IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN: **File Number: 36068**

BARRETT RICHARD JORDAN

Appellant (Appellant)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRISISH COLUMBIA AS REPRESENTED BY THE ATTORNEY GENERAL OF BRITISH COLUMBIA

Respondent (Respondent)

- and –

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

Interveners

AND BETWEEN:

(ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO)

File Number: 36112

HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF ONTARIO AS REPRESENTED BY THE ATTORNEY GENERAL OF ONTARIO

Appellant (Respondent)

- and -

KENNETH GAVIN WILLIAMSON

Respondent (Appellant)

- and –

ATTORNEY GENERAL OF ALBERTA
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FACTUM OF THE INTERVENER

PART I – OVERVIEW AND FACTS

Overview

1. The s 11(b) right is not absolute. Trials need not be held forthwith, nor as soon as is practicable, but within a reasonable time. Like other *Charter* rights, this right exists in balance with other rights, other aspects of the justice system, and interests beyond the justice system. These realities should inform the meaning of "reasonable" in s 11(b). There is no room for siloed thinking, in which because a delay issue is framed, delay concepts are applied in isolation.

2. This Court has always been sensitive to the tension inherent in holding the government to its constitutional obligations while respecting the roles of the judiciary, legislature and executive.[1] Respect for this balance will be critical in resolving the cases at bar, since this Court is effectively being asked to force the governments' hands on resource allocation,[2] using the language of guidelines and inferred prejudice. These blunt instruments may respond to delay at its end point, but in so doing they imperil other, equally important interests.

3. Alberta asks this Court to define *reasonable* delay in context, not in isolation. Trials should occur within a time that is reasonably capable of delivering the kind of justice that Canadians expect today. Solutions should recognize and, where possible, address the causes of delay. These causes include complexity, introduced by common law and by legislation, and courtroom culture, which is the responsibility of all justice system participants.

Facts

4. The Attorney General of Alberta takes no position on the facts of the cases at bar.

PART II – ISSUES

5. This intervention responds to the Appellant Jordan's call to "recalibrate the [s 11(b)] analysis".[3] Alberta's position on this issue is stated at paragraph 3 above.

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[1] *R v Askov*, [1990] 2 SCR 1199 (SCC) at pp 1224, 1241-1242 [Tab 2]; *R v Morin*, [1992] 1 SCR 771 (SCC) at pp 795, 796 [Tab 4]

[2] *R v Jordan*, 36068, Appellant's Factum at paras 1, 3, 4, 92-93, 104, 139; Intervention Affidavit (BCCLA) at paras 11, 15, 20, 24; Intervention Affidavit (CLAO) at paras 13-14, 20. The facta of the interveners and the Respondent in *R v Williamson*, 36112, are not available at the time of writing.

[3] *R v Jordan*, 36068, Appellant's Factum at para 5

PART III – ARGUMENT

6. The best answers to s 11(b) issues will achieve two goals; (1) they will balance four vital interests: time to trial, the individual's other legal entitlements, democratic allocation of resources, and society's interest in law enforcement; and (2) they will encourage all justice system participants to do their part in bringing criminal charges to resolution on their merits within a reasonable time.

Guidelines: realistic measures

7. This Court is being asked to enhance the force of institutional delay or inferred prejudice, both of which amount to the imposition of stricter guideline periods for institutional delay. [4]

8. In *R v Askov*, this Court set out guidelines for court lead times. It reviewed a copious statistical record to find a best-case comparator, and adopted that jurisdiction's standard lead times as a guideline for comparable jurisdictions. The exemplary jurisdiction demonstrated how to "balance the demands of the system and the allocation of available resources in order to administer justice with a minimal delay".[5]

9. Presented with additional information in *R v Morin*, this Court refined its guideline numbers, while continuing to stress that different numbers may be appropriate for different cases and places, and that a guideline "is neither a limitation period nor a fixed ceiling on delay."[6] The process is essential. Reasonableness was determined by taking a realistic measure of the time required to deliver justice.

Delivering the justice that Canadians expect

10. Today the world of criminal law is a more complex place than it was when this Court last reviewed its delay guidelines.[7] Courts and legislators have chosen to create new offences, new procedures, new obligations and legal tests that are more complicated, more time-consuming,

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[4] *R v Jordan*, 36068, Appellant's Factum at paras 3, 5, 77, 92-93; Intervention Affidavit (BCCLA) at paras 16, 21, 24-25; *R v Jordan*, 36068, Intervention Affidavit (CLAO) at paras 19, 23-25, 34-35

[5] *R v Askov*, [1990] 2 SCR 1199 (SCC) at p 1213; see also 1226-1227, 1238-1240 [Tab 2], summarizing with approval the position of Lamer J in *R v Mills*, [1986] 1 SCR 863 (SCC) [not reproduced]

[6] *R v Morin*, [1992] 1 SCR 771 (SCC) at pp 791-793, 795-800, 806-807 [Tab 4]

[7] *R v Morin*, [1992] 1 SCR 771 (SCC) at pp 46-52 [Tab 4]

and less predictable. Every new step and consideration requires time.[8] It is an accomplishment that lead times have remained as steady as they have over the decades.

11. Some complexity has been introduced through legislation. Today's *Criminal Code* contains more offences than in the early 1990s. Examples include new charges relating to criminal harassment,[9] child pornography, grooming and luring,[10] identity theft,[11] animal cruelty,[12] terrorism,[13] organized crime,[14] human trafficking,[15] credit card forgery,[16] disarming and injuring peace officers,[17] nuclear materials,[18] dangerous driving[19] and making, possessing, trafficking and discharging firearms.[20] Sexual assault law has become more nuanced with amendments or additions regarding sexual exploitation, voyeurism and consent.[21]

12. The *Code* also contains more procedures at the investigative, pre-trial and post-trial stages.[22] Examples include new warrant provisions,[23] new procedures regarding sexual reputation evidence and third party records,[24] new duties to victims,[25] new protections for child witnesses,[26] and new sentencing options such as alternative measures, conditional sentences, long-term offender orders, and ancillary orders.[27]

13. Even where new procedures were intended to increase efficiency, they can give counsel new things to disagree about. For example, a 2002 amendment to the *Criminal Code* introduced

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[8] Attorney General of Ontario, *Report of the Review of Large and Complex Criminal Case Procedures*, November 2008 (The Honourable Patrick J. LeSage, C.M, Q.C, Professor Michael Code) at pp 7-10, 14 (*Lesage-Code Report*) [Tab 7], http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lesage_code/ and http://www.attorneygeneral.jus.gov.on.ca/french/about/pubs/lesage_code/

[9] *Criminal Code*, R.S.C. 1985, c. C-46, s. 264 [not reproduced]

[10] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 163.1, 171.1, 172.1, 172.2 [not reproduced]

[11] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 402.2, 403 [not reproduced]

[12] *Criminal Code*, R.S.C. 1985, c. C-46, s. 445.1 [not reproduced]

[13] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 83.02, 83.03, 83.04, 83.18, 83.19, 83.2, 83.21, 83.22, 83.23, 83.231 [not reproduced]

[14] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 467.11-467.13 [not reproduced]

[15] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 279.01-279.011 [not reproduced]

[16] *Criminal Code*, R.S.C. 1985, c. C-46, s. 342.01 [not reproduced]

[17] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 270.01, 270.02, 270.1 [not reproduced]

[18] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 82.3-82.6 [not reproduced]

[19] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 249.1-249.4 [not reproduced]

[20] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 91-102, 244.1, 244.2 [not reproduced]

[21] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 150, 153, 153.1, 162, 273.1, 273.2 [not reproduced]

[22] Alberta Justice and Solicitor General, Criminal Justice Division, *Injecting a Sense of Urgency – A new approach to delivering justice in serious and violent criminal cases*, April 2011 (Greg Lepp), at pp 13, 15-16 (*Primary Report)* [Tab 5]

[23] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 487.01, 487.012, 487.013, 487.02, 487.05, 487.092, 492.1, 492.2, 529.1 [not reproduced]

[24] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 276-276.5, 278.1-278.91 [not reproduced]

[25] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 380.4, 722, 737, 742-742.7, 753.1 [not reproduced]

[26] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 486.1-486.3 [not reproduced]

[27] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 161, 380.2, 447.1, 717, 720 [not reproduced]

new procedures designed to streamline the preliminary inquiry process.[28] The Appellant Jordan has cited an example of the defence successfully objecting to the Crown's attempt to proceed with a "paper" preliminary inquiry. The defence application took time, and implementing the Court's order occasioned further delay.[29] This illustrates that every issue has the potential to drain counsel's time and the court's resources, and to cause delay before the next step can be taken toward completing the trial.

14. The common law has also added complexity by creating legal tests that involve more factors, more discretion, less predictability, and more court time.[30] To take just one example, *R v Stinchcombe* changed the law of disclosure in 1991.[31] Subsequent decisions from this Court created new tests for disclosure of third party records,[32] information provided by confidential informants,[33] lost evidence,[34] police disciplinary records,[35] and past complaints of victimization.[36] There are additional tests for awarding various remedies.[37]

15. Over the years, courts have ruled that this degree of nuance is required to meet the constitutional guarantee of trial fairness. But managing that complexity takes time. Counsel are not available for trial during the countless hours spent vetting, copying, reading, and preparing arguments about volumes of disclosure that were unimaginable in the early 1990s.[38] Courtrooms are not available for trial during the inevitable disclosure hearings. Indeed, disclosure has long

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[28] SC 2002, c 13, ss. 24-30, now incorporated at *Criminal Code*, R.S.C. 1985, c. C-46 ss. 536.3-537, 540, 549; *House of Commons Debates*, 37th Parl,1st Sess, No 054, (03 May 2001) at 1630-1635 (Hon Anne McLellan); http://www.parl.gc.ca/HousePublications/Publication.aspx?Doc=54&Language=E&Mode=1&Parl=37&Pub=Hansard&Ses=1#LI_NK235 and http://www.parl.gc.ca/HousePublications/Publication.aspx?Doc=54&Mode=1&Parl=37&Pub=Hansard&Ses=1&Language=F [Tab 12]; see also Legislative Summary, Bill C-15: *Criminal Law Amendment Act 2001 revised* (12 October 2001), http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?source=library_prb&ls=C15&Parl=37&Ses=1&Language=E&Mode=1 and http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?source=library_prb&ls=C15&Parl=37&Ses=1&Mode=1&Language=F at p 19 [Tab 10]

[29] *R v Jordan*, 36068, Appellant's Factum at para 91, citing *R v Florence*, 2014 CarswellOnt 7488 (CA) [not reproduced]

[30] *Lesage-Code Report* at pp 7-10, 14, 15-17 [Tab 7]

[31] *R v Stinchcombe*, [1991] 3 SCR 326 (SCC) [not reproduced]; see also *R v C (MH)*, 1988 CarswellBC 789 (CA) [not reproduced]

[32] *R v O'Connor*, [1995] 4 SCR 411 (SCC) [not reproduced]; *R v Mills*, [1999] 3 SCR 668 (SCC) [not reproduced]

[33] *R v Scott*, [1990] 3 SCR 979 (SCC) [not reproduced]; *R v Leipert*, [1997] 1 SCR 281 (SCC) [not reproduced]

[34] *R v La*, [1997] 2 SCR 680 (SCC) [not reproduced]

[35] *R v McNeil*, 2009 SCC 3 [not reproduced]

[36] *R v Quesnelle*, 2014 SCC 46 [not reproduced]

[37] eg *R v Dixon*, [1998] 1 SCR 244 (SCC) [not reproduced]; *Krieger v Law Society (Alberta)*, 2002 SCC 65 (SCC) [not reproduced]; *R v Bjelland*, 2009 SCC 38 (SCC) [not reproduced]

[38] *eg Adrian Humphreys*, "'The system is sick': Canada's courts are choking on an increase in evidence", The National Post, (3 May 2013), http://news.nationalpost.com/news/canada/canadas-courts-are-choking-on-an-increase-in-evidence [not reproduced]

been recognized as a major contributor to delay.[39]

16. Disclosure is just one example of increased complexity. More examples can be found in other *Charter* provisions, impaired driving law, rules of evidence, jury instructions, and virtually every other aspect of criminal justice.[40] The result is that parties are litigating issues that did not exist in 1992, or that were more likely to be resolved out of court. Preparation and pre-trial hearings clog the schedules of counsel and the courts, reducing their availability for trial. Trials, when reached, notoriously take more time. Impaired driving trials that once would have taken hours now take days; murder trials that would have taken days now take months.[41]

17. Legislators and jurists have chosen the means to achieve the aims of criminal justice in the 21st century. Those means are complex, and complexity is not free. It costs time. A reasonable time to trial is one which allows for the delivery of our chosen quality of justice.

Blunt instruments are the enemies of balance

18. The defence parties propose to solve delay from the back end. They seek to enforce the institutional delay guidelines, or to enhance the role of inferred prejudice. Neither proposal addresses the causes of delay.

19. Imposition of strict guidelines is simply not feasible. Vancouver's Provincial Court cannot function in the same way as a fly-in court in a hamlet in Nunavut. In any court, different lead times are appropriate for a single-count failure-to-appear trial and for a preliminary inquiry where multiple parties are charged with conspiracy to commit homicide. Experience teaches that misapplied guidelines may lead to wholesale termination of criminal prosecutions.[42] Just as accused persons deserve sophisticated assessments of their legal entitlements, citizens and victims deserve a more nuanced approach than simple cut-off numbers. The societal interest in

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[39] *Lesage-Code Report* at p 8 [Tab 7]

[40] The Right Honourable Beverley McLachlin, P.C., *The Challenges We Face*, Speech delivered at the Empire Club of Canada, March 8, 2007, at pp 3, 5 [Tab 16] http://speeches.empireclub.org/62973/data?n=1

[41] *Lesage-Code Report* at p 5 [Tab 7]. See also *Law Reform Initiatives Relating to the Megatrial Phenomenon, International Society for the Reform of Criminal Law*, 2008 (Michael Code) at pp 2-4 [Tab 9]; *Structural Aspects of Terrorist Mega-Trials: A Comparative Analysis*, 2007 (Bruce MacFarlane) at pp 13-43 [Tab 14]; *Long Criminal Trials: Masters of a System They Are Meant to Serve*, 2005 32 CR (6th) 316 (The Hon. Justice Michael Moldaver) at p 2 [Tab 11]; *R v Lahiry*, 2011 CarswellOnt 12516 (SCJ) at paras 158-160 [Tab 3]; The Right Honourable Beverley McLachlin, P.C., *The Challenges We Face*, Speech delivered at the Empire Club of Canada, March 8, 2007, at pp 2-3 [Tab 16] http://speeches.empireclub.org/62973/data?n=1

[42] *R v Morin*, [1992] 1 SCR 771 (SCC) at pp 779-780 [Tab 4]

law enforcement is an integral component of the s 11(b) balance.[43]

20. As explained by the Crown Appellant in *R v Williamson*, elevating the role of inferred prejudice would be similarly flawed.[44] There is no test for inferred prejudice. If inferred prejudice can determine breaches of s 11(b), then society faces the termination of prosecutions for something that it cannot define, assess, predict, conclusively avoid - or, likely, appeal. If there is no legal test for inferred prejudice, presumably there can be no legal error, and no route to a Crown appeal. A stay of proceedings would truly be the final remedy.

21. Underlying both these proposals is the essential claim of the defence parties: that the governments' hands should be forced to allocate more resources to criminal justice. Obviously, court decisions can have ancillary financial consequences, but "[i]t is for the duly elected members of the legislature to determine what funds are expended on the administration of justice, not the judges." Were a court to direct expenditures from the public purse, it may "diminish public confidence in the integrity of the judiciary as an institution." In a recent case, the Criminal Lawyers' Association of Ontario submitted that these policy concerns would not be engaged if expenditure orders were made rarely and for small sums. This Court rejected that submission.[45]

22. An implied claim for nationwide, system-wide expenditure is no rare or small thing. One would expect a claim of this magnitude to be impeccably supported. Here, however, there is no record showing that institutional delay has increased nationwide,[46] or that any such increase is due to inadequate resourcing.[47] Nor is there evidence on whether delay problems can be fixed with money, or how much money would be needed, or where the money would come from, or where it would go. (Courts, Crowns, legal aid, bail supervision, transcript management, probation, police, court security, forensic psychiatric services, medical examiners, forensic labs, pre-sentence and *Gladue* report writers, victims' assistance workers, with support staff and

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[43] *R v Askov*, [1990] 2 SCR 1199 (SCC) at pp 1219-1221, 1240-1241 [Tab 2], also 154 per McLachlin J (as she then was), concurring; *R v Morin*, [1992] 1 SCR 771 (SCC) at pp 786-787, 807 also 809-810 per McLachlin J (as she then was), concurring [Tab 4]

[44] *R v Williamson*, 36112, Appellant's Factum at paras 41-45

[45] *Ontario v Criminal Lawyers Association of Ontario and Lawrence Greenspon*, [2013] 3 RCS 3 (SCC) at paras 59-60, 69, 77-79 [Tab 1]

[46] One 2008/09 study showed a national reduction in median time to trial: Statistics Canada, *Cases in adult criminal courts are starting to get shorter*, Jennifer Thomas (Ottawa, Statistics Canada, 2008/2009) [Tab 13]

[47] The same study concludes that "[l]engthy cases do not necessarily imply delays in the court process": Statistics Canada, *Cases in adult criminal courts are starting to get shorter*, Jennifer Thomas (Ottawa, Statistics Canada, 2008/2009) [Tab 13]

infrastructure for all? [48])

23. No matter how many resources are allocated to the legal system, disparate interests will still need to be balanced. The British Columbia Provincial Court is making efforts to reduce delay in all its areas of practice. According to a report cited by the Appellant Jordan, the Court intended to prioritize the reduction of lead times in civil, family, and child protection cases. Remaining resources would go to adult criminal cases, with priority given to in-custody accused and more serious prosecutions.[49] This prioritization recognizes that criminal trials are not the sole source of stress or stigma; other legal issues also require timely resolution. Recent BC statistics suggest that there has been more success reducing lead times in criminal courts than in civil, family or child protection.[50]

24. When other *Charter* rights are given priority through increasingly complex tests and procedures, s 11(b) interests suffer. If s 11(b) is given priority through more stringent delay tests, society's interest in law enforcement suffers. If criminal trial lead times are given priority, other areas of litigation suffer. If justice system resourcing is a forced priority, other public systems suffer. In any of these events, the repute of the administration of justice suffers.[51]

Compromises

25. Crown agencies have been seeking other means of reducing delay.[52]

26. When Alberta confronted this issue, it refused to simply blame "the system". Solutions will only be found when institutions and individuals involved in the system shoulder their share of the responsibility.[53] Alberta has chosen to give priority to serious and violent cases, while recognizing that as a result less serious cases may experience increased delay and may be lost.[54]

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[48] cf The Provincial Court of British Columbia, *Justice Delayed: A Report of the Provincial Court of British Columbia Concerning Judicial Resources*, September 14, 2010 at p 4 [Tab 15]
[49] *R v Jordan*, 36068, Appellant's Factum at paras 47-50, citing The Provincial Court of British Columbia, *Justice Delayed: A Report of the Provincial Court of British Columbia Concerning Judicial Resources*, September 14, 2010 at p 4 [Tab 15]
[50] The Provincial Court of British Columbia, *Justice Delayed: A Report of the Provincial Court of British Columbia Concerning Judicial Resources*, September 14, 2010 at Figures 1 and 2; cf Figures 3 to 8 [Tab 15]; see also *The Semi-Annual Time to Trial Report* of The Provincial Court of British Columbia, March 31, 2015 [Tab 17]
[51] cf. *Ontario v Criminal Lawyers Association of Ontario and Lawrence Greenspon*, [2013] 3 RCS (SCC) at paras 64, 69, 79, 83, but see 82 [Tab 1]
[52] In addition to the following discussion, see Statistics Canada, *Cases in adult criminal courts are starting to get shorter*, Jennifer Thomas (Ottawa, Statistics Canada, 2008/2009) [Tab 13]
[53] *Injecting a Sense of Urgency - Primary Report* at pp 2, 17, 32 [Tab 5]
[54] *Injecting a Sense of Urgency - Primary Report* at p 27 [Tab 5]

27. Many of the solutions now being implemented in Alberta consist of improvements to existing processes, such as enhanced Crown education and pre-charge consultation with police[55] and technological advances. [56] Alberta is increasing its use of direct indictments,[57] and hopes to work with the courts toward case management that blends "reasonable accommodation of lawyers while holding them accountable, and an expectation that hearings will accomplish what they are scheduled to achieve."[58]

28. Other systems proposed but not yet implemented represent more significant changes, such as expanding court case management;[59] shifting cases to other court points; [60] eliminating preliminary inquiries; [61] and pursuing traffic offences outside a trial process, thereby freeing up court resources for criminal matters. [62]

29. The Attorney General of British Columbia has implemented a policy that will reduce the number of impaired driving cases in the criminal courts. In 2010, the BC *Motor Vehicle Act* introduced the Immediate Roadside Prohibition scheme. Drivers who refuse to blow, or blow a fail, on a screening device or breath analysis instrument will be subject to "significant consequences" via administrative processes. BC Crowns are instructed to take these consequences into account, along with "the length and expense of a prosecution", when deciding whether to lay criminal charges. Absent certain aggravating factors, the BC policy instructs that prosecutions for impaired driving "will generally not be in the public interest" and criminal charges should not be laid.[63]

Leading the way to solutions

30. The first step in finding solutions is to be certain that there is a problem – that times to trial are beyond what is reasonable to achieve Canadians' chosen quality of justice. In particular,

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[55] *Injecting a Sense of Urgency - Primary Report* at pp 18-21 [Tab 5]; Alberta Justice and Solicitor General, Criminal Justice Division, *Injecting a Sense of Urgency – A new approach to delivering justice in serious and violent criminal cases*, December 1, 2014 (Greg Lepp) at pp 2, 5 (*Final Report*) [Tab 6]

[56] *Injecting a Sense of Urgency - Primary Report* at pp 25, 29 [Tab 5]; *Injecting a Sense of Urgency - Final Report* at pp 3, 4, 8-9 [Tab 6]

[57] *Injecting a Sense of Urgency - Primary Report* at p 26 [Tab 5]; *Injecting a Sense of Urgency - Final Report* at p 4 [Tab 6]

[58] *Injecting a Sense of Urgency - Primary Report* at p 30 [Tab 5]

[59] *Injecting a Sense of Urgency - Primary Report* at pp 22-24 [Tab 5]; *Injecting a Sense of Urgency - Final Report* at pp 2-3 [Tab 6]

[60] *Injecting a Sense of Urgency - Primary Report* at p 25 [Tab 5]; *Injecting a Sense of Urgency - Final Report* at p 3 [Tab 6]

[61] *Injecting a Sense of Urgency - Primary Report* at p 29 [Tab 5]; *Injecting a Sense of Urgency - Final Report* at pp 7-8 [Tab 6]

[62] *Injecting a Sense of Urgency - Primary Report* at p 28 [Tab 5]; *Injecting a Sense of Urgency - Final Report* at p 7 [Tab 6]

[63] *British Columbia Attorney General's Crown Counsel Policy Manual, Policy IMP 1*, at pp 1-3, online: http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/IMP1-ImpDrivingProscns.pdf [Tab 8]

before acting on the defence parties' proposals, this Court would need to be satisfied that institutional delay is a stand-alone problem. Court lead times, sometimes wrongly categorized as institutional delay,[64] often overlap with the inherent time required to prepare the case. Counsel use lead time to investigate, negotiate, research, or bring motions. Counsel's schedules can be as overbooked as the courts'.[65] As one study concluded, "[l]engthy cases do not necessarily imply delays in the court process."[66]

31. Given the absence of a supporting record, this is not the moment to reassess either the role or the length of institutional delay guidelines.[67]

32. It would be undesirable, and likely impossible, to reduce delay by reducing legal sophistication and safeguards. However, as discussed above, legal complexity must be factored into the s 11(b) analysis.

33. It may be highly desirable to change courtroom culture, which today is characterised by complacency toward delay. Much trial time is booked but not used. For example, in Airdrie, Alberta in 2011-12, about 20% of adult criminal cases were set for trial, but evidence was called in only 3%.[68] Many trials collapsed due to last-minute guilty pleas, the failure of witnesses or accused to attend, or the absence of counsel. Judges and counsel have come to accept delay as the norm. Adjournments are permitted for trivial reasons. Counsel are permitted to set dates without being fully retained or instructed. There may even be a tendency for the defence to resist speed, or at least to embrace inertia, incrementally transforming s 11(b) from shield to sword.[69] Counsel contribute to delay when they act unprofessionally or uncivilly, or when they take steps that are prolix or baseless. Courts have contributed directly by tolerating adjournments and missed deadlines and other procedural laxness.[70] Too often, courtroom culture is characterised by "a tendency for every court participant in the justice system to look after their own best

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[64] *See R v Jordan*, 36068, Respondent's Factum at para 73
[65] *R v Morin*, [1992] 1 SCR 771 (SCC) at pp 791-792 [Tab 4]
[66] Statistics Canada, *Cases in adult criminal courts are starting to get shorter*, Jennifer Thomas (Ottawa, Statistics Canada, 2008/2009) [Tab 13]
[67] At most, this Court may wish to remind the provincial appellate courts that they are best situated to take a realistic measure of the time reasonably required to deliver justice in 2015: *R v Morin*, [1992] 1 SCR 771 (SCC) at para 800 [Tab 4] qtng *R. v. Stensrud*, [1989] 2 SCR 1115 (SCC) [not reproduced]
[68] *Injecting a Sense of Urgency - Primary Report* at p 11 [Tab 5]
[69] *R v Askov*, [1990] 2 SCR 1199 (SCC) at pp 1221-1222, 1227-1228 [Tab 2]; *R v Morin*, [1992] 1 SCR 771 (SCC) at pp 801-802, 807-808, also 811-812 per McLachlin J (as she then was), concurring [Tab 4]
[70] *Lesage-Code Report* at pp 15-17 [Tab 7]

with insufficient regard given to the overall process."[71]

34. Renewing the culture of criminal litigation is no small task, but if this Court cannot lead the way, it is not clear who can. Courts must "take control of the process from the litigants and put it back in the hands of the judges."[72] All parties should be responsible for taking expected steps on schedule; thinking of the effect of those steps on delay during the pre-trial process, not just after; and respecting the use of court time. All justice system participants must work in concert to reach dispositions on the merits in criminal cases.

35. Until the causes of delay are addressed, it will not be reasonable to crack down on the delay that results. A one-dimensional focus on delay threatens individual protections, the collective interest in law enforcement, and the reputation of the administration of justice.

PART IV – SUBMISSIONS ON COSTS

36. Alberta makes no submissions regarding costs.

PART V – REQUEST TO PRESENT ORAL ARGUMENT

37. Alberta seeks permission to present oral argument for 10 minutes or such other duration as this Court may direct.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Calgary, Alberta, this 30 day of July, 2015.

JOLAINE ANTONIO
COUNSEL FOR THE INTERVENER

JAA/kel

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[71] *Lesage-Code Report* at pp 15-17 [Tab 7]; *Injecting a Sense of Urgency - Primary Report* at pp 17, 23, 26 [Tab 5]

[72] The Right Honourable Beverley McLachlin, P.C., *The Challenges We Face*, Speech delivered at the Empire Club of Canada, March 8, 2007, citing Ontario Court of Appeal Justice Michael Moldaver, (as he then was) [Tab 16] http://speeches.empireclub.org/62973/data?n=1

PART VI – TABLE OF AUTHORITIES

TAB	AUTHORITIES	Cited at Paragraph No.
1	*Ontario v Criminal Lawyers Association of Ontario and Lawrence Greenspon*, [2013] 3 RCS (SCC)	21, 24
2	*R v Askov*, [1990] 2 SCR. 1199 (SCC)	2, 8, 16, 33
3	*R v Lahiry*, 2011 CarswellOnt 12516 (SCJ)	16
4	*R v Morin*, [1992] 1 SCR 771 (SCC)	2, 9, 10, 19, 30, 31, 33

TAB	SECONDARY SOURCES	Cited at Paragraph No.
5	Alberta Justice and Solicitor General, Criminal Justice Division, *Injecting a Sense of Urgency – A new approach to delivering justice in serious and violent criminal cases*, April 2011 (Greg Lepp) (*Primary Report)*	12, 26, 27, 28, 33
6	Alberta Justice and Solicitor General, Criminal Justice Division, *Injecting a Sense of Urgency – A new approach to delivering justice in serious and violent criminal cases*, December 1, 2014 (Greg Lepp) (*Final Report*)	27, 28
7	Attorney General of Ontario, *Report of the Review of Large and Complex Criminal Case Procedures*, November 2008 (The Honourable Patrick J. LeSage, C.M, Q.C, Professor Michael Code) (*Lesage-Code Report*)	10, 14, 15, 16, 33
8	*British Columbia Attorney General's Crown Counsel Policy Manual, Policy IMP 1*	29
9	*Law Reform Initiatives Relating to the Megatrial Phenomenon, International Society for the Reform of Criminal Law*, 2008 (Michael Code)	16
10	Legislative Summary, Bill C-15: *Criminal Law Amendment Act 2001 revised* (12 October 2001)	13
11	*Long Criminal Trials: Masters of a System They Are Meant to Serve*, 2005 32 C.R. (6th) 316 (The Hon. Justice Michael Moldaver)	16
12	*House of Commons Debates*, 37th Parl,1st Sess, No 054, (03 May 2001) at 1630-1635 (Hon Anne McLellan)	13
13	Statistics Canada, *Cases in adult criminal courts are starting to get shorter*, Jennifer Thomas (Ottawa, Statistics Canada, 2008/2009)	22, 25, 30

14	*Structural Aspects of Terrorist Mega-Trials: A Comparative Analysis,* 2007 (Bruce MacFarlane)	16
15	The Provincial Court of British Columbia, *Justice Delayed: A Report of the Provincial Court of British Columbia Concerning Judicial Resources*, September 14, 2010	22, 23
16	The Right Honourable Beverley McLachlin, P.C., *The Challenges We Face*, Speech delivered at the Empire Club of Canada, March 8, 2007	16, 34
17	*The Semi-Annual Time to Trial Report* of The Provincial Court of British Columbia, March 31, 2015	13, 23

PART VII – LEGISLATION AT ISSUE

***Criminal Code*, RSC 1985, c C-46**
***Code Criminel*, LRC (1985), ch C-46**

536.3 Procedures Before Preliminary Inquiry

If a request for a preliminary inquiry is made, the prosecutor or, if the request was made by the accused, counsel for the accused shall, within the period fixed by rules of court made under section 482 or 482.1 or, if there are no such rules, by the justice, provide the court and the other party with a statement that identifies

(*a*) the issues on which the requesting party wants evidence to be given at the inquiry; and

(*b*) the witnesses that the requesting party wants to hear at the inquiry.

536.3 Procédures précédent l'enquête préliminaire

En cas de demande d’enquête préliminaire, le poursuivant ou, si la demande a été faite par le prévenu, l’avocat de ce dernier doit, dans le délai prévu par les règles établies en vertu des articles 482 ou 482.1, ou, en l’absence de règles, dans le délai fixé par le juge de paix, fournir au tribunal et à l’autre partie une déclaration énonçant :

a) les points sur lesquels la partie faisant la demande veut que des témoignages soient présentés dans le cadre de l’enquête;

b) le nom des témoins que la partie faisant la demande veut entendre à l’enquête.

536.4 Order for Hearing

(1) The justice before whom a preliminary inquiry is to be held may order, on application of the prosecutor or the accused or on the justice's own motion, that a hearing be held, within the period fixed by rules of court made under section 482 or 482.1 or, if there are no such rules, by the justice, to

(*a*) assist the parties to identify the issues on which evidence will be given at the inquiry;

(*b*) assist the parties to identify the witnesses to be heard at the inquiry, taking into account the witnesses' needs and circumstances; and

(*c*) encourage the parties to consider any other matters that would promote a fair and expeditious inquiry.

(2) When the hearing is completed, the justice shall record any admissions of fact agreed to by the parties and any agreement reached by the parties.

536.4 Ordonnance

1) Le juge de paix qui tiendra l'enquête préliminaire peut, sur demande du poursuivant ou du prévenu ou d'office, ordonner la tenue d'une audience dans le délai prévu par les règles établies en vertu des articles 482 ou 482.1, ou, en l'absence de règles, dans le délai fixé par lui :

a) en vue d'aider les parties à cerner les points faisant l'objet de témoignages dans le cadre de l'enquête;

b) en vue de les aider à désigner les personnes qui seront appelées à témoigner à l'enquête, compte tenu de leur situation et de leurs besoins;

c) en vue de les encourager à examiner toute question qui favoriserait une enquête rapide et équitable.

(2) Une fois l'audience terminée, le juge de paix consigne au dossier tout aveu et tous points qui ont fait l'objet d'un accord entre les parties.

536.5 Agreement to limit scope of preliminary inquiry

Whether or not a hearing is held under section 536.4 in respect of a preliminary inquiry, the prosecutor and the accused may agree to limit the scope of the preliminary inquiry to specific issues. An agreement shall be filed with the court or recorded under subsection 536.4(2), as the case may be.

536.5 Accord en vue de limiter la portée de l'enquête préliminaire

Qu'une audience ait été tenue ou non au titre de l'article 536.4, le poursuivant et le prévenu peuvent, d'un commun accord, limiter l'enquête préliminaire à des questions données. L'accord est déposé auprès du tribunal ou consigné au dossier en application du paragraphe 536.4(2), selon le cas.

537 Powers of Justice

(1) A justice acting under this Part may

(*a*) adjourn an inquiry from time to time and change the place of hearing, where it appears to be desirable to do so by reason of the absence of a witness, the inability of a witness who is ill to attend at the place where the justice usually sits or for any other sufficient reason;

(*b*) remand the accused to custody for the purposes of the *Identification of Criminals Act*;

(*c*) except where the accused is authorized pursuant to Part XVI to be at large, remand the accused to custody in a prison by warrant in Form 19;

(*d*) resume an inquiry before the expiration of a period for which it has been adjourned with the consent of the prosecutor and the accused or his counsel;

(*e*) order in writing, in Form 30, that the accused be brought before him, or any other justice for the same territorial division, at any time before the expiration of the time for which the accused has been remanded;

(*f*) grant or refuse permission to the prosecutor or his counsel to address him in support of the charge, by way of opening or summing up or by way of reply on any evidence that is given on behalf of the accused;

(*g*) receive evidence on the part of the prosecutor or the accused, as the case may be, after hearing any evidence that has been given on behalf of either of them;

(*h*) order that no person other than the prosecutor, the accused and their counsel shall have access to or remain in the room in which the inquiry is held, where it appears to him that the ends of justice will be best served by so doing;

(*i*) regulate the course of the inquiry in any way that appears to the justice to be consistent with this Act and that, unless the justice is satisfied that to do so would be contrary to the best interests of the administration of justice, is in accordance with any admission of fact or agreement recorded under subsection 536.4(2) or agreement made under section 536.5;

(*j*) where the prosecutor and the accused so agree, permit the accused to appear by counsel or by closed-circuit television or any other means that allow the court and the accused to engage in simultaneous visual and oral communication, for any part of the inquiry other than a part in which the evidence of a witness is taken;

(*j.1*) permit, on the request of the accused, that the accused be out of court during the whole or any part of the inquiry on any conditions that the justice considers appropriate; and

(*k*) for any part of the inquiry other than a part in which the evidence of a witness is taken, require an accused who is confined in prison to appear by closed-circuit television or any other means that allow the court and the accused to engage in simultaneous visual and oral communication, if the accused is given the opportunity to communicate privately with counsel, in a case in which the accused is represented by counsel.

(1.01) Where a justice grants a request under paragraph (1)(*j.1*), the Court must inform the accused that the evidence taken during his or her absence could still be admissible under section 715.

(1.1) A justice acting under this Part shall order the immediate cessation of any part of an examination or cross-examination of a witness that is, in the opinion of the justice, abusive, too repetitive or otherwise inappropriate.

(2) Where a justice changes the place of hearing under paragraph (1)(*a*) to a place in the same province, other than a place in a territorial division in which the justice has jurisdiction, any justice who has jurisdiction in the place to which the hearing is changed may continue the hearing.

(3) and (4) [Repealed, 1991, c. 43, s. 9]

537 Pouvoirs du juge de paix

(1) Un juge de paix agissant en vertu de la présente partie peut :

a) ajourner l'enquête de temps à autre et changer le lieu de l'audition, lorsque la chose paraît opportune en raison de l'absence d'un témoin, de l'impossibilité pour un témoin malade d'être présent à l'endroit où le juge de paix siège ordinairement, ou pour tout autre motif suffisant;

b) renvoyer le prévenu à la détention pour l'application de la *Loi sur l'identification des criminels*;

c) sauf lorsque le prévenu est, en application de la partie XVI, autorisé à être en liberté, renvoyer le prévenu à la détention dans une prison, au moyen d'un mandat rédigé selon la formule 19;

d) reprendre une enquête avant l'expiration d'une période pour laquelle elle a été ajournée avec le consentement du poursuivant et du prévenu ou de son avocat;

e) ordonner par écrit, selon la formule 30, que le prévenu soit amené devant lui, ou devant tout autre juge de paix pour la même circonscription territoriale, à toute époque avant l'expiration de la période pour laquelle le prévenu a été renvoyé;

f) accorder ou refuser au poursuivant ou à son avocat la permission de lui adresser la parole, à l'appui de l'inculpation, soit pour ouvrir ou résumer l'affaire, soit par voie de réplique sur tout témoignage rendu pour le compte du prévenu;

g) recevoir une preuve de la part du poursuivant ou du prévenu, selon le cas, après avoir les témoignages rendus pour le compte de l'un ou l'autre d'entre eux;

h) ordonner que personne, autre que le poursuivant, le prévenu et leurs avocats, n'ait accès à la salle où se tient l'enquête, ou n'y demeure, lorsqu'il lui paraît que les fins de la justice seront ainsi mieux servies;

i) régler le cours de l'enquête de toute manière qui lui paraît désirable et qui n'est pas incompatible avec la présente loi et, sauf s'il est convaincu que cela ne servirait pas au mieux l'intérêt de la justice, est en conformité avec tout aveu et tout accord consignés au dossier en application du paragraphe 536.4(2) avec ou tout accord intervenu au titre de l'article 536.5;

j) avec le consentement du poursuivant et de l'accusé, permettre à ce dernier soit d'utiliser la télévision en circuit fermé ou tout autre moyen permettant au tribunal et à l'accusé de se voir et de communiquer simultanément, soit de permettre à l'avocat représentant l'accusé de comparaître à sa place durant toute l'enquête sauf durant la présentation de la preuve testimoniale;

j.1) permettre, aux conditions qu'il juge à propos, au prévenu qui en fait la demande d'être absent pendant tout ou partie de l'enquête;

k) ordonner à l'accusé enfermé dans une prison de comparaître en utilisant la télévision en circuit fermé ou par tout autre moyen permettant, d'une part, au tribunal et à l'accusé de se voir et de communiquer simultanément et, d'autre part, à l'accusé de communiquer en privé avec son avocat, s'il est représenté par un avocat, durant toute l'enquête sauf durant la présentation de la preuve testimoniale.

(1.01) S'il est fait droit à la demande prévue à l'alinéa (1)*j.1*), le tribunal avise l'accusé que la preuve recueillie en son absence pourrait être admise aux termes de l'article 715.

(1.1) Lorsqu'il estime qu'une partie de l'interrogatoire ou du contre-interrogatoire est abusive, trop répétitive ou contre-indiquée, le juge de paix agissant en vertu de la présente partie en ordonne la cessation.

(2) Lorsque l'audition est transférée en vertu de l'alinéa (1) *a*) dans une autre circonscription territoriale de la même province, le juge de paix compétent dans ce ressort est compétent pour la poursuivre.

(3) et (4) [Abrogés, 1991, ch. 43, art. 9]

540 Taking Evidence

(1) Where an accused is before a justice holding a preliminary inquiry, the justice shall

(*a*) take the evidence under oath of the witnesses called on the part of the prosecution and allow the accused or counsel for the accused to cross-examine them; and

(*b*) cause a record of the evidence of each witness to be taken

(i) in legible writing in the form of a deposition, in Form 31, or by a stenographer appointed by him or pursuant to law, or

(ii) in a province where a sound recording apparatus is authorized by or under provincial legislation for use in civil cases, by the type of apparatus so authorized and in accordance with the requirements of the provincial legislation.

(2) Where a deposition is taken down in writing, the justice shall, in the presence of the accused, before asking the accused if he wishes to call witnesses,

(*a*) cause the deposition to be read to the witness;

(*b*) cause the deposition to be signed by the witness; and

(*c*) sign the deposition himself.

(3) Where depositions are taken down in writing, the justice may sign

(*a*) at the end of each deposition; or

(*b*) at the end of several or of all the depositions in a manner that will indicate that his is intended to authenticate each deposition.

(4) Where the stenographer appointed to take down the evidence is not a duly sworn court stenographer, he shall make oath that he will truly and faithfully report the evidence.

(5) Where the evidence is taken down by a stenographer appointed by the justice or pursuant to law, it need not be read to or signed by the witnesses, but, on request of the justice or of one of the parties, shall be transcribed, in whole or in part, by the stenographer and the transcript shall be accompanied by

(*a*) an affidavit of the stenographer that it is a true report of the evidence; or

(*b*) a certificate that it is a true report of the evidence if the stenographer is a duly sworn court stenographer.

(6) Where, in accordance with this Act, a record is taken in any proceedings under this Act by a sound recording apparatus, the record so taken shall, on request of the justice or of one of the parties, be dealt with and transcribed, in whole or in part, and the transcription certified and used in accordance with the provincial legislation, with such modifications as the circumstances require mentioned in subsection (1).

(7) A justice acting under this Part may receive as evidence any information that would not otherwise be admissible but that the justice considers credible or trustworthy in the circumstances of the case, including a statement that is made by a witness in writing or otherwise recorded.

(8) Unless the justice orders otherwise, no information may be received as evidence under (7) unless the party has given to each of the other parties reasonable notice of his or her intention to tender it, together with a copy of the statement, if any, referred to in that

(9) The justice shall, on application of a party, require any person whom the justice considers appropriate to appear for examination or cross-examination with respect to information intended to be tendered as evidence under subsection (7).

540 Prise des témoignages

(1) Lorsque le prévenu est devant un juge de paix qui tient une enquête préliminaire, ce juge doit :

a) d’une part, recueillir les dépositions sous serment des témoins appelés par la poursuite et permettre au prévenu ou à son avocat de les contre-interroger;

b) d’autre part, faire consigner la déposition de chaque témoin :

(i) soit par un sténographe nommé conformément à la loi ou qu’il nomme ou dans une écriture lisible sous forme de déposition d’après la formule 31,

(ii) soit, dans une province où l'utilisation d'un appareil d'enregistrement du son est autorisée par ou selon la loi provinciale dans les causes civiles, au moyen du type d'appareil ainsi autorisé et conformément aux prescriptions de la loi provinciale.

(2) Lorsqu'une déposition est prise par écrit, le juge de paix, en présence du prévenu et avant de demander à ce dernier s'il désire appeler des témoins :

a) fait lire la déposition au témoin;

b) fait signer la déposition par le témoin;

c) signe lui-même la déposition.

(3) Lorsque des dépositions sont prises par écrit, le juge de paix peut signer :

a) soit à la fin de chaque déposition;

b) soit à la fin de plusieurs ou de l'ensemble des dépositions, d'une manière indiquant que sa signature est destinée à authentiquer chaque déposition.

(4) Lorsque le sténographe désigné pour consigner les témoignages n'est pas un sténographe judiciaire dûment assermenté, il doit jurer qu'il rapportera sincèrement et fidèlement les témoignages.

(5) Lorsque les témoignages sont consignés par un sténographe nommé par un juge de paix ou conformément à la loi, il n'est pas nécessaire qu'ils soient lus aux témoins ou signés par eux; ils sont transcrits, en totalité ou en partie, par le sténographe à la demande du juge de paix ou de l'une des parties et la transcription est accompagnée :

a) d'un affidavit du sténographe déclarant qu'elle est un rapport fidèle des témoignages;

b) d'un certificat déclarant qu'elle est un rapport fidèle des témoignages, si le sténographe est un sténographe judiciaire dûment assermenté.

(6) Lorsque, en conformité avec la présente loi, on a recours à un appareil d'enregistrement du son relativement à des procédures aux termes de la présente loi, l'enregistrement ainsi fait est utilisé et transcrit, en totalité ou en partie, à la demande du juge de paix ou de l'une des parties, et la transcription est certifiée et employée, avec les adaptations nécessaires, conformément à la législation provinciale mentionnée au paragraphe (1).

(7) Le juge de paix agissant en vertu de la présente partie peut recevoir en preuve des renseignements par ailleurs inadmissibles qu'il considère plausibles ou dignes de foi dans les circonstances de l'espèce, y compris une déclaration d'un témoin faite par écrit ou enregistrée.

(8) À moins que le juge de paix n'en ordonne autrement, les renseignements ne peuvent être admis en preuve que si la partie a remis aux autres parties un préavis raisonnable de son intention de les présenter. Dans le cas d'une déclaration, elle accompagne le préavis d'une copie de celle-ci.

(9) Sur demande faite par une partie, le juge de paix ordonne à toute personne dont il estime le témoignage pertinent de se présenter pour interrogatoire ou contre-interrogatoire sur les renseignements visés au paragraphe (7).

549 Order to stand trial at any stage of inquiry with consent

(1) Notwithstanding any other provision of this Act, the justice may, at any stage of a preliminary inquiry, with the consent of the accused and the prosecutor, order the accused to stand trial in the court having criminal jurisdiction, without taking or recording any evidence or further evidence.

(1.1) If the prosecutor and the accused agree under section 536.5 to limit the scope of a preliminary inquiry to specific issues, the justice, without recording evidence on any other issues, may order the accused to stand trial in the court having criminal jurisdiction.

(2) If an accused is ordered to stand trial under this section, the justice shall endorse on the information a statement of the consent of the accused and the prosecutor, and the accused shall after that be dealt with in all respects as if ordered to stand trial under section 548.

549 Renvoi au procès à tout stade d'une enquête, avec consentement

(1) Nonobstant toute autre disposition de la présente loi, le juge de paix peut, à tout stade d'une enquête préliminaire, avec le consentement du prévenu et du poursuivant, astreindre le prévenu à passer en jugement devant le tribunal ayant juridiction criminelle, sans recueillir ni enregistrer aucune preuve ou preuve supplémentaire.

(1.1) Si le poursuivant et le prévenu se sont entendus pour limiter la portée de l'enquête préliminaire au titre de l'article 536.5, le juge de paix peut astreindre le prévenu à passer en jugement devant le tribunal ayant juridiction criminelle, sans recueillir ni enregistrer aucune preuve ou preuve supplémentaire relativement à toute question non visée par l'accord en cause.

(2) Lorsqu'un prévenu est astreint à passer en jugement aux termes du présent article, le juge de paix inscrit sur la dénonciation une mention du consentement du prévenu et du poursuivant, et le prévenu est par la suite traité à tous égards comme s'il était astreint à passer en jugement aux termes de l'article 548.