File No. 36068

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

B E T W E E N:

BARRETT RICHARD JORDAN

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

-and-

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

Interveners

A N D:

File No. 36112

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

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

-and-

KENNETH GAVIN WILLIAMSON

Respondent

-and-

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

Interveners

FACTUM OF INTERVENER, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

ADDARIO LAW GROUP
171 John Street, Suite 101
Toronto, ON M5T 1X3
Tel: (416) 979-6446
Fax: 1-866-714-1196

Frank Addario
Erin Dann

Counsel for the Intervener
Criminal Lawyers' Association (Ontario)

SACK GOLDBLATT MITCHELL LLP
30 Metcalfe Street, Suite 500
Ottawa, ON K1P 5L4
Tel: (613) 482-2463
Fax: (613) 235-3041

Colleen Bauman

Agent for the Intervener
Criminal Lawyers' Association (Ontario)

PECK AND COMPANY
610 – 744 West Hastings Street
Vancouver, BC V6C 1A5

Richard C.C. Peck, Q.C.
Tel: (604) 669-0208
Fax: (604) 669-0616

Counsel for the Appellant
Barrett Richard Jordan

GOWLING LAFLEUR HENDERSON LLP
2600 - 160 Elgin St
Box 466 Station D
Ottawa, ON K1P 1C3

Jeffrey W. Beedell
Tel: (613) 786-0171
Fax: (613) 788-3587
E-mail: jeff.beedell@gowlings.com

Agent for the Appellant
Barrett Richard Jordan

PUBLIC PROSECUTION SERVICE OF CANADA
900-840 Howe Street
Vancouver, BC V6Z 2S9

P.R. LaPrairie
Croft Michaelson, Q.C.
Tel: (604) 666-5250
Fax: (604) 666-1599

Counsel for the Respondent
Her Majesty the Queen (File 36068)

DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA
160 Elgin Street
12th Floor
Ottawa, ON K1A 0H8

François Lacasse
Tel: (613) 957-4770
Fax: (613) 941-7864
Email: flacasse@ppsc-sppc.gc.ca

Agent for the Respondent
Her Majesty the Queen (File 36068)

ATTORNEY GENERAL OF ONTARIO
10th Floor, 720 Bay Street
Toronto, ON M5G 2K1

Eric H. Siebenmorgen
Phone: (416) 326-4595
Fax: (416) 326-4656

Counsel for the Appellant
Her Majesty the Queen (File 36112)

BURKE-ROBERTSON
Suite 200, 441 MacLaren Street
Ottawa, ON K2P 2H3

Robert E. Houston, Q.C.
Phone: (613) 236-9665
Fax: (613) 235-4430
Email: rhouston@burkerobertson.com

Agent for the Appellant
Her Majesty the Queen (File 36112)

HALE CRIMINAL LAW OFFICE
Suite 101, 116 Lisgar Street
Ottawa, ON K2P 0C2

John H. Hale
Phone: (613) 695-4253
Fax: (613) 695-8500

Counsel for the Respondent
Kenneth Gavin Williamson

ATTORNEY GENERAL OF ALBERTA
Appeals, Education & Prosecution Policy Branch
Alberta Justice, Criminal Division
300, 332 – 6 Avenue S.W.
Calgary, AB T2P 0B2

Jolaine Antonio
Phone: (403) 297-6005
Fax: (403) 297-3453
Email: jolaine.antonio@gov.ab.ca

Counsel for the Intervener
Attorney General of Alberta

GOWLING LAFLEUR HENDERSON LLP
2600, 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Phone: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlings.com

Agent for the Intervener
Attorney General of Alberta

FARRIS, VAUGHAN, WILLS & MURPHY LLP
Box 10026, Pacific Ctr. S. TD Bank Tower
25th Floor – 700 Georgia Street West
Vancouver, BC V7Y 1B3

Tim A. Dickson
Martin Twigg
Phone: (604) 661-9341
Fax: (604) 661-9349
Email: tdickson@farris.com

Counsel for the Intervener
British Columbia Civil Liberties Association

GOWLING LAFLEUR HENDERSON LLP
2600, 160 Elgin Street
Ottawa, ON K1P 1C3

Matthew Estabrooks
Phone: (613) 233-1781
Fax: (613) 563-9869
Email: matthew.estabrooks@gowlings.com

Agent for the Intervener
British Columbia Civil Liberties Association

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PART I: OVERVIEW AND STATEMENT OF THE FACTS

1. Less than a year and half after its landmark decision in *R. v. Askov*,[1] this Court revisited the constitutional right to be tried within a reasonable time in *R. v. Morin* and clarified the proper approach to determining violations of s. 11(b) of the *Charter*: "Embarking as we did on uncharted waters it is not surprising that the course we steered has required, *and may require in the future*, some alteration in its direction to accord with experience."[2]

2. More than two decades later further adjustments are needed. The s. 11(b) waters are well-charted. Repeat voyages through the criminal courts show a stubborn, systemic tolerance for ever-expanding periods of delay, inconsistent results and a micro-calculating approach to the adjudication of s. 11(b) claims. Trial judges have fixated on the categories identified in *Morin* (1992) in preference to the holistic approach required by *Godin* (2009).[3] The speedy trial right envisaged by judges is a world away from the experience of criminal defendants seeking the right's protection.

3. Both cases before the Court highlight the shortcomings of the current approach to s. 11(b). The period from charge to trial was 35 months (nearly three years) in *R. v. Williamson* and 49.5 months (over four years) in *R. v. Jordan*. In each case, the trial judges noted the applicable 14 to 18 month range of tolerable delay articulated in *Morin*, and yet dismissed the respective applications for a stay of proceedings. On appeal, the decision in *Jordan* was upheld, while *Williamson* was overturned.

4. In these appeals the Court has an opportunity to revisit the proper approach to adjudicating s. 11(b) claims. In doing so the Court should take into the account the experience of the past two decades. Setting national standards for speedy trials carries with it the acknowledgement that s. 11(b) is no less important than any other right in the *Charter*. The state owes a duty to meet the minimum standard.

5. The CLA makes no submissions on the facts of these appeals.

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[1] *R. v. Askov*, [1990] 2 S.C.R. 1199

[2] *R. v. Morin*, [1992] 1 S.C.R. 771 at 784 [emphasis added].

[3] *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3

PART II: POSITION ON QUESTIONS IN ISSUE

6. The CLA will confine its submissions to the invitation by the Appellant, Mr. Jordan, to this Court to "recalibrate the [s. 11(b)] analysis." In particular, the CLA submits as follows:

i) To accord with the lessons learned in the decades since *Morin* and the practical realities of busy trial courts, the s. 11(b) analysis developed by this Court ought to include the articulation of *meaningful* guidelines for tolerable delay. Failure to comply with such guidelines puts an onus on the Crown to satisfy the court that the delay is reasonable; and

ii) The "micro-counting" analysis that dominates a significant portion of today's s. 11(b) jurisprudence is inefficient, overly reliant on judicial "guestimations" and reflects a judicial reluctance to enforce the right to a speedy trial. The holistic approach emphasized by this Court in *Godin* should be reaffirmed.

PART III: STATEMENT OF ARGUMENT

A. The Problem

7. The constitutional guarantee of a trial within a reasonable time sets a limit on state action (or inaction) in bringing a matter to trial. In *Morin*, that limit was defined as in the range of eight to ten months for Provincial Court matters, and a further six to eight months after committal for trial.[4] Governments across Canada have had ample time (23 years!) to respond to these guidelines and eliminate unreasonable systemic delay. It is fair to expect defendants to get trials at the low end of the range articulated in *Morin* as the constitutional standard.[5] Trial courts in Ontario have repeatedly expressed frustration at the lack of progress being made in reducing systemic delays. For example:

> It is time for our senior levels of government to commit to a strategy that will ensure that these constitutionally guaranteed objectives are met. **Government has had more than 20 years to improve upon the systemic deficiencies** which continue to erode the constitutional rights protected by s. 11(b) of our Charter - for the benefit of persons charged and for our society alike. **Yet the situation only grows worse by the day.**[6]

In a similar vein:

> It is certainly arguable that the guidelines of constitutionally tolerable systemic delay as described in *Morin* are today outdated reference points. **The government has had more than a quarter of a century to improve upon the systemic deficiencies** that

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[4] *Morin*, *supra* note 2 at 798-799
[5] *R. v. Sharma*, [1992] 1 S.C.R. 814 at 827.
[6] *R. v. Nguyen*, 2010 ONCJ 116 at para. 24 [emphasis added]

undermine the constitutional rights protected by section 11(b) of the *Charter* and **the situation has only grown worse.**[7]

8. The Attorney General of Alberta suggests there is no evidence of a nationwide increase in institutional delay and cites a 2008/2009 study that showed a "national reduction in median time to trial."[8] In fact, the study examined the median time to *complete* a criminal case, whether by guilty plea, withdraw, stay, trial or otherwise. Since the majority of cases (over 90%) are completed without proceeding to trial, the median completion time does not provide significant insight into the problem of lengthy trial delay.[9] Moreover, while the median completion rate fell slightly, to 124 days, in 2008/2009 from its peak of 128 days in 2004/2005, it remained significantly higher than the rate of completion in 1994 when the median elapsed time was only 73 days.[10] There is, in short, no evidence that the problem of delay plaguing the justice system when *Askov* and *Morin* were decided has been eliminated or even reduced. Indeed, in many jurisdictions the problem has grown worse.[11] Complacency in the face of this persistent systemic delay can be traced to the *Morin* decision and the signal it sent that the right to a trial within a "reasonable time" contemplates endless flexibility.[12]

9. Many courts continue to forgive ever-greater periods of delay under the guise of flexibility,[13] a concept that offers an unlimited bank account of forgiveness on which to draw. Such courts appear to have taken up the state's claim that systemic delay – even where it is avoidable – is "reasonable" so long as a flexible approach to the right to a speedy trial is adopted.

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[7] *R. v. Lore*, 2013 ONCJ 439 at para. 4, citing *R. v. Hamilton*, 2010 ONCJ 465 at para. 21 [emphasis added]. See also *R. v. Garcia*, [2008] O.J. No. 29 (S.C.) at para. 73; *R. v. Khoia*, [2010] O.J. No. 6022 (Ct. J.) at para. 35; *R. v. Brickman* 2013 ONCJ 690 at para. 28

[8] Factum of the Intervener, Attorney General of Alberta at para. 22

[9] Statistics Canada, *Adult Criminal Court Statistics, 2008/2009*, Jennifer Thomas (Ottawa, Statistics Canada, 2008/2009), online: http://www.statcan.gc.ca/pub/85-002-x/2010002/article/11293-eng.htm

[10] *Ibid.* Statistics Canada, *Adult Criminal Court Statistics, 1996-97*, Denyse Carrière (Ottawa, Statistics Canada, 1996-97) at p. 14, online: http://www.statcan.gc.ca/pub/85-002-x/85-002-x1998007-eng.pdf

[11] See footnote 18 of Factum of the Intervener, British Columbia Civil Liberties Association (BCCLA)

[12] At least in the upward direction. Although this Court made clear that deviations from the guidelines "in *either* direction" could be justified by the presence or absence of prejudice, it is difficult to find any case where a stay has been granted where the delay fell below the *Morin* range. *Morin*, *supra* note 2 at 807

[13] In 2014, for example, the Court of Appeal for Ontario overturned a stay of proceedings granted following a 26-month delay for a Provincial Court trial (*R. v. Stilwell* 2014 ONCA 563, 313 C.C.C. (3d) 257) and upheld dismissals of s. 11(b) applications in respect of 29-month (*R. v. Florence* 2014 ONCA 443, 312 C.C.C. (3d) 165) and 33-month (*R. v. Ralph* 2014 ONCA 3, 299 C.R.R. (2d) 1) delays for trial in Superior Court.

B. The Solution

10. Although the *Morin* court was clearly directing trial judges to take an individualized approach to speedy trial cases, the "flexibility" emphasized in *Morin* has instead resulted in ever-expanding tolerance for institutional delay. In order to prevent this from continuing for another 23 years, the Court should state guidelines that *do* act as presumptive limitation periods on delay.

11. A presumptive limitation period would not result in the automatic imposition of a stay of proceedings. Rather, an accused would be required to prove that the delay in her case exceeded the guidelines set by this Court and demonstrate that the actions of the defence were not the cause of the delay complained about. The onus would shift to the Crown to explain and justify the excessive delay. Factors – including the causes of delay and the complexity of the case – currently considered by the courts in determining reasonableness would continue to be relevant.

12. Boundless flexibility is incompatible with the concept of a *Charter* right and has proved to serve witnesses, victims, defendants and the justice system's reputation poorly. Articulating a clear boundary for delay, beyond which the Crown would bear the onus of demonstrating that the right to a trial within a reasonable time has not been violated, may result in short-term disruption in the criminal justice system. Ultimately, however, it would serve to give meaningful direction to the state on its constitutional requirements, ensuring a speedier justice system that protects not just the rights and interests of individual accused, but also the community.

C. Meaningful Guidelines

13. This Court's decision in *Morin* has generally been interpreted as establishing an elastic range of permissible *institutional* delay rather than a guideline for the total time period within which criminal cases should be tried.[14] In light of this interpretation, both "reasonable" intake periods and all institutional delay that falls within the *Morin* guidelines is regularly excluded from s. 11(b) consideration.[15] When further unjustified delay, beyond the upper limits of the ranges provided in *Morin* is tolerated in the absence of any justification for the departure, the guidelines cease to have any real meaning or impact.

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[14] See, *e.g.*, *R. v. Ignagni*, 2013 ONSC 5030, especially paras. 65-66

[15] In relation to the question of whether the *Morin* guidelines were meant to encompass only institutional delay or, more broadly, sufficient time for the completion of criminal cases, the CLA adopts the submissions of the BCCLA, Intervener's Factum at paras. 18-20 and the Appellant Jordan, Appellant's Factum in Response at paras. 27-32

14. In *Jordan*, for example, the total period of non-waived delay was 44.5 months. The trial judge concluded that 10.5 months could be attributed to inherent time requirements of the case. The remaining 34.5 months were attributed to Crown and institutional delay. In assessing prejudice, the trial judge deducted both the 10.5 months of inherent delay *and* the *Morin* upper limit for institutional delay (*i.e.* 18 months) from the total 44.5 months. Using this calculus, the amount of delay that received meaningful scrutiny was reduced to 17 months.[16] The trial judge went on to conclude that the prejudice experienced by Mr. Jordan was "not substantial." If significant prejudice is not inferred even where the upper limit of tolerable delay has been exceeded by over a year, the guideline set by this Court is not providing much guidance.

15. The case law in Ontario is clear that the *Morin* guidelines only "come into play" *after* generous allowances have been made for the "inherent" time requirements of the case, including retaining counsel, preparing and providing disclosure, conducting Crown and judicial pre-trials and preparing for trial.[17] To recognize the limits on institutional resources, the guidelines permit months of delay *beyond* that inherently required by a particular case. Thus the ranges articulated by this Court decades ago already provide a "pretty generous allowance for inefficiency."[18] The Ontario case law means that the speedy trial right is diluted before the analysis about its potential violation even begins.

16. If guidelines are to have a practical impact on the pace of litigation in criminal courts, cases "cannot be routinely excused from compliance on the basis that the Crown got pretty close."[19] To conclude otherwise, as Nordheimer J. pointed out in *R. v. Osei*, is to excuse constitutional shortcomings except where the failure is especially egregious:

> That result would, in turn, mean that the Crown would not have to concern itself with its obligation to ensure that all cases conform to the guidelines but would only have to concern itself with an abject failure to comply. That cannot be an acceptable result when we speak of fundamental rights such as those enshrined in Section 11(b) of the *Charter*.[20]

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[16] Appellant's Record, Vol. I, pp. 36-37 at paras. 119-130
[17] *R. v. Santucci*, 2014 ONCJ 627 at paras. 55-57
[18] *Ibid.* at para. 55
[19] *R. v. Osei* (2007),152 C.R.R. (2d) 152 (Ont. S.C.) at para. 40
[20] *Ibid.*

D. Guidelines with Teeth are not a Prohibited Judicial Expenditure Order

17. One Attorney General argues that proposing meaningful s. 11(b) guidelines is an argument for forcing the government "to allocate more resources to criminal justice."[21] There are two flaws to this argument. First it is based on the unproven assumption that institutional delay is solely the result of insufficient resources. There is no record demonstrating that institutional delay has 1) increased because of shrinking resources and burgeoning caseloads;[22] or 2) can only be remedied with increased public expenditures. A 1994 study by the Law Commission of Canada concluded that a lack of resources is *not* usually a significant cause of delay. More pressing issues included the efficient use of *existing* resources and changes "to the attitudes and expectation of practitioners and courts."[23]

18. The observations of busy provincial court judges in Toronto suggest that the inefficient deployment of resources remains a significant contributor to delay:

> It is a startling fact that the backlog of cases in the College Park Courthouse consists almost entirely of cases that will never actually proceed to trial. I am the administrative judge in this courthouse and, as such, I know for a fact that, during the material timeframe of this case, every week, not just some weeks, but every week, 90% of the cases forecast to last one day or more collapsed on the trial date. This is the real delay problem in the prosecution of criminal cases in this jurisdiction.[24]

19. Trial dates must be set "in order to accommodate s. 11(b)."[25] It is the responsibility of the government to determine how best to meet the constitutional demand for speedy trials whether by adjusting resource allocation and case management practices or otherwise. The solution to

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[21] Factum of the Intervener, Attorney General of Alberta at para. 21

[22] It is noteworthy that in 1992, the year the Court released its decision in *Morin*, there were 132,419 impaired driving incidents in Canada. By 2011, that number had dropped to 90,277, despite a significant increase in population size. In fact, the 2011 impaired driving rate was less than half of what it was 25 years ago. The ongoing struggle to try impaired driving cases in a reasonable time does not seem to be the result of an increase in the number of these charges. See Samuel Perreault, "Impaired Driving in Canada, 2011" (2013) 33:1 Juristat 1 at pp. 3, 5, 22 and 26, online: http://www.statcan.gc.ca/pub/85-002-x/2013001/article/11739-eng.pdf and Sylvain Tremblay, "Impaired Driving in Canada, 1996" (1997) 17:12 Juristat 1 at p. 3, online: http://www.statcan.gc.ca/pub/85-002-x/85-002-x1998007-eng.pdf

[23] Canada, Department of Justice, *Trial within a Reasonable Time: A Working Paper Prepared for the Law Reform Commission of Canada* (Ottawa: Communication Group,1994) at pp. 11-14, online: http://www.lareau-legal.ca/LRCWP67.pdf

[24] *R. v. Lore*, *supra* note 7 at para. 4.

[25] *R. v. Gorges*, [2004] O.J. No. 790 (C.A.) at para. 3

delay is not limited to increasing funding. It is constitutionally impermissible, however, to simply abide a culture that accepts delays as inevitable. [26]

20. Second, the Alberta Attorney General's argument confuses the Court's established role (enforcing rights vigorously) with certain inevitable consequences of constitutional rulings. If the Supreme Court cannot enforce a constitutional right because it might cost the state money, it cannot insist that duty counsel is made available to comply with s. 10(b) (*Brydges*), that affiants trudge to a judge's office instead of asking their superior for his signature to invade privacy (*Hunter v. Southam*) or that the state supply an interpreter under s. 14 (*Tran*).[27] Taking shortcuts is the state's primary way of avoiding its constitutional obligations. Eliminating those shortcuts, as required by the *Charter*, is the Court's job. Clearly the state does not have limitless resources to devote to the administration of justice. There will always be competing demands for public funds and it is for elected officials to make the difficult decisions about how those funds are best allocated.[28] It is the responsibility of the courts, however, to ensure that the state's constitutional promises – including the guarantee of a trial within a reasonable time – are kept. Courts are not excused from or hindered in their duties to enforce the protection of *Charter* rights simply because a judicial decision could have ancillary financial consequences for the government.

E. Losing the Forest for the Trees: Micro-counting and Guessing

21. Reliance on judicial inferences and "guesstimations" with respect to the availability of institutional resources, the necessity of intake procedures and the trial preparation requirements of counsel has resulted in a s. 11(b) analysis that is frequently plagued by speculation and micro-counting. Nowhere in *Morin* does it say that in considering the reasons for delay, a court must attribute each and every day to one of the five categories articulated in that case. Nevertheless, this has become standard practice in the s. 11(b) analysis.[29]

22. For example, in determining the appropriate time to attribute to "inherent delay," the typical s. 11(b) analysis presumes the reasonableness of intake periods and the necessity, or at

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[26] *R. v. Garcia*, *supra* note 7 at para 73
[27] *R. v. Brydges*, [1990] 1 S.C.R. 190; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Tran*, [1994] 2 S.C.R. 951
[28] *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3 at para. 69
[29] See, *e.g.*, *R. v. Hussein*, 2014 ONSC 3567; *R. v. Melvin*, 2015 NSSC 13; *R. v. Gittens*, 2014 ONSC 6499

least usefulness, of mandatory pre-trials.[30] In *R. v. Lahiry*, Code J. held that a six-week interval is a "reasonable" first appearance date for individuals accused of impaired driving offences and that more time is usually needed after the first appearance for the Crown to provide disclosure.[31] *Lahiry* was a Toronto case. Data available with respect to the prosecution of drinking and driving offences in the neighbouring jurisdiction of Peel suggest the timelines articulated in *Lahiry* were overly tolerant of an entrenched pattern of intake delay in Toronto. In Peel, most accused charged with an impaired driving offence have a first appearance within two weeks of arrest and are provided with substantial disclosure at that time.[32]

23. Even more troubling, courts have taken to reassigning significant periods of institutional delay to "inherent delay" in order to account for counsel preparation time:

> It is rarely true that counsel is immediately available for trial, when setting a date. Whenever counsel take on a new case, they complete various preliminary steps during the intake period. Once they have taken these steps and are ready to set a date for trial, they need to set aside sufficient time in their calendars to prepare the new case for trial and to then conduct the trial. If the case is lengthy and complex, or if counsel are very busy, it may be some considerable period of time before counsel are ready for trial. To use a simple hypothetical, if counsel has no time in his/her calendar to prepare a new case for trial and to then try it until ten months in the future, and the earliest date that the court has available for the trial is 12 months in the future, then systemic congestion in the court is the cause of only two months of delay. The other ten months is delay that the accused needs, for entirely beneficial reasons, in order to allow his/her counsel of choice to prepare the case for trial and to accommodate it in an otherwise busy calendar. It is good and necessary delay that would have occurred in any event, even if the court had earlier available dates. It is a fiction to characterize this kind of useful delay as unwarranted or unreasonable or prejudicial.[33]

24. There are at least three problems with this approach. First, it is logically unfair. Defence counsel preparation time is not the cause of any delay where it can be completed before the first date offered for trial.

25. Second, the approach requires defence counsel to put all available dates on the record along with evidence of trial readiness. The Crown responds in turn. And so, the advocates who

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[30] *R. v. Tran*, 2012 ONCA 18, 288 CCC (3d) 177 at para. 34[*Tran*, ONCA]
[31] *R. v. Lahiry*, 2011 ONSC 6780, 283 CCC (3d) 525 at para. 22
[32] *R. v. Duszak*, 2013 ONCJ 586, 7 C.R. (7th) 97 at paras. 32-37 and 50
[33] *R.v. Lahiry*, *supra* note 31 at para. 34. Cited with approval in *R. v. Tran*, ONCA, *supra* note 30 at para. 32, where Simmons J.A. held that parties should not be deemed automatically to be ready to conduct a hearing as of the date a trial is set since counsel require time to clear their schedule and prepare for the hearing.

may have to argue the s. 11(b) motion participate in the creation of the evidentiary record.[34] Where there are gaps in this record, judges are free to deduct weeks or even months as reasonable estimates for clearing schedules and preparing for trial.[35] The result is increased posturing in set date court and/or largely arbitrary estimates. Neither encourages a fair, consistent or efficient resolution of complaints about trial delay.

26. Third, though purportedly aimed at injecting a dose of realism into the s. 11(b) analysis, the concept of "trial readiness" has instead imposed a legal fiction over the reality of institutional delay. Defence counsel are not required "to hold themselves in a state of perpetual availability."[36] As Justice Green put it is *R. v. Duszak*, there is "a certain legerdemain, if not outright artifice, in subtracting defence counsel's trial readiness from a period of systemic delay."[37] Justice Green's colleague at Old City Hall Court House in Toronto, Justice McLeod, put the matter more plainly:

> I still don't understand what the OCA meant by saying that "counsel require time to clear their schedule so they can be available for the hearing". Nor do I agree that a further period of time has to be neutralized to account for trial preparation – because my experience is that as a general proposition lawyers don't allocate time to preparation. This is a bureaucratic construct that means nothing to practicing criminal lawyers. To the extent that advance preparation is done, it occurs when the opportunity arises. Otherwise, lawyers prepare when necessary – usually shortly before the trial commences, working around other scheduled court events.[38]

27. The complex reassignment of delay from "institutional" to "inherent" has acted as an inflationary mechanism to steadily increase the length of "tolerable" delay. Controversy surrounding the appropriate number of days, weeks or months to assign to "trial readiness" is one example of trial and appellate courts' preoccupation with s. 11(b) trees, despite this Court's direction in *Godin* not to lose sight of the forest. The micro-counting analysis so prevalent in today's s. 11(b) jurisprudence runs contrary to the principle that it is the Crown's duty to bring

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[34] One judge has repeatedly commented that requiring counsel to provide a full evidentiary record puts lawyers "on trial," is unseemly and risks seriously damaging the adversarial system. See *R. v. Nguyen et al.*, 2012 ONCJ 512 at paras. 23-33 and *R. v. Kim*, 2013 ONCJ 54

[35] See, e.g., *R. v. Ralph, supra* note 13 at para. 8; *R. v. Florence, supra* note 13 at para. 55.

[36] *R. v. Godin, supra* note 3 at para. 23

[37] *R. v .Duszak, supra* note 32 at para. 56

[38] *R. v. Santucci, supra* note 17 at para. 46

the accused to trial,[39] appears premised on the faulty presumption that individuals *want* to delay their matters and reflects a hesitancy to "reward" an accused with a stay of proceedings.

28. Accused individuals do not "benefit" from a violation of their fundamental legal rights. Delay prolongs the "exquisite agony"[40] of waiting for trial. It does not relieve it.[41] The Court has determined that the appropriate remedy for an infringement of the right to be tried within a reasonable time is a stay of proceedings. Any discomfort with that remedy ought not to affect the determination of whether the right has been violated. To suggest that a stay is a windfall for an accused is to engage in an "*ex post facto* analysis of rights violations" and confuses a constitutional remedy for the harm done by state action with a "benefit."[42] A fair and holistic approach to the assessment of s. 11(b) claims must begin and end with an acknowledgement that the guarantee of a trial within a reasonable time is entitled to the same robust constitutional protection as the other legal rights enshrined in the *Charter*.

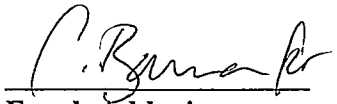
PART IV: SUBMISSIONS ON COSTS

31. The CLA makes no submissions regarding costs.

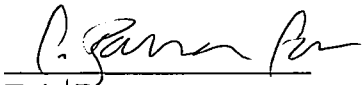
PART V: ORDER REQUESTED

32. The CLA requests permission to present oral argument at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 8th day of September 2015.



Frank Addario
Counsel to the Intervener,
Criminal Lawyers' Association (Ontario)



Erin Dann
Counsel to the Intervener,
Criminal Lawyers' Association (Ontario)

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[39] *R. v. Askov*, *supra* note 1 at 1225, 1227 and 1229.
[40] *Ibid.* at 1219
[41] Michael A. Code, *Trial Within a Reasonable Time* (Toronto: Carswell: 1992) at p. iii
[42] *Ibid* at p. iv

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30	Michael A. Code, *Trial Within a Reasonable Time* (Toronto: Carswell: 1992)	28
31	Samuel Perreault, "Impaired Driving in Canada, 2011" (2013) 33:1 Juristat 1	17
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