Court file no. 36112

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N :

HER MAJESTY THE QUEEN

Appellant

- and -

KENNETH GAVIN WILLIAMSON

Respondent

APPELLANT'S FACTUM

Eric Siebenmorgen and Tracy Kozlowski
Crown Law Office - Criminal
720 Bay Street, 10th Floor
Toronto, Ontario
M5G 2K1
Tel: (416) 326-8248/326-9964
Fax: (416) 326-4656
eric.siebenmorgen@ontario.ca/tracy.kozlowski@ontario.ca
Counsel for the Appellant

Robert Houston, Q.C.
Burke-Robertson
70 Gloucester Street
Ottawa, Ontario
K2P 0A2
Tel: (613) 236-9665
Fax: (613) 235-4430
rhouston@burkerobertson.com
Ottawa Agent for the Appellant

John H. Hale
Hale Criminal Law Office
Suite 101
116 Lisgar Street
Ottawa, Ontario
K2P 0C2
Tel: (613) 695-4253
Fax: (613) 695-8500
Counsel for the Respondent

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PART I
OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This appeal concerns the right to be tried within a reasonable time as guaranteed by s. 11(b) of the *Canadian Charter of Rights and Freedoms*. The Respondent was charged on January 7, 2009 with several offences arising out of the historic sexual abuse of a young boy. The Respondent was ordered to stand trial following a preliminary inquiry held on May 7, 2010. A jury trial in the Superior Court of Justice was to commence the week of December 12, 2011. The trial judge dismissed an application seeking a stay of the prosecution for unreasonable delay, and the Respondent was then convicted by a jury of buggery, gross indecency, and indecent assault. He was sentenced to a total of four years' imprisonment. On appeal, the Court of Appeal dismissed all grounds of appeal against the conviction but one: it held that the Respondent's right to be tried within a reasonable time had been infringed. Despite characterizing the Respondent's crimes as "especially despicable," the Court of Appeal allowed the appeal from conviction and imposed a stay of proceedings.

2. As aptly stated by Mclachlin J. (as she then was) in her concurring reasons in *Regina v. Morin*:[1]

> When those charged with criminal conduct are not called to account before the law, the administration of justice suffers. Victims conclude that justice has not been done and the public feels apprehension that the law may not be adequately discharging the most fundamental of its tasks.

These words apply with great force to the present case. The Respondent was convicted by a jury of his peers of serious sexual crimes against a vulnerable child, crimes that were characterized, as mentioned above, as "especially despicable" by the Court of Appeal for Ontario. Despite this, the Court of Appeal ruled that the case had taken too long to get to trial. It set aside the convictions and ordered a stay of the proceedings. It did so essentially because it found that the prejudice (all inferred) to the Respondent's *Charter*-protected interests outweighed the societal interest in the prosecution. In re-calibrating the trial judge's balancing of interests, the Court of Appeal made the

[1] [1992] 1 S.C.R. 771 at pp. 809-810, [1992] S.C.J. No. 25 at para. 85

following determinations which, it is submitted, are erroneous and require correction by this Honourable Court:

1) it disagreed with the trial judge's finding that the "inferred prejudice" from the trial delay was not significant (having affirmed the trial judge's finding that there was no actual prejudice); and

2) it effectively took judicial notice (in 2014), in the absence of any notice to the parties and without comment on the point by the trial judge, that there were "plenty" of locations and judges elsewhere in eastern Ontario (in 2010 or 2011) such that this trial could have taken place earlier than it did.

B. Factual Chronology, Including Explanation for Delays

i) Time from Date of Charge to First Date for Preliminary Inquiry: January 7 to November 23, 2009 (Ten Months, 16 Days)

3. The initial period of January 7, 2009 to April 28, 2009 was taken up with the usual "intake" functions required to process matters in the Ontario Court of Justice (bail, retention of counsel, provision of disclosure, meetings between counsel, and the provision of instructions to counsel). The trial judge found that one month and four (4) days of this period had to be characterized as unexplained delay caused by the Crown due to a delay in completing some of the disclosure materials (copies of the recorded audio-visual interviews of the complainant and the Respondent).

Appellant's Record, Vol. I:	Reasons for Judgment, Superior Court, p. 7, para. 29
Appellant's Record, Vol. II:	Proceedings of January 7, 9, 12, 27, February 17, March 10, April 14, 2009, pp. 27-48; 50-53; 55-58 Letters to Crown dated February 17 and March 13, 2009, pp. 49, 54

4. On April 28, 2009, the date of November 23, 2009 was set for a preliminary inquiry and November 9, 2009 was set as a date for a "focus hearing".[2] An agent appeared on behalf of counsel for the Respondent and stated on the record merely that he had received correspondence from counsel and had confirmed with the trial co-ordinator that these dates were available. There was no evidence led as to whether there were earlier available dates in the Ontario Court of Justice or how much time counsel required in order to prepare for the preliminary inquiry. Both Crown and defence

[2] Pursuant to s. 536.4 of the *Criminal Code*, a justice may hold a hearing for the purpose of identifying and narrowing the issues and scope of the evidence to be heard at a preliminary inquiry.

counsel agreed, however, that the entire period from April 28 to November 23 (6 months, 26 days) could be characterized as due to limitations on institutional resources.

Appellant's Record, Vol. I:	Reasons for Judgment, Superior Court, p. 6, para. 27 Reasons for Judgment, Court of Appeal, p. 105, para. 25
Appellant's Record, Vol. II:	Proceedings of April 28, 2009, pp. 59-63 Adjournment, Efforts to Re-Schedule, and Completion of Preliminary Inquiry: November 23, 2009 to May 7, 2010 (Five Months, 15 days)

5. Correspondence between the Crown Attorney's office and the Victim/Witness office on October 26 and 27, 2009 indicated that a trial matter had been set for continuation on November 23, in addition to the Respondent's preliminary inquiry. However, it was thought that the Respondent's matter would still be reached in the afternoon. The record of the focus hearing held on November 9 indicates that counsel had discussed the case and the upcoming preliminary inquiry. The record of the court appearance does not, however, give any indication that there was a problem with the scheduled date. Less than two weeks later, in the afternoon of Friday, November 20, with the preliminary inquiry scheduled to proceed the following Monday, correspondence was sent from the trial co-ordinator to the Crown Attorney's office advising that as the assigned judge was to attend a funeral in the afternoon, it was unlikely that the Respondent's matter would be reached that day. Following consultation, the Crown's office contacted the police to advise that the preliminary inquiry would not be reached on November 23. Although the correspondence indicated that defence counsel had been contacted and advised, counsel (who was in Ottawa) denied receiving this message and appeared in court, with the Respondent, on November 23 in Kingston. The trial judge accepted that defence counsel had not, in fact, received notice that the matter would not be proceeding, until the morning of November 23.

Appellant's Record, Vol. I:	Reasons, Superior Court, p. 7, para. 30
Appellant's Record, Vol. II:	Proceedings of November 9, 2009, pp. 64-67 Proceedings of November 23, 2009, pp. 68-70
Appellant's Record, Vol. III:	Email between Trial Co-Ordinator and Crown's Senior Administrative Assistant, p. 10 Email between VWAP and Assistant Crown Attorney, p. 11 Submissions (Defence), p. 62

6. On the hearing of the s. 11(b) motion, Crown counsel accepted that approximately one month of the delay from November 23, 2009 to February 22, 2010 could be properly attributed to the Crown as a result of the Crown's failure to take steps to make other arrangements for the preliminary inquiry when Crown counsel became aware as early as October 26 or 27 that less than a full day was available for this case on November 23, as a result of a continuing matter having been scheduled for that day. The trial judge, however, characterized the entire period from November 23, 2009 to February 22, 2010 as institutional delay.

Appellant's Record, Vol. I: Reasons, Superior Court, p. 7, paras. 30-31
Appellant's Record, Vol. III: Submissions (Crown), p. 101

7. Although the initial date set for a full-day preliminary inquiry for this matter was some 6 months, 26 days from the "set-date" appearance, when the matter did not proceed on November 23, 2009, the preliminary inquiry was re-scheduled for February 22, 2010, only three further months away. The Crown relied upon this as evidence of efforts having been made to give the case priority when it did not proceed as initially scheduled. Furthermore, when the new date was scheduled, there was no indication on the record that this was the earliest available new date in the Ontario Court of Justice. Counsel wrote to the Crown on November 23, 2009 expressing that the defence was "anxious to move the case forward," but expressed no dissatisfaction to the presiding judge with the pace of the proceedings thus far.

Appellant's Record, Vol. II: Proceedings of November 23, 2009, pp. 68-70
Letter to Crown, dated November 23, 2009, pp. 68-69
Appellant's Record, Vol. III: Submissions (Crown), pp. 99-101

8. Unfortunately, on February 22, 2010, the matter again did not proceed and had to be further adjourned. The Respondent and his counsel attended but were advised that the assigned judge and the investigating officer were unavailable and thus the inquiry could not commence. The trial judge found that the failure of the preliminary inquiry to proceed on this date was unexplained. The Crown did not dispute this conclusion and acknowledged that the parties were given no explanation on February 22 as to the reason for the judge's unavailability. It is apparent, however, that the trial judge misapprehended the record of the proceedings when he concluded that the assigned justice was in fact in attendance. While the title page of the transcript indicates that the proceedings were "before

the Honourable Justice P.H. Megginson," the transcript of the proceedings themselves indicates that the matter was spoken to before the courtroom clerk, who was addressed by the parties and who ultimately adjourned the matter and re-scheduled it for May 7, 2010. The Crown had stated on the record that a new date of March 15 (less than a month later) was available; ultimately, however, a new date of May 7, 2010 was established. On the hearing of the s. 11(b) motion, the Crown relied, as evidence of attempts to expedite the matter, on the fact that a full-day hearing was re-scheduled just two months and 15 days later once it could not proceed on the date previously scheduled.

Appellant's Record, Vol. I:	Reasons, Superior Court, p. 7, paras. 20, 33-34
Appellant's Record, Vol. II:	Proceedings of February 22, 2010, pp. 74-79
Appellant's Record, Vol. III:	Submissions (Crown), pp. 102-103

ii) From Preliminary Inquiry to First Appearance in Superior Court: May 7, 2010 to August 4, 2010 (Approximately Three Months)

9. The preliminary inquiry was heard on May 7, 2010 and the Respondent was ordered to stand trial on that date. The courtroom clerk suggested the date of June 2, 2010 as the first appearance in Assignment Court in the Superior Court of Justice; however, defence counsel requested a later date in view of the out-of-court examinations of the police witnesses that were yet to be conducted, by agreement of counsel. The clerk than provided dates of June 23, July 7, July 21, and August 4, 2010. The latter date was set at the request of defence counsel. The trial judge, on the basis of a misapprehension that there was a concession by both Crown and defence counsel, made no finding concerning the characterization of the delay from May 7 to August 4 other than that it was neutral intake time in the Superior Court. In fact, Crown counsel at the hearing of the s. 11(b) application had taken the position that the delay between the May 7th committal for trial and the August 4th pre-trial date was as a result of defence counsel's preference. The Court of Appeal did ascribe two months of that delay to the defence.

Appellant's Record, Vol. I:	Reasons, Superior Court, p. 8, paras. 35-36 Reasons for Judgment, Court of Appeal, p. 172, para. 15; p. 178, para. 30
Appellant's Record, Vol. II:	Information, p. 22 Proceedings of May 7, 2010, pp. 183- 187
Appellant's Record, Vol. III:	Submissions (Crown), pp. 104-106, 109-110

iii) From First Appearance in Superior Court to Setting of Trial Date: August 4, 2010 to October 22, 2010 (Two Months, 18 Days)

10. On August 4, 2010, the judicial pre-trial conference was adjourned at the request of the defence to September 29, 2010 so that the assigned Crown counsel could be present to conduct the conference. On the latter date, following the pre-trial conference, the matter was adjourned to the October 22, 2010 Assignment Court for the purpose of scheduling pre-trial motions (estimated at three days) and the trial (estimated at 6 to 7 days). This time period was characterized by both the trial judge and the Court of Appeal as neutral time, as part of the inherent delay in the Superior Court intake process.

Appellant's Record, Vol. I:	Reasons, Superior Court, p. 8, paras. 37-40 Reasons for Judgment, Court of Appeal, p. 178, para. 31; p. 179, para. 33
Appellant's Record, Vol. II:	Indictment, p. 26 Proceedings of August 4, 2010, pp. 189- 192 Proceedings of September 29, 2010, pp. 194-196

iv) The Setting of the Trial Date and Dates for Pre-Trial Motions: October 22, 2010 to December 12, 2011 (13 Months, 20 Days)

11. On October 22, 2010, it was confirmed by the trial co-ordinator that the first available date for commencing a seven-day judge and jury trial was December 12, 2011. The trial was scheduled accordingly, with four days of pre-trial motions scheduled to commence on September 6, 2011. Crown counsel (not the assigned Crown counsel for the trial), looking at the Crown's pre-trial conference form, noted for the record that the anticipated pre-trial motions included: a *voir dire* as to admissibility of the Respondent's police interview; a third party records application; and an application to stay the proceedings pursuant to s. 11(b). A further date of November 7, 2011 was reserved, should it be necessary, for completion of the pre-trial motions.

Appellant's Record, Vol. I:	Reasons, Superior Court, pp. 6-7, para. 27; pp. 8-9, paras. 46-47 Reasons for Judgment, Court of Appeal, p. 183, para. 45
Appellant's Record, Vol. II:	Indictment, p. 26 Proceedings of August 4, 2010, pp. 189- 192
Appellant's Record, Vol. III:	Affidavit of Christine Harnett, p. 9, para. 6

12. The trial judge had characterized the entire period from October 22, 2010 to December 12, 2011 as being a delay due to limited institutional resources. The Court of Appeal, recognizing that

such characterization did not make reasonable allowance for preparation time required by the parties, re-characterized one month of this period as part of the inherent time requirements of the case (thus neutral delay), leaving an institutional delay of 12 months, 20 days in the Superior Court.

Appellant's Record, Vol. I: Reasons, Superior Court, p. 8, para. 46
Reasons for Judgment, Court of Appeal, p. 183, para. 45

13. The Crown relied upon the Affidavit of the Superior Court trial co-ordinator, Christine Harnett, in order to provide some evidence of the length of the institutional delay in setting trial dates in that Court in Kingston. Ms. Harnett deposed that as of March 4, 2010, a jury trial in the matter of *R. v. Shafia*, involving three accused and four deceased persons, was to proceed in one of the two jury courtrooms in the Frontenac County Courthouse. A block of time, from March 28 through June of 2011 (just over three months) had been reserved for that case. As of the August 27, 2010 Assignment Court, two jury trials had been scheduled to be heard in mid and late January, 2011(some four and one-half months later). The remaining four jury trials scheduled on that date were scheduled after the expected conclusion of the *Shafia* trial, in July, August, September and October of 2011, respectively (between 11 and 14 months later). By the time that the Respondent's trial date was set at the October 22, 2010 Assignment Court, the earliest available trial date for a jury matter was December 12, 2011.[3] The Crown's submission was that because of the unusual nature of the *Shafia* prosecution, that case placed a temporary strain upon local judicial resources, necessitating longer wait times for those electing to have a jury trial than would otherwise be the usual case in Kingston.

Appellant's Record, Vol. III: Affidavit of Chrstine Harnett, pp. 7-9
Submissions (Crown), pp. 114, 129-130

14. In his reasons for dismissing the s. 11 (b) motion, the trial judge found that the *Shafia* prosecution referred to above caused institutional delay in both levels of courts, impacting upon the Respondent's case. He did not, however, mention in his reasons how this temporary additional institutional delay impacted upon the analysis of the overall reasonableness of the delay. For its part,

[3] Ultimately, on May 27, 2011, the *Shafia* trial was rescheduled to commence on October 11, 2011 for three and one-half months or until the end of January 2012: see Affidavit of Christine Harnett, Appellant's Record, Vol. III, p. 9, para. 7.

the Court of Appeal, criticized the Crown for failing to explain why, in light of the extra strain on judicial resources, no one approached the Regional Senior Justice of the Superior Court to explore, among other possibilities, accommodating the Respondent's trial in other venues in the Eastern Ontario Region. This issue was not raised before the trial judge or in the arguments advanced on appeal; nor was there evidence in the trial record of the availability, in 2010 and 2011, of other judicial resources in the Eastern Ontario Region. The Court of Appeal went further, stating both:

1) that, in its opinion, "[T]he Eastern Region of the Superior Court has plenty of locations and judges;" and

2) that, in its opinion, "the trial could have been accommodated earlier."

No evidentiary foundation for these findings of fact was cited by the Court of Appeal.

Appellant's Record, Vol. I: Reasons, Superior Court, p. 8, para. 47
Reasons for Judgment, Court of Appeal, p. 181-182, paras. 39, 42

C. Assessment of Actual and Inferred Prejudice to the Respondent's *Charter*-Protected Interests

15. In this case, the Respondent filed an Affidavit alleging various forms of prejudice, some of which would, had the evidence been accepted, constituted prejudice to one or more of the three groups of individual interests protected by s. 11 (b). He was extensively cross-examined upon that Affidavit, and the trial judge ultimately found as a fact that the prejudice alleged had not been proved. Specifically, he found that:

- while the Respondent claimed that he was effectively under house arrest prior to his trial, that condition was self-imposed;

- the specific term of his bail that he not associate with children except in the presence of a responsible adult was reasonable and not onerous, and could in any event have been varied except that the brother who was most affected by this condition was too busy to swear an Affidavit and travel to court in Kingston in support of a bail variation;

- the Respondent had moved to Ottawa to help his parents, and thus his reduced contact with colleagues was neither charge nor delay-related;

- any media attention or professional scrutiny came only as a result of the charges and were not the result of a delay in processing them, and in any event, the Respondent continued to be supported by his colleagues;

- while the Respondent did experience regrettable stress, emotion and financial costs as a result of the two unexpected adjournments of the preliminary inquiry, this was found not to amount to significant prejudice, and the Respondent had not filed any supporting medical evidence.

These findings were affirmed by the Court of Appeal, which stated in its reasons that the trial judge's factual findings in this regard were not challenged on appeal, let alone proven to suffer from any palpable and overriding error. The Court of Appeal affirmed that there was no actual prejudice in this case [emphasis added].

Appellant's Record, Vol. I: Reasons, Superior Court, p. 8, paras. 5-13; 51-56
Reasons for Judgment, Court of Appeal, pp. 185-186, 190-191, paras. 51-53, 66

16. Having detailed his specific findings on the matter of actual prejudice, the trial judge reminded himself that, based upon the binding authorities, such a finding was not the end of the matter. He went on to consider the extent to which he would infer prejudice based upon the passage of time. Referring specifically to the reasons of Cromwell J. for this Honourable Court in *Regina v. Godin*, [2009] 2 S.C.R. 3 at paras. 39-40 and of Cory J. in *Regina v. Askov*, [1990] 2 S.C.R. 1199 at para. 75, he found that the delay in this case constituted a basis from which to infer prejudice to the Respondent. Having pointed out that inferred prejudice due to failing witness memories can be minimized where witness accounts have been preserved in reasonably reliable forms, he noted that this was done in the Respondent's case. Ultimately, he concluded on the facts of this matter that the prejudice to be inferred was not significant. The Court of Appeal agreed with the trial judge that no prejudice to fair trial interests could be inferred because the evidence had been preserved but held, based upon its examination of three of its own previous decisions,[4] that in view of the delays in this case, significant prejudice to the Respondent "must be inferred." It therefore reasoned from this conclusion that the trial judge erred in finding otherwise.

Appellant's Record, Vol. I: Reasons, Superior Court, pp. 10-11, paras. 57-64
Reasons for Judgment, Court of Appeal, pp. 186-188, paras. 54-57

[4] *R. v. Ralph*, 2014 ONCA 3; *R. v. Steele*, 2012 ONCA 383; *R. v. H. (B.)*, 2009 ONCA 731

PART II
STATEMENT OF QUESTIONS IN ISSUE

Question 1: ***What rules and principles guide judges of trial or appellate courts in their use of their own personal knowledge of or experience with institutional resources and court practices in adjudicating claims of infringement of the constitutional right to a trial within a reasonable time?***

17. It is the position of the Applicant that the Court of Appeal for Ontario erred in law by:

1) taking judicial notice, on appeal and in the absence of comment on the matter in the trial record, of the extent of available judicial resources in the region beyond the local jurisdiction in which the trial took place; and

2) determining that it could properly draw a conclusion from its own knowledge, on appeal and several years after the trial had taken place, that the trial could have been accommodated sooner in another part of the region beyond the local jurisdiction; and

3) ultimately, in failing to extend the constitutionally permissible period of institutional delay in a case where the local jurisdiction was experiencing a temporary but significant strain on its resources.

Question 2: ***What is the proper role of the concept of "inferred prejudice" as a function of the length of delay in bringing an accused person to trial, in adjudicating claims alleging denials of the constitutional right to be tried within a reasonable time, particularly where on the evidence it is found that the delay has resulted in minimal or no actual consequences to the accused's liberty, security, or fair trial interests?***

18. It is the position of the Applicant that the Court of Appeal for Ontario erred in law by effectively converting a permissive (and case-specific) factual inference into a categorical finding that must be made if the delay exceeds a particular "cap" or level. In doing so, it failed in this case to apply settled principles of appellate review to findings of fact.

PART III
STATEMENT OF ARGUMENT

FIRST ISSUE: TAKING NOTICE OF LOCAL RESOURCES

A. Position of the Crown at Trial

19. The Crown at trial took the position that given that there were just two courtrooms in the Frontenac County Courthouse that could be used for jury trials, the multiple murder prosecution of *R. v. Shafia* had placed a temporary strain on local judicial resources. This had increased the waiting time to trial for those electing to have a trial by jury in the Kingston area. Crown counsel submitted that such a situation, resulting from a temporary strain on resources, ought not to result in an "amnesty" for persons charged with offences who elect trial by jury, particularly where, as in this case, the trial could have been scheduled much sooner had the Respondent availed himself of an earlier Assignment Court date.

Appellant's Record, Vol. III: Affidavit of Chrstine Harnett, pp. 7-9
Submissions (Crown), pp. 114, 129-130

B. Reasons of the Trial Judge

20. In his reasons for dismissing the s. 11(b) application, the trial judge stated, at paragraph 47, that "a further reason" for the institutional delay in this case, in additional to the reasons for the delay already considered, was the impact of a multiple murder victim and accused trial at the Kingston courthouse during the relevant period of time (the "*Shafia* trial"). The extent to which the Shafia trial lengthened the delay in scheduling the Respondent's trial was deemed attributable to the *Shafia* trial was not, however, the subject of comment.[5]

C. Decision at the Ontario Court of Appeal

21. Writing for the Court, Lauwers J.A. considered the Crown's submission that the Crown had provided sufficient explanation for the institutional delay, in that the defence had elected for a trial by jury in Kingston, where one of the two available courtrooms in that jurisdiction was being utilized for the *Shafia* trial. The Court held that this was insufficient explanation for the delay as "the Crown did not have any explanation for why no one approached the Regional Senior Justice to see what

[5] *Ibid.*, at para. 47

other arrangements could be made to accommodate this trial under those circumstances, such as utilizing other venues in the Eastern Region of the Superior Court of Justice".[6] Likewise, in the Court's view, as "[t]he Eastern Region of the Superior Court has plenty of locations and judges" the trial could have been accommodated sooner.[7] It is submitted that the Court of Appeal fell into error in this regard, and that this error prevented a proper consideration of the extent to which the tolerable period of delay due to limited judicial resources could be adjusted in this case given the temporary additional strain imposed by one large trial.

D. Judicial Notice - General Principles

22. A stringent test of judicial notice was adopted by This Honourable Court in *R. v. Find*:

> Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy….[8]

23. In *R. v. Spence*, This Honourable Court made a distinction between facts that are "social facts" or "legislative facts", and those that may be classified as "adjudicative facts". Social facts are defined as, "…*social science research that is used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case*…" examples of which include the court's acceptance of the "battered wife syndrome" to explain a wife's conduct in *R. v. Lavallee*,[9] the effect of the "feminization of poverty" in *Moge v. Moge*,[10] and systemic factors contributing to the difficulties of aboriginal people in the criminal justice system in *R. v. Gladue*.[11]

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[6] *R. v. Williamson*, [2014] O.J. No. 3828 (C.A.), 314 C.C.C. (3d) 156 (Ont. C.A.), 324 O.A.C. 231 at para. 39

[7] *Ibid.* at para. 42

[8] [2001] 1 S.C.R. 863 at para. 48; Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 4th Edition [Markham: LexisNexis Canada Inc. 2014]

[9] [1990] 1 S.C.R. 852

[10] [1992] 3 S.C.R. 813

[11] [1999] 1 S.C.R. 688

In contrast, "adjudicative facts" deal with the "where, when and why of what the accused is alleged to have done". "Legislative facts" are non-adjudicative facts that relate to legislation or judicial policy. Though the distinction between adjudicative and non-adjudicative facts (which have relevance to the reasoning process and may involve broad considerations of policy) can be useful is determining how strictly the threshold for judicial notice will be applied, with adjudicative facts requiring the most strict application of the threshold, categorizing the fact in issue "does not license the court to put aside the need to examine the trustworthiness of the 'facts' sought to be judicially noticed". Instead, the important consideration is the extent to which the fact of which notice is taken may be dispositive of the issue at hand. The closer the fact approaches the dispositive issue, the more stringently the requirements for notice as adopted in *Find* must be applied.[12]

E. Judicial Notice Respecting Local Resources and Practice in the 11(b) *Charter* Context

24. While it appears on its face that provincial appellate courts have taken apparently disparate positions respecting whether judges are permitted to take judicial notice of resources and practices in making attributions of periods of delay as systemic, a review of the jurisprudence demonstrates that it is the extent to which the application judge can be taken to know about conditions and practices local to his/her own community which determines whether judicial notice of those conditions may be appropriately taken.[13]

25. In *Bennett*,[14] a 1991 decision of the Court of Appeal for Ontario, at issue was whether the judge at trial had erred in entering a stay where 8.5 months of systemic delay had accumulated, an amount the trial judge had concluded was outside the permissible range. In so concluding, the judge had taken judicial notice that the cause of the delay was the shortage of at least one judge in the Provincial Court in the District of Algoma. In finding that the trial judge erred in employing the District of Peel as the comparator to the Algoma district, the Ontario Court of Appeal also held that "…conclusions about systemic delay and its unreasonableness should not rest exclusively on judicial

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[12] [2005] 3 S.C.R. 458 at paras. 53-64

[13] *R. v. Potts* (1982), 36 O.R. (2d) 195 at 203-4, [1982] O.J. No. 3207 (C.A.) at para. 21, leave to appeal refused [1982] 1 S.C.R. xi, [1982] S.C.C.A. No. 301

[14] (1991), 3 O.R. (3d) 193, 64 C.C.C. (3d) 449, [1991] O.J. No. 884 (C.A.) at para.78; affirmed [1992] 1 S.C.R. 168

notice. Judges should be particularly wary of relying on nothing more than their own information and perceptions as to the current state of the criminal justice system and, more significantly, of the causes of this state of affairs".

26. That some evidentiary basis is required before a judge in a given jurisdiction can attribute delay to systemic inadequacies was also held to be the case in two more recent decisions from Newfoundland and British Columbia. In *R. v. J.J.J.*,[15] the Newfoundland and Labrador Court of Appeal found the trial judge had erred where he had determined that the institutional delay in that case was attributable to lack of resources within the Legal Aid system which caused a delay in the preparation of a preliminary hearing transcript. The trial judge had before him the affidavit of one of the Court Administrators outlining the working conditions in Newfoundland and Labrador that prevented quick production of transcripts. However, in the appellate court's view, the trial judge erred in finding that the Crown could have ameliorated the delay had extra or temporary assistance been employed with a view to getting the transcript prepared within a reasonable period of time. The Court held, "The fact is, the record in this appeal does not indicate that there was evidence from which the trial judge could properly draw such conclusions."[16] In *R. v. Jordan*,[17] the appeal which is to be heard together with the case at bar, the British Columbia Court of Appeal likewise held that absent a proper evidentiary foundation, one beyond that of a report suggesting *widespread systemic delay* in a given jurisdiction, "Judges should not be left to assume that delay in setting dates is necessarily institutional delay caused by lack of resources".[18]

27. Other courts have taken the view that a judge may take notice of *local* resources and practices. In *R. v. Kovacs-Tatar*,[19] the Crown at trial had failed to advance any evidence respecting whether the delay in that particular region was unreasonable though it was conceded that the Supreme Court guideline had been exceeded. As there was no evidence called in that regard, the trial

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[15] 2002 NFCA 31; 212 Nfld. & P.E.I.R. 224; [2002] N.J. No. 149; 54 W.C.B. (2d) 307

[16] *Ibid.* at paras, 27-30

[17] 2014 BCCA 241; 116 W.C.B. (2d) 249; [2014] B.C.J. No. 1263; leave to appeal granted November 27, 2014, [2014] S.C.C.A. No. 397

[18] *Ibid.* at para. 38

[19] 73 O.R. (3d) 161, [2004] O.J. No. 4756 (C.A.)

judge measured whether the institutional delay was acceptable solely by reference to his own experience within the jurisdiction. The Court of Appeal held that he was entitled to do so in those circumstances.[20] Likewise, in *R. v. Chenier*, the Court held that where the trial judge's reasons for granting a stay were in large part driven by her determination that the pace of the litigation was inconsistent with her knowledge of practices and procedures in her region, they would not interfere with her granting of a stay for delay.[21] In *R. v. Hoffner*,[22] Hill J. suggests that, "When a trial judge intends to employ his or her knowledge of local conditions, the parties should be alerted to the information in question in order that they may introduce evidence if so advised and make argument addressing the extra-judicial facts."[23]

F. Application to the Case at Bar

28. Having regard to the above-noted jurisprudence, it is submitted that it has become generally accepted, within the s. 11(b) Charter context, that local judges may take judicial notice of local resources and practices within their particular community, but will run afoul of the law in relying on their own perceptions of the state of the justice system generally, or should notice be taken with respect to local practice in some other region beyond their own core community in the absence of an evidentiary basis for such a finding. It is submitted that the justification for the distinction lies in the fact that a judge in a particular region can be taken to be knowledgeable about what takes place in his or her own "court community".[24] For example, in *Hoffner*, Hill J. allows for notice of such information given that "Frequently, as here, the court is the custodian of relevant information pertaining to delay-to-trial conditions". In *Chenier*, the local judge's reasons were driven by "her knowledge" of practice in her region, and in *Kovacs-Tatar*, it was the trial judge's "own experience" upon which he relied and it was held to be acceptable to rely upon. In these cases, the rationale for allowing local judges to take account of conditions or resources in their particular region or

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[20] *Ibid.* at paras. 29-30

[21] 2013 ONCA 775 at para. 4; see also R. v. Paul [1990] O.J. No. 1816 (C.A.)

[22] [2005] O.J. No. 3862 (S.C.J.) at para. 38; see also *Levesque v. Levesque*; *Birmingham v. Birmingham* (1994), 116 D.L.R. (4th) 314 at 324-5, [1994] A.J. No. 452 (Alta. C.A.)

[23] *Ibid.* at paras. 37-8

[24] David M. Paccocio, *The Law of Evidence*, 7th Edition (Toronto: Irwin Law Inc., 2015) at 507-9

courthouse at a given time appears to be that they can be taken to know of such conditions as part of their day-to-day work experience.

29. In the instant case, however, the Court of Appeal had no evidence before it, nor can it be taken to have had any knowledge as to the availability of resources in the particular region at issue at the relevant point in time. There was also no notice to the parties on the appeal that the potential availability of another courthouse within the eastern region was a potentially determinative issue in the appeal and, along with such notice, an invitation to prepare and file fresh evidence in this regard. Given that the reasons for that delay, and its classification as institutional/systemic, were both adjudicative matters and were at least potentially *determinative issues* on the appeal, it is submitted that This Honourable Court's decision in *Spence* makes clear that the stringent test for judicial notice as adopted in *Find* should have been applied.[25] It was not.

30. That there were plenty of courtrooms and judges available in the Eastern region available to hear the Respondent's trial before it could be heard in Kingston is neither so notorious or generally accepted as not to be the subject of debate among reasonable persons, nor is that fact capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy. The appellate court is likewise not a part of the local court community such that it could be taken to be in possession of any knowledge about the availability of other courtrooms and judges at the relevant time. In *R. v. Potts*, Thorson J.A. put the concern in these terms:

> As for the appellant[*sic*] court, the cases also make it clear that it is not its function to adjudicate upon the correctness of a trial court's decision to take judicial notice of some fact or matter known locally, relying solely upon the appellate court's knowledge of (or for that matter, its lack of knowledge of) that which was noticed in the court below, unless of course that same knowledge is in the larger public domain. While no member of an appellate court is obliged to "check at the doorway to the court-house" his own personal knowledge and expertise of the world around him, in the very nature of an appellate court, particularly in a jurisdiction as geographically vast as Ontario, it is highly improbable that each of its members will share personally

[25] See G.D. Nokes, "The Limits of Judicial Notice" (1958) 74 Law Q. Rev. 59. "The scope of judicial notice depends on the nature of the fact to a dispositive issue in the litigation. If the fact is an adjudicative, as opposed to a legislative or social fact, the scope of judicial notice is narrowed. Similarly, if the fact is central to a dispositive issue, resort to judicial notice in restricted"; *R. v. Perkins* (2007), 51 C.R. (6th) 116, [2007] O.J. No. 3246 (C.A.) at para. 38; *R. v. Spence*, *supra* at paras. 60-2.

> in the knowledge that is "common knowledge" in the diverse communities from which it draws its cases.[26]

31. Further, even assuming there had been evidence as to the availability of courtrooms and judges, to find that moving the trial to another city or town within the Eastern region of Ontario would have shortened the length of delay, was speculative in this case. In any event, consideration would have needed to be given, had such an alternative had been a realistic possibility, as to whether this would have resulted in even more cost and disruption to the Respondent. Changing the venue of a criminal trial is a serious matter. As noted by Doherty J.A. writing for the Court of Appeal for Ontario in *R. v. Suzack*, "it is a well-established principle that criminal trials should be held in the venue in which the alleged crime took place".[27] Accordingly, it is submitted that the Court of Appeal for Ontario erred in effectively taking judicial notice in this case.

32. In doing so, the Court removed from consideration the Crown's explanation for the delay in setting the trial date, a factor relevant to the reasonableness of the length of delay in this case. It is submitted that what the Court of Appeal ought to have done is to make some allowance for the temporary additional strain on resources created by the *Shafia* trial. Based upon the local trial co-ordinator's Affidavit, it appears that as a result of this case, other jury trials were being scheduled some three to ten months later than they may otherwise have been. As stated by this Honourable Court in *Morin*,[28]

> Rapidly changing conditions may place a sudden and temporary strain on resources.... Such changing conditions should not result in an amnesty for persons charged in that region. Rather this fact should be taken into account in applying the guideline.

There was no evidence of a chronic shortage of resources in Frontenac County on the record in this case.

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[26] *R. v. Potts*, *supra* at para. 22

[27] *R. v. Suzack* (2000), 141 C.C.C. (3d) 449, [2000] O.J. No. 100 at para. 30; leave to appeal refused (2001), 270 N.R. 193, [2000] S.C.C.A. No. 583

[28] *R. v. Morin*, [1992] 1 S.C.R. 771 at p. 797, para. 52 (QL)

ISSUE 2: DID THE COURT OF APPEAL ERR IN ITS APPROACH TO APPELLATE REVIEW OF THE TRIAL JUDGE'S FINDING CONCERNING THE EFFECT OF THE INFERENCE OF PREJUDICE IN THIS CASE?

A. Introduction of the Issue

33. It is the position of the Appellant that the Court of Appeal for Ontario erred in law by effectively converting a permissive factual (and thus case-specific) inference into a categorical finding of significant prejudice that *must* be made by a trial judge on a s. 11(b) application where the delay in a particular case exceeds a particular "cap" or level. Put another way, the Court of Appeal's judgment amounts to an assertion that there is a cap on institutional delay beyond which prejudice *must* be inferred. This finding on appeal occurred despite the Court of Appeal's affirmation of the trial judge's conclusion that the Respondent, who had provided evidence in support of his claim, suffered insignificant actual prejudice to the interests protected by the s. 11(b) guarantee. The Court of Appeal has arguably misconstrued *R. v. Godin* in judicially declaring that significant prejudice must be inferred where institutional delay exceeds the *Morin* guidelines to some degree. It is submitted that there is a need for clarification and correction on this important issue.

34. In addition, and of particular importance given this Honourable Court's pronouncements concerning the nature of inferred prejudice in the s. 11(b) context, the trial judge was prepared to infer a certain degree of prejudice to the Respondent beyond the minimal prejudice that he had been able to establish, but found that this was not significant on the facts of the case. It is submitted that the Court of Appeal, by finding that the trial judge erred in this regard, failed to apply proper principles of appellate review in essentially substituting its opinion for the considered conclusion of the trial judge.

B. The Law on Inferred Prejudice

35. The s. 11 (b) jurisprudence across Canada has taken a largely consistent course over the past two decades, particularly since the 1992 decision in *Morin*. The experience of trial and appellate courts in engaging in the requisite judicial balancing of interests at the conclusion of the s. 11 (b) "calculus" has generally borne out the wisdom of the observation of McLachlin J. (as she then was) that:

> Where the accused suffers little or no prejudice, it is clear that the consistently important interest of bringing those charged with criminal offences to trial outweighs the accused's and society's interest in obtaining a stay of proceedings on account of delay, because the consequences of the delay are not great.[29]

36. In *R. v. Morin*, Sopinka J. wrote that, "in an individual case, prejudice may be inferred from the length of the delay. The longer the delay the more likely such an inference will be drawn." Further, "in circumstances where prejudice is not inferred and is not otherwise proved, the basis for the enforcement of the individual right is seriously undermined".[30] This passage of the judgment appears in the context of a paragraph addressing the American position that unless an accused asserts his/her right to a speedy trial, it can be assumed that s/he never wanted one.

37. *R. v. Godin* represents an individual case where this Honourable Court held that prejudice was properly inferred by the trial judge, at least in part, from the length of the delay. Applying conventional and settled principles of appellate review, this Court affirmed the findings of the trial judge and restored the stay of proceedings that it had concluded was improperly reversed by the Court of appeal. Cromwell, J., writing for the unanimous Court, affirmed the earlier jurisprudence in writing that prejudice "is concerned with the three interests of the accused that s.11(b) protects: liberty, as regards to pre-trial custody or bail conditions; security of the person, in the sense of being free from the stress and cloud of suspicion that accompanies a criminal charge; and the right to make full answer and defence, insofar as delay can prejudice the ability of the defendant to lead evidence, cross-examine witnesses, or otherwise raise a defence".[31] Importantly, the Court noted that the trial judge had found that:

- the accused had been subject to "fairly strict" bail conditions over the 30 months;
- the delay exceeded the *Morin* guidelines by over a year;
- the case was a straightforward one;

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[29] *R. v. Morin*, [1992] 1 S.C.R. 771 at p. 812 (para. 91 S.C.J.). See, for example, *R. v. Seegmiller* (2004), 191 C.C.C. (3d) 347, [2004] O.J. No. 5004 (C.A.) at para. 25; leave to appeal refused, [2005] S.C.C.A. No. 64

[30] *R. v. Morin*, [1992] 1 S.C.R. 771 at para. 61

[31] *R. v. Godin*, [2009] 2 S.C.R. 3 at para. 30

- the delay was entirely attributable to the Crown and no explanation for the delay had been provided by the Crown;
- defence counsel had tried to move the case forward faster; and
- there was evidence before the trial court of risk of prejudice to Godin's defence.[32]

Cromwell J. likewise wrote that "proof of actual prejudice to the right to make full answer and defence is not invariably required to establish a section 11(b) violation. This is only one of three varieties of prejudice, *all of which must be considered together with the length of the delay and the explanations for why it occurred* [emphasis added]."[33] Disagreeing with the Court of Appeal's conclusion that the evidence of prejudice the right to make full answer and defence was too speculative to be considered, Cromwell J. found that, "The length of the delay and the evidence supported the trial judge's inference that some prejudice to the appellant resulted from the delay."[34]

C. Application of Principles to the Present Case

38. *R. v. Steele* and *R. v. Ralph*, and now the decision under appeal, are all recent Ontario decisions wherein the Court of Appeal has begun to use the decision in Godin as support for the proposition that significant prejudice must be inferred where there is institutional delay beyond the *Morin* guidelines. In *Steele*, Rosenberg J.A., relying on *Godin*, held that inferred prejudice "must" be given substantial weight where the institutional delay was 26 months. Significantly, he found that this was the necessary result even where the trial judge's finding that there was no actual prejudice to the accused was fully available on the record.[35] In this case, it must be noted that as found by the Court of Appeal, the trial judge, unlike in the present case, had failed entirely to consider the question of inferred prejudice.

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[32] *Ibid.*, at paras. 2; 5; 29-37

[33] *Ibid.*, at para. 38

[34] *Ibid.*, at paras. 29, 39

[35] *R. v. Steele*, [2012] O.J. No. 2545 at paras. 27-36

39. In *Ralph*, Rosenberg J. held that even where the accused called no evidence of actual prejudice, *Godin* stands for the proposition that "where an accused has to wait almost three years for trial", even where the case is relatively complex, "it is proper to infer significant prejudice".[36]

40. Building on the cases noted above, the Court of Appeal in the instant case held that because the length of delay was similar, the necessary result was that "it must be inferred that the appellant had experienced significant prejudice". This was so notwithstanding that the accused had not established any actual prejudice and there was no prejudice to his right to make full answer and defence.

Appellant's Record, Vol. I: Reasons of the Court of Appeal, pp. 184-189, paras. 46-57

41. The Court of Appeal, in the instant case and in *Steele* and *Ralph*, have misinterpreted the Reasons in *Godin*, and elevate what *Godin* makes clear is a possible inference to be drawn, having regard to the whole of the evidence on the motion (an inference which "may" be drawn having regard to the circumstances of an individual case) to a requirement so long as the institutional delay amounts to 8 to 10 months beyond the 18-month total allowed by *Morin* ("significant prejudice must be inferred"). In doing so, important factors upon which Cromwell J. relied in making the inference of actual prejudice are ignored. In the instant case, in contrast to the factual determinations made in *Godin*, a finding was made that there was no actual prejudice to the accused arising from the delay, the entirety of the delay was not wholly attributable to the Crown, and the Crown had offered an explanation for some of the delay - a temporary strain in resources due to a complex trial being held. The Court of Appeal in the instant case takes the *Godin* decision to stand for the proposition that notwithstanding the absence of any actual prejudice, the complexity of the case, or explanations for delay, significant prejudice must be inferred. This is entirely out of line with the holding in Morin that the 18 month guideline is not a strict cut-off, temporary strains on resources are to be expected and are tolerable, and that deviations of several months can be justified depending on the reasons for the delay.

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[36] *R. v. Ralph*, [2014] O.J. No. 13 at para. 16

D. Appellate Review of Findings of Prejudice

42. On the subject of appellate review of determinations of whether a deprivation of the right to be tried within a reasonable time has occurred in a given case, provincial appellate courts[37] are generally in agreement on the applicable principles, as follows:

(i) The ultimate decision as to whether the delay is unreasonable is reviewed on a standard of correctness;

(ii) With respect to a judge's analysis of the *Morin* factors, including the characterization and allocation of various periods of time, the standard of appellate review is also one of correctness; and

(iii) A judge's underlying findings of fact are reviewed on a standard of palpable and overriding error.

43. Particularly on the subject of prejudice to an accused person flowing from delay in a particular case, it has been recognized that a judge's finding with respect to inferred and actual prejudice in the s. 11 (b) analysis is a finding of fact, and thus reviewable on the basis of palpable and overriding error. Appellate courts have stated this directly,[38] and this Honourable Court, most recently in *Godin*, *supra*, has implied as much. It is submitted that this is completely sensible, given the highly case-specific nature of the determination of whether, and to what extent, proof of actual prejudice has been made out, as well as the extent to which prejudice is to be inferred from the nature of the delay in a given case. It is, after all, inherent in the nature of inferred prejudice, that its existence in a particular case is a matter of drawing an "inference" from other facts such as the length of the delay. It is submitted that this reasoning is consistent with the conclusion of Sopinka J. in *Morin* that, "Accordingly, in an individual case, prejudice may be inferred from the length of the delay. The longer the delay the more likely that such an inference will be drawn."[39]

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[37] *R. v. Schertzer*, 2009 ONCA 742 at para. 71; R. v. Horner, 2012 BCCA 7 at para. 70; *Regina v. Pidskalny*, 2013 SKCA 74 at paras. 41-44; R. v. C.D., 2014 ABCA 333 at paras. 26-28

[38] *R. v. Godin*, *supra*, at paras. 29-39; *Regina v. Thompson* (sub nom. Guilbride), 2006 BCCA 392 at paras. 83-84, cired in *R. v. Jordan*, 2014 BCCA 241 at para 245; appeal to SCC pending

[39] *R. v. Morin*, *supra*, at p. 801, par. 61 (QL)

44. It is submitted that, applying this standard of review, it is plain that the trial judge made no palpable and overriding error in his findings of fact in relation to both inferred and actual prejudice, and it was not open to the Court of Appeal to find error on his part. The trial judge's conclusions that the delay in this case resulted in no significant prejudice to the Respondent, actual or inferred, in relation to the three groups of personal interests that s. 11(b) serves to protect, were and are entitled to deference.

E. Even Assuming That the Standard of Review for Weighing Inferred Prejudice is Correctness, the Court of Appeal Erred

45. As this Honourable Court has made plain in the jurisprudence commencing with *Morin*, prejudice flowing from delay may be *inferred*; it is not *conclusively presumed*. The Court of Appeal in this case has erroneously elevated it to a matter for judicial notice by comparison with the delay in other decided cases, even when there is evidence which *disproves* substantial prejudice in a particular case - such as this one, where the trial judge found no actual prejudice; a finding that the Court of Appeal itself affirmed as reasonable It is submitted that it smacks of artificiality to conclude, as the Court of Appeal effectively did here, to say that the trial judge was wrong in failing to infer more significant prejudice flowing from trial delay than he actually found to exist. This is particularly the case where, as here, the trial judge adverted to all three forms of prejudice to the interests of an accused person that s. 11(b) is designed to protect. Surely, if a trial judge finds that the accused did not, in fact, suffer serious personal hardship as a result of delay in getting to trial, then it is open to him/her to place minimal weight on inferred prejudice, or to decline to draw the inference at all.

F. The Assessment of Prejudice to the Respondent

46. The Court of Appeal re-allocated, in response to the Crown's submission, two months of the delay between committal and the initial date for the Superior Court pre-trial as being caused by the defence. However, having done so, the Court did not ask itself what significance this defence-created delay had. There was evidence from the trial co-ordinator that, had this case been spoken to in an earlier Superior Court Assignment Court (on August 27, 2010 instead of October 22), it could potentially have been scheduled for a jury trial as early as January, 2011 instead of in December of

that year. As has been held by this Honourable Court, delays caused by the conduct of the defence, though falling short of waiver, can certainly be considered in assessing claims that the defence has been prejudiced by the overall delay.

CONCLUSION: SHOULD THE PROCEEDINGS HAVE BEEN STAYED IN THIS CASE?

47. The Respondent in this case was convicted by a jury of buggery, gross indecency, and indecent assault. He was sentenced to a total of four years' imprisonment for offences against a boy he was tasked to mentor as part of a Big-Brother-style outreach program. The Court of Appeal deemed the offences, "especially despicable". In staying the proceedings, the Court of Appeal ran afoul of the standard of appellate review with respect to findings of prejudice, substituting its own view that significant prejudice was to have been inferred, and notwithstanding the trial judge's finding that the Respondent had experienced none. In doing so, the Court of Appeal likewise transformed a permissible inference, that prejudice *could* be inferred from a lengthy delay, into a mandatory finding so long as a certain amount of time had passed - a cap on delay beyond which a stay must result notwithstanding the reasons for the delay. The Court also took judicial notice of the availability of resources of which it could not be taken to have any knowledge, and without any notice to the parties in that regard. Finally, in properly reallocating a portion of the time as attributable to the defence, the Court of Appeal failed to go further and consider the impact of that finding in the overall balancing of factors and of the individual and societal interests at stake.

48. Accordingly, the Appellant submits that a proper balancing of the interests, substantially for the reasons given by the trial judge, compels a conclusion that the proceedings should not have been stayed. The Appellant requests that the convictions and sentence imposed at trial be restored.

PART IV
SUBMISSIONS ON COSTS

49. The Appellant makes no submissions as to costs.

PART V
ORDER REQUESTED

50. It is respectfully submitted that the appeal should be allowed, that the stay of proceedings be set aside, and that the convictions and sentence imposed at trial be restored.

ALL OF WHICH is respectfully submitted this 12th day of May, 2014 by:

Eric Siebenmorgen
Counsel for the Attorney General for Ontario

Eric Siebenmorgen for
Tracy Kozlowski
Counsel for the Attorney General for Ontario

PART VI
AUTHORITIES CITED

Para(s)

PART VII
STATUTORY PROVISIONS

None.