved, but that is not necessary to a decision in this case. To the extent that a finding of prejudice is necessary, the motions judge has found on the evidence that there is actual prejudice. Although the motions judge took into account some factors that are irrelevant (e.g. the stress and embarrassment to members of the appellant's family), there was sufficient relevant evidence to support his finding. I prefer that finding to that of the Court of Appeal. In any event, the statement of Huband J.A. quoted above acknowledges that there is prejudice in that "a criminal charge will be hanging over him for a substantial period of time". This is the very essence of prejudice to the security interests of a [page1139] person charged with an offence. In Mills, at p. 919, Lamer J. 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" ....

¶ 43 Accordingly, whether prejudice is conclusively presumed or to be inferred, the appellant has satisfied any requirement in connection with this factor.

Disposition

¶ 44 Based on the foregoing, and having balanced the factors to which I have alluded, I must find that the appellant's right to be tried within a reasonable time has been infringed. Accordingly, s. 11(b) has been breached. I would allow the appeal, set aside the order of the Court of Appeal and restore the order of Darichuk J.

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