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Court file no. 36112

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN

HER MAJESTY THE QUEEN

Appellant

— and —

KENNETH GAVIN WILLIAMSON

Respondent

— and —

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

Intervenors

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. Trial within a reasonable time was enshrined as a fundamental legal right, a constitutional imperative, in 1982, in the form of section 11(b) of the *Canadian Charter of Rights and Freedoms*. The ancient notion that "justice delayed is justice denied" had become part of Canada's supreme law.[1]

2. Eight years later, in October 1990, this Court released its landmark decision in *R. v. Askov*[2], which continues to resonate as the seminal decision on "unreasonable delay". Subsequent decisions of this Court and of provincial appellate and trial courts have clarified, dissected and expanded on *Askov*, but none have departed from its core ruling, namely that an assessment of the reasonableness of delay must take into account four factors:

   i) The length of the delay;
   ii) The explanation for the delay, and in particular…
      a) Delays attributable to the Crown;
      b) Systemic or institutional delays;
      c) Delays attributable to the accused;
   iii) Whether the accused waived any of the delay; and
   iv) Prejudice to the accused.[3]

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[1] The concept dates back at least 800 years, when the Magna Carta was agreed at Runnymede in 1215. Clause 40 provided, "To no one will we sell, to no one deny or delay right or justice: http://www.bl.uk/magna-carta/articles/magna-carta-english-translation

[2] [1990] 2 S.C.R. 1119, [1990] S.C.J. No. 106

[3] *Askov*, supra n. 1, para. 69

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3. This appeal concerns the fourth and final factor, namely prejudice to the accused. The appeal also raises the question of whether a Court of Appeal can effectively take judicial notice of the state of delay in that province's trial courts.

4. **Prejudice and Unreasonable Delay:** In *Askov*, Cory J., writing for the majority, concluded that there is a presumption of prejudice that flows from delay, a presumption that is "virtually irrebuttable" as the delay becomes excessive:

> There is a general, and in the case of very long delays an often virtually irrebuttable presumption of prejudice to the accused resulting from the passage of time. Where the Crown can demonstrate that there was no prejudice to the accused flowing from a delay, then such proof may serve to excuse the delay. It is also open to the accused to call evidence to demonstrate actual prejudice to strengthen his position that he has been prejudiced as a result of the delay.[4]

5. As long ago as *Askov*, this Court distinguished between two types of prejudice: "presumed" (or inferred) prejudice and "actual" (or proven) prejudice. The accused had no obligation to demonstrate prejudice, but could if he wanted to: it was simply a given that unreasonable delay caused prejudice.

6. The Crown in this appeal takes the position that prejudice is not a given, regardless of the length of the delay. Put another way, the Crown's position is that it is open for trial Judges to find, even in cases of excessive delay, that the "inferred prejudice" is insignificant or even non-existent.

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[4] *Askov*, supra n. 2 at para. 69. Chief Justice Lamer, in separate reasons and following his dissenting reasons in *Mills v. The Queen*, [1986] 1 S.C.R. 863, went further, asserting that there is an irrebuttable presumption of prejudice that flows from delay (para. 115), and indeed that prejudice should not be a factor when assessing the reasonableness of delay (paras. 111 and 122). According to Lamer C.J., "prejudice" is relevant to the remedy, not to whether there has been a breach.

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7. The Respondent's position is that a "no harm, no foul" approach to assessing the reasonableness of delay would be contrary to the goals and spirit of s. 11(b), that it would take away any incentive for the Crown and the state to ensure the right to a speedy trial, that it would convert s. 11(b) applications into lengthy evidentiary hearings which focus on the prejudice sustained by the accused – thus taking more time and, ironically, causing more delay – and that it would lead to the absurd result that "trial within a reasonable time" will be determined less by "time" (the length of and reasons for delay) than by how much the accused has suffered because of the delay.

8. Less than two weeks shy of the 25th anniversary of *Askov*, this Court will hear this appeal and the companion appeal in *R. v. Jordan*[5] . The jurisprudence on delay has reached a critical juncture, and this Court is in the position of having to choose between two stark options. Going down one path will breathe life into the concept of inferred prejudice, and thus fortify the right to trial within a reasonable time and remain true to the spirit of this Court's decision in *Askov* and other early *Charter* jurisprudence. This is the path that the Respondent is asking this Court to follow.

9. The other option, which is being urged by the Crown, is to retreat from the path hinted at by this Court's decision in *Godin*[6] and instead restrict section

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[5] *R. v. Jordan*, 2014 BCCA 241; [2014] B.C.J. No. 1263; leave to appeal granted November 27, 2014, [2014] S.C.C.A. No. 397
[6] *R. v. Godin*, [2009] 2 S.C.R. 3

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11(b)'s protection to those individuals who not only have waited way too long to get to trial, but who have suffered demonstrable prejudice as a result.

10. The Respondent urges this Court, on the 25th anniversary of *Askov*, to make a clear statement that delay is presumptively prejudicial when the time to trial is outside the guidelines that have been well-established by this Court in *Askov* and its progeny, that the accused has absolutely no duty to prove prejudice, and that it would be only in the most extraordinary of cases that the Crown could rebut the presumption of prejudice.

11. **"Judicial notice":** In the decision under appeal, the Court of Appeal for Ontario stated that the Respondent's trial "could have been accommodated earlier" had the trial been moved to another court in the Eastern Region of Ontario. The Crown takes the position that the Court of Appeal improperly took judicial notice, given that there was no evidence that the trial could in fact have been accommodated earlier.

12. The Respondent's position with respect to the judicial notice issue is that the Court of Appeal is entitled, as a superior court of record[7], to comment on the state of delay in the Superior Courts of the same province. If the Court of Appeal's comment in the present case amounts to "judicial notice", it is notice of facts that are within the purview of the Court's knowledge. This was fair comment by the province's highest court.

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[7] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 2

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13. Either way, the Respondent's position is that this appeal should not turn on this issue. If the Court of Appeal was accurate in stating that the trial could have been accommodated earlier elsewhere, then the Court was also correct in suggesting that it therefore should have been moved. If the Court of Appeal was inaccurate, and the trial could not have been accommodated earlier anywhere in the East Region, then the problem of institutional delay in the East Region is truly grave and, again, the Respondent's right to trial within a reasonable time was breached – in this case, not by a temporary problem in Kingston, but by widespread systemic delay in the entire Region.

B. CHRONOLOGY

14. The record, which consists of transcripts, correspondence and affidavit material, speaks for itself. The Respondent accepts that the Crown has accurately set out the facts, and adds the following information in order to provide context and greater detail. The Respondent will adopt the outline used by the Crown in the Appellant's Factum.

15. It is necessary, as in any section 11(b) analysis, to examine the proceedings in some detail in order to understand why it took so long for Mr. Williamson to get to trial. On any view of the chronology, certain conclusions are unavoidable. The Respondent suggests that the record supports the following factual findings.

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(i) From an evidentiary perspective, this was a relatively uncomplicated case. The Crown's case consisted of the testimony of the complainant, plus a video statement by the Respondent which amounted to a confession which, at trial, the Respondent repudiated. The defence case depended largely on the testimony of the Respondent, as well as some brief testimony with respect to the plausibility of the timing of some of the alleged incidents.[8]

(ii) In addition to the s. 11(b) application, there were pre-trial motions relating to third-party records and to the voluntariness of the Respondent's statement to the police.

(iii) The Respondent did not waive any of the delay, from the date of the charge until the end of his trial.

(iv) The Respondent did not cause any delay, and in fact through his counsel he was diligent in advancing his s. 11(b) right at every appropriate point in the proceedings.

(v) The time elapsed from the date the Respondent was charged (January 7, 2009) until his trial began in the Superior Court of Justice (December 12, 2011) is **1069 days** – a few weeks short of

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[8] Two of the grounds of appeal raised in the Court of Appeal related to the admissibility of all or some of the statement (Appellant's Record, Vol. I, p. 210: Notice of Appeal). These grounds were dismissed by the Court of Appeal (Appellant's Record, Vol. I, p. 167 at pp. 192-7: Decision of the Court of Appeal); the Respondent sought leave to cross-appeal on the statement issue, and leave was denied.

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3 years. Of this, 485 days (16 months) was in the Ontario Court of Justice leading up to the Respondent's committal to stand trial, and 584 days (a little over 19 months) was in the Superior Court.

16. With the above as the baseline facts, the chronology can now be examined by dividing it into pre- and post-committal events.

i) Time from Date of Charge to Committal to Stand Trial: January 7 to May 7, 2010 (485 days)

17. The Respondent was arrested on January 6, 2009 at the school where he was teaching at the time, Gananoque Secondary School.[9] This was the last day he ever taught, as subsequent bail conditions made teaching impossible.[10] He was taken to the police station where he gave a lengthy statement.

18. The following day, the Respondent was brought to the Ontario Court of Justice at Kingston for a bail hearing. The Information was sworn the same day.[11] The Respondent was charged with sexual offences that would have occurred over a four-year period between the beginning of 1979 and the end of 1982, some 30 years earlier.

19. The bail hearing was adjourned on January 7th[12] and again on January 9th.[13]

[9] Appellant's Record, Vol. II, p. 9, para. 4: Affidavit of Kenneth Gavin Williamson
[10] Appellant's Record, Vol. II, p. 10, para. 7: Affidavit of Kenneth Gavin Williamson
[11] Appellant's Record, Vol. II, p. 20, at p. 22: Information
[12] Appellant's Record, Vol. II, p. 29: Transcript of Proceedings, January 7, 2009
[13] Appellant's Record, Vol. II, p. 33: Transcript of Proceedings, January 9, 2009

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20. On January 12, 2009 the Respondent was released on consent on a recognizance with various conditions.[14] The case was adjourned roughly two weeks.

21. Mr. May, counsel for the Respondent, attended remand court in Kingston on January 27, 2009. Disclosure was not yet available and the case was adjourned three more weeks.[15] On February 17th (41 days after charge) the case was adjourned another three weeks.[16] The next day, February 18th, Mr. May wrote to the Crown asking for significant additional disclosure.[17]

22. On March 10th (62 days after charge), the matter was adjourned to April 14th in order for Mr. May to conduct a counsel pre-trial with the Crown.[18]

23. On March 13th (65 days after arrest), Mr. May requested further disclosure, specifically the "critical"[19] video statements of the Respondent and the complainant.[20] This disclosure was not sent to Mr. May until April 2nd (85 days after charge).[21]

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[14] Appellant's Record, Vol. II, p. 37: Transcript of Bail Proceedings, January 12, 2009; Vol. III, p. 3: Recognizance of bail

[15] Appellant's Record, Vol. II, p. 43: Transcript of Proceedings, January 27, 2009

[16] Appellant's Record, Vol. II, p. 47: Transcript of Proceedings, February 17, 2009

[17] Appellant's Record, Vol. II, p. 49: Letter from defence counsel to Crown dated February 18, 2009

[18] Appellant's Record, Vol. II, p. 52: Transcript of Proceedings, March 10, 2009

[19] Appellant's Record, Vol. I, p. 7: Reasons for Judgment, Superior Court, para. 29

[20] Appellant's Record, Vol. II, p. 54: Letter from defence counsel to Crown dated March 13, 2009

[21] Appellant's Record, Vol. III, p. 15: Undertaking re digital disclosure

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24. On April 14th (97 days after charge), the matter was adjourned two weeks so that Mr. May could get instructions from his client following discussions he had had with the Crown on April 8th.[22]

25. On April 28th (111 days after charge), an agent for Mr. May set two dates for the Respondent: (1) a "focus hearing" date of November 9, 2009, and (2) a full-day preliminary inquiry date of November 23, 2009 (209 days from set-date, 320 days after charge).[23]

26. On the focus hearing date the preliminary inquiry date – 2 weeks later – was confirmed.[24] On the same date, the Respondent's bail was varied: his surety was removed, and his address was changed from Lyn, Ontario to Ottawa. All other conditions remained in place.[25]

27. The application Judge concluded that the 320 days to the first preliminary inquiry date could be apportioned as follows:[26]

- January 7 – April 28, 2009 (111 days):
    - 1 month + 4 days (34 days) attributable to the Crown because of unexplained delay in providing the "critical" audiovisual disclosure
    - the balance (77 days) is neutral intake

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[22] Appellant's Record, Vol. II, p. 57: Transcript of Proceedings, April 14, 2009; Vol. III, p. 17, Letter from defence counsel to agent, c.c.'d to Crown, dated April 9, 2009
[23] Appellant's Record, Vol. II, p. 61: Transcript of Proceedings, April 28, 2009
[24] Appellant's Record, Vol. II, p. 66: Transcript of Proceedings, November 9, 2009
[25] Appellant's Record, Vol. III, p. 5: Recognizance of bail dated November 9, 2009
[26] Appellant's Record, Vol. I, p. 7: Reasons for Judgment, Superior Court, paras. 29-30

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- April 28 – November 23, 2009 (209 days):
    - Institutional delay

28. The Respondent and his counsel both attended Court for the preliminary inquiry on the scheduled date of November 23rd. There was no advance indication to either of them that there was a problem with this date. Unbeknownst to them, from the Crown's perspective the matter was not proceeding and their witnesses had therefore been cancelled:

- An internal email exchange within the Crown's office, dated October 26 and 27, 2009 (two weeks before the focus hearing) shows that the Crown expected the Respondent's preliminary inquiry to start by 2 PM on November 23rd, after the completion of an unrelated trial continuation.[27]

- On Friday November 20th, Judge's Chambers sent an email to Sandra Foley of the Crown's office indicating that the presiding Judge, Mr. Justice Megginson, would be attending a funeral on Monday afternoon, November 23rd. Ms. Foley and "Ross" "went ahead and contacted the defence and police" to notify them that the matter would not be going ahead on Monday.[28]

- Mr. May was in fact never notified that the matter was not going ahead. He was not aware that witnesses had been cancelled. He was advised just

[27] Appellant's Record, Vol. III, p. 11: Email exchange between Janet Lee and John Skoropada

[28] Appellant's Record, Vol. III, p. 10: Email exchange between Joyce Williams, Sandra Foley and John Skoropada

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before Court that Justice Megginson would not be available because of a funeral. It then turned out that Justice Megginson was indeed sitting, but that he was hearing (a) another preliminary inquiry and (b) a trial continuation.[29]

- Given this situation, a new preliminary inquiry date was set for February 22, 2010.[30] There is no indication that this was anything other than the earliest available date available for a full-day hearing.

29. The same day, Mr. May confirmed the above situation in writing, concluding with the following comments:

> As you will understand, Mr. Williamson and I attended at Kingston Provincial Court with the expectation that this matter would proceed on the date scheduled. A new date has now been set for preliminary inquiry on February 22, 2010 for a full day.
>
> *We continue to be anxious to move forward in this matter which regrettably could not proceed today due to administrative and institutional delay.*[31] (Emphasis added)

30. On February 22, 2010 (411 days after charge), Mr. May and the Respondent again traveled from Ottawa to Kingston for preliminary inquiry. According to Mr. May's unchallenged comments on the record, the matter again could not

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[29] Appellant's Record, Vol. II, p. 72: Letter from defence counsel to Crown dated November 23, 2009

[30] Appellant's Record, Vol. II, p. 70: Transcript of Proceedings, November 23, 2009

[31] Supra n. 29, p. 73

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proceed, to the surprise and disappointment of the Respondent. These are the circumstances set out by Mr. May:[32]

- Both Justice Megginson and the investigating officer were unavailable that day;
- A new preliminary inquiry date of March 15th was offered but rejected by Mr. May;
- Mr. May offered to proceed on dates as early as March 23rd;
- The earliest date available to counsel and the Court was May 7, 2010;
- Mr. May again asserted his client's s. 11(b) rights, and indicated that he was not waiving any of the delay caused by the matter not proceeding on February 22nd.[33]

31. The preliminary inquiry proceeded on May 7, 2010 (485 days after charge). The day was not long enough to complete the inquiry, as there was only enough time for the complainant's testimony plus legal argument regarding the addition of a third count against the Respondent. Rather than set a continuation date, the Respondent consented to a committal to stand trial.[34]

ii) Time from Committal to First Appearance in Superior Court: May 7 to August 4, 2010 (89 days)

32. Mr. May, after consultation with the Crown, suggested that the most efficient way to proceed would be to cross-examine the remaining police witnesses in

[32] Appellant's Record, Vol. II, p. 76: Transcript of Proceedings, February 22, 2010
[33] The trial Judge found the period of February 22 to May 7 to be institutional delay (Appellant's Record, Vol. I, p. 7, paras. 32-4). The Court of Appeal made no comment.
[34] Appellant's Record, Vol. II, p. 82-186: Transcript of Proceedings, May 7, 2010

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an out-of-court discovery, without the need for a Judge.[35] The Respondent consented to committal even though the preliminary inquiry was not completed.

33. The next step was to adjourn the case to the Superior Court for a judicial pre-trial. Mr. May expressed that he wished to have the discoveries completed before appearing in Superior Court.[36]

34. The Respondent was offered five dates from June 2 to August 4 for his first Superior Court appearance. Given that the discovery dates had not yet been scheduled and were going to be set another time, Mr. May accepted the August 4th pre-trial date "just to be on the safe side".[37]

35. As the Crown points out in the Appellant's Factum, para. 9, the trial Judge and the Court of Appeal took different views of this 89-day delay. The trial Judge treated it as neutral intake in the Superior Court. The Court of Appeal concluded that two months of this delay is attributable to the defence, given that the Respondent was offered a Superior Court date of June 2nd and turned it down, and turned down three other dates before August 4th.[38]

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[35] The other options would have been (a) to forego the police witnesses entirely, but given that the voluntariness of the Respondent's statement was a critical issue, this was not practical, or (b) insist on setting a continuation of the preliminary inquiry, which in all likelihood would have added significantly more time to the proceedings.
[36] Of relevance is that it appears to be the practice in Kingston that the first Superior Court appearance following committal involves a judicial pre-trial conference.
[37] Supra n. 34., pp. 185-6
[38] The Court of Appeal's finding is arguably incorrect on this point. As this Court remarked in *Godin*, supra n. 6, para. 23, "Scheduling requires reasonable availability and

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36. In this Court the Respondent respectfully suggests that none of this period should count against the defence. The Respondent chose August 4th, rather than an earlier date, because he had opted to waive his right to have all preliminary inquiry witnesses examined in front of a Judge. The Respondent's conduct was consistent with doing everything possible to move the case along as quickly as possible, while minimizing the number of court appearances. The August 4th date was accepted in order to ensure that all discoveries would have been completed by then. Had the Respondent insisted on completing the preliminary inquiry with a Judge, the additional time would surely have counted as institutional delay.

iii) Time from First Appearance in Superior Court to Setting of Trial Date: August 4 to October 22, 2010 (79 days)

37. The assigned Crown, Ms. Williams, did not attend the pre-trial conference on August 4, 2010 (575 days after charge). Given that, consequently, nothing of substance could be accomplished on August 4th, the Respondent requested that the case be adjourned to September 29th for pre-trial. This was Mr. May's next available date, although the record does not indicate what other dates, if any, the Court was offering.[39]

38. On September 29, 2010 (630 days after charge), a judicial pre-trial was held with Mr. Justice McNamara. The case was adjourned to the next Assignment

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reasonable cooperation; it does not, for s. 11(*b*) purposes, require defence counsel to hold themselves in a state of perpetual availability."

[39] Appellant's Record, Vol. II, p. 191: Transcript of Proceedings, August 4, 2010

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Court in order to fix two dates: (1) 3 days for pre-trial motions, and (2) 6-7 days for trial.[40]

iv) Time from Set-Date to Trial Date: October 22, 2010 to December 12, 2011 (416 days)

39. At the next Assignment Court, on October 22, 2010 (653 days after charge), two dates were set:[41]

- 4 days for pre-trial motions, including s. 11(b), to be heard September 6-9, 2011 (earlier dates were offered for the pre-trial motions, but rejected);

- 7 days for jury trial, set to begin December 12, 2011, with jury selection on December 5th. Regardless of when the pre-trial motions were argued, this was the earliest date available for a jury trial.[42]

40. On November 19, 2010, the Respondent's brother and sister-in-law wrote to the Crown, requesting that the Respondent's bail conditions be varied so as to permit him to have unsupervised contact with their son, the Respondent's 13-year-old nephew. They described it as "an incredibly sad situation" for their son, who was "very close" to his uncle and had been unable to have unsupervised contact in almost two years.[43]

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[40] Appellant's Record, Vol. II, p. 196: Transcript of Proceedings, September 29, 2010
[41] Appellant's Record, Vol. II, pp. 200-204: Transcript of Proceedings, October 22, 2010
[42] Ibid, p. 202, lines 11-14
[43] Appellant's Record, Vol. II, p. 17: Letter from Margaret Polanyi and Jim Williamson dated November 19, 2010

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41. On November 23, 2010, the Crown wrote to Mr. May, indicating that they would not consent to a bail variation and suggested that, should the Respondent wish to pursue the issue, he could bring an application in Superior Court.[44] The Respondent never did bring an application to vary his conditions.

42. The pre-trial motions began on September 6, 2011, 972 days after the Respondent had been charged. The jury was selected on December 5th of the same year. On December 12, 2011, 1069 days after he was charged, the Respondent began his trial in the Superior Court.

43. As indicated by the Crown in the Appellant's Factum, para. 12, the trial Judge characterized the entire period from set-date to trial date as institutional delay. The Court of Appeal concluded that one month of this period was neutral (or inherent) delay.

44. At trial and on appeal the Crown relied on an affidavit of Christine Harnett, the Trial Coordinator, to the effect that a complex multiple-accused murder trial had put a temporary strain on judicial resources in Kingston. As of October 22, 2010, that trial, the *Shafia* trial, was scheduled for three months beginning March 28, 2011. On May 27, 2011, the *Shafia* trial was rescheduled to October 11, 2011.[45] There are only two jury courtrooms in Kingston, and the *Shafia* case occupied one of them.

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[44] Appellant's Record, Vol. II, p. 19: Letter from Megan Williams (Assistant Crown Attorney) to defence counsel dated November 23, 2010

[45] Appellant's Record, Vol. III, p. 9: Affidavit of Christine Harnett, para. 7

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45. The rescheduling of the *Shafia* trial meant that, ironically, the Respondent's trial began while the *Shafia* trial was still running in the other courtroom at the Kingston courthouse.

46. In her affidavit Ms. Harnett states that on August 27, 2010 six matters were set for jury trial. The dates set ranged from January 17, 2011 to October 3, 2011.[46] The implication is that, had the Respondent set his trial date on August 27th rather than on October 22nd, he would likely have had an earlier trial date. The Respondent takes the position that this is a red herring and should not be taken into account when apportioning responsibility for the delay:

- It is unknown whether any of the dates set on August 27th were in-custody dates or would otherwise have had priority over the Respondent's trial;

- It is unknown whether any trial dates were set at the September 10, 2010 Assignment Court referred to in para. 4 of the affidavit;

- It is unknown whether there were other earlier dates available on August 27th. In other words, if the Respondent did set his trial date at the August 27th Assignment Court, there is no evidence that he would have been offered an earlier date. For all we know from the affidavit, the six earliest dates were used up, and the Respondent may have been offered the December 2011 date even if he had set it in August 2010;

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[46] Ibid, p. 8, para. 5

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- Much of the delay is blamed on the fact that the *Shafia* trial took over one of the two jury courts for three months beginning at the end of March 2011; when that trial was rescheduled on May 27, 2011 (para. 7 of the affidavit, which does not explain how the trial was "rescheduled" when it should have been just finishing its second month), there is no indication that the Respondent was offered the trial time that had just freed up.

v) The Judicial Notice Issue
Accommodating the Trial Elsewhere in the East Region

47. The Court of Appeal concluded that the Regional Senior Justice should have been approached for assistance and that relocating the trial should have been considered as an option: "The Eastern Region of the Superior Court has plenty of locations and judges; the trial could have been accommodated earlier."[47]

48. The Ontario Superior Court of Justice sits in 51 locations, divided into eight regions. Kingston is in the East Region, which has criminal Superior Courts in ten locations:[48]

- Belleville
- Brockville
- Cornwall
- Kingston
- L'Orignal
- Ottawa
- Napanee
- Pembroke
- Perth
- Picton

[47] Appellant's Record, Vol. I, p. 182: Decision of the Court of Appeal for Ontario, para. 42
[48] Superior Court of Justice, Court Locations and Schedules: http://www.ontariocourts.ca/scj/locations/#Judicial_Regions_and_Regional_Court_Schedules; there is also a separate Superior Court Family Court in Kingston

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49. As of March 31, 2012, there were 45 Judges of the Superior Court of Justice in the East Region, including the Regional Senior Judge and 11 Local Administrative Judges.[49] One Judge in the East Region had retired in 2010, and one in 2011.[50] It is unknown how many appointments there had been in that same period of time.

50. According to an annual report from the Ministry of the Attorney General, the Superior Court in Kingston did not experience an extraordinary year surrounding the time when the Respondent's indictment was filed. In fact, the court statistics in Kingston were consistent with statistics not only across the East Region, but across Ontario. This is true with respect to the number of Indictments and Appeals received, disposed of and pending. Statistically there was nothing to justify an extraordinary delay in Kingston. If anything, at the time that the Respondent's case entered the Superior Court, 2011 had seen a decrease in cases.[51]

51. It is against this backdrop that the Court of Appeal concluded that the trial could have been accommodated earlier had it been relocated to another court in the East Region.

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[49] The Superior Court of Justice: Mapping the Way Forward, 2010-2012 Report http://www.ontariocourts.ca/scj/files/annualreport/2010-2012-EN.pdf, p. 2
[50] Ibid, p. 50
[51] Ministry of the Attorney General, Court Services Division, Annual Report 2011-2012
https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/courts_annual_11/Court_Services_Annual_Report_FULL_EN.pdf, pp. B20-B29

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C. Prejudice

52. In an affidavit in support of his s. 11(b) application the Respondent pointed to the following circumstances which made the delay particularly difficult for him:[52]

a) He was 57 years old at the time of the affidavit (para. 2) and had worked as a high school teacher since 1981 (para. 3).

b) His release conditions have "severely inhibited my activities" and have caused a "great deal of stress and anxiety" (para. 5).

c) His release conditions include conditions not to be with someone under the age of 16 without a responsible adult present, and not to be employed in a position that involves being in a position of trust or authority to a person under the age of 16 (para. 6).

d) As a result of the bail conditions, he has been unable to return to teaching since January 6, 2009 (para. 7).

e) While he is fortunate enough to be on paid leave from teaching, he still must be on call on any school day in case the school board or union requires his presence. This situation has prevented him from finding other employment during the day in order that he remain accessible and available at all times. The result is that he has been left "with a significant amount of time to be alone with my thoughts and to reflect on the severity of my current situation" (para. 8).

f) Because of his leave from work, he has lost contact with his colleagues and has experienced "feelings of loneliness and isolation" (para. 9).

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[52] Appellant's Record, Vol. II, pp. 9-13: Affidavit of Kenneth Gavin Williamson, sworn July 21, 2011

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g) The bail conditions have had "a significant effect" on his relationship with his 14-year-old nephew, one of the Respondent's few relatives in Canada. The Respondent had sought a bail variation but the Crown would not consent (para. 10).

h) The delay has been "exceptionally stressful and difficult to cope with". The Respondent has "thought about these charges each and every day" (para. 12).

i) The continual stress has affected the Respondent's sleep. Prior to being charged he took sleeping pills once or twice per week to help him sleep; since his arrest, he has become "entirely incapable of sleeping without the assistance of sleeping pills" (para. 13).

j) The delay caused by the two rescheduled preliminary hearings particularly affected the Respondent. He had to mentally prepare for each day. In addition, he had to pay counsel for each day, which significantly contributed to his legal costs (para. 14).

53. The trial Judge found that the Respondent "has not proven the actual prejudice that he claimed to have suffered". His house arrest was self-imposed. His nephew was in Toronto and there would have been limited opportunities to visit. The delay due to the two cancelled preliminary inquiry dates was "most unfortunate and most inappropriate" and the "stress, emotion (*sic*) and financial cost to the accused that resulted is most regrettable", but this did not amount to significant prejudice. There was no medical evidence.[53]

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[53] Appellant's Record, Vol. I, pp. 9-10: Reasons for Judgment, Superior Court, paras. 50-56

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PART II: RESPONSE TO ISSUES

54. The Crown states the two issues as follows:[54]

> **Question 1: What rules and principles guide judges of trial or appellate courts in their use of their own knowledge of or experience with institutional resources and court practices in adjudicating claims of infringement of the constitutional right to a trial within a reasonable time?**
>
> **Question 2: What is the proper role of the concept of "inferred prejudice" as a function of the length of delay in bringing an accused person to trial, in adjudicating claims alleging denials of the constitutional right to be tried within a reasonable time, particularly where on the evidence it is found that the delay has resulted in minimal or no actual consequences to the accused's liberty, security or fair trial interests?**

55. The Respondent would restate the first issue in the following way:

> **Question 1: Is it proper for a provincial appellate court, when determining whether delay was reasonable in a superior court of the same province, to take into account its own knowledge of or experience with institutional resources and court practices within the superior courts of the province?**

56. The Respondent agrees with the Appellant's framing of the second issue.

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[54] Appellant's Factum, p. 10

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PART III: ARGUMENT

A. JUDICIAL NOTICE

57. The Respondent accepts the Crown's statement of the law relating to judicial notice. The Respondent's position is that the jurisprudence relating to judicial notice does not apply in the context of this case. If it does apply, and if judicial notice was improperly taken, the Court of Appeal was still correct in finding that the Respondent's right to trial within a reasonable time had been breached and that a stay of proceedings was the appropriate remedy.

58. The Court of Appeal raised the question, not raised by counsel in written or oral argument, why the Regional Senior Justice had not been approached to assist by perhaps relocating the trial to another court in the East Region. The Court concluded that the trial could have been accommodated earlier had this been done.

59. The present case can be distinguished from the cases relied on by the Crown. None of those cases relate to a situation where a court is making findings of fact in relation to the administration of justice within courts overseen by that same court.

60. In the present case, the Court of Appeal made a factual finding about the administration of justice within the Superior Court of the Province of Ontario.

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The *Courts of Justice Act* confirms that, at law, the Court of Appeal and the Superior Court of Justice are both superior courts of record:[55]

> 2. (1) The Court of Appeal for Ontario is continued as a superior court of record under the name Court of Appeal for Ontario in English and Cour d'appel de l'Ontario in French.
>
> (2) The Court of Appeal has the jurisdiction conferred on it by this or any other Act, and in the exercise of its jurisdiction has all the powers historically exercised by the Court of Appeal for Ontario.
>
> 11. (1) The Ontario Court (General Division) is continued as a superior court of record under the name Superior Court of Justice in English and Cour supèrieure de justice in French.

61. In *Morin*, this Court made the following comments which, the Respondent submits, support his position that the Court of Appeal did not commit error or overstep its bounds by stating that the trial could have been accommodated earlier if relocated within the East Region:[56]

> **57** These suggested time periods are intended for the guidance of trial courts generally. These periods will no doubt require adjustment by trial courts in the various regions of the country to take into account local conditions and they will need to be adjusted from time to time to reflect changing circumstances. *The court of appeal in each province will play a supervisory role in seeking to achieve uniformity subject to the necessity of taking into account the special conditions and problems of different regions in the province*.
>
> **58** The application of these guidelines under the supervision of the court of appeal is subject to the review of this Court to ensure that the right to trial within a reasonable time is being respected. In this regard I wish to reiterate what this Court said in *Stensrud* [[1989] 2 S.C.R. 1115], at p. 1116:

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[55] *Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 2, 11
[56] *R. v. Morin*, [1992] 1 S.C.R. 771 at p. 800, paras. 57-8

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> *The provincial courts of appeal are generally in a better position than this Court to assess the reasonableness of their province's institutional limitations and resources*. Nevertheless, they must decide applications under s. 11(b) on the basis of correct principles.

62. Even if the Court of Appeal was incorrect in this respect, and even if the trial could not have been accommodated earlier, this does not invalidate the ultimate conclusion of the Court of Appeal and the appeal should not be allowed on this basis alone. If in fact the trial could not have been accommodated earlier elsewhere in the East Region, the fact remains that the Court could not accommodate the Respondent's trial within a reasonable time, leading to a breach of his s. 11(b) right.

B. INFERRED PREJUDICE

i) The Constitutional Right to a Trial Within a Reasonable Time

63. The *Charter* sets out various rights and fundamental freedoms in a constitutional document, "the supreme law of Canada".[57] These rights and freedoms reflect core social values. The Respondent respectfully submits that none of these protected rights and freedoms would have attained constitutional status if the breach of such a right or freedom did not always, at least presumptively, have a negative impact upon the life or liberty of the individual affected. The framers of the Constitution, including the *Charter*, would not have included provisions that were not considered absolutely necessary.

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[57] *Hunter v. Southam*, [1984] 2 S.C.R. 145, 1984 CanLII 33, para. 1 of CanLII

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64. Some *Charter* rights attach to the individual without reference to the state. The fundamental freedoms set out in s. 2 of the *Charter*, for example, the democratic rights in s.3, and the mobility rights in s. 6 attach to all individuals without reference to the state and its agents, other than by implication. These rights protect the rights of individuals to do certain things which any person ought to be permitted to do in a free and democratic society. These rights are framed in positive terms: the right to freedom of conscience and religion; the right to assemble freely; the right to vote; the right to move freely throughout Canada.

65. The legal rights set out in sections 7-14 of the *Charter* are qualitatively different. These rights quite clearly set out not only what an individual has a right *to do*, but also what the state does *not* have the right to do or what the state has an *obligation to do*. For the most part, unlike the rights protected elsewhere in the *Charter*, these rights are framed in terms that place an obligation on state agents *to do something FOR* the individual, or *NOT to do something TO* the individual:

- s. 7: the right *not* to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice
- s. 8: the right to be secure *against* unreasonable search and seizure (i.e., the right *not* to be unreasonably searched or be seized from)
- s. 9: the right *not* to be arbitrarily detained or imprisoned
- s. 10(a): the right *to be informed* of the reason for arrest or detention
- s. 10(b): the right to retain and instruct counsel, and the right *to be informed* of that right
- s. 10(c): the right *to be released* if the detention is unlawful
- s. 11(a): the right *to be informed* of the offence charged

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- s. 11(b): the right *to be tried* within a reasonable time
- s. 11(c): the right *not to be compelled* to be a witness against oneself
- s. 11(d): the right *to be presumed* innocent…
- s. 11(e): the right *not to be denied* reasonable bail without just cause
- s. 11(f): the right to the benefit of a jury trial (i.e., the state must provide access to a jury trial)
- s. 11(g): the right *not to be found guilty* of an offence not known to law
- s. 11(h): the right *not* to be tried and *not* to be punished a second time for the same offence;
- s. 11(i): the right to the benefit of lesser punishment if the punishment has changed (i.e., *not* to be given the higher penalty)
- s. 12: the right *not* to be subjected to cruel and unusual treatment or punishment
- s. 13: the right *not* to have incriminating testimony used against the person
- s. 14: the right to the assistance of an interpreter (i.e., the state must provide an interpreter)

66. It can be readily seen that the Legal Rights amount to a constitutional code of conduct that state agents – the police, the Crown, Judges, courts administration – must adhere to when dealing with an individual caught up in the criminal justice system.

67. None of the legal rights is subject to a "no harm, no foul" rule. To take one example, our s. 10(b) jurisprudence would have developed very differently if the accused not only had to show that he was not provided with his right to counsel, but that this led to prejudice. It is well known that a suspected drunk driver will virtually always be legally required to provide two breath samples into an ap-

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proved instrument. Legal advice will virtually always be to the effect that the suspect must provide the samples, but should not answer any questions or perform any physical coordination tests. Yet an accused person who has not given a statement and who has not done coordination tests will still have the breath results excluded if he has not been provided the opportunity to consult with counsel. Prejudice is not a prerequisite to *Charter* relief, in this case the exclusion of evidence under s. 24(2).[58]

68. The focus of the legal rights is on the actions of state agents who interfere with these rights at least as much as it is on the harm, or potential harm, suffered by the individual. The focus is not on the degree to which the individual has actually suffered or been prejudiced as a result of state wrongdoing, because it is presumed that a breach of a fundamental constitutional right is inherently prejudicial and must be avoided. A breach of a legal right will, depending on the circumstances, lead to either a general remedy under s. 24(1), or to the exclusion of evidence under s. 24(2). The nature of the remedy may well depend on the degree of prejudice suffered by the applicant, but the remedy is granted only once it has been established that the right has been breached in the first place.

69. The jurisprudence surrounding s. 11(b) is anomalous in this respect, in that prejudice is one of the factors considered when evaluating whether there has been a breach of the right; normally, prejudice is taken into account when de-

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[58] See the similar example given by Lamer C.J. in his concurring reasons in *Askov*, supra n. 2, para. 122: "...the rights guaranteed under s. 10(b) have still been restricted. This person may not have suffered any prejudice, but surely his or her rights have been infringed."

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termining the appropriate remedy, if any.[59] With respect to any other *Charter* right, it is a given that a person whose right has been breached has thereby suffered in one way or another. *Charter* relief is given even where there is no clear prejudice, in order to give state agents an incentive to respect *Charter* rights. Remedies are granted not just to provide relief to the specific accused, but also to send the message to state authorities that *Charter* breaches will not be tolerated.

70. The protections set out in the *Charter* must be interpreted in a manner that gives effect to its provisions and to the intent behind them. In another context, in one of the very first *Charter* cases to reach this Court, Chief Justice Dickson compared the *Charter* to a living tree and wrote, in powerful language, that the *Charter* must be interpreted not in a narrow and formalistic manner, but rather in a broad and purposive manner lest it become the equivalent of a last will and testament:

> … The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. *A constitution, by contrast. is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties*. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one"…

[59] Ibid

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> I begin with the obvious. The *Canadian Charter of Rights and Freedoms is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action*…(Emphasis added)[60]

ii) The *Askov* Decision

71. It was in the same spirit of broad and purposive interpretation that this Court gave definition and life to s. 11(b) in *Askov*. The majority referred to and implicitly endorsed the following comments of Lamer J. (as he then was) and Dickson C.J. dissenting in *Mills v. The Queen*, [1986] 1 S.C.R. 863:

> *First, prejudice is part of the rationale for the right and is assured by the very presence of s. 11(b) in the Charter*. Consequently, there exists an irrebuttable presumption that, as of the moment of the charge, the accused suffers a prejudice the guarantee is aimed at limiting, and that the prejudice increases over time.
>
> Second, actual prejudice is, therefore, irrelevant when determining unreasonable delay. Actual prejudice will, however, be relevant to a determination of appropriate relief .... Prejudice to the liberty and security of the person, the former objectively ascertainable and the latter presumed, must be kept to a minimum if the presumption of innocence is to be respected. (Emphasis added.)[61]

72. The Court in *Askov* recognized that s. 11(b) is concerned primarily with the accused person's interests:

> Purpose of s. 11(b)
>
> **43** I agree with the position taken by Lamer J. that *s. 11(b) explicitly focusses upon the individual interest of liberty and security of the person*. Like other specific guarantees provided by s. 11, this paragraph is primarily concerned with an aspect of fundamental justice guaranteed by s. 7 of the Charter. There could be no

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[60] *Hunter v. Southam*, supra n. 57, paras. 16 and 19 of CanLII

[61] *Askov*, supra n. 2, para. 26

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> greater frustration imaginable for innocent persons charged with an offence than to be denied the opportunity of demonstrating their innocence for an unconscionable time as a result of unreasonable delays in their trial. *The time awaiting trial must be exquisite agony for accused persons and their immediate family*. It is a fundamental precept of our criminal law that every individual is presumed to be innocent until proven guilty. It follows that on the same fundamental level of importance, *all accused persons, each one of whom is presumed to be innocent, should be given the opportunity to defend themselves against the charges they face and to have their name cleared and reputation re-established at the earliest possible time*. (Emphasis added)[62]

73. At the same time, this Court acknowledged that victims and the community at large also have an interest in having the accused brought to trial within a reasonable time. "There is, at least by inference, a community or societal interest implicit in s. 11(b)." [63] Cory J., continuing to focus on the actions of the state, continued,[64]

> **47** *The failure of the justice system to deal fairly, quickly and efficiently with criminal trials* inevitably leads to the community's frustration with the judicial system and eventually to a feeling of contempt for court procedures. When a trial takes place without unreasonable delay, with all witnesses available and memories fresh, it is far more certain that the guilty parties who committed the crimes will be convicted and punished and those that did not, will be acquitted and vindicated. It is no exaggeration to say that a fair and balanced criminal justice system simply cannot exist without the support of the community. Continued community support for our system will not endure in the face of lengthy and unreasonable delays.

74. Even though there are competing interests at play, ultimately the s. 11(b) protection exists primarily to benefit the accused:

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[62] Ibid, para. 43

[63] Ibid, paras. 44-6. Chief Justice Lamer disagreed strongly on this point, asserting that s. 11(b) – like all other legal rights – is an individual right and not at all a societal or community right; a by-product of an efficient court system is that the community experiences a benefit (paras. 112-3)

[64] Ibid, para. 47

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> **49** I believe the inferred societal interest should be considered in conjunction with the main and primary concept of the protection of the individual's right to fundamental justice. This is closer to the views expressed by Wilson J. in *Mills*, supra. At some level, the conduct of and prejudice to the accused must be examined. *Although it must be recognized that the primary goal of s. 11(b) is the protection of the individual's interest in fundamental justice*, *nevertheless that same section contains a secondary and inferred societal interest that should not be ignored*. If the recognition of both the primary individual interest and the inferred society interest is accepted as the true aim of s. 11(b), then I think the various factors which should be taken into consideration in determining whether there has been an unreasonable delay can be clarified and set forth in a consistent test.[65]

75. The Court went on to set out the four factors to be considered when assessing delay: the length of the delay, the reasons for delay, waiver, and prejudice. Before getting to the prejudice issue, it is worth remembering – in the context of the Court of Appeal's comments about relocating the Respondent's trial – two passages from *Askov* that drive home the message that the Crown and the Courts are obliged to do whatever can be done, and even take extraordinary measures, to ensure that s. 11(b) is respected.

76. First, it is always the duty of the Crown to bring the accused to trial. This includes providing facilities and staff to ensure that the accused is tried within a reasonable time.[66]

77. Second, the Court held that "the lack of institutional resources can never be used as a basis for rendering the s. 11(b) guarantee meaningless."[67] Sometimes creative solutions must be found to resolve both temporary and chronic shortages of facilities:

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[65] Ibid, para. 49
[66] Ibid, paras. 57-8
[67] Ibid, para. 56

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92 I would note in passing that the delay cannot be justified on the basis that it came within a "transitional period" necessitated by the passage of the *Charter*…

93 This conclusion should not be taken as a direction to build an expensive courthouse at a time of fiscal restraint. Rather, it is a recognition that this situation is unacceptable and can no longer be tolerated. *Surely an imaginative solution could be found that would rectify the problem. For example, courtroom space might be found in other nearby government buildings. Or perhaps an interim solution could be achieved by the installation of portable structures similar to those used in the school system. If the children who represent the most precious resource of the nation can be taught in portable classrooms, then as a temporary solution trials can take place in similar accommodation*.

94 Arguments can always be raised as to why interim solutions should not be used. *Yet, imaginative cooperation can surely resolve these problems. If temporary structures cannot be used for criminal cases for reasons of security, then the criminal trials might proceed in the courthouse while the civil cases are heard in the nearby government buildings or portable buildings*.

95 ***Another temporary solution might be to encourage changes of venue***. Section 599 of the Criminal Code, R.S.C., 1985, c. C-46, provides:

> 599. (1) A court before which an accused is or may be indicted, at any term or sittings thereof, or a judge who may hold or sit in that court, may at any time before or after an indictment is found, on the application of the prosecutor or the accused, order the trial to be held in a territorial division in the same province other than that in which the offence would otherwise be tried if
>
> (a) it appears expedient to the ends of justice;

. . .

> (3) The court or judge may, in an order made on an application by the prosecutor under subsection (1), prescribe conditions that he thinks proper with respect to the payment of additional expenses caused to the accused as a result of the change of venue.

Both the interest of the individual accused and the inferential societal interest would be served by a change of venue if it resulted in a trial taking place within a reasonable time… In those situations where a change of venue could be fairly and effectively completed, and yet is rejected by an accused, such a refusal would weigh against the accused in determining whether there had been an unreasonable delay. (Emphasis added)[68]

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[68] Ibid, paras. 92-5

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78. **Length of Delay.** This Court, after comparing courts in the Peel District with the best comparable courts in other regions and jurisdictions, concluded that "a period of delay in a range of some six to eight months between committal and trial might be deemed to be the outside limit of what is reasonable."[69] The permissible delay was more clearly defined by this Court in *Morin* less than two years later.[70]

79. **Prejudice**. In1986 in *Mills*, Chief Justice Lamer concluded that there is an irrebuttable presumption of prejudice that flows from excessive delay. He maintained this position in his concurring judgment in *Askov*:

> **115** In *Mills*, I took the position that because of the very nature of our criminal justice system, a certain degree of prejudice, including, at p. 920, "*stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction*", will inevitably be imposed upon an individual charged with a criminal offence and will thereby infringe the rights of liberty and security of the person. Therefore, *there exists an irrebuttable presumption of prejudice from the moment the charge is laid*.
>
> **116** One of the objectives of s. 11(b) is to guarantee a disposition of the charge within a reasonable period of time which will put an end to this inevitable prejudice. It is not simply the trial which is the objective, but instead the termination of the entire process which is causing the anxieties and infringing the rights of liberty and security of the person. *If the completion of the trial and the disposition of the charge are unreasonably delayed, the prejudice which is presumed from the moment the charge is laid can grow to eventually constitute an infringement of s. 11(b):*
>
>> Although, to some extent, these negative consequences are unavoidable, one of the purposes of s. 11(b) is to limit the impact of such forms of preju-

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[69] Ibid, para. 89.

[70] In *Morin* (supra n. 56, paras. 54-6), this Court established "guidelines" of 8-10 months of "purely systemic delay" in the Provincial Courts, and an additional 6-8 months of institutional delay after committal to stand trial. The lengthier period in Provincial Courts is justified by the added demands on those courts.

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> dice to the accused by circumscribing the time period within which they may occur. In other words, while some such prejudice to the accused may be seen as a cost of the very right to a hearing, a fortiori a public one, it must nevertheless be kept to a minimum by a speedy determination of criminal responsibility. Hence, in my view, such forms of prejudice leading to impairment of the security of the person may, in and of themselves, constitute a violation of s. 11(b) if allowed to foster over-long. [*Mills*, at pp. 920-21.]
>
> **117** *The accused need not demonstrate any further manifestations of prejudice beyond the kind presumed in order to establish a restriction of s. 11(b).* If there has been additional prejudice, it could be considered when deciding on a remedy under s. 24(1), but is irrelevant for the determination of a s. 11(b) infringement… (Emphasis added)[71]

80. According to the majority in *Askov*, prejudice becomes "virtually irrebuttable" once the delay becomes excessive. It remained possible for the Crown to demonstrate that there is no prejudice and thereby excuse the delay.[72]

iii) Prejudice Since *Askov*

81. The *Askov* decision was released on October 18, 1990. In less than a year, between October 22, 1990 and September 6, 1991, over 47,000 charges were either stayed or withdrawn in Ontario alone.[73]

82. The reaction to *Askov* was deeply divided. On one hand, many applauded the result that the system had been unclogged of much of the "dead wood", freeing the system up to focus on the truly pressing cases. On the other hand, some concluded that *Askov* had led to an "amnesty for criminals".[74] The latter view was in line

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[71] Supra n. 2, paras. 115-7
[72] Ibid, para. 69
[73] *R. v. Morin*, supra n. 56, para. 7
[74] Ibid

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with comments by Doherty J. (as he then was) in a 1989 paper to the National Criminal law Program:

> An accused is often not interested in exercising the right bestowed on him by s. 11(b). His interest lies in having the right infringed by the prosecution so that he can escape a trial on the merits. This view may seem harsh but experience supports its validity.[75]

83. ***R. v. Morin* (1992).** This Court acknowledged the mixed reaction to *Askov* and, while also referencing Cory J.'s comment that s. 11(b) "can often be transformed from a protective shield to an offensive weapon in the hands of the accused",[76] clearly saw fit to course-correct.

84. With Lamer C.J. dissenting and continuing to hold fast on the prejudice issue, this Court stated that prejudice "*can* be inferred from prolonged delay".[77] While not a ringing endorsement of the concept of inferred prejudice, there was still an acknowledgment by this Court that delay could reasonably be found, without proof, to cause prejudice. However, as the then-Chief Justice pointed out, the majority – and to a greater extent, McLachlan J. (as she then was) – appeared to have placed a burden on the accused to prove that he was prejudiced in one or more of three senses: liberty, security of the person, or fair trial interests. By the same token, the Crown could prove that the accused was not prejudiced in one of these ways. Further, a lack of action on the accused's part (for example, not pushing for an

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[75] Ibid, para. 62
[76] Ibid
[77] Ibid, para. 61

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early date, just going with the flow of the system), could be "relevant in assessing the degree of prejudice".[78]

85. ***R. v. Godin (2009).*** There are a number of significant pronouncements regarding s. 11(b) that come from this Court's most recent decision on the issue.

1) Section 11(b) protects three interests of the accused:[79]

   i. liberty (pre-trial custody or bail conditions);

   ii. security of the person, in the sense of being free from the stress and cloud of suspicion that accompanies a criminal charge;

   iii. the right to make full answer and defence

2) Even in the absence of specific prejudice, unreasonable delay can lead to a "reasonable inference" of prejudice.[80]

3) "It is reasonable to infer…that the prolonged exposure to criminal proceedings resulting from the delay gave rise to some prejudice."[81]

4) It is also reasonable to infer that delay causes prejudice to the accused's ability to make full answer and defence, particularly in a credibility case,

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[78] Ibid, paras. 62-3
[79] *R. v. Godin*, supra n. 6, para. 30
[80] Ibid, para. 31
[81] Ibid, para. 34

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and that the risk of such prejudice is not merely "speculative". Proof of this type of prejudice is "not invariably required".[82]

5) When it takes 30 months to bring a non-complex case to preliminary inquiry and trial, the length of the delay and the evidence supported the trial judge's inference that the accused suffered "some" prejudice.[83]

86. The Respondent respectfully submits that, in not referring to passages from *Morin* that seemed to put a burden on the accused to prove prejudice, and in repeatedly referring to the reasonable inferences of prejudice that can be inferred from the delay itself, this Court course-corrected again in *Godin*. Further, the conclusions in *Godin* are consistent with *Charter* jurisprudence that generally, outside the anomalous context of s.11(b), places no burden on the accused at the proof-of-breach stage to demonstrate prejudice.

87. Having said that, the Respondent urges this Court to go further and find not only that a reasonable inference of prejudice can be drawn, but that there is a virtually irrebuttable presumption of prejudice as it takes longer and longer to get to trial.

88. **Post-*Godin* decisions from provincial appellate courts.** As the two appeals presently under consideration demonstrate, provincial appellate courts have gone in two directions.

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[82] Ibid, paras. 35-8
[83] Ibid, para. 39

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89. **The *Williamson* stream**. In some jurisdictions the Courts have recognized that inferred prejudice flows from delay and can be presumed to exist without proof. Those jurisdictions include Newfoundland and Labrador[84], Nova Scotia[85], Ontario[86] and Québec[87].

90. **The *Jordan* stream.** In other jurisdictions Courts have concluded that a s. 11(b) application will fail where the inferred prejudice is minimal, or is rebutted by such factors as minimal or non-existent release conditions, or by a failure of the accused to press the case forward, include Alberta[88], British Columbia[89] and New Brunswick[90].

91. It is clear that appellate and trial courts require guidance from this Court on the issue of inferred prejudice.

92. For the reasons set out above, the Respondent urges this Court to continue the trajectory set by its 2009 decision in *Godin* and reject a no-harm, no foul rule. It is at the same time respectful of the objectives of s. 11(b), and practical, to presume that any person who has suffered a breach of this or any other *Charter* right has experienced prejudice. While the Crown may be permitted the opportunity to disprove prejudice, the Respondent urges this Court to find that it would only be in the most extraordinary case where the Crown could do so.

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[84] *R. v. Taylor*, [2010] N.J. No. 147, para. 35
[85] *R. v. MacIntosh*, [2011] N.S.J. No. 660, para. 103
[86] *R. v. Williamson*, following *R. v. Steele*, [2012] O.J. No. 2545, para. 28
[87] *R. v. Auclair*, [2013] Q.J. No. 3349, para. 72
[88] *R. v. Dias*, [2014] A.J. No. 1319, para. 21
[89] *R. v. Jordan*, [2014] B.C.J. No. 1263, para. 51
[90] *R. v. Downey*, [2015] N.B.J. No. 91, para. 6

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PART IV: COSTS

93. The respondent makes no submission as to costs.

PART V: ORDER REQUESTED

94. The Respondent respectfully requests that this Honourable Court confirm the decision of the Court of Appeal for Ontario and dismiss this appeal.

All of which is respectfully submitted this 17th day of August, 2015.

John Hale
Counsel for the Respondent, Kenneth Gavin Williamson

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PART VI: AUTHORITIES CITED

Authority	***Para(s)***
Hunter v. Southam, [1984] 2 S.C.R. 145, 1984 CanLII 33 Respondent's Authorities, Tab 4	63, 70
Ministry of the Attorney General, Court Services Division, Annual Report 2011-2012 https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/courts_annual_11/Court_Services_Annual_Report_FULL_EN.pdf Respondent's Authorities, Tab 3	50
R. v. Askov, [1990] 2 S.C.R. 1119, [1990] S.C.J. No. 106 Appellant's Authorities, Tab 3	2, 4, 5, 8, 10, 67, 69, 71-82
R. v. Auclair, [2013] Q.J. No. 3349 (C.A.) Respondent's Authorities, Tab 7	89
R. v. Dias, [2014] A.J. No. 1319 (C.A.) Respondent's Authorities, Tab 8	90
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R. v. Godin, [2009] 2 S.C.R. 3 Appellant's Authorities, Tab 9	9, 35, 85-87, 92
R. v. Jordan, [2014] B.C.J. No. 1263 (C.A.) Appellant's Authorities, Tab 15	90
R. v. Jordan, 2014 BCCA 241; [2014] B.C.J. No. 1263; leave to appeal granted November 27, 2014, [2014] S.C.C.A. No. 397 Appellant's Authorities, Tab 15	8
R. v. MacIntosh, [2011] N.S.J. No. 660 (C.A.) Respondent's Authorities, Tab 6	89
R. v. Morin, [1992] 1 S.C.R. 771 Appellant's Authorities, Tab 17	61, 78, 81-84
R. v. Steele, [2012] O.J. No. 2545 (C.A.) Appellant's Authorities, Tab 26	89

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Superior Court of Justice, Court Locations and Schedules: 48
http://www.ontariocourts.ca/scj/locations/#Judicial_Regions_and_Regional_Court_Schedules
Respondent's Authorities, Tab 1

The Superior Court of Justice: Mapping the Way Forward, 2010-2012 Report http://www.ontariocourts.ca/scj/files/annualreport/2010-2012-EN.pdf 49
Respondent's Authorities, Tab 2

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PART VII: STATUTORY PROVISIONS

Courts of Justice Act

R.S.O. 1990, c. C.43

PART I
COURT OF APPEAL FOR ONTARIO

SECTION 2

Court of Appeal

2.--(1) The Court of Appeal for Ontario is continued as a superior court of record under the name Court of Appeal for Ontario in English and Cour d'appel de l'Ontario in French.

Idem

(2) The Court of Appeal has the jurisdiction conferred on it by this or any other Act, and in the exercise of its jurisdiction has all the powers historically exercised by the Court of Appeal for Ontario.

R.S.O. 1990, c. C.43, s. 2.

Superior Court of Justice

11. (1) The Ontario Court (General Division) is continued as a superior court of record under the name Superior Court of Justice in English and Cour supÈrieure de justice in Fren