File No. 36068

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)

BETWEEN:

BARRETT RICHARD JORDAN

APPELLANT

-and-

HER MAJESTY THE QUEEN

RESPONDENT

- and -

ATTORNEY GENERAL OF ALBERTA,
CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), and
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

INTERVENERS

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PART I - STATEMENT OF FACTS

A. Overview

1. The Crown Respondent now concedes that the trial judge erred in relying upon *R. v. Ghavami*, 2010 BCCA 126 in his treatment of institutional delay. The Crown further concedes that the relied upon passage from *Ghavami*, a five year old decision that has been widely cited across the country, is wrong (Respondent's Factum ("R.F."), paras. 4, 60-64, 94). In order to defend the ultimate decision to deny a stay of proceedings, however, the Crown submits that the trial judge also erred in his various characterizations of delay.

2. The Crown now alleges that the trial judge was not just "unduly favourable" to the Appellant in his characterizations of the delay, but that he actually "erred" in both fact and law. The Crown suggests that the trial judge made repeated palpable and overriding errors in his assessment of the facts including: whether the Crown was responsible for the underestimate of time required for the preliminary inquiry, whether the appellant attempted to use delay as an "offensive weapon", and whether counsel would have been ready for the preliminary inquiry and trial within the timeframes alluded to by the trial judge. In so arguing, the Crown changes some positions it took at trial, including resiling from one that the trial judge agreed with in making a finding of fact that is now suggested to be in error.

3. Relying on *R. v. Lahiry*, 2011 ONSC 6780, the Crown also urges upon this Court a new and controversial analytical framework for s. 11(b) that is inconsistent with both the practical realities of day-to-day court operations and the policy rationales underpinning this *Charter* right. Using this framework, the Crown argues that out of the 49 months it took to get this "very straightforward" case to trial, only 5 (or perhaps 8) months can be attributed to Crown or institutional delay, representing a seven-fold decrease from the trial judge's findings at trial.

4. Pursuant to Rules 29(4) and 35(4) of the *Rules of the Supreme Court of Canada*, the Appellant files this factum in response.

B. The Facts

5. The relevant facts are summarized in paragraphs 6-76 of the Appellant's main factum.

PART II - STATEMENT OF QUESTION IN ISSUE

6. The new issue raised by the Respondent is: did the trial judge err by incorrectly characterizing the periods of delay in this case? The Appellant submits that the trial judge did not commit palpable and overriding errors in his analysis of the facts, and that he properly characterized the delay in this case.

PART III – STATEMENT OF ARGUMENT

A. Legal Principles – The Approach to Characterizing Delay: *R. v. Morin*

i. The Analytical Framework

7. The analytical framework for determining whether there has been a violation of s. 11(b) of the *Charter* was set out in *R. v. Morin*, [1992] 1 S.C.R. 771 at 787-803. The factors to be considered are: the length of the delay; waiver of time periods; the reasons for the delay; and prejudice to the accused.

8. The first factor, the overall length of the delay, requires the court to examine the period spanning from the laying of the charge to the end of the trial. If the length of the delay warrants an inquiry into its reasonableness, the court should then consider whether the accused has waived, in whole or in part, his or her right to complain of delay. Any waived period is deducted from the overall time under consideration. The court then considers the reasons for any remaining delay and the resulting prejudice to the accused. Finally, the court must determine whether the length of the delay is unreasonable in light of these four factors. The general approach is not "a mathematical or administrative formula" but instead a "judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay" (*Morin*, at 787).

9. In *R. v. Godin*, 2009 SCC 26 at para. 18, Justice Cromwell for the Court summarized the s. 11(b) analysis as follows: "Whether delay has been unreasonable is assessed by looking at the length of the delay, less any periods that have been waived by the defence, and then by taking

into account the reasons for the delay, the prejudice to the accused, and the interests that s. 11(b) seeks to protect."

ii. Characterizing the Delay

10. The Court in *Morin* identified five categories of delay.

Inherent Time Requirements (*Morin*, at 791-792)

11. First, all offences have certain inherent time requirements which inevitably lead to delay. Cases must be prepared, and the more complicated a case, the longer it will take for counsel to prepare for trial. Additionally, each case has "intake requirements", such as retention of counsel, bail hearings, police and administration paperwork, and disclosure. The inherent time requirements are to be assessed on a case-by-case basis and the amount of time that should be allocated to this category "is well within the field of expertise of trial judges".

Actions of the Accused (*Morin*, at 793)

12. Second, actions of the accused falling short of waiver may also be relevant to assessing the reasonableness of the delay. For example, change of venue motions, attacks on search warrants, and adjournments which do not amount to waiver may be included in this category.

Actions of the Crown (*Morin*, at 794)

13. Third, some delay may be attributed to actions of the Crown. Such actions include adjournments requested by the Crown, failure or delay in disclosure, or change of venue motions.

Institutional Delay (*Morin*, at 794-800)

14. The fourth and most common source of delay is institutional delay. In *Morin*, Sopinka J. defined institutional delay as "the period that starts to run when the parties are ready for trial but the system cannot accommodate them" (*Morin*, at 794-795). In a world of scarce resources, the state does not have unlimited funds and some delay is inevitable. However, the government has a constitutional obligation to commit sufficient resources to prevent unreasonable delay and there is a point in time at which the court will no longer tolerate institutional delay. In *Morin*, Sopinka

J. set out administrative guidelines for acceptable institutional delay. He suggested a period in the range of 8 to 10 months in provincial courts. With respect to institutional delay after committal for trial, Sopinka J. adopted the range of 6 to 8 months established in *R. v. Askov*, [1990] 2 S.C.R. 1199.

Other Reasons for the Delay (*Morin*, at 800)

15. Finally, there may be other reasons for delay, such as actions of trial judges. In most cases, other types of delay will weigh against the Crown.

iii. Burden of Proof

16. The accused has the ultimate or legal burden of proving a violation of s. 11(b). However, a secondary or evidentiary burden shifts to the Crown to explain or justify the delay (*Morin*, at 788-789). In *Askov*, Cory J. explained that it is the duty of the Crown to bring the accused to trial and to provide facilities and staff to ensure that the accused is tried within a reasonable time. It is therefore incumbent upon the Crown to show that the institutional delay is justifiable (*Askov*, at 1225-1227). The Crown also bears the burden of proving whether any delay should be attributed to actions of the accused (*Askov*, at 1228). Finally, the onus rests upon the Crown to establish on a balance of probabilities any actions of the accused which are alleged to constitute waiver of his or her s. 11(b) rights (*Askov*, at 1229).

iv. Standard of Review

17. On appeal, the trial judge's analysis of the *Morin* factors, including the characterization and allocation of various periods of time, are reviewed on a correctness standard. However, the judge's underlying findings of fact are reviewed on a standard of palpable and overriding error (*R. v. Horner*, 2012 BCCA 7 at para. 70).

B. The Ontario Approach to Delay

18. After *Morin*, it was unclear whether the time period to be assessed against the standard of reasonableness was the entire time from the laying of the charge to the end of the trial or simply

the time beyond which the trial should have concluded (Gerry Ferguson and Steve Coughlan, *Annual Review of Criminal Law 2006* (Toronto: Carswell, 2007) at 146-150; *R. v. Sikorski*, 2013 ONSC 1714 at para. 84). Jurisprudence in Ontario suggests the latter. The Ontario Court of Appeal has made it clear that any delay characterized as part of the inherent time requirements of the case should be subtracted from the total length of delay before assessing the reasonableness of the delay.

19. In *R. v. G.(C.R.)* (2005), 206 C.C.C. (3d) 262 (Ont. C.A.), the trial judge considered a 23 month period from the time the accused was charged to the time of trial. The case was in provincial court for 19.25 months. The trial judge characterized 7.25 of these months as the "intake period". The trial judge held that the delay of over 19 months in provincial court was well outside the *Morin* guidelines and stayed the proceedings. The Ontario Court of Appeal set aside the stay of proceedings. The Court held that the trial judge erred in failing to "deduct" the 7.25 months of "intake" or "inherent" delay from the overall period in provincial court. The Court found that once the inherent delay was "deducted", the institutional delay was only 12 months (at paras. 15-19).

20. The Court in *G.(C.R.)* held that the trial judge further erred by failing to characterize some of the delay arising from the continuation of the preliminary inquiry as an inherent time requirement. Six weeks of inherent time requirements should have been deducted from the overall time period, resulting in 10.5 months of institutional delay – only slightly more than the upper end of the *Morin* guideline for provincial courts. The Court concluded that this delay was not unreasonable.

21. The approach set out in *G.(C.R.)* has been adopted in subsequent cases, and the intake or inherent requirements of a case are now considered "neutral" and are effectively "deleted from the global 'time' subject to s. 11(b) 'reasonable'-ness scrutiny" (*R. v. Duszak*, 2013 ONCJ 586 at para. 20). In this way, long periods of delay are shrunk to fit the "reasonableness" standard.

22. In *R. v. Lahiry*, 2011 ONSC 6780, Code J. expanded the inherent time requirements of criminal cases. He held that it is an error to characterize the entire period from the set date appearance to the trial date or preliminary inquiry date as institutional delay. As institutional

delay is defined as the period that starts to run when the parties are ready for trial but the system cannot accommodate them, some time must be deducted to account for the fact that counsel must prepare and clear their calendars when taking on a new case. The time necessary to accommodate such preparation and availability is generally considered part of the case's "inherent time requirements". Code J. explained:

> [34] Finally there is no place for fictions when seeking to prove *Charter* violations. It is rarely true that counsel is immediately available for trial, when setting a date. Whenever counsel take on a new case, they complete various preliminary steps during the intake period. Once they have taken these steps and are ready to set a date for trial, they need to set aside sufficient time in their calendars to prepare the new case for trial and to then conduct the trial. If the case is lengthy and complex, or if counsel are very busy, it may be some considerable period of time before counsel are ready for trial. To use a simple hypothetical, if counsel has no time in his/her calendar to prepare a new case for trial and to then try it until ten months in the future, and the earliest date that the court has available for trial is 12 months in the future, then systemic congestion in the court is the cause of only two months of delay. The other ten months is delay that the accused needs, for entirely beneficial reasons, in order to allow his/her counsel of choice to prepare the case for trial and to accommodate it in an otherwise busy calendar. It is good and necessary delay that would have been occurred in any event, even if the court had earlier available dates. It is a fiction to characterize this kind of useful delay as unwarranted or unreasonable or prejudicial. (Emphasis added.)

23. In order to create a proper record for unreasonable delay applications, Code J. encouraged counsel to state their earliest availability for trial or the preliminary hearing on the record in set date court (*Lahiry*, at para. 33).

24. Subsequent Ontario Court of Appeal cases have endorsed the *Lahiry* approach to varying degrees (See, for example: *R. v. Tran*, 2012 ONCA 18 at paras. 30-32; *R. v. Steele*, 2012 ONCA 383 at paras. 19-20; *R. v. Williamson*, 2014 ONCA 598 at paras. 21, 36-37). As a result, Ontario courts now deduct a certain amount of "inherent" time after a hearing date is set to account for the time defence counsel needs to become ready and available, regardless of whether the court was available or not. In the absence of evidence of when defence counsel was actually ready and available to conduct the trial or preliminary inquiry, the trial judge can infer a reasonable amount of preparation time (*Lahiry*, at paras. 60, 118; *Tran*, at paras. 38-40; *Williamson*, at para. 37; *Duszak*, at para. 55).

25. Ultimately, the effect of the *Lahiry* approach is to further expand the length of permissible delay, and to shrink the period of delay that is scrutinized within the s. 11(b) reasonableness analysis.

C. This Court Should Reject the Ontario Approach

26. The Appellant respectfully submits that this Court should reject the Ontario approach to the s. 11(b) analysis.

i. Ontario's "Subtraction Innovation"

27. Subtracting inherent delay from the time period under consideration in the reasonableness analysis is inconsistent with this Court's jurisprudence. This Court has consistently held that judges should assess whether the entire period of delay is reasonable, minus any periods that have been waived by the defence (*Godin*, at para. 18). The Court has never directed trial judges to subtract the inherent time requirements from the overall delay. In other words, when the Court has used the term "unreasonable delay", it has referred to the total time a case takes to get to trial – not the period of time that exceeds that which the trial ought to take (see: Stephen Coughlan, "Annotation to *R. v. Lahiry*" (2012) 90 C.R. (6th) 90).

28. For example, in *Askov*, Cory J. described the various categories of delay. With respect to delay attributable to the Crown, Cory J. held that this category "will comprise all of the potential factors causing delay which flow from the nature of the case, the conduct of the Crown, including officers of the state, and the inherent time requirements of the case." Cory J. further held that "[i]t is under this heading that the complexity of the case should be taken into account" (*Askov*, at 1223, emphasis added). This was a clear direction that the intake or inherent delay related to any given case should not be subtracted from the overall length of delay.

29. In *Morin*, Sopinka J. also discussed the various reasons for delay, including the inherent time requirements of a case. Sopinka J. found that the inherent time requirements in that case amounted to two months, which was in addition to twelve months of institutional delay. However, when considering the reasonableness of the overall delay, Sopinka J. did not appear to deduct the inherent time requirements from his analysis (*Morin*, at 804-808). Indeed, the Court

found that the delay exceeded what would have been reasonable in the circumstances, but declined to enter a stay of proceedings because "the accused was content with the pace with which things were proceeding" and therefore suffered no prejudice (*Morin*, at 807-808). The Court did not justify the delay by subtracting the intake or inherent delay.

30. Finally, in *Godin*, the Court held that a 30 month delay from the time the accused was charged to the trial date was unreasonable, and restored the trial judge's stay of proceedings. In assessing the reasonableness of the delay, the Court did not subtract the inherent time requirements of the case. The Court considered the entire 30 month period, and held that it exceeded the *Morin* guidelines by at least one year (*Godin*, at paras. 5, 31, 39). Clearly, then, the reasonableness analysis is meant to apply to the entire period of time, subtracting only those periods waived by the accused (see also: *R. v. Conway*, [1989] 1 S.C.R. 1659 at 1674).

31. Clayton Ruby has also commented on Ontario's "subtraction innovation" and has pointed out that the *Morin* guidelines were meant to cover, at least to some degree, the time it takes to get a case to trial (see: Clayton Ruby, "Trial Within a Reasonable Time Under Section 11(b): the Ontario Court of Appeal Disconnects from the Supreme Court" (2013) 2 C.R. (7th) 91). Ruby argues that subtracting inherent delay from the total delay results in double-counting: the inherent delay is counted once to expand the guidelines to include the requirements of the case, and then counted again by deducting them from the actual delay that occurred. As a result of this double-counting, far longer delays are tolerated than what *Morin* originally contemplated.

32. This appeal provides this Court with the opportunity to reaffirm that the entire period of delay, minus only the time waived by the accused, should be subjected to the reasonableness inquiry under s. 11(b). "Delay" means the time it takes for a case to get to trial, including the inherent time requirements of the case.

ii. The Lahiry Approach to Defence Availability

33. Following *Lahiry*, Ontario courts have taken the "subtraction innovation" one step further. Now, if defence counsel is otherwise unavailable, the entire period of time between the setting of a hearing date and the actual hearing is characterized as "inherent", even if the Court is

also unavailable. This time period is then deducted in the analysis, allowing for even more delay that was previously (and the Appellant argues properly) considered institutional delay. The Appellant respectfully submits that this approach is problematic for several reasons.

34. First, the *Lahiry* approach does not reflect the practical realities of trial courts, and would otherwise encourage artificial submissions about counsel's availability in circumstances where it would not matter. For example, in some jurisdictions, the scheduling of hearing dates is not recorded, creating an impediment to counsel recording their availability when the relevant information is known.[1] In other jurisdictions where the scheduling of hearing dates is recorded, the *Lahiry* approach would only encourage counsel to tediously put their earliest available dates on the record – even though the court would not be available. Counsel would provide details of their schedule and explain how long it will take to prepare for the hearing, knowing full well that it would not occur during the timeframe under discussion. Invaluable court time would be taken up by counsel explaining the various dates they have available over the upcoming weeks and months, all to artificially "paper the record" in light of *Lahiry*. This additional and completely unnecessary step would unquestionably lead to further congestion in set date court, and lead to undesirable "grandstanding" by counsel (*R. v. Taylor*, 2010 NLCA 26 at para. 30).

35. Second, the *Lahiry* approach penalizes defence counsel for not being completely available at any time that the court might be able to accommodate a preliminary hearing or a trial. This is inconsistent with Justice Cromwell's conclusion in *Godin* that it is incorrect to hold defence counsel's reasonable unavailability against the accused: "Scheduling requires reasonable availability and reasonable cooperation; it does not, for s. 11(b) purposes, require defence counsel to hold themselves in a state of perpetual availability" (*Godin*, at para. 23). Further, as recognized by Justice Nordheimer in *Sikorski*, at paras. 88-91, counsel are often unavailable for earlier dates because they know that the courts are unavailable:

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[1] In British Columbia, for example, the trial or preliminary inquiry dates in provincial court are set by the "trial scheduler", rather than the judge at the arraignment hearing (*Provincial Court of British Columbia Criminal Caseflow Management Rules*, SI/99-104, Rule 8(6)). Proceedings before the trial scheduler are not recorded (*R. v. Davidson*, 2007 BCPC 207 at para. 10).

> Put simply, counsel are not going to refrain from scheduling other matters into those periods (considering all of the consequences including, obviously, financial ones) in order just to gain a theoretical (and costly) advantage in the s. 11(b) analysis. Practically speaking, they are going to schedule other matters into those time periods because of their certain knowledge that dates for preliminary hearings or for trials are not available during those time periods.
>
> *Sikorski*, at para. 89; see also: *R. v. Santucci*, 2014 ONCJ 627.

36. Third, the *Lahiry* approach is simply illogical. If no court time is available for several months, then the time required by defence counsel to become available is irrelevant. The delay will be several months, regardless of when counsel is ready. Justice Green of the Ontario Court of Justice put it this way:

> There is, admittedly, a certain legerdemain, if not outright artifice, in subtracting defence counsel's trial readiness from a period of systemic delay that, under almost any circumstances, would not impact the length of the interval between a defendant's trial and the date on which it was set. Further, from the defendant's perspective and, respecting fair trial concerns, that of the public as well, any prejudicial effect on the interests protected by s. 11(b) is neither suspended nor mitigated during the period nominally assigned to defence counsel's preparation and availability.
>
> *Duszak*, at para. 56.

37. Finally, and perhaps most significantly, the *Lahiry* analysis masks the pervasive and serious problem of institutional delay. The government has a constitutional obligation to commit sufficient resources to prevent unreasonable delay, and there is a point at which institutional delay becomes intolerable (*Morin*, at 795). As noted above, defence counsel's availability does not generally affect the amount of time it takes to get a case to trial.[2] Artificially shortening the period of institutional delay by carving out a period notionally assigned to defence counsel's availability provides a distorted picture of the justice system. As Nordheimer J. explained in *Sikorski*:

> [92] The other reason that the *Lahiry* analysis is troublesome is that it serves to mask the problem with the current availability of dates in both courts. The fact is that trial dates are not generally available in this court for nine to twelve months after the case has been judicially pre-tried and is ready for trial. I understand that there are

[2] Of course, if it actually does, the existing s. 11(b) framework can already take such a circumstance into account.

> similar, if not greater, delays in the Ontario Court of Justice. These delays are, of course, directly the result of the level of resources that are directed to both courts.
>
> ...
>
> [95] ... As I have said, one effect of the *Lahiry* form of analysis is that it, in essence, deflects a portion, often a significant portion, of the cause for delays away from the courts as a public institution onto the shoulders of defence counsel. The result is that the public is provided with a distorted picture of the causes of delay. This distortion, in turn, means that the public cannot properly evaluate the timeliness of the court system as a public institution funded by the taxpayers and direct proper criticism, if criticism is warranted, to the true source of the problem. Public criticism is, of course, an invaluable tool in shaping government action and government priorities. ...
>
> ...
>
> [97] ... Indeed, I would suggest that if the true availability of dates within the court system is not clearly identified and exposed, and given its proper place among the different causes of delay, then the consideration of the effect of institutional delay under the s. 11(b) analysis risks becoming meaningless. All institutional delay becomes obscured by other considerations. The illumination of the causes for delay never shines on the failings within the justice system to provide timely dates. ...

38. In light of these problems, the Appellant submits that this Court should reject the *Lahiry* approach. The full period of time for which the courts are unable to provide dates for preliminary hearings or for trials should be recognized for what it is – institutional delay. In the alternative, only very modest amounts of inherent delay should be reallocated from what would otherwise be institutional delay to account for counsel's realistic preparation time (*Santucci*, at para. 47).

D. Application of the Law to Facts of this Case

39. In this case, the trial judge found 10.5 months of the delay could be attributed to the inherent requirements of the case. The judge deducted this amount from the total delay of 45 months and then considered whether the remaining 34.5 months of delay (characterized as Crown and institutional delay) was reasonable in light of all the factors. The Respondent now argues that the trial judge mischaracterized much of the delay. The Respondent says that most of the delay is properly characterized as inherent delay, and when that time is subtracted, there is only five, or perhaps eight months of Crown/institutional delay – well within the *Morin* guidelines.

40. As discussed above, the Appellant submits that this is not the correct approach. Only periods of waiver are deducted from the overall delay. The entire length of the delay – 45 months once waiver is deducted – should be assessed against the reasonableness standard from *Morin*.

41. The Appellant further submits that the trial judge did not mischaracterize any of the delay.

i. Charge to Arraignment Hearing (December 18, 2008 – May 26, 2009)

42. The Respondent suggests that the trial judge mischaracterized one month of this period as institutional delay. The Respondent alleges that in so doing the trial judge committed a "fundamental error in principle" by failing to take into account "what actually took place" during this time. The Crown suggests that this one month should be reallocated as defence or neutral delay on the basis of counsel's consent to various adjournments in this timeframe (R.F., paras. 66-71).

43. The Respondent's submissions incorrectly calculate this period of time, and impart a finding to the trial judge that he did not make. In fact, when properly analyzed, the Crown's submissions amount to a trivial complaint regarding an eight day discrepancy in the trial judge's mathematical calculations.

44. The trial judge referred to this period as "six months (roughly)" and summarized the Crown's submissions that it should be considered "intake period". The trial judge disagreed with the Crown and found that five months could be properly characterized as inherent delay (Appellant's Record ("A.R."), Vol. I, pp. 24-25 at paras. 64(a) and 69).

45. In actuality, December 18, 2008 to May 26, 2009 comprised five months and eight days. Therefore, the trial judge's estimate of the "intake period" was off by eight days when compared against the actual series of court appearances relied upon by the Crown.[3]

46. The trial judge went on to find an additional 5.5 months of inherent delay elsewhere in the case. Then later, when calculating the length of institutional delay, the trial judge did not allocate

[3] It should be noted that the Appellant agreed that the period between December 18, 2008 and May 26, 2009 should be considered "inherent": A.R., Vol. III, p. 32, ll. 6-25; p. 40, ll. 1-4; p. 111, ll. 26-39; p. 116, ll. 10-14. As such, contrary to the Crown's submissions, the Appellant did not try to use delay he consented to in support of his s. 11(b) claim (R.F., para. 69).

time in the same way (i.e. by assigning particular months as institutional delay). Instead, he subtracted the 10.5 months of inherent delay from the time left over after his analysis (A.R., Vol. I, pp. 31-33 at paras. 98-103, 107). As such, the trial judge never allocated one month of time from between December 18, 2008 to May 26, 2009 as institutional delay. Indeed, once the trial judge's various allocations are compared to the exact number of days at issue, he appears to have allocated eight days to institutional delay more than he should have. As the trial judge later indicated, "there is of course some rounding or approximation in these assessments" (A.R., Vol. I, p. 43 at para. 151).

47. The trial judge's mathematical error can hardly be considered a "fundamental error in principle". Contrary to the Crown's submissions, it is a trivial mistake about eight (8) days in the context of a case that took 49 months to come to trial. This is the very kind of minute analysis discouraged by the Ontario Court of Appeal in *Tran* at para. 48.

ii. Arraignment Hearing to Preliminary Inquiry (May 26, 2009 – May 19, 2010)

48. Relying on *Lahiry*, the trial judge acknowledged that some of the time between the arraignment hearing and the preliminary hearing should be attributed to the inherent time requirements of the case to account for defence counsel's preparation and coordination of schedules. In the absence of evidence as to when defence counsel would have been prepared to proceed with the preliminary inquiry, the trial judge held that two months was a reasonable estimate. The trial judge concluded that the remaining time amounted to institutional delay (A.R., Vol. I, pp. 18, 22 at paras. 41, 71-72). It was open to the trial judge to make such a finding in the context of this factual record (*Lahiry*, at paras. 60, 118; *Tran*, at paras. 38-40; *Williamson*, at para. 37; *Duszak*, at para. 55).

49. As discussed above, the Appellant's primary position is that the *Lahiry* approach is incorrect, and the entire period between the arraignment hearing and the date for the preliminary inquiry should be attributed to institutional delay.

50. In any event, it was the Crown who submitted at trial that this period should have been characterized as two months inherent delay and ten months "systematic" delay, a position it now

appears to resile from (A.R., Vol. I, p. 20 at para. 64(b); Vol. III, p. 95, ll. 10-23, p. 96, ll. 1-16; p. 116, ll. 16-32).

51. The Respondent now argues that the trial judge committed palpable and overriding error in agreeing with the Crown's submissions. The Respondent submits that this period ought to have been characterized as entirely waiver or defence caused delay. The Crown points to no evidence to satisfy its burden of establishing these alleged causes of delay or the trial judge's alleged error. The Crown merely asserts that the "lens of experience" indicates that counsel are often unavailable for many months, citing the availability of counsel in two other unrelated cases as proof of this broad proposition (R.F., paras. 72-78).

52. The Respondent also indicates that it would have been "easy for [defence counsel] to put their availability on the record at some point", but failed to do so. Of course, it was equally as easy for the Crown to put on the record that defence calendars were the cause of this delay, but it did not do so. The Crown now seeks to rely on this absence of evidence to meet its burden to prove waiver and/or defence caused delay (R.F., paras. 76-77).

53. In *Morin*, the Court held that the amount of time that should be allocated to the inherent time requirements of a case is "well within the field of expertise of trial judges" (*Morin*, at 792). In this case, the trial judge recognized that the inherent time requirements of a case flow directly from the complexity of the case and the time required for preparation. The judge noted that the case against the Appellant was not complex, but that there were several defendants and some significant inherent delays would be inevitably encountered by the need to coordinate everyone's calendars (A.R., Vol. I, pp. 19-20 at paras. 62, 65). The trial judge accepted the Appellant's submission that, given the preparation required by defence counsel prior to the arraignment hearing, very little additional time would be required for preparation before the preliminary inquiry. However, the trial judge also acknowledged that the parties would need some time to coordinate their calendars (A.R., Vol. I, p. 21 at para. 70). In light of these factors, the trial judge held that it was reasonable to infer that the parties would have been ready to commence the preliminary inquiry two months after the arraignment hearing (A.R., Vol. I, p. 26 at para. 72).

The Appellant submits that the judge's estimate of two months was reasonable, and that there is no reason to interfere with this finding.

iii. Adjournments of the Preliminary Inquiry (May 18, 2010 – September 28 and 30, 2010 – December 20 and 21, 2010 – April 8, 2011 – May 9, 2011)

54. The preliminary inquiry was originally scheduled for four days. This turned out to be an underestimate, and ultimately, the preliminary inquiry took approximately nine days inclusive of submissions (A.R. Vol. I, p. 24 at para. 65). However, the court was unable to offer immediate continuation dates, and, in total, it took almost one year to complete the preliminary inquiry.

55. The trial judge found that the length of the preliminary inquiry was driven by the Crown's own assessment of its needs. Indeed, the witness list at trial was only provided to the defence on the eve of the hearing, and no witnesses were called on behalf of the Appellant (A.R. Vol. III, p. 84, ll. 15-16; p. 121, ll. 32-34; p. 125, ll. 23-25; Vol. IV, pp. 41-46). The trial judge further found that it should have been "obvious" to the Crown long before the commencement of the preliminary inquiry that four days would be insufficient. These are underlying findings that cannot be overturned absent palpable and overriding error. Based on these facts, the trial judge attributed the delay caused by the underestimate of time to the Crown (A.R., Vol. I, pp. 19-20, 28, 31 at paras. 44-47 85-86, 95-96).

56. Ultimately, however, the trial judge held that the time lost due to this underestimate was relatively minor. The judge found that the one year delay was mostly due to the lack of institutional resources, as the court could not provide timely continuation dates (A.R., Vol. I, p. 29 at para. 88).

57. The Respondent now argues that the period from May 18, 2010, to December 21, 2010, should be characterized as inherent or neutral delay. The Respondent says that trial estimates are sometimes wrong, and it is unrealistic to think that additional court days will be instantaneously available.

58. However, several courts have held that when a hearing or trial is not completed on the scheduled dates, the case must be given priority in the system. Delays resulting from rescheduling will generally be treated as institutional, or as part of the inherent time

requirements, or as both, depending on the circumstances (*R. v. Allen* (1996), 110 C.C.C. (3d) 331 at 347-35 (Ont. C.A.), aff'd [1997] 3 S.C.R. 700; *Tran*, at paras. 54-55; *Horner*, at para. 109; *R. v. Ghozerash*, 2013 BCCA 272 at paras. 47-48). Given the lengthy delays between continuation dates in this case, and the fact that the court was only able to provide a few days at a time for the continuation, the judge's characterization of this period as institutional delay was appropriate (*Horner*, at paras. 90-111). It is clear that the case was not given the required priority in the system.

59. In the alternative, the Appellant submits that any delay resulting from the underestimate of time should be allocated as Crown delay. Where the Crown seriously underestimates the time needed to present its own case, the resulting delay is properly attributable to the Crown (*R. v. Guilbride*, 2006 BCCA 392 at para. 106).

60. The record amply supports the trial judge's finding that the underestimate was attributable to the Crown. The Crown initially suggested two days would be required, a gross underestimate of the time needed for the preliminary inquiry. After interventions by counsel for the appellant, four days were ultimately set. Up to the eve of the preliminary inquiry, it appeared that all parties were content with that estimate. However, on the day before the preliminary inquiry, Mr. LeDressay (now the third Crown lawyer assigned to this file) wrote to defence counsel indicating his intention to call 15 witnesses with an eye to canvassing 26 events spanning nine months, including some that involved defendants who had already pleaded guilty (A.R., Vol. I, p. 141, ll. 2-24; Vol. IV, pp. 41-46). This was the first time the Crown disclosed its witness list (A.R. Vol. III, p. 18, ll. 24-37; 125, ll. 23-25).

61. It is clear that the last minute change in tactics sent the preliminary inquiry "off the rails". In the four days originally set for the preliminary inquiry, the Crown was only able to lead evidence against the more "minor" accused, leaving the bulk of the evidence against the appellant for the continuation dates (A.R. Vol. I, p. 143, ll. 9-24; Vol. II, p. 11, ll. 9-17).

62. Indeed, the facts of this case are much like the situation in *R. v. Sanghera*, 2014 BCCA 249, aff'd 2015 SCC 13 at paras. 123-132, a case relied upon by the Crown. In that case, initial trial estimates proved inadequate as a result of defence counsel's "eleventh hour" *Charter*

motions, causing a "ripple effect" of delay in the case. This delay was attributed to the defence, much like it should be attributed to the Crown for its "eleventh hour" change in approach in the case at Bar (see also: *Godin*, at para. 23).

63. The Respondent further argues that the period between December 21, 2010 (when defence counsel asked for an adjournment of the final day of the preliminary inquiry) and February 3, 2011 (when defence counsel was available to make submissions on committal), should be attributed to the defence. The Respondent concedes that the next two months (February 3-April 8, 2011) are attributable to the Crown, as the Crown was not available on the February date. Finally, the Respondent asserts that the period from April 8, 2011 to May 9, 2011 should be attributed to defence counsel's erroneous estimate of time required for submissions.

64. The Crown places particular emphasis on Mr. Hoem's request to adjourn the last day of the continuation dates (December 22, 2010). The Crown suggests that this request caused a "significant ripple effect" in the case because submissions on committal could have been completed on that day. The Crown also leaves the impression that Mr. Hoem needed until January 2011 to prepare his submissions on committal (R.F., paras. 83-87).

65. The Crown's submissions ignore several crucial facts that support the trial judge's conclusion that this period ought to be considered Crown and institutional delay, including the following (in chronological order):

a) It was the trial schedulers who decided to "split" the continuation dates between September and December 2010, clearly indicating court unavailability (A.R. Vol. II, p. 13, ll. 3-9);

b) September 29, 2010 was lost because the Crown failed to take into account the vacation time of its witnesses when scheduling the continuation dates, leaving no witnesses to call on that day (A.R. Vol. II, p. 22, ll. 42-47; Vol. III, p. 23, ll. 1-25; p. 75, ll. 20-22). As such, if any error caused a "ripple effect", it was the Crown's failure to schedule the hearing properly;

c) There is no evidence that the Crown was in a position to proceed with submissions regarding committal on December 22, 2010 (A.R., Vol. III, p. 75, l. 38 – p. 76, l. 6);

d) Mr. Hoem only indicated that he would have his submissions to the Crown in January after he was informed that the continuation would be set in the spring (A.R., Vol. II, p. 71, l. 12 – 72, l. 1). In other words, knowing the matter would not be heard for many months, Mr. Hoem simply indicated that he would have his submissions to the Crown "well in advance" of the continuation date;

e) Mr. Hoem estimated a "half day" for submissions, and the matter was adjourned to April 8, 2011 accordingly. Mr. LeDressay did not provide any assistance to the Court regarding his time estimate for submissions. On April 8, 2011, the Crown took up the available time, leaving the defence with no time to reply (A.R., Vol. II, pp. 75, 80-81). On May 9, 2011, Mr. Hoem completed his submissions as scheduled; and

f) It was actually conflicts in the preliminary inquiry judge's calendar that caused the delay between April 8, 2011 and May 9, 2011 (A.R., Vol. II, p. 81, ll. 11-29).

66. Taking these various factors into account, the Appellant submits that the trial judge was correct to attribute the one year period between May 18, 2010 and May 9, 2011 as Crown and institutional delay.

67. Finally, it should be noted that at trial the Crown did not argue that any portion of the delay following the first four days of the preliminary inquiry was inherent delay (A.R., Vol. I, p. 26 at para. 73). The Crown appears to change its position on this point.

iv. Setting the Six Week Trial (May 19, 2011 – September 10, 2012)

68. On May 19, 2011, the trial was scheduled for six weeks commencing on September 10, 2012 – over one year later. Pursuant to *Lahiry*, the trial judge acknowledged that some of the time following the setting of dates in Supreme Court must be attributed to trial preparation and coordination of calendars. In the absence of any evidence of when the parties would have been ready for trial, the judge held that two months of inherent delay was a reasonable estimate and

deducted this period from the overall length of delay (A.R., Vol. I, pp. 26-27 at para. 77). The remaining time was attributed to institutional delay (A.R., Vol. I, p. 32 at para. 102).

69. The Respondent now says that there was no basis upon which the trial judge could reasonably infer that defence counsel would have been available for a six week trial within two months. In particular, the Respondent points to the fact that the Appellant's counsel noted on the record that he had a six week block of time available in mid-June, 2012, but that no judges were available then. The Respondent says that the only reasonable inference from this statement is that the Appellant's counsel was not available until mid-June, 2012, and therefore the institutional delay in Supreme Court was only three months.

70. Again, the Appellant's primary response is that the *Lahiry* approach is incorrect and the entire period between setting the trial date and the date provided by the court should have been characterized as institutional delay.

71. In the alternative, the Appellant submits that the judge's estimate of two months was reasonable, and this Court should not interfere with this underlying finding of fact. An examination of the record reveals that when defence counsel stated that he was available for a six week trial in mid-June, 2012, he meant that was the first available court date, and that it worked with his schedule. However, no judges were available. Defence counsel was not saying that he would not be ready for trial until mid-June, 2012. The record states:

> MR. HOEM: And My Lady, on behalf of Mr. Jordan, I did have six weeks available to start in the middle of June and going to July. That created a lot of difficulties for judges being present for that period in a trial, so …
> THE COURT: Is that 2012 or –
> MR. HOEM: 2012.
> THE COURT: 2012. All right. Nothing else available in 2011.
> MR. LE DRESSAY: No.
> THE COURT: All right. It's on the record.
>
> A.R., Vol. II, p. 97, ll. 14-24, emphasis added.

72. During the Crown's submissions on the s. 11(b) application, Crown counsel confirmed that "June and July 2012 was available as trial dates" (A.R., Vol. III, p. 88, ll. 44-46). On appeal,

the Crown submitted that it was an "undisputed fact" that the first available date for trial was 16 months away (Crown Factum at BCCA, para. 123(a)). This suggests that defence counsel's statement that he was available in mid-June 2012 was made in the context of an available trial date at that time. Clearly, defence counsel did not mention earlier dates because the court had not provided any earlier dates. As Mr. LeDressay confirmed, no earlier dates were available.

73. Finally, though it is somewhat unclear, it appears that the Crown at trial agreed that the period between May 2011 and July 2011 should be treated as either "inherent" or "systematic" delay (A.R., Vol. I, p. 24 at para. 64(c); Vol. III, p. 118, ll. 25-39). Again, there is no reason to overturn the trial judge's finding or the Crown's apparent concessions in this area of the case.

E. Conclusion

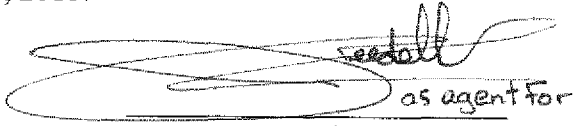
74. The Respondent applies the Ontario approach to transform a 45 month delay (almost 4 years) into 5-8 months of institutional or Crown delay (3-5 months in provincial court and 3 months in superior court). This allows the Respondent to say that the delay is well within the *Morin* guidelines and therefore reasonable. The Appellant respectfully submits that this approach is inconsistent with the true spirit of *Askov*, *Morin*, and *Godin*. This Court should reject the Ontario approach and confirm an approach that meaningfully protects the right to a speedy trial.

PARTS IV and V – COSTS and NATURE OF ORDER SOUGHT

75. That the appeal be allowed without costs, and a stay of proceedings be entered, as requested in the Appellant's main factum filed April 17, 2015.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Vancouver, British Columbia, this 9th day of July, 2015.



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PART VI – TABLE OF AUTHORITIES

Secondary Sources