File Number: 36068

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

BETWEEN:

BARRETT RICHARD JORDAN

APPELLANT
(Appellant)

and

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

FACTUM OF HER MAJESTY THE QUEEN, RESPONDENT
(Rule 42)

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TABLE OF CONTENTS

PART I: OVERVIEW AND STATEMENT OF FACTS

(1) Overview

1. The appellant, Barrett Jordan, was charged with serious drug trafficking offences that he committed in connection with a "dial-a-dope" operation in the Lower Mainland of British Columbia. The appellant was the principal behind this drug ring and employed others, who took drug orders by phone and delivered the drugs to purchasers. On the date of his arrest, a search warrant was executed at the appellant's residence which resulted in the seizure of 42.3 grams of heroin, 1.4 kilos of cocaine, $6600 and an employee shift calendar. The appellant was on bail for other drug offences when he committed these crimes.

2. The appellant sought a stay of proceedings at trial, arguing that his right to a trial within a reasonable time under s. 11(b) of the *Charter* had been infringed. Although the trial judge attributed 34.5 months of delay to institutional and Crown delay, the trial judge found that the appellant had suffered no substantial prejudice to his protected interests under s. 11(b) of the *Charter*, and concluded, after balancing the relevant factors, that the appellant had failed to establish any infringement of his s. 11(b) right.

3. On appeal, the appellant argues that the trial judge, adopting and applying the decision of the Court of Appeal for British Columbia in *R. v. Ghavami*, accorded less weight to institutional delay than he should have. The appellant also argues that the period of tolerable institutional delay, as expressed in the *Morin* administrative guidelines, should never be extended if an accused suffers "some", rather than "significant", prejudice. Finally, the appellant urges this Court to interfere with the trial judge's factual findings that the appellant suffered some prejudice, but it was not substantial.

4. The respondent's position is that the appeal should be dismissed for the following reasons: (i) the trial judge mischaracterized the delays in this case and erred in principle in attributing so much of the delay to Crown delay and institutional delay. When the delays are properly characterized, the delays are reasonable and well within the *Morin* guidelines. Although the trial judge erred in stating that institutional delay should be given less weight than Crown delay, the error is of no consequence and the trial judge's conclusion that the appellant failed to

establish an infringement should be upheld; (ii) the *Morin* guidelines are guidelines, not limitation periods, and the period of institutional delay that is tolerable may be extended in circumstances where an accused suffers some, insubstantial prejudice; and, (iii) the trial judge's findings of fact on prejudice are well supported by the record and are entitled to deference on review.

(2) Facts

5. The respondent accepts as substantially correct the facts set out in the appellant's factum, except those set out in paragraphs 13 and 16, as explained below. The respondent emphasizes and relies upon the following facts.

a) The appellant is arrested a second time for drug trafficking

6. Between March 12, 2008 and December 17, 2008, the RCMP conducted an investigation into a highly organized and busy "dial-a-dope" phone line operating in the Lower Mainland of British Columbia. Undercover officers purchased cocaine on six separate occasions, by contacting the phone line and placing orders with persons who then delivered drugs to the officers.[1]

7. At the conclusion of the investigation, the police executed a search warrant at the appellant's home and seized 42.3 grams of heroin, 1.4 kilos of cocaine, $6,640, plus a "shift calendar" for the employees of the phone line. The appellant was arrested inside his home.[2]

8. Initially, the appellant was charged with trafficking cocaine and possession of heroin and cocaine for the purpose of trafficking, offences that were alleged to have occurred on December 17, 2008. An additional count of trafficking cocaine, alleged to have occurred on December 10, 2008, was added about a week later.[3]

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[1] Ruling of the Trial Judge, Appellant's Record, Vol. I, p. 6, paras. 2-4; Transcript, Appellant's Record, Vol. I, p. 141, ll.25-47.
[2] Ruling of the Trial Judge, Appellant's Record, Vol. I, p. 6, paras. 5-6.
[3] Ruling of the Trial Judge, Appellant's Record, Vol. I, p. 7, para. 7; Information, Appellant's Record, Vol. IV, pp. 7 & 11.

9. This was not the first time that the appellant was involved in drug trafficking. When he committed these offences, he was already on bail that had been granted a year earlier, in December 2007, in relation to other drug trafficking offences.[4]

b) The initial appearances and the appellant's requests for adjournments

10. After his arrest, the appellant made his first appearance in Surrey Provincial Court on December 18, 2008. He made a number of other appearances in custody prior to his bail hearing on February 16, 2009, while he made efforts to retain counsel and arrange for his bail hearing. On each of these appearances, the appellant requested, or consented to, the adjournment.[5]

11. At his bail hearing, the appellant was released from custody on a recognizance. The conditions of bail included provisions that he reside with his father; remain in his residence except for employment or study purposes; not be in possession of cellphones, pagers or Blackberries; and, not have contact with nine named persons.[6]

12. On February 20, 2009, a new, 14-count Information was sworn charging the appellant and nine other persons with various drug offences arising out of the investigation. The appellant was now alleged, in count 14, to have been the organizing mind of the "dial-a-dope" phone operation from March 12, 2008 to December 17, 2008, and the co-accused were alleged to have been his employees.[7]

13. After the new Information was sworn, from February 27, 2009 until May 26, 2009 (the date of the arraignment hearing, a form of pre-trial conference), the appellant made five further appearances in court. On each appearance, the appellant's counsel requested an adjournment. Contrary to the appellant's assertions in paragraph 13 and 16 of his factum, there is no indication that the appellant was prepared to arraign on February 27, and the appellant did not appear five times for his arraignment hearing. In fact, on February 27, the appellant's counsel requested an adjournment to March 16 in order to marry up the appellant with his new co-accused, and stated

[4] Ruling of the Trial Judge, Appellant's Record, Vol. I, p. 35, para. 112; Recognizance, Appellant's Record, Vol. IV, p. 51.
[5] Appearances, Appellant's Record, Vol. I, p. 81-87.
[6] Recognizance, Appellant's Record, Vol. IV, p. 23.
[7] Ruling of the Trial Judge, Appellant's Record, Vol. 1, p. 7, paras. 7-8; Information, Appellant's Record, Vol. IV, pp. 16-22.

that it was unlikely that an arraignment hearing would take place then because the appellant would "be coming in on a first appearance". On the next two appearances (March 16 and April 6), the appellant's counsel was not available to attend court when other defence counsel were able to be present, necessitating further adjournments. Finally, on April 24, which had been marked for an arraignment hearing, the appellant's counsel indicated that he did not wish to proceed with the arraignment hearing and asked that it be put over to May 26, 2009. [8]

c) The defence and Crown under-estimate the time required for preliminary hearing

14. At the arraignment hearing on May 26, 2009, the appellant and a number of his co-accused appeared before the court. The appellant elected to be tried by a judge and jury, and requested a preliminary inquiry. The Crown's initial estimate was that the preliminary inquiry would take about two days. When asked how long he thought the preliminary inquiry would take, the appellant's counsel advised the court that his initial thought was that it "would be in the vicinity of three days". He said that he was not yet in a position to advise "what witnesses I would require to be called but quite a few." On this date, the appellant also filed his Arraignment Report, dated February 27, 2009, with the court. In that report, the appellant's counsel set out an estimate of three days for the preliminary inquiry.[9]

15. During the ensuing discussion with the court about the amount of time required for the preliminary inquiry, the appellant's counsel stated "we've streamlined the issues down", and went on to say, "I don't think it would take five, but maybe we should go with four." The presiding justice then concluded the arraignment hearing by stating:

> Okay. We'll have an early pre-trial date, let's reschedule this from - - there was a suggestion by Mr. Hoem [appellant's counsel] to increase the preliminary inquiry from two days to three, we said that, we're now going to increase it to four because of the number of counsel and the number of defendants, so that will be - - the record can disclose that. Thank you then.[10]

This estimate of time for the preliminary inquiry would prove to be inadequate.

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[8] Transcript, Appellant's Record, Vol. 1, p. 88, l.17 – p. 89, l.25; p. 92, ll.8-17; p. 93, l.36- p. 94, l.38; p. 96, l.11– p. 97, l.18.
[9] Transcript, Appellant's Record, Vol. I, p. 98, l.6 – p. 99, l.17; Arraignment Report, Appellant's Record, Vol. IV, p. 37.
[10] Ruling of the Trial Judge, Appellant's Record, Vol. 1, p. 17, para. 38; Transcript, Appellant's Record, Vol. I, p. 103, ll.8-31.

16. The preliminary inquiry was scheduled for May 13, 14, 17 and 18, 2010, with a pre-trial conference arranged for January 19, 2010. On the date scheduled for the pre-trial conference, it was adjourned, with the agreement of all counsel, to March 9, 2010.[11]

17. When the matter returned for the pre-trial conference on March 9, 2010, Crown counsel advised the court that he had engaged in discussions with all defence counsel and said, "I think we're all ready to proceed to the preliminary inquiry on this matter which is set for four days". The matter was adjourned to the preliminary inquiry dates.[12]

d) The preliminary inquiry goes beyond the estimated time

18. By the time of the preliminary inquiry, a new Crown counsel had assumed carriage of the matter. The appellant and four co-accused were still before the court. On May 12, 2010, Crown counsel wrote to the remaining defence counsel and expressed the view that, if the Crown were required to canvass all of the evidence in direct testimony, the preliminary inquiry would take a number of weeks. He provided the defence with a list of 15 potential witnesses to be called at the hearing, and requested that they consider the admissions that they would be prepared to make to complete the evidence in the four days scheduled.[13]

19. At the outset of the preliminary inquiry, Crown counsel expressed his concern to the court that the preliminary inquiry would not be completed in the four days scheduled. He said that the investigation had been a lengthy one and that much evidence would need to be introduced to establish the appellant's involvement in the "dial-a-dope" drug ring over the period alleged in count 14 of the Information. Crown counsel indicated that he had assumed "that there had been some discussions to focus the evidence on matters that counsel wanted to deal with". He stated that he had held such discussions with all of the defence counsel and, with the exception of the appellant's counsel, "we have some focus to what my friends want to hear". Crown counsel indicated, however, that the appellant's counsel was taking the position that the

[11] Transcript, Appellant's Record, Vol. I, p. 109, ll.14-17; p. 122, l.9 – p. 123, l.5.
[12] Transcript, Appellant's Record, Vol. I, p. 124, l.10 – p. 125, l.47.
[13] Ruling of the Trial Judge, Appellant's Record, Vol. I, p. 18, paras. 42-43; Correspondence, Appellant's Record, Vol. IV, p. 41.

Crown needed to prove every element of the offence, and Crown counsel was of the view that would take "weeks" of evidence.[14]

20. Crown counsel decided to call any evidence relating to the co-accused (some of which was also relevant to the appellant's guilt on count 14) over the four days scheduled, so the preliminary inquiry would be completed in respect of those accused and it would be easier to schedule any continuation of the preliminary inquiry that might be required in respect of the appellant.[15]

21. The preliminary inquiry as it pertained to the appellant was not completed by the end of the fourth day. Accordingly, counsel for the Crown and the appellant obtained additional dates for the continuation of the preliminary inquiry on September 28-30, 2010, and December 20-22, 2010.[16]

e) The continuation of the preliminary inquiry

22. When the preliminary inquiry resumed on September 28, 2010, Crown counsel advised the court that the sole witness who was to testify the following day (September 29) had suffered an allergic reaction to a bee sting on the weekend ("his heart stopped"). The witness was no longer available that week and, because of the sudden hospitalization of the witness, the Crown had been unable to schedule a replacement witness. Crown counsel also advised that he had been asked to attend a pre-trial in person in Vancouver Supreme Court on the afternoon of September 29. The Crown sought approval of the court to not sit on the second day of the continuation. In response to this request, the appellant's counsel said, "I have no problem with that".[17]

23. The appellant's bail conditions were varied on September 30, 2010, replacing the house arrest with a curfew from 11 p.m. to 6 a.m... This was the only bail variation that was ever

[14] Ruling of the Trial Judge, Appellant's Record, Vol. I, p. 19, para. 45; Transcript, Appellant's Record, Vol. I, p. 140, l.16 – p. 143, l.24.
[15] Transcript, Appellant's Record, Vol. I, p. 143, l.9 – p. 149, l.46.
[16] Ruling of the Trial Judge, Appellant's Record, Vol. I, p. 20, para. 49; Transcript, Appellant's Record, Vol. II, p. 22, ll.10-27.
[17] Transcript. Appellant's Record, Vol. II, p. 22, l.28 – p. 23, l.33.

sought by the appellant. At the end of the day on September 30, the preliminary inquiry was adjourned to December 20, 2010 for continuation.[18]

24. When the preliminary inquiry resumed on December 20, 2010, the appellant's counsel advised the court that he was no longer available to attend on the last of the three days set aside for the preliminary inquiry, because he needed to be in another court that morning and then "on a ferry at one o'clock". Later that same day, the appellant's counsel asked that the court break early, so he could obtain another date in the future when he would be able to make his submissions on committal.[19]

25. When the evidence on the preliminary inquiry concluded the next day (December 21), counsel discussed with the court the amount of time required for submissions. The appellant's counsel stated that half a day would be required for submissions. The appellant's counsel also advised the Court, "I have to do my research to tell - - to figure out which way I'm going to do this", and said that he would know his position by the end of January. When counsel returned to court from the trial scheduling office, the earliest date that worked for both counsel was April 8, 2011. The appellant's counsel had been available on an earlier date, February 3, 2011, but the Crown was not available.[20]

26. When the case resumed on April 8, 2011, the appellant's counsel indicated that it was questionable whether he would complete his submissions in the time set in accordance with his earlier position. When the Crown's submissions were completed, the appellant's counsel requested that the court break, so he could obtain a continuation date for his submissions. He estimated that he would require two hours for his submissions, or, to use the court's words, "pretty much half a day".[21]

27. The preliminary inquiry resumed on May 9, 2011 for the submissions of the appellant's counsel. The court delivered its reasons for committing the appellant on all counts on May 18, 2011. The appellant's counsel then, for the first time, voiced his objection to the length of the

[18] Ruling of the Trial Judge, Appellant's Record, Vol. I, p. 35, paras. 113-114; Transcript, Appellant's Record, Vol. II, p. 32, ll.14-35; Recognizance, Appellant's Record, Vol. IV, pp. 27-29.
[19] Transcript, Appellant's Record, Vol. II, p. 34, l.12-16; p. 35, l.13-32.
[20] Transcript, Appellant's Record, Vol. II, p. 71, l.12 – p. 72, l.35.
[21] Transcript, Appellant's Record, Vol. II, p. 75, l.23-32; p. 80, l.43 – p. 81, l.6.

proceedings, stating "the defence contends that Mr. Jordan was not responsible for any delays in the proceedings". The Crown disagreed.[22]

f) The length of the trial in Supreme Court is over-estimated

28. On May 19, 2011, the appellant appeared in the Supreme Court of British Columbia, together with his then two remaining co-accused. The Crown noted that the trial was potentially a very lengthy one, and advised that six weeks had been booked for trial commencing September 10, 2012. A pre-trial conference had been arranged for December 1, 2011. The appellant's counsel stated that **if** he was going to bring a delay application, he would notify the Crown and set separate dates in advance of trial. The appellant's counsel also stated that he had six weeks available for trial starting **in the middle of June, 2012** (i.e., three months before the date set for trial), but judges weren't available for the trial then.[23]

29. After the trial date was set, the prosecution was assigned to another Crown counsel. On July 7, 2011, the new Crown wrote to the appellant's counsel and stated that she would be filing a six count Indictment charging the appellant and his co-accused Gaudet. She estimated that the trial would take two weeks. The appellant's counsel wrote back, stating that he disagreed with her estimate of time for the trial and required a list of witnesses before he could judge the length of the trial.[24]

30. On July 12, 2011, Crown counsel wrote to the appellant's counsel, provided a list of witnesses, and stated that she estimated that the trial could be completed in two weeks, or, if cross-examination was lengthy, at most three weeks. Crown counsel invited the appellant's counsel to let her know if he was interested "in calling this matter ahead…to canvass earlier trial dates that would accommodate a three week, rather than a six week, trial." The appellant's counsel never responded to the Crown's invitation to explore earlier trial dates.[25]

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[22] Transcript, Appellant's Record, Vol. II, p. 82, ll.13-17; p. 85, l.22 – p. 93, l.31; p. 93, l.45- p. 94, l.13.
[23] Transcript, Appellant's Record, Vol. II, p. 95, l.8 – p. 97, l.23.
[24] Correspondence, Appellant's Record, Vol. IV, p. 47-49.
[25] Correspondence, Appellant's Record, Vol. IV, p. 50; Ruling of the Trial Judge, Appellant's Record, Vol. I, p. 22, para. 57.

g) Meanwhile, the appellant deals with his other charges

31. On June 17, 2011, the appellant was arrested and charged with breach of recognizance, because he had been found in possession of two Blackberry devices while out past his curfew. The appellant was detained in custody until he was released approximately one month later, on July 14, 2011. On September 26, 2011, he entered a guilty plea to the breach charge, and was sentenced to one day in custody in addition to time served.[26]

32. On July 15, 2011, the appellant was sentenced to a 15-month conditional sentence order for his earlier drug trafficking offence from 2007. The terms of the conditional sentence order were similar to the varied conditions of his bail in this case.[27]

h) The defence confirms the trial estimate at the pre-trial conference

33. At the pre-trial conference on December 1, 2011, the Crown stated that its position was that, even with *Charter* applications, three weeks was a generous estimate of time for the trial. The appellant's counsel confirmed that the appellant would be re-electing judge alone, said that he would be challenging the search warrant, and also indicated that he would be bringing a delay application prior to the trial date. The court directed counsel to obtain an early date for the delay argument and questioned the need for a six week trial. The appellant's counsel maintained that the trial was "going to take awhile", but agreed that he would advise the court if there was a re-estimate of the time required for trial.[28]

34. The matter was adjourned to January 19, 2012 for re-election and to confirm a date for the delay application. On that date, the delay hearing was set to commence at the outset of the trial starting September 10, 2012. The appellant's counsel did not provide any re-estimate of the six weeks set aside for the trial, although the Crown yet again reiterated her view that the Crown's case, including *Charter* arguments, would be completed in no more than three weeks.[29]

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[26] Transcript, Appellant's Record, Vol. II, p. 100, ll.37-41; Ruling of the Trial Judge, Appellant's Record, Vol. I, p. 2, para.1; p. 36, para. 118; Information, Appellant's Record, Vol. IV, pp. 31-33; Affidavit of Appellant, Appellant's Record, Vol. IV, p. 4, paras. 14-17.
[27] Ruling of the Trial Judge, Appellant's Record, Vol. 1, p. 36, paras. 116-117; Conditional Sentence Order, Appellant's Record, Vol. IV, pp. 53-56.
[28] Transcript, Appellant's Record, Vol. II, p. 119, l.6 – p. 122, l.41.
[29] Transcript, Appellant's Record, Vol. II, p. 123, ll.35-38; p. 125, l.24 – p. 126, l.4.

i) The appellant retains new counsel who is not available for trial

35. A pre-trial conference was held by teleconference on July 25, 2012. The appellant's counsel advised that the appellant's legal aid funding had terminated, and he now intended to bring a *Rowbotham* funding application at trial. It was agreed that the appellant's delay application and funding application would be dealt with the week of September 10, 2012, with the trial itself to begin the following week. The Crown advised that she anticipated completing her case within two weeks, and noted that she and the appellant's counsel were both involved in another lengthy, on-going trial that would be recommencing on October 1, 2012.[30]

36. The court, therefore, suggested that the trial be set down for two weeks commencing September 17, 2012. The appellant's counsel, although expressing some concern that two weeks might not be enough time if there was a challenge to the search warrants, stated: "I am content to start it that way". As a result, it was not until less than two months prior to the trial that the appellant's counsel agreed to reduce the estimated trial time from six weeks to two.[31]

37. On August 24, 2012, new counsel for the appellant appeared before the court by way of teleconference to advise that he had now been retained. The appellant's new counsel advised that he was not available for the two week trial set to commence on September 17, 2012, but he would be ready to proceed with the delay application on September 10. The funding application would not be pursued. The court granted an adjournment of the trial, and a new trial date was set for ten days to commence on January 21, 2013.[32]

[30] Transcript, Appellant's Record, Vol. II, p. 128, l.40 – p. 136, l.6.
[31] Transcript, Appellant's Record, Vol. II, p. 136, ll.28-45.
[32] Transcript, Appellant's Record, Vol. II, p. 140, l.11 – p. 141, l.40; p. 148, ll.38-46.

j) The delay hearing

38. The appellant's delay application was heard on September 10 and 11, 2012. The trial judge dismissed the application.[33]

39. The trial judge found that the total period of delay was 49.5 months, from the date that the appellant was first charged until the end of the scheduled trial date, but the appellant had effectively waived the final four months of delay when he requested an adjournment of his trial.[34]

40. The trial judge found that the total period of delay in the provincial court was 29 months. He attributed eight months of this period to the inherent requirements of the case, and two months of delay to the Crown because Crown counsel was not available on February 3, 2011 to make his submissions on committal. Any delay arising from the failure of the defence and Crown to accurately estimate the length of the preliminary inquiry was attributed by the trial judge solely to the Crown. The trial judge, however, relying on a report of the Provincial Court of British Columbia dated September 14, 2010, attributed the bulk of the delay in provincial court to the lack of institutional resources.[35]

41. The trial judge also found that the total period of delay in the Supreme Court, less the appellant's waiver of four months, was approximately sixteen months, from May 19, 2011 to September 28, 2012. He attributed 2.5 months of this delay to the inherent requirements of the case, and the remaining 13.5 months to the limits of institutional resources in the Supreme Court.[36]

42. The trial judge, therefore, concluded that 34.5 months of delay was attributable to either the Crown or the lack of institutional resources.[37]

43. The trial judge went on to decide that, although the appellant had suffered some inferred prejudice and some actual prejudice, the degree of prejudice was not substantial. The appellant's

[33] Reasons of the Court of Appeal, Appellant's Record, Vol. I, p. 51, para. 3.
[34] Reasons of the Court of Appeal, Appellant's Record, Vol. I, p. 58, paras. 18-19; Ruling of the Trial Judge, Appellant's Record, Vol. I, p. 8, para. 12.
[35] Ruling of the Trial Judge, Appellant's Record, Vol. I, p. 28, para. 86; p. 31, para. 98; p. 32, paras. 99-100.
[36] Ruling of the Trial Judge, Appellant's Record, Vol. I, p. 32, para. 102.
[37] Ruling of the Trial Judge, Appellant's Record, Vol. I, p. 33, para. 107.

liberty interests were not greatly affected because he was already on bail for other offences, or serving sentence, during much of the period of delay. The trial judge noted that the appellant's trial would not have been completed, even within the outer limits of the *Morin* guidelines, until mid-May 2011, and the appellant was in custody on his breach charge as of June 16, 2011, and then serving his 15-month conditional sentence for drug trafficking as of July 15, 2011. The trial judge did not consider the restriction on the appellant's ability to possess a cell phone as anything more than a "minor impingement".[38]

44. The trial judge found that any prejudice to the appellant's security of the person interests had been substantially reduced because of the fact that the appellant was facing other charges which were also responsible for causing him anxiety and stress during the period of delay.[39]

45. Finally, given the nature of the Crown's evidence, which consisted of the evidence of drug purchases by undercover officers, surveillance evidence (including photographs and video surveillance), and physical evidence seized from the appellant's residence, the trial judge determined that the delay had not caused any prejudice to the appellant's ability to make full answer and defence.[40]

46. In approaching the balancing of the relevant factors, the trial judge referred to the decision of the Court of Appeal for British Columbia in *R. v. Ghavami*[41], where the court had stated:

> Inherent time requirements should receive little if any weight, because they are not attributable to either the state or the accused, and because some delay is inevitable. Actual or inferred prejudice to the accused will be accorded a certain weight, but it may be counter-balanced by delay caused or contributed to by the deliberate actions of the defence. Correspondingly, if the organs of state – Crown, justice system, or judiciary – are responsible for some part of the delay, then the public interest will be entitled to less weight when balanced against the accused's right to a timely trial, because the protectors of the public interest have failed to live up to the standard expected of them. However, institutional and judicial delays will be accorded less weight than delays

[38] Ruling of the Trial Judge, Appellant's Record, Vol. I, p. 38, paras. 130-131; p. 35, paras. 115-122.
[39] Ruling of the Trial Judge, Appellant's Record, Vol. I, p. 37, paras. 123-124.
[40] Ruling of the Trial Judge, Appellant's Record, Vol. I, p. 37, paras. 126-127.
[41] 2010 BCCA 126.

> actually within the scope of the Crown's ability to expedite proceedings, because they are not the result of voluntary Crown action.[42]

47. The trial judge noted that the delay in the case was primarily institutional, but found that, as mentioned above, the prejudice to the appellant's interests was not substantial. The trial judge held that the appellant had taken a passive approach to the matter, and had never taken any proactive steps to obtain a speedy trial. Balancing all of the relevant factors, the trial judge concluded that the appellant had failed to establish a breach of his right to be tried within a reasonable time. The trial judge stated:

> If in this case I was persuaded that there was significant prejudice, given all of the factors, most notably the length of the delay and the causes of the delay, I would have had little hesitation in concluding that the delay was unreasonable, and that Mr. Jordan's s. 11(b) rights had been infringed. Where, as here the charges are serious, the delays are primarily institutional, the prejudice is not substantial in relation to the section 11 (b) interests, and Mr. Jordan's approach has been passive, in balancing all of the factors, I am not persuaded that Mr. Jordan has established a breach of s. 11 (b) of the Charter.[43]

k) The appellant admits the Crown's case and is sentenced to four years

48. In the end, the appellant never actually had a trial. After admitting the Crown's case, the appellant was sentenced, on June 7, 2013, to a term of imprisonment of four years.[44]

l) The appellant's appeal is dismissed

49. The appellant's appeal of his conviction was dismissed by the Court of Appeal.[45]

50. The Court of Appeal noted that the trial judge had conducted his analysis on the basis that the reason for the delay had been primarily institutional, which was the most favourable characterization of the delay for the appellant in the circumstances. The court was critical of the appellant for failing to lay any evidentiary foundation concerning scheduling issues in the courts below that contributed to the delay. The court stated:

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[42] Ruling of the Trial Judge, Appellant's Record, Vol. I, p. 40, para. 139.
[43] Ruling of the Trial Judge, Appellant's Record, Vol. I, p. 41, paras. 140-143.
[44] Reasons of the Court of Appeal, Appellant's Record, Vol. I, p. 51, para. 4; Warrant of Committal, Appellant's Record, Vol. I, p. 70.
[45] Reasons of the Court of Appeal, Appellant's Record, Vol. I, p. 66, para. 53.

> …there was no evidence about what occurred when counsel arranged dates with the trial schedulers. Judges should not be left to assume that delay in setting dates is necessarily institutional delay caused by a lack of resources. There must be a proper evidentiary foundation, which is missing in this case. It is simply not enough to rely on a generic report, which suggests widespread systemic delay.[46]

51. The Court of Appeal also noted that the trial judge, in characterizing the delay in completing the preliminary inquiry as primarily institutional, had failed to take into account the extent to which it should be considered part of the inherent time of the case. The court observed that the trial judge's whole approach to the assessment of the reasons for delay had been favourable to the appellant "considering his substantial contribution to the inaccurate time estimates for the preliminary inquiry and the trial, and his failure to take action to move the trial date forward." The court stated:

> Estimating the length of a preliminary hearing and a trial is not an exact science and the Crown cannot be expected to be the guarantor of time estimates. In fact, the defence is "often" in the best position to estimate the required amount of time: *R. v. Baldini*, 2012 BCCA 206 (CanLII). [47]

52. The Court of Appeal concluded that the trial judge committed no reviewable error in finding that the delay was not unreasonable and that there was no breach of the appellant's s. 11(b) *Charter* rights. The court held that the trial judge had properly considered and applied the *Morin* factors, did not miscalculate the time in assessing the period of delay, and made no error in his analysis of prejudice to the appellant as a result of the delay.[48]

[46] Reasons of the Court of Appeal, Appellant's Record, Vol. I, p. 62, para. 38.
[47] Reasons of the Court of Appeal, Appellant's Record, Vol. I, p. 63, paras. 39-42.
[48] Reasons of the Court of Appeal, Appellant's Record, Vol. I, p. 66, para. 52.

PART II: RESPONSE TO QUESTIONS IN ISSUE

53. The appellant argues that the trial judge erred in two respects: (i) he accorded less weight to institutional delay than he did to Crown delay; and, (ii) he extended the tolerable period of institutional delay because the appellant had suffered no substantial prejudice. The appellant also advances an alternative argument, contending that the trial judge erred in inferring only some prejudice, rather than substantial prejudice, from the length of the delay.

54. The respondent's position is that the weight given to the factors relevant to an assessment of delay will vary from case to case, and there is no invariable rule that institutional delay should be given less weight than so-called Crown delay. To the extent that the trial judge adopted and applied such an invariable rule, he erred. This error was, however, of no consequence, given that the trial judge erred in principle in characterizing many of the periods of delay as institutional delay. When the periods of delay are properly characterized, the institutional delay is significantly reduced and well within the *Morin* guidelines. The trial judge's conclusion that the appellant failed to establish a breach of his s. 11 (b) *Charter* right should be upheld, especially in light of the trial judge's finding that the appellant suffered no substantial prejudice.

55. The respondent's position is also that the degree of prejudice that is suffered by an accused person is a critical factor in the assessment of whether his or her right to trial within a reasonable period of time has been infringed. This Court has always been mindful of the fact that many accused persons have no interest in having their trials within a reasonable time, and that, if care is not taken in the assessment of delay, the protective shield of s. 11(b) could easily be turned into a sword. Where an accused person suffers minimal or no prejudice from delay, the period of institutional delay that is "tolerable" may, therefore, extend well beyond the administrative guidelines laid down by this Court in *Morin*, before giving rise to any breach of s. 11(b) of the *Charter*.

56. Finally, the respondent's position is that the appellant's alternative argument simply amounts to an attack on a factual finding made by the trial judge. Whether prejudice should be inferred from the length of delay in a particular case will depend on the circumstances, and ultimately is a question of fact. There is no rule that prejudice must be inferred any time there is

a long delay, regardless of the circumstances. The trial judge's finding that the appellant suffered only some, insubstantial prejudice is supported by the record, and this Court should not interfere with that finding of fact.

PART III: ARGUMENT

(1) There is no rule that institutional delay is given less weight than Crown delay

57. The legal framework for determining whether delay is unreasonable under s. 11(b) of the *Charter* is well established. If the period of delay is long enough to warrant an enquiry, the court must consider the reasons for the delay, and examine the extent to which the delay was occasioned by the inherent requirements of the case, the actions of the accused, the actions of the Crown, limits on institutional resources, and any other reasons. After conducting this analysis, the court must consider whether the accused has suffered any prejudice to the interests that s. 11(b) is intended to protect – security of the person, liberty, and the right to make full answer and defence. The court then makes a judicial determination of whether the delay was unreasonable in the circumstances, having regard to the interests that s. 11(b) is intended to protect, the explanation for the delay, and the prejudice, if any, to the accused.[49]

58. In *R. v. MacDougall, supra*, this Court stated that the "analysis must not proceed in a mechanical manner", and that the factors and framework governing the analysis "are not immutable or inflexible."[50] As this Court recognized, "The reasonableness of delay must be assessed on a case-by-case basis. Each case must proceed on its own facts."[51]

59. It follows then that the factors relevant to the assessment of delay will vary from case to case, as will the weight that may be placed on those factors in the circumstances. As Cronk, J.A. wrote for a unanimous court in *R. v. Seegmiller*:

> The determination of what constitutes a 'reasonable' time for trial under s. 11(b) of the *Charter* is fact driven and case specific. Accordingly, the weight to be attached to the governing factors in assessing the 'reasonableness' of delay and in balancing the sometimes competing interests protected by s. 11(b) will vary from case to case.[52]

60. In *R. v. Ghavami, supra,* however, the Court of Appeal for British Columbia held that the public interest will be entitled to less weight when balanced against the accused's right to a

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[49] *R. v. Morin*, [1992] 1 S.C.R. 771 at 788(b)-(e); *R. v. MacDougall*, [1998] 3 S.C.R. 45 at paras. 40-41; *R. v. Godin*, [2009] 2 S.C.R. 3 at para. 18.
[50] *R. v. MacDougall, supra* at para. 41.
[51] *R. v. MacDougall, supra* at para. 69.
[52] *R. v. Seegmiller* (2004), 191 C.C.C. (3d) 347 (Ont. C.A.) at para. 26, leave ref'd [2005] 2 S.C.R. xi; see also *R. v. Austin*, 2009 ONCA 329, at para. 67.

timely trial, "if the organs of the state – Crown, justice system, or judiciary – are responsible for some part of the delay", on the basis that "the protectors of the public interest have failed to live up to the standard expected of them." That court further held that "institutional and judicial delays will be accorded less weight than delays actually within the scope of the Crown's ability to expedite proceedings, because they are not the result of voluntary Crown action."[53]

61. These statements in *Ghavami* cannot be correct. First, they adopt the very mechanistic approach to the assessment of delay that was rejected by this Court in *MacDougall*. Second, they ignore the reality that each case is to be governed by an assessment of the circumstances particular to that case. It cannot be right that any time **some** delay is attributed to the Crown or judicial system, it invariably follows that the public interest must be accorded less weight in the assessment. And it cannot be right that institutional and judicial delays will invariably be accorded less weight than delays that were within the control of the Crown, or conversely, that Crown delay will always be given greater weight than institutional delay.

62. This Court has never articulated a rule that certain reasons for delay should be given more prominence in the assessment than others, nor should it. Inflexible rules fail to adequately capture and reflect the myriad circumstances that can arise from case to case.

63. Other courts have recognized that institutional delay and Crown delay should be put on the same footing, although there may be times when the conduct of the Crown weighs more heavily in the assessment. For example, in the recent decision of *R. v. Florence*, Rouleau J.A. wrote:

> I acknowledge that there may well be cases where the Crown's refusal to cooperate with the defence to accelerate a proceeding will be considered a form of Crown delay that weighs more heavily at the final balancing stage of the s. 11(b) analysis. In the normal course, however, a delay in the setting of a preliminary inquiry date caused by an unsuccessful tactical decision by the Crown will be considered Crown delay and given the same weight as institutional delay.[54]

[53] *R. v. Ghavami*, *supra* at para. 52.
[54] *R. v. Florence*, 2014 ONCA 443, at para. 50. See also *R. v. Austin*, *supra*, at para. 67 (seriousness with which one views Crown conduct causing delay, or systemic or institutional reasons causing delay, will vary from case to case).

64. To the extent that the trial judge adopted and applied the rule in *Ghavami* in his assessment of delay, he was in error. However, that error is not dispositive of this appeal because, as explained below, the trial judge mischaracterized much of the delay as institutional delay, when it should have been characterized as inherent delay, or delay caused or consented to by the defence. When the delay periods are properly characterized, there was no unreasonable delay in all of the circumstances. The trial judge's ultimate conclusion that there was no breach of s. 11(b) was correct, notwithstanding the error he made in following *Ghavami*.

(2) The trial judge mischaracterized much of the delay

65. The characterization of the various periods of delay, and the ultimate decision whether the total period of delay was unreasonable, are reviewed on a standard of correctness.[55] In *MacDougall*, this Court held that the mischaracterization of a period of delay was an error of principle that warranted appellate intervention.[56] As explained below, the trial judge in the case on appeal mischaracterized much of the delay when he characterized it as institutional delay or Crown delay.

a) The period from arrest to the arraignment hearing (December 18, 2008 – May 26, 2009)

66. On the delay application, the Crown argued that the period of approximately six months between the appellant's arrest and the arraignment hearing should be attributed to the inherent time requirements of the case.[57] The trial judge, however, was of the view that a reasonable period for "intake" was five months, given the nature of the case and all the circumstances. Thus, one month of the delay in this period ended up being attributed to either Crown or institutional delay.

67. The mischaracterization of one month of delay by the trial judge may seem relatively minor or trivial, but the error in principle made by the trial judge is not. The trial judge's characterization of this period of delay reflected a fundamental error in principle. It may well have been correct to say that a reasonable "intake" period should have been five months, but the

[55] *R. v. Sanghera*, 2014 BCCA 249 at para. 63; aff'd 2015 SCC 13; *R. v. Tran* (2012), 288 C.C.C. (3d) 177 (Ont. C.A.) at para. 19.
[56] *R. v. MacDougall*, *supra* at para. 63.
[57] Ruling of the Trial Judge, Appellant's Record, Vol. I, p. 24, para. 64.

characterization of this period failed to take into account **what actually took place** during this period. As this Court emphasized in *MacDougall*, "The inherent time required to process a particular case must not be confused with the average time required to process a case of that type."[58]

68. Numerous adjournments over this six month period were requested, or consented to, by the appellant and his counsel. For example, on February 27, 2009, the appellant's counsel asked that the matter be adjourned to 1:30 p.m. on March 16, 2009 although other counsel were appearing at 9:30 a.m., so he could "catch up at that point". But on March 16, when the appellant's counsel appeared, he advised that he was not available on the next return date that had been scheduled for April 6, "so I'll speak to co-counsel and we'll arrange another date". On April 6, the matter was adjourned to April 24, the date that the appellant's counsel had indicated that he was available. And on April 24, the appellant's counsel appeared with counsel for the co-accused and requested an adjournment to May 26.

69. As this Court has repeatedly held, delays that are caused by, consented to or requested by an accused cannot be used in support of a claim that a s. 11(b) violation has occurred.[59] There is a powerful policy rationale underpinning this rule: if such delays are allowed to figure in the assessment, "there might be an incentive to employ dilatory tactics in order to escape justice."[60]

70. In *R. v. Smith*, *supra* this Court unanimously held that, "Agreement by an accused to a future date will in most circumstances give rise to an inference that the accused waives his right to subsequently allege that an unreasonable delay has occurred."[61] In *R. v. Morin*, *supra*, the Court qualified this statement by adding that waiver cannot be inferred, if consent to a future date "amounts to mere acquiescence in the inevitable."[62] But in the ensuing decisions of *R. v. Brassard* and *R. v. Nuosci*, this Court held that consents to adjournments or future trial dates

[58] *R. v. MacDougall*, *supra* at para. 45.
[59] *R. v. Smith*, [1989] 2 S.C.R. 1120 at 1136(e)-(g); *R. v.* Askov, [1990] 2 S.C.R. 1199 at 1229; R. *v. Morin*, *supra* at 790(h)-(j); *R. v. Brassard*, [1993] 4 S.C.R. 287; *R. v. Nuosci*, [1993] 4 S.C.R. 283.
[60] *R. v. MacDougall*, *supra* at para. 48.
[61] *R. v. Smith*, *supra* at 1136(e)-(g).
[62] *R. v. Morin*, *supra* at 790(h)-(j).

cannot be characterized as acquiescing in the inevitable **in the absence of any evidence to that effect.**[63]

71. Just as was the case in *Brassard*, the appellant's consents to adjournments during the period up to the arraignment hearing were more properly characterized as waiver, or as actions of the appellant and attributable to him. At minimum, this entire period should have been characterized as neutral delay, not Crown delay or institutional delay.

b) **The period between arraignment hearing and the preliminary hearing (May 26, 2009 – May 19, 2010)**

72. Institutional delay does not start to run until counsel are ready and available to proceed with the preliminary hearing or trial and the system cannot accommodate them.[64] Thus, as the Court of Appeal noted, some evidence as to when counsel were available for the proceeding is essential before one can characterize any period of delay as institutional delay. One cannot point to a report on systemic delay generally and argue from that that institutional delay necessarily arose in any particular case before the court.

73. As Code J. aptly observed in *R. v. Lahiry*, the period of time during which defence counsel is unavailable is treated as part of the inherent time required for the case. It is wrong in principle to attribute the delay in a case to systemic delay, when defence counsel is not available to conduct the proceeding. Code J. stated:

> …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 the 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**

[63] *R. v. Brassard*, *supra*; *R. v. Nuosci*, *supra.*
[64] *R. v. Morin*, *supra* at 794(j)-795(a); *R v. Tran*, *supra* at para. 32; *R. v. Steele*, [2012] O.J. No. 2545 (Ont. C.A.) at para. 19.

> **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 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.[65](Emphasis added)

74. The trial judge recognized that evidence should have been adduced on the delay application concerning the dates when defence counsel were all available to commence the preliminary hearing. However, in the absence of such evidence, he was of the view that a "reasonable estimate" of the amount of time required before all of the defence lawyers would be available for a four-day preliminary hearing was two months.[66]

75. There was nothing in the record from which the judge could reasonably infer that all of the defence counsel would have been able to coordinate their calendars and schedule a four-day preliminary inquiry within two months. The lens of experience indicates that counsel are often not available for proceedings for many months. In *R. v. Ayers*, a case in Surrey, B.C., defence counsel was not available for a half-day trial until more than five months after the set date.[67] In *R. v. Goodkey*, a case in New Westminster, B.C., the defence counsel did not have three to five days available to complete a trial until six months later.[68]

76. Common sense suggests that as the length of a proceeding and the number of counsel increase, the more difficult it will be to arrive at a date that can be accommodated within existing calendars.[69] It was palpable and overriding error for the trial judge to infer that defence counsel would all have been available for the preliminary inquiry within two months, in the absence of any evidence as to their availability.

77. Had defence counsel been available on earlier dates, it would have been easy for them to put their availability on the record at some point. But they did not do so. This Court should not condone a practice of inferring counsel's availability when counsel has failed to put his or her availability on the record. As Code J. stated in *R. v. Lahiry*, there is no place for fictions in *Charter* litigation. Moreover, such a practice simply encourages those whose calendars are full to

[65] *R. v. Lahiry* (2011), 283 C.C.C. (3d) 525 (ONSC) at para. 34.
[66] Ruling of the Trial Judge, Appellant's Record, Vol. I, p. 25, paras. 71-72.
[67] *R. v. Ayers*, 2010 BCPC 86 at paras. 4-5.
[68] *R. v. Goodkey*, 2013 BCSC 1431 at para. 131.
[69] *R. v. Widdifield*, 2014 BCCA 170 at para. 104.

remain silent in the hope that the court might infer that they were available when in fact they were not.

78. In the absence of any evidence that the appellant's counsel was available on dates prior to the preliminary inquiry, the preliminary inquiry dates should have been taken for what they were: dates the appellant had agreed to without objection. The trial judge erred in characterizing any of this period as institutional delay. In accordance with the decisions of this Court in *Smith*, *Brassard* and *Nuosci*, the delay should be characterized as waiver, or actions of the appellant that are attributable to him.

c) **The delays arising from the erroneous time estimate (May 18, 2010 – December 22, 2010)**

79. The trial judge characterized the period of delay arising from the erroneous estimate of time for the preliminary inquiry as Crown delay and institutional delay, because the Crown should have realized that four days would be insufficient,[70] and there was nothing to suggest that the parties would not have been able to continue the preliminary inquiry promptly if the court could have accommodated them.[71] This again was a mischaracterization of the delay.

80. When a proceeding cannot be completed in the period of time originally estimated, any delay occasioned by the need to find additional time to complete the proceeding should be treated as part of the inherent requirements of the case.[72] Trial estimates are just that, estimates, and sometimes those estimates will be wrong. It is not realistic to think that additional court days will be instantaneously available, when the time set aside for a proceeding proves to be insufficient. As Doherty J.A. stated in *R. v. Allen*:

> When addressing s. 11(b), one must consider the inherent time requirements needed to get a case into the system and to complete that case: *R. v. Morin, supra*, at p. 16. Those time requirements can include adjournments necessitated by the need to find additional court time when initial time estimates prove inaccurate: *R. v. Hawkins* (1991), 6 O.R. (3d) 724 (Ont. C.A.) at 728, aff'd, (1992), 11 O.R. (3d) 64*n* (S.C.C.); *R. v. Philip* (1993), 80 C.C.C. (3d) 167 (Ont. C.A.) at 172-73. The inherent time requirements needed to

[70] Ruling of the Trial Judge, Appellant's Record, Vol. I, p. 28, paras. 85-86.
[71] Ruling of the Trial Judge, Appellant's Record, Vol. I, p. 29, para. 88.
[72] *R. v. Allen* (1996), 110 C.C.C. (3d) 331 (Ont.C.A.) at 348-49, aff'd [1997] 3 S.C.R. 700; *R. v. Qureshi* (2004), 190 C.C.C (3d) 453 (Ont. C.A.) at para. 27; *R. v. Tran, supra* at para. 61.

> complete a case are considered to be neutral in the s. 11(b) calculus. The recognition and treatment of such inherent time requirements in the s. 11(b) jurisprudence is simply a reflection of the reality of the world in which the criminal justice system operates. No case is an island to be treated as if it were the only case with a legitimate demand on court resources. The system cannot revolve around any one case, but must try to accommodate the needs of all cases. When a case requires additional court resources the system cannot be expected to push other cases to the side and instantaneously provide those additional resources.[73]

81. Moreover, as the Court of Appeal correctly recognized in this case, the trial judge's attribution of the delay to the Crown failed to take into account the role of defence counsel in the erroneous time estimate. Crown counsel was off the mark in estimating the amount of time required, but so too was defence counsel. Indeed, as late as March, 2010 when the pre-trial conference was held, all counsel were still of the view that four days was sufficient.

82. Both Crown counsel and defence counsel obviously have a role to play in estimating the time for any particular proceeding, but defence counsel has a unique role because he or she is the only one who knows the nature of the defence and the issues that relate to it. Only defence counsel knows how long cross-examinations of witnesses are likely to take and whether he or she will challenge the admissibility of evidence at preliminary inquiry or trial. The reality is that the court and the Crown are both dependent on the defence for accurate time estimates. Unless defence counsel cooperates in scheduling *and adhering to* time estimates, court proceedings will rarely be completed in the time scheduled. The obligation of defence counsel to properly estimate trial time was highlighted in the recent decision of the British Columbia Court of Appeal in *R. v. Sanghera*:

> Mr. Sanghera's actions apart from that week resulted in trial dates that were hopelessly inadequate, as discussed by the judge in the passages quoted above. That is, even in the absence of the delay caused by the co-accused, the faulty time estimation and late Charter application and disclosure issues would have combined to ensure the need for prolonged continuation dates.
>
> [130] With respect to the obligation of the Defence to properly estimate trial time, this Court's observations in *R. v. Baldini*, 2012 BCCA 206 (CanLII), are apt:

[73] *R. v. Allen, supra* at 348(d)-(g).

> [52] The flaw in Mr. Baldini's argument is that it ignores the fact that defence counsel is the person most knowledgeable about the case as a whole and is, therefore, in the best position to estimate how much trial time is needed. While Crown counsel knows the evidence the Crown intends to present and can, therefore, estimate how much time is needed to introduce that evidence, he or she cannot accurately estimate—or guesstimate—such things as how much time defence counsel will take cross-examining witnesses and challenging the admissibility of the Crown's evidence, or how much time the defence will take for the presentation of its case, should the defence elect to call evidence. It is, no doubt, because defence counsel is in the best position to provide the most accurate estimate of the total amount of time needed that the *Criminal Caseflow Management Rules* require defence counsel to provide that information in their arraignment and trial confirmation reports, not Crown counsel.[74]

83. Thus, the trial judge erred in attributing all of the delay arising from the erroneous time estimate to Crown delay and institutional delay. The delay up to the time of the first continuation in September 2010, a period of approximately four months, should have been characterized as inherent delay. It is not realistic to expect that six days of additional court time could have been found any earlier than that, nor is there any indication that the appellant's counsel had free days available in that timeframe in any event.

84. Given the record, the period of time between the September and December continuation dates is more difficult to characterize. There is no explanation as to why additional dates were scheduled in December, rather than October or November. On this record, given that the defence did not raise any objection to the December dates and fairly consented to an adjournment when the Crown witness took ill, the period of delay between September and December should properly be characterized as neutral delay.

d) **The delay arising from the defence request for adjournment (December 22, 2010 – April 8, 2011)**

85. When the preliminary inquiry resumed for the scheduled three days in December, the appellant's counsel advised that he was no longer available for the final day of the hearing, and would not be able to make his submissions on committal until a later date. The trial judge erred in

[74] *R. v. Sanghera*, *supra*, at paras. 129-30.

principle when he failed to attribute any delay arising from this adjournment request to the defence.

86. The adjournment of the final day of the preliminary inquiry had a significant ripple effect on the proceedings. The evidence on the preliminary inquiry was completed on the second day of the continuation, meaning that the final day could have been devoted to submissions if the appellant's counsel had been ready to make his submissions. Because the delay was occasioned by the defence adjournment request, and the first court date when the defence was available was February 3, 2011, the delay up to that point is properly attributed to the defence.

87. The period between February 3, 2011 and April 8, 2011 (two months) is attributable to the Crown because Crown counsel was not available on the February date. But the period between April 8, 2011 and May 9, 2011 is properly attributable to the erroneous estimate of the time required for submissions that was provided to the court by the appellant's counsel. A full day should have been scheduled, rather than the half day he advised it would take. The entire period between April 8, 2011 and the committal on May 18, 2011 should, therefore, be characterized as part of the inherent time required for the case.

e) The time required to schedule a six week trial (May 19, 2011 – September 10, 2012)

88. On May 19, 2011, the appellant's trial, which then involved two co-accused, was set down for a six week trial commencing September 10, 2012, approximately sixteen months later. The trial judge characterized two-and-a-half months of this period of delay as the inherent time required for trial preparation and to coordinate the calendars of counsel and the court. The balance of time was characterized as institutional delay. This was a serious mischaracterization.

89. There was no basis upon which the trial judge could reasonably infer that the appellant's counsel would have been available for a six week trial within two-and-a-half months. Indeed, when the date was set, the appellant's counsel noted for the record that he had a six week block of time available beginning **mid-June, 2012**, but judges were not available then. He said nothing about any earlier dates. The only reasonable inference from this statement is that the appellant's counsel was not available for such a long trial until mid-June, 2012. The institutional delay in the Supreme Court was thus only three months. The appellant conceded that he was responsible for the delay that was occasioned when he retained new counsel who was unavailable for the trial.

f) **Properly characterized, the delay was not unreasonable**

90. The trial judge erred when he mischaracterized so much of the delay in the provincial court and Supreme Court as institutional delay or Crown delay.

91. As explained above, the delays in the provincial court are properly characterized as inherent time requirements, waiver or conduct attributable to the defence, and a modest amount of Crown delay (two months). Even if this Court were to conclude that the period between the first and second continuations of the preliminary inquiry should be attributed to institutional delay, the delay amounts to only three months.

92. The delays in the Supreme Court are properly characterized as inherent time requirements, conduct attributable to the defence, and only three months of institutional delay.

93. While at first glance the overall period of time appears to be long, the periods of delay are explained and reasonable when properly characterized, and the institutional delays in both courts are well within the administrative guidelines laid down by this Court in *Morin*. The trial judge found that the appellant had taken a passive approach, doing nothing to seek a speedy trial, and had suffered no substantial prejudice to his liberty, security of the person, and fair trial interests. Having regard to all of the relevant factors, there was no unreasonable delay in this case.

94. Although the trial judge erred in stating that institutional delay is accorded less weight than Crown delay, he also erred in mischaracterizing much of the delay as institutional delay. Properly characterized, little of the delay was institutional and it was within the *Morin* administrative guidelines in any event. There was no *Charter* breach and the appeal should be dismissed.

(3) The *Morin* guidelines are guidelines, not limitation periods

95. The appellant suggests in his second ground of appeal that the administrative guidelines in *Morin* should effectively be taken as limitation periods and hard caps on the length of permissible institutional delay, whenever there is "some", but "not substantial" delay. Strictly speaking, it is not necessary to address this ground of appeal because the argument above is

dispositive of the appeal. However, should the Court consider it necessary to address this ground of appeal, the respondent's position is that the *Morin* guidelines were intended to be applied in a flexible manner, and the degree of prejudice suffered by an accused is an important factor in determining the length of institutional delay that will be tolerated in a given case.

96. The purpose of s. 11(b) of the *Charter* is "to expedite trials and minimize prejudice" to the liberty, security of the person, and fair trial interests of the accused.[75] Given the purpose of s. 11(b), the extent to which prejudice has been caused to any of the three protected interests lies at the heart of the enquiry into whether delay is unreasonable. If the accused has suffered no, or minimal, prejudice, then the "basis for the enforcement of the individual right is seriously undermined."[76] As McLachlin, J. (as she then was) stated in *R. v. Morin*, *supra*, at 812:

> 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.[77]

97. In *Morin*, *supra*, this Court acknowledged that many accused persons are not interested in speedy trials. Rather, their interest lies in having their s. 11(b) right infringed so they can avoid trial on the merits. Indeed, the Court recognized that "the majority group" of offenders does not want early trials. The Court also observed that the s. 11(b) right can readily be "transformed from a protective shield to an offensive weapon in the hands of the accused", and stated that the s. 11(b) right must be interpreted in a manner that recognizes the potential for abuse which may be invoked by some accused.[78]

98. The s. 11(b) right should also be interpreted with an eye to the drastic nature of the remedy that is available to address any infringement of the right. A finding of unreasonable delay leads to a stay of proceedings, a remedy that is usually reserved for exceptional situations.[79] Yet,

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[75] *R. v. Morin*, *supra* at 802(c)-(d); *R. v. MacDougall*, *supra* at para. 29; *R. v. Seegmiller*, *supra* at para. 30.
[76] *R. v. Morin*, *supra* at 801.
[77] *R. v. Morin*, *supra* at 812(a).
[78] *R. v. Morin*, *supra* at 801(h)-803(d).
[79] *R. v. Camiran*, 2013 QCCA 452 at para. 59, leave ref'd [2013] 3 S.C.R. vi.

"[a]s the seriousness of the offence increases so does the societal demand that the accused be brought to trial."[80]

99. Prejudice is thus a critical factor in ensuring that the s. 11(b) right does not serve simply to exonerate those who have little interest in speedy trials. Prejudice is also an important factor in ensuring that the remedy only operates to stay proceedings when the societal interest in bringing the offender to trial is outweighed by the harm done to the protected interests of the accused.

100. When this Court articulated administrative guidelines in *Morin*, it was careful to state that the guidelines were just that – guidelines, not limitation periods. The Court emphasized that guidelines must not be applied in a purely mechanical fashion, because many courts had treated the guideline suggested in *R. v. Askov* as a limitation period, resulting in the termination of more than 47,000 charges in Ontario alone. As Sopinka J. stated, "I hasten to add that this guideline is neither a limitation period nor a fixed ceiling on delay."[81] He went on to add that a guideline "will yield to other factors"[82], and that "deviations of several months in either direction can be justified by the presence or absence of prejudice."[83]

101. An administrative guideline for institutional delay functions generally as a proxy for reasonable, systemic delay. Every accused person must expect to encounter some reasonable period of delay before his or her trial can be heard. "Some delay inevitably results from the fact that the justice system must schedule and process a large number of cases": *MacDougall,* at para. 53. It is only periods of systemic delay extending beyond the administrative guideline that warrant careful scrutiny, for "[o]nly unreasonable systemic delay will count against the Crown in the s. 11(b) assessment."[84]

102. The mere fact, though, that systemic delay in a particular case runs beyond the *Morin* administrative guidelines does not render that delay unreasonable, for "[m]any factors may affect

[80] *R. v. Morin*, *supra* at 787.
[81] *R. v. Morin*, *supra* at 795.
[82] *R. v. Morin*, *supra* at 797.
[83] *R. v. Morin*, *supra* at 807.
[84] *R. v. MacDougall*, *supra* at para. 53; *R. v. Godin*, *supra* at para. 5.

whether a given systemic delay is unreasonable."[85] The length of the delay is just one factor; the degree of prejudice suffered is another.

103. The extent to which an accused has suffered prejudice is "an important factor in determining the length of institutional delay that will be tolerated", and the "application of any guideline will be influenced by this factor."[86] Indeed, in some instances, as where the accused is among those who have no interest in having a trial within a reasonable period of time and who suffer no prejudice from any delay, almost any length of institutional delay is tolerable. In other instances, as where an accused is in custody, the length of institutional delay that will be tolerated may lie at the lower end of the *Morin* guidelines.

104. In cases such as this one, where the trial judge found that the appellant suffered "some" prejudice, but that it was not substantial, the *Morin* guidelines may be extended to take into account the fact that the appellant suffered insubstantial prejudice. To hold otherwise, and conclude that the *Morin* guidelines function as the outside limit on the amount of institutional delay that will be tolerated, whenever there is some, insubstantial amount of prejudice, would effectively turn the administrative guidelines into limitation periods.

105. This ground of appeal should be dismissed.

(4) This Court should not interfere with the trial judge's findings on prejudice

106. The appellant raises an alternative argument in his factum, attacking the trial judge's factual finding that the appellant did not suffer any substantial prejudice. This Court should not interfere with that finding for two reasons: (1) the trial judge's finding on prejudice is a finding of fact which is entitled to deference on appeal, absent palpable and overriding error; (2) the factual finding was supported by the record.

107. Whether, and the extent to which, an accused has suffered any actual or inferred prejudice to his or her protected interests under s. 11(b) of the *Charter* is ultimately a question of fact that is determined by the trial judge on the basis of the evidence in a particular case.[87] It is

[85] *R. v. MacDougall*, *supra* at para. 53.
[86] *R. v. Morin*, *supra* at 803.
[87] *R. v. Black* (2010), 255 C.C.C. (3d) 62 (NBCA) at para. 12, leave ref'd [2011] 1 S.C.R. vi.

trite law that a trial judge's findings of fact are entitled to deference on appellate review, in the absence of palpable and overriding error. Findings of fact and inferences of fact are subject to the same standard of review.[88]

108. This Court has held on numerous occasions that prejudice to an accused's protected interests may be inferred from the length of delay[89], and has stated that "the longer the delay the more likely that such an inference will be drawn."[90]

109. However, this Court has also recognized that whether prejudice is inferred from the length of delay in a particular case will depend on the circumstances. It is always open to the prosecution to rely on other evidence to negative the existence of prejudice that might otherwise be inferred from a long delay. In *Morin,* Sopinka, J. stated:

> Conversely, the prosecution may establish by evidence that the accused is in the majority group who do not want an early trial and that the delay benefited rather than prejudiced the accused. **Conduct of the accused falling short of waiver may be relied upon to negative prejudice**.[91]

110. Similarly, in *MacDougall, supra,* this Court said that "any action or inaction on the part of an accused which is inconsistent with a desire for a timely trial is relevant to the assessment of prejudice."[92]

111. In this case, the trial judge considered all of the evidence and found that the appellant had suffered some actual and some inferred prejudice, but that it was not substantial. Those findings of fact were open to him to make on the evidence. When arrested, the appellant was on bail in relation to other pending drug trafficking charges. For much of the period of delay that is alleged to be excessive and unreasonable, the appellant was in custody or serving a sentence in relation to his other offences. His ability to make full answer and defence was not impaired, in light of the nature of the case and the evidence.[93] He took a passive approach to the proceedings,

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[88] *Housen v. Nikolaisen,* [2002] 2 S.C.R. 235 at paras. 10-25.
[89] *R. v. Morin, supra* at 801(f); *R. v. MacDougall, supra* at para. 58; *R. v. Godin, supra* at para. 37.
[90] *R. v. Morin, supra* at 801(f).
[91] *R. v. Morin, supra* at 803(c)-(e).
[92] *R. v. MacDougall, supra* at para. 58.
[93] *R. v. Bains,* 2010 BCCA 178 at para. 64.

and failed to avail himself of the opportunity to explore earlier trial dates when it was offered to him by the Crown.[94]

112. The trial judge made no palpable and overriding error in finding that the appellant suffered some prejudice, but that it was not substantial. Indeed, at the end of the day, the appellant's trial amounted to nothing more than a delay application, followed by an admission of the Crown's case against him. His conduct bears all the hallmarks of the "majority group" of offenders who seek to benefit from delay in the hope of avoiding the certainty of a conviction.

113. This ground of appeal should be rejected.

[94] *R. v. Morin, supra* at 802(g); *Tremblay c. R.*, 2014 QCCA 690 at para. 113, leave ref'd [2011] 1 S.C.R. xi.

PART IV: SUBMISSIONS CONCERNING COSTS

114. The respondent does not seek costs and makes no submissions in that regard.

PART V: NATURE OF ORDER SOUGHT

115. The respondent asks that the appeal be dismissed, without costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Ottawa, Ontario, June 2015

Croft Michaelson, Q.C. Counsel for the respondent	Peter LaPrairie. Counsel for the respondent

PART VI: LIST OF AUTHORITIES

Case Law	Factum Paragraph(s)
R. v. Allen (1996), 110 C.C.C. (3d) 331 (Ont. C.A.), aff'd [1997] 3 S.C.R. 700	80
R. v. Askov, [1990] 2 S.C.R. 1199	69, 100
R. v. Austin, 2009 ONCA 329	59, 63
R. v. Ayers, 2010 BCPC 0086	75
R. v. Bains, 2010 BCCA 178	111
R. v. Baldini, 2012 BCCA 206	51, 82
*R. v. Black (*2010), 255 C.C.C. (3d) 62 (NBCA), leave ref'd [2011] 1 S.C.R. vi	107
R. v. Brassard, [1993] 4 S.C.R. 287	69, 70, 71, 78
R. c. Camiran, 2013 QCCA 452, leave ref'd [2013] 3 S.C.R. vi	98
R. v. Florence, 2014 ONCA 443	63
R. v. Ghavami, 2010 BCCA 126, 253 C.C.C. (3d) 74	3, 46, 60, 61, 64
R. v. Godin, [2009] 2 S.C.R. 3	57, 101, 108
R. v. Goodkey, 2013 BCSC 1431	75
R. v. Hawkins (1991), 6 O.R. (3d) 724 (Ont. C.A.) aff'd [1992] 3 S.C.R. 463	80
Housen v. Nikolaisen, [2002] 2 SCR 235	107
R. v. Lahiry, (2011), 283 C.C.C. (3d) 525 (ONSC)	73, 77
R. v. MacDougall, [1998] 3 S.C.R. 45	57, 58, 61, 65, 67, 69, 96, 101, 102, 108, 110
R. v. Morin, [1992] 1 S.C.R. 771, 71 C.C.C. (3d) 1	3, 4, 43, 52, 54, 55, 57, 69, 70, 72, 80, 93, 94, 95, 96, 97, 98, 100, 102, 103, 104, 108, 109, 111
R. v. Nuosci, [1993] 4 S.C.R. 283	69, 70, 78
R. v. Philip (1993), 80 C.C.C. (3d) 167 (Ont. C.A.)	80
R. v. Qureshi, [2004] 190 C.C. C. (3d) 453 (Ont. C.A.)	80
R. v. Sanghera, 2014 BCCA 249, aff'd 2015 S.C.C. 13	65, 82
R. v. Seegmiller (2004), 191 C.C.C. (3d) 347 (Ont. C.A.), leave ref'd [2005] 2 S.C.R. xi	59, 96
R. v. Smith, [1989] 2 S.C.R. 1120	69, 70, 78
R. v. Steele, [2012] O.J. No. 2545 (Ont. C.A.)	72

PART VII: LEGISLATION

Canadian Charter of Rights and Freedoms

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

GUARANTEE OF RIGHTS AND FREEDOMS

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

LEGAL RIGHTS

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

(b) to be tried within a reasonable time

ENFORCEMENT

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Charte Canadienne des Droits et Libertés

Attendu que le Canada est fondé sur des principes qui reconnaissent la suprématie de Dieu et la primauté du droit :

GARANTIE DES DROITS ET LIBERTES

Droits et libertés au Canada

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

GARANTIES JURIDIQUES

Affaires criminelles et pénales

11. Tout inculpé a le droit :

(b) d'être jugé dans un délai raisonnable

RECOURS

Recours en cas d'atteinte aux droits et libertés

24. (1) Toute personne, victime de violation ou de négation des droites ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.