File No. 36068

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

BETWEEN:

BARRETT RICHARD JORDAN

APPELLANT

-and-

HER MAJESTY THE QUEEN

RESPONDENT

APPELLANT'S FACTUM

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

Counsel for the Appellant, Barrett Richard Jordan

Richard C.C. Peck, Q.C.
Eric V. Gottardi
Peck and Company
Barristers
610-744 West Hastings Street
Vancouver, B.C. V6C 1A5
Telephone: 604-669-0208
Facsimile: 604-669-0616
Email: rpeck@peckandcompany.ca

Ottawa Agent for the Counsel for the Appellant

Brian Crane, Q.C.
Gowling LaFleur Henderson LLP
Barristers and Solicitors
2600 – 160 Elgin Street
Ottawa, Ontario K1P 1C3
Telephone: 613-233-1781
Facsimile: 613-563-9869
Email: brian.crane@gowlings.com

Counsel for the Respondent, Her Majesty the Queen

Peter R. La Prairie
Public Prosecution Service of Canada
900-840 Howe Street
Vancouver, BC V6Z 2S9
Telephone: 604-666-5250
Facsimile: 604-687-6298
Email: peter.laprairie@ppsc-sppc.gc.ca

Ottawa Agent for Counsel for the Respondent

Francois-Felix Lacasse
Public Prosecution Service of Canada
1200 – 160 Elgin Street
Ottawa, ON K1P 1C3
Telephone: 613-957-4770
Facsimile: 613-941-7865
Email: flacasse@ppsc-sppc.gc.ca

TABLE OF CONTENTS

PART I - STATEMENT OF FACTS

I. Overview

1. Almost seven years ago, Mr. Jordan was charged with respect to a "very straightforward" undercover case involving approximately 1.5 kilograms of cocaine. It took nearly four years to bring the Appellant to trial mostly because of a chronic lack of resources in the system. The Appellant did not cause any meaningful periods of delay, but had suffered both actual and inferred prejudice. His application for a stay of proceedings was nonetheless dismissed. In so concluding, it is submitted that the lower courts committed errors arising out of a genuine confusion in the law regarding institutional delay and prejudice.

2. The right to a trial within a reasonable time has been part of the common law for hundreds of years. Exactly 800 years ago, in 1215, King John of England agreed to the *Magna Carta*, which included Article 40, the promise that "to no one will we deny *or delay* right or justice." Since that time, courts have endeavored to craft an appropriate balance between providing timely justice to the accused while still seeing to the disposition of criminal cases on their merits. Though "beguiling in its simplicity", s. 11(b), the Canadian incarnation of this fundamental right, has proven equally difficult to interpret and apply.

3. Nearly 25 years ago, this Court released its decision in *R. v. Morin*, [1992], 1 S.C.R. 771. Viewed by many as a revision of the law following *R. v. Askov*, [1990] 2 S.C.R. 1199, *Morin* ushered in a new era for delay applications in Canada. Over the next two decades, courts placed increasing emphasis on the seriousness of the offence in issue, intentional conduct on the part of Crown or defence counsel, and the importance of establishing "actual" prejudice. As a result, institutional delay and inferred prejudice have been diminished in importance to a point where delay applications are now being dismissed in some jurisdictions if the accused fails to establish "significant" or "substantial" prejudice. Some courts, as in this case, explicitly accord institutional delay "less weight" in the analysis, even though this has never been the law in Canada.

4. During this era, access to timely justice has eroded and institutional delay has worsened in many jurisdictions. Despite this Court's clear affirmation of the accused's right to be tried within a reasonable time, and the Crown's duty to ensure this occurs, resources have remained inadequate in many places. For example, in Surrey, British Columbia, where much of this case took place, delays upwards of 18 months in Provincial Court were commonplace for simple trials.

5. This case provides this Court with an opportunity to recalibrate the analysis and to reaffirm the prejudicial impact of institutional delay. Lengthy institutional delay which subjects the accused to the "vicissitudes" of a charge for too long should not be condoned. As this Court held more recently in *R. v. Godin*, [2009] 2 S.C.R. 3, prolonged exposure to criminal proceedings can necessarily give rise to prejudice. Such an approach properly takes into account the historical and legal background of s. 11(b) of the *Charter*. Rooted in the presumption of innocence, s. 11(b) recognizes the inherent stigmatization that occurs when someone is accused of a criminal offence, and the importance of resolving the question of guilt quickly both for the sake of clearing the innocent and punishing the guilty.

II. The Facts

6. In 2008, the RCMP conducted an undercover investigation into a "dial-a-dope" operation involving the sale of drugs in Langley/Surrey, British Columbia. Over the course of six months, undercover officers purchased cocaine on six occasions by calling a number associated to the Appellant. On December 17, 2008, the police executed a search warrant at an apartment associated to the Appellant and his girlfriend, Kristina Gaudet. The police seized 42.3 grams of heroin and just under 1.5 kilograms of cocaine and crack cocaine.

   - *Appellant's Record*, Vol. I, p. 6 at paras. 2-5.

7. The case did not involve any wiretap, one-party consents or other complex investigative techniques. The Crown characterized the matter as "a very straightforward undercover buy-and-bust case after which search warrants are executed."

- *Appellant's Record*, Vol. II, p. 134, ll. 20-22.

8. Many facets of the operation were "typical", unsurprising and "very common" for dial-a-dope operations, a form of drug dealing that had been observed in the jurisdiction for approximately 15 years.

   - *Appellant's Record*, Vol. II, p. 40, ll. 9-20; p. 46, ll. 27-37; p. 50, ll. 27-41; p. 51, l. 7 – p. 52, l. 30; p. 54, l. 47 – p. 57, l. 7; p. 134, ll. 20-22.

9. Following the search of the apartment, the Appellant was arrested and charged on December 18, 2008. At the time, he was on bail for less serious, unrelated drug charges. He remained in custody until his release on February 16, 2009 on strict conditions which included house arrest. Over this period of time, the Crown swore amended Informations, ultimately charging ten accused. The Appellant was the main target of the investigation and prosecution, and faced six charges including a "global" count of trafficking which spanned March to December 2008.

   - *Appellant's Record*, Vol. I, pp. 6-8, 17, 37 at paras. 6-8, 14(c), 38, 124; Vol. IV, p. 52.

10. The Appellant and some of his co-accused elected to be tried in Supreme Court, and there was consensus among the Crown and Defence that a preliminary hearing should be conducted. It took nearly 29 months to complete the first stage of the process in Provincial Court, and another 16 months to obtain a trial date in Supreme Court for the two remaining accused.

    - *Appellant's Record*, Vol. I, pp. 7, 9, 17, 28 at paras. 11, 14(i), 37-38, 82.

a. History of the Proceedings – Provincial Court

11. On December 18, 2008, the Appellant made his first court appearance in Surrey Provincial Court. Several court appearances followed to address initial disclosure, bail preparation and retaining counsel for various accused.

- *Appellant's Record*, Vol. I, p. 8 at para. 14(b); pp. 81-87; Vol. IV, pp 13-14.

12. On February 16, 2009, the Appellant was released on bail with strict conditions. He was ordered to reside with his father, and remain in that residence 24 hours a day, 7 days week, with limited exceptions allowing him to work two days a week with his father. The bail order also included a reporting condition and a complete prohibition on possessing cellular phones. There was also an expansive "no contact" order listing nine individuals.

- *Appellant's Record*, Vol. I, p. 8 at para. 14(c); Vol. IV, pp. 16, 23-26, 30.

13. On February 27, 2009, eleven days after being released on bail, the Appellant appeared in person with his counsel. The Appellant was prepared to arraign, as his counsel had drafted the required Arraignment Report electing a Supreme Court trial. The Arraignment Report indicated that no admissions would be made and that some disclosure remained outstanding. Some of the co-accused were still retaining counsel, however, and the matter was adjourned.

- *Appellant's Record*, Vol. I, pp. 8, 17 at paras. 14(c), 37; pp. 88-91; Vol. IV, pp. 37-38.

14. Between March 16 and April 24, 2009, the Appellant appeared in person three additional times. During this period, the co-accused and their counsel obtained particulars and prepared for arraignment.

- *Appellant's Record*, Vol. I, pp. 92-97.

15. In May 2009, the Appellant's father lost his job due to the recession. As a result, the Appellant could no longer leave his residence twice a week for employment, and thereafter remained confined to strict house arrest until his conditions were varied 14 months later.

- *Appellant's Record*, Vol. IV, pp. 3-4 at paras. 12-13; p. 30.

16. On May 26, 2009, the Appellant appeared in person for the fifth time for his arraignment hearing. The Appellant elected to be tried by judge and jury, and filed the Arraignment Report that was originally drafted on February 27, 2009. Ms. Jamori, for the Crown,

suggested that two days would be required for a preliminary inquiry and indicated that the Appellant was the "main target". Mr. Hoem, for the Appellant, said that his "initial thought" was three days, "but it depends [sic] how many witnesses my – I'm not in a position to respond to my friend yet as to what witnesses I would require to be called, but quite a few."

- *Appellant's Record*, Vol. I, p. 17 at para. 38; pp. 98-99.

17. After additional counsel for the co-accused arrived, the time estimates were revisited. Mr. Hoem said that they had "streamlined the issues down", noting that many of the co-accused were involved in just one transaction. He added, however, that the Appellant's case was "much heavier" and suggested four days be set.

- *Appellant's Record*, Vol. I, p. 17 at para. 37; pp. 98-104; Vol. IV, pp. 37-38.

18. The Crown did not prepare an Arraignment Report as was required, and offered little to no input during this discussion with the Court regarding scheduling, including no mention of requesting admissions or providing a witness list. The Court ultimately agreed to set four days for the preliminary inquiry and the matter was adjourned to the Judicial Case Managers.

19. In British Columbia, counsel consult with a "trial scheduler" (or "Judicial Case Manager") following arraignment hearings to fix dates. These interactions are not recorded. In this case, the trial scheduler set four days between May 13-18, 2010, nearly one year after the arraignment hearing. A pre-hearing conference was also scheduled for January 19, 2010.

- *Appellant's Record*, Vol. I, p. 18 at paras. 40-41.

20. On January 19, 2010, the pre-hearing conference was adjourned to March 9, 2010 by consent. Mr. Randhawa, for the Crown, indicated that he had "just taken conduct of this matter very recently". On March 9, 2010, Mr. Randhawa indicated that the parties were ready to proceed with the preliminary inquiry as scheduled for four days.

- *Appellant's Record*, Vol. I, pp. 9, 18-19 at paras. 14(f), 42; pp. 122-126.

21. On May 12, 2010, the day before the preliminary inquiry, Mr. Le Dressay, now the third Crown lawyer assigned to the file, wrote to the remaining defence counsel. He indicated that it was "necessary" to call 15 witnesses with an eye to canvassing 26 events spanning some nine (9) months, including those that involved defendants who had already pleaded guilty.

- *Appellant's Record*, Vol. 1, p. 141, ll. 2-24; IV, pp. 41-46.

22. The remainder of the letter suggested that the Crown had not, to that point, canvassed witnesses or admissions with defence counsel, and that the time allotted for the preliminary inquiry was insufficient for the Crown's case:

> I do not know if you have spoken amongst yourselves as to what evidence you wish to focus on in the Preliminary Inquiry. I also do not know if counsel are determined to make any submissions as regards committal. ...
>
> Obviously, to move through this volume of evidence in four days is going to require considerable cooperation from counsel by way of admissions. May I encourage you to review the list and the disclosure that has been provided to you, all with a view to reaching an accommodation as to admissions for the purpose of getting through the preliminary inquiry evidence in the scheduled four days. [emphasis added]

- *Appellant's Record*, Vol. I, p. 19 at paras. 43-44; Vol. IV, pp. 41-46.

23. The next day, Mr. Le Dressay addressed the Court with an opening statement. He indicated, among other things, that he was not counsel when the matter was set for four days, and that he "assumed" there had been discussions to focus the evidence. Mr. Le Dressay further indicated that he was caught "completely off-guard" by Mr. Hoem's position that he would make no admissions. As the trial judge later observed, there was no evidence to support Mr. Le Dressay's comment that he was "caught completely off-guard".

- *Appellant's Record*, Vol. I, p. 19-10 at paras. 45-48; p. 142, ll. 24-44; Vol. IV, p. 37.

24. The preliminary inquiry commenced on May 13, 2010 and continued for four days. In that time, the Crown was able to lead testimony relating to the "more minor players" in the scheme, but did not get to the bulk of the evidence against the Appellant.

    - *Appellant's Record*, Vol. I, p. 143, ll. 9-24; Vol. II, p. 11, ll. 9-17.

25. On May 18, 2010, additional continuation dates were obtained. The trial schedulers decided to "split" the remaining time, with three days commencing on September 28 and an additional three days commencing on December 20, 2010. It was decided that all other accused, except Mr. Jordan, could be adjourned to the last anticipated day of evidence (December 22, 2010).

    - *Appellant's Record*, Vol. II, p. 11, ll. 9-38; p. 13, ll. 3-39.

26. On September 28, 2010, the preliminary inquiry continued. Before calling evidence, the Crown indicated that the matter had been booked without consulting the availability of some police witnesses. Mr. Le Dressay said this was done "because we wanted to try and get this thing dealt with as quickly as possible, and I had enough witnesses that I thought I could shuffle them around." As it turned out, there were no witnesses available for the second day because one got ill, and Mr. Le Dressay had a commitment in Supreme Court in any event. The Crown requested an adjournment, which Mr. Hoem did not oppose.

    - *Appellant's Record*, Vol. II, p. 22, l. 11 – p. 23, l. 18; Vol. III, p. 23, ll. 1-22.

27. The preliminary inquiry continued on September 30, 2010. The Appellant's bail conditions were also varied on that day, deleting the house arrest condition and replacing it with a curfew. To this point, the Appellant had spent two (2) months in custody and 19 months on strict house arrest. He would not be committed to stand trial for another eight (8) months.

    - *Appellant's Record*, Vol. I p. 9 at para. 14(i); Vol. IV, p. 29.

28. The preliminary inquiry resumed on December 20, 2010 for three days. Mr. Hoem was no longer available for the last day (December 22), but the evidence was completed by December 21 in any event. At the end of the day on December 21, counsel estimated that a

half day would be required for submissions on committal and they were adjourned to the trial schedulers to obtain a date. It is unclear whether the Crown was in a position to proceed with submissions on December 22, 2010.

- *Appellant's Record*, Vol. II, pp. 34, 70-72; Vol. II, p. 76, ll. 2-6; Vol. IV, pp. 42-43.

29. Counsel went through a number of dates with the trial schedulers and settled upon April 8, 2011. An earlier date was possible on February 3, 2011, but Mr. Le Dressay was not available. At the end of the day, Mr. Le Dressay said on the record: "I don't know if this is going to be raised as an *Askov* issue or not... but certainly let this date stand because that's the earliest we could get."

- *Appellant's Record*, Vol. I, pp. 127-129; Vol. II, p. 72.

30. On April 8, 2011, counsel appeared for submissions on committal. The Crown submissions took up the available time and an additional date was required for Defence submissions. The presiding judge mentioned some scheduling conflicts in the coming weeks, and the matter was adjourned to May 9, 2011. On that day, Mr. Hoem made submissions on committal and the Court reserved its judgment.

- *Appellant's Record*, Vol. I, p. 21 at para. 52; Vol. II, pp. 73-84.

31. On May 18, 2011, the Appellant was committed for trial. At the conclusion of the ruling, Mr. Hoem indicated that the Appellant was not responsible for any of the delay to that point and that he had not waived his right to a speedy trial. The Crown claimed the delay was entirely the fault of the Defence.

- *Appellant's Record*, Vol. I, p. 21 at para. 52; Vol. II, pp. 85-94

b. History of the Proceedings – Supreme Court

32. On May 19, 2011, the day after committal, the Appellant appeared in Supreme Court to fix dates for trial. At the time, there was consensus between the Crown and Defence that a six-

week trial would be required. In particular, Mr. Le Dressay, for the Crown, said that it was "potentially a very lengthy trial". The Crown noted that "*Askov*" issues had been raised by the Appellant, and the Crown wanted to consider severing the co-accused.

- *Appellant's Record*, Vol. 1, pp. 29-30 at paras. 91-92; Vol. II, p. 95, l. 37 – p. 96, l. 13.

33. Despite the concern over delay, the Crown agreed that a six-week trial was required and then set the matter down for trial commencing in September 2012. The Crown confirmed that there was nothing else available in 2011. Mr. Hoem further that he a possible six-week window in June-July 2012 could not work because of the unavailability of judges.

- *Appellant's Record*, Vol. II, pp. 95-97; Vol. III, p. 89, ll. 2-12.

34. On June 16, 2011, the matter was unexpectedly brought back to court as a result of an allegation that the Appellant breached his bail condition regarding the possession of a cellular phone. The Appellant was remanded in custody and ultimately released again on July 14, 2011.[1]

- *Appellant's Record*, Vol. I, pp. 1-4; p. 36 at para. 118; Vol. II, pp. 99-117; Vol. IV, pp. 4 at para. 14; p. 32.

35. During this same period, a fourth lawyer (Ms. Loda) was assigned to conduct this case on behalf of the Crown. On July 7, 2011, Ms. Loda wrote to Mr. Hoem suggesting that two weeks would be sufficient for the trial, subject to what *Charter* arguments might be raised.

- *Appellant's Record*, Vol. IV, p. 47.

36. On July 8, 2011, Mr. Hoem wrote back to the Crown indicating that he anticipated challenging the searches conducted during the investigation and that no admissions would be made. Mr. Hoem disagreed that two weeks would be sufficient for the trial.

---

[1] On September 26, 2011, the Appellant pleaded guilty to breaching the terms of his release. He was sentenced to time served plus one day: Vol. IV, p. 4 at para. 17.

- *Appellant's Record*, Vol. I, pp. 48-50.

37. On July 12, 2011, Ms. Loda again wrote to Mr. Hoem and concluded her letter with the following: "Given your stated concerns about your client's right to a speedy trial, kindly let me know if you are available or interested in calling this matter ahead to the New Westminster Supreme Court fix date list to canvass earlier trial dates that would accommodate a three week, rather than six week trial."

- *Appellant's Record*, Vol. I, p. 50.

38. On July 14, 2011, Mr. Hoem conducted a bail hearing for the Appellant arising out the breach of his conditions. Then, on July 15, 2011, Mr. Hoem conducted a sentencing hearing with respect to the Appellant's pre-existing drug charge. The Appellant received a 15-month Conditional Sentence Order that included a curfew similar to his revised bail conditions.

- *Appellant's Record*, Vol. I, p. 9 at paras. 14(q), 116-117; Vol. IV, pp. 32, 54-55.

39. It does not appear that Mr. Hoem responded to the Crown's July 12, 2011 letter. Nor does it appear that the Crown ever canvassed with the Court whether there were earlier available dates for a three-week trial.

- *Appellant's Record*, Vol. I, p. 23 at para. 59.

40. On December 1, 2011, the parties appeared for a pre-trial conference. The Crown suggested that three weeks would be sufficient for the trial. Mr. Hoem acknowledged that it was a "straightforward, factual case", but indicated that he believed the evidence would "take awhile". Mr. Hoem also pointed out that the preliminary inquiry had taken some time.

- *Appellant's Record*, Vol. II, pp. 118-123.

41. Two more pre-trial conferences took place on January 19 and July 25, 2012. During these appearances, it was resolved that the delay application and a *Rowbotham* application would

be heard during the first week, with two additional weeks of evidence to follow.[2] The trial was therefore shortened to three weeks, but Mr. Hoem expressed some hesitation that the matter could conclude in that amount of time.

- *Appellant's Record*, Vol. II, pp. 125-138; p. 136, ll. 33-39.

42. On August 24, 2012, the matter was called ahead. The Appellant had recently retained Richard C.C. Peck, Q.C. to act as his counsel. Mr. Peck told the Court that the *Rowbotham* application was no longer required, and that he was able to proceed with the delay application as scheduled. The trial, however, would have to be adjourned. Mr. Peck indicated that the Defence would waive any resulting delay from the adjournment of the trial. He was also prepared to make admissions to shorten the trial.

- *Appellant's Record*, Vol. II, pp. 140-147.

43. On September 4, 2012, the trial was re-scheduled to run for two weeks from January 21 to February 1, 2013.

- *Appellant's Record*, Vol. II, pp. 148-150.

c. The Appellant's Evidence

44. The Appellant filed an affidavit in support of his application for a stay of proceedings and was cross-examined on September 10, 2012.

45. By the time of trial, the Appellant was 27 years old. He described the strict terms of his bail in the case at Bar and the resulting prejudice. In particular, he described being confined to house arrest from February 2009 to September 2010, except for a three month period where he was able to work two days a week with his father. The Appellant also described the

[2] The Appellant's Legal Aid expired in January 2012 and the Defence anticipated bringing a *Rowbotham* application for funding.

repeated police checks at his residence, which sometimes occurred seven days a week, at all hours of the night. These checks were corroborated in a letter filed with the Court.

- *Appellant's Record*, Vol. III, p. 58, ll. 7-12; Vol. IV, pp. 1-6, 30.

46. The Appellant explained that these charges caused him a "great deal of anxiety and stress", negatively impacting his relationship with his family. He also expressed an inability to move forward in his relationship with his girlfriend because of the uncertainty in his future. The Appellant agreed that his other court matter caused some anxiety and stress, but he maintained that the case at Bar was more of a concern.

- *Appellant's Record*, Vol. III, p. 9, l. 34 – p. 10, l. 46; Vol. IV, p. 6 at para. 19(f);

d. Evidence Presented Regarding the British Columbia Provincial Court

47. As part of his application, the Appellant filed a report entitled *Justice Delayed: A Report of the Provincial Court of British Columbia Concerning Judicial Resources* (the "Delay Report"). Drafted by the Provincial Court in September 2010, and updated in September 2011, the Delay Report detailed the resourcing problems that had been plaguing the Provincial Court over the past number of years in British Columbia.

- *Appellant's Record*, Vol. III, p. 37, ll. 27-31; p. 47, ll. 10-23; Vol. IV, pp. 59-124.

48. The Delay Report was drafted to provide the government with data to inform its decisions regarding the allocation of resources. It noted that the British Columbia Provincial Court was the only such court in the country which had experienced a decrease in its judicial compliment over the previous five years (a loss of 17 judges or 11%).

- *Appellant's Record*, Vol. IV, pp. 60, 64-65, 70-71, 73-75, 97.

49. As of March 31, 2010, 13% of cases in the system were over 18 months old, and many were "at risk of being stayed". Surrey Provincial Court was one of the "most impacted" areas with an average 15 month delay between arraignment and trial for a typical ½ day criminal case.

There was approximately 1000 days of backlogged trial time in Surrey. The Delay Report recommended restoring the judicial compliment to 2005 levels, as the Provincial Court was not meeting its legal obligation to provide timely access to justice.

- *Appellant's Record*, Vol. IV, pp. 60, 62, 64, 76, 80-81, 86, 94-96.

50. A year after the Delay Report was issued, the Provincial Court provided an update indicating that the judicial compliment had a net increase of 1.7 judges in the interim. As of September 2011, 18% of all adult criminal cases in Provincial Court were pending for more than 18 months, an increase of 5% from the year before, and the average delay between arraignment and trial for a ½ day trial in Surrey Provincial Court was still 15 months.

- *Appellant's Record*, Vol. IV, pp. 112-119.

III. Ruling of the Trial Court

51. The trial judge determined the total length of delay from charge to trial was 49 months. Of that time, two (2) months was Crown delay as a result of Mr. Le Dressay being unavailable in February 2011 for the continuation of the preliminary inquiry. An additional 32.5 months was institutional delay. The Appellant was not responsible for any delay, except for a four (4) month period at the very end of the case.

- *Appellant's Record*, Vol. I, pp. 8, 14-15, 23, 31-32, 38 at paras. 12, 14(b), 19, 21-25, 27, 61, 82, 95-103.

52. The trial judge characterized the case as "not especially complex", but involving "substantial" disclosure requirements in light of the number of accused that were initially charged. Taking these, and other intake and inherent requirements into account, the total amount of inherent delay was fixed at 10.5 months.

- *Appellant's Record*, Vol. I, pp. 23-27 at paras. 62-79.

a. Specific Findings Regarding Institutional Delay

i. Provincial Court Delay

53. There was a 29 month delay between charge and committal. The trial judge allocated eight (8) months as inherent delay, two (2) months as Crown delay, and 19 months as institutional delay.

- *Appellant's Record*, Vol. I, p. 31 at para. 98.

54. The trial judge found that the Crown was responsible for the faulty time estimates in Provincial Court. He alluded to the Crown's failure to seek admissions earlier than the eve of the preliminary inquiry, and concluded that the ultimate length of the preliminary inquiry was "driven by the Crown's own assessment of its needs". As such, the inadequacy of the time estimate "should have been obvious to the Crown, if not at the arraignment hearing, then in any event long before the commencement of the preliminary inquiry".

- *Appellant's Record*, Vol. I, pp. 19-20, 28, 31 at paras. 43-48, 85-86, 95-96.

55. Regardless, the underestimate was only a "relatively minor" factor, as the delay was "overwhelmingly" due to limited resources. Specifically, the additional 12-month delay required to complete the preliminary inquiry (from May 18, 2010 to May 18, 2011) was attributable to institutional/Crown delay that remained "unexplained".

- *Appellant's Record*, Vol. I, pp. 21, 29, 31-32 at paras. 53, 87-88, 98-101.

56. The trial judge further held that once the preliminary inquiry did not complete as scheduled, it should have been given priority in the system, which did not occur. He noted that Crown counsel was alive to the possibility of delay arguments being made as early as December 2010 and received clear notice of this risk on May 18, 2011.

- *Appellant's Record*, Vol. I, pp. 26, 29 at paras. 75-76, 89-90.

ii. Supreme Court Delay

57. There was a 16 month delay between the fix date hearing and the initial trial date. The trial judge found that 2.5 months was inherent delay and 13.5 months was institutional delay.

- *Appellant's Record*, Vol. I, pp. 27, 29-30, 32 at paras. 77, 91-92, 102.

58. The Crown argued that the Appellant waived 14 months at the Supreme Court based on his counsel's failure to respond to the Crown's July 12, 2011 letter. The trial judge rejected the Crown's submission. The Crown did not obtain or offer earlier dates, and therefore, it would have required speculation to conclude that an earlier trial could have been obtained had a three-week trial been sought in July 2011.

- *Appellant's Record*, Vol. I, pp. 22-23, 32 at paras. 57, 59, 102.

b. Findings Regarding the Actions of the Accused

59. Other than the four month period at the end of the case, the trial judge found that the Appellant did not waive, nor was he responsible for any of the delay. However, the trial judge held that the Appellant's "attitude" towards delay should not escape judicial notice. In particular, he noted that there was "no indication on the record that Mr. Jordan took any positive steps to speed up the trial process or that he openly expressed concern about delay until it began to appear that it could be used to his advantage."

- *Appellant's Record*, Vol. I, pp. 22, 30-31 at paras. 55, 94.

c. Findings of Prejudice

60. The trial judge analyzed the three recognized forms of prejudice. With respect to the Appellant's **liberty interests**, the trial judge acknowledged the lengthy period spent on bail. However, he found that the Appellant's liberty interests "were not greatly affected by the delay". In this regard, the trial judge specifically referred to the Appellant's 15-month CSO

that had been imposed on July 15, 2011 for an unrelated conviction. This CSO coincided with the "17 month delay period" which fell beyond the *Morin* guidelines for this case (the trial judge having found that the trial ought to have concluded by mid-May 2011).

- *Appellant's Record*, Vol. I, pp. 36-37 at paras. 119, 121-122.

61. With respect to **security of the person**, the trial judge accepted that the case at Bar was "much more serious" and "caused more stress and worry" than the Appellant's pre-existing drug charge. Nonetheless, the Appellant's prior charge and his breach of bail conditions "substantially reduce[d]" the degree of prejudice.

- *Appellant's Record*, Vol. I, p. 37 at para. 124.

62. With respect to **fair trial interests**, the trial judge was not persuaded that the delay had caused prejudice to the Appellant's ability to make full answer and defence.

- *Appellant's Record*, Vol. I, pp. 37-38 at paras. 125-127.

63. In considering prejudice, the trial judge noted that the Appellant did not proactively seek a speedy trial and that his counsel "ignored the Crown's invitation to explore an earlier trial date". Nonetheless, the Appellant did *not* actively contribute to the delay, "such that s. 11(b) [was] allowed to become an offensive weapon".

- *Appellant's Record*, Vol. I, p. 38 at paras. 128-129.

64. Taking these various factors into account, the trial judge concluded that "some degree of prejudice should be inferred", again referring specifically to the "17 months" of delay which exceeded the *Morin* guidelines. The trial judge also accepted that the Appellant had "suffered some degree of actual prejudice, relating primarily to his interests in security of the person."

- *Appellant's Record*, Vol. I, pp. 38-39 at paras. 130-131.

d. The Balancing of Interests

65. The trial judge dismissed the application upon considering four factors in particular. First, the charges against the Appellant were "undoubtedly very serious". Second, relying on *R. v. Ghavami*, 2010 BCCA 126, the delay was "primarily institutional" and therefore deserving of less weight. Third, the Appellant had taken a "passive approach" to the matter. Fourth, relying on *R. v. Seegmiller* (2004), 191 C.C.C. (3d) 347 (Ont. C.A.), the prejudice to the Appellant was "not substantial", allowing for a longer period of tolerable delay.

- *Appellant's Record*, Vol. I, p. 40-41, 47 at paras. 137, 139-143, 170

66. It appears that the lack of "significant" prejudice was one of the determining factors. In dismissing the application, the trial judge held had there been "significant" prejudice, he would have had "little hesitation" in finding the delay unreasonable.

e. Ms. Gaudet's Application

67. The Appellant's co-accused, Ms. Gaudet, also made a delay application. The trial judge found that the total delay in Ms. Gaudet's case was 47 months, including 34.5 months of Crown and institutional delay (mostly comprising the latter). Ms. Gaudet did not waive or cause any periods of delay, and could not proceed sooner because the Crown decided to keep her case together with the Appellant's charges.

- *Appellant's Record*, Vol. I, pp. 42-44 at paras. 149-156.

68. The trial judge found that "some degree of prejudice should be inferred" and "some degree of actual prejudice" was also present in relation to Ms. Gaudet's interest in the security of the person. However, the prejudice was "not substantial". In making these findings, the trial judge held that "the prejudice inquiry must focus on the additional prejudice to Ms. Gaudet flowing from the 16.5-17 months of delay that is beyond the *Morin* guidelines."

- *Appellant's Record*, Vol. I, p. 46 at paras. 167, 169.

69. In balancing the various factors, the trial judge concluded that a stay of proceedings was unwarranted. The trial judge emphasized that the institutional nature of the delay was "entitled to less weight than other reasons for delay within the control of the Crown". In all, bearing in mind all of the relevant factors, the "lack of substantial prejudice" led the trial judge to conclude that the "delay [was] not beyond the limits of constitutional tolerance".

- *Appellant's Record*, Vol. I, p. 47 at paras. 170-171.

70. In June 2013, the Appellant invited the trial judge to convict on the basis of an Agreed Statements of Facts. A sentencing hearing immediately followed, and a joint submission for four years imprisonment was accepted. The charges against Ms. Gaudet were then stayed. Two weeks later the Appellant filed a Notice of Appeal.

- *Appellant's Record*, Vol. I, p. 51 at para. 4; pp. 72-73.

IV. Reasons of the Court of Appeal of British Columbia (per Newbury J.A., MacKenzie J.A., Stromberg-Stein J.A.)

71. On appeal, it was submitted that the trial judge erred in dismissing the delay application by (a) miscalculating the amount of time in his assessment of delay; (b) erring in his analysis of prejudice; and (c) failing to properly weigh the primarily institutional nature of the delay.

- *Appellant's Record*, Vol. I, p. 51 at para. 5.

72. The Crown argued that the trial judge did not make any error in his calculation of time, or in his ultimate conclusion. While not alleging error, the Crown suggested that the trial judge's allocations of time were favourable to the Appellant, arguing that some of the institutional delay ought to have been considered inherent as a result of faulty time estimates.

73. The appeal was dismissed with Madam Justice Stromberg-Stein writing for the Court. The Court found that the trial judge did not miscalculate the period of delay, concluding that he

correctly subtracted the time Mr. Jordan had waived and the inherent time requirements of the case, leaving "17 months beyond the *Morin* guidelines."

- *Appellant's Record*, Vol. I, pp. 61-62 at para. 37.

74. With respect to institutional delay, the Court held that the trial judge's analysis was the "most favourable outcome" for the Appellant, and that he "benefitted" from the trial judge's findings. For example, the Court held that the Appellant made a "substantial contribution" to the inaccurate time estimates, and that the trial judge did not factor in abbreviated court days resulting from defence counsel's other commitments. However, the Court found no error and dismissed this ground of appeal.

- *Appellant's Record*, Vol. I, pp. 62-63, 65 at paras. 38-42, 49.

75. Regarding prejudice, the Court reviewed the trial judge's various findings and concluded that he committed no error. In so doing, the Court reiterated that the "17-month delay largely coincided with the 15-month CSO" that was imposed on the Appellant in July 2011.

- *Appellant's Record*, Vol. I, pp. 63-66 at paras. 43-52.

76. The Court also appeared to endorse the trial judge's use of the decision in *Seegmiller*. Namely, that because the prejudice to the Appellant was "not substantial", the period of constitutionally tolerable delay could be lengthened.

- *Appellant's Record*, Vol. I, p. 65 at para. 49.

PART II - STATEMENT OF QUESTION IN ISSUE

Issue #1: Should institutional delay be accorded "less weight" in the context of a delay application pursuant to s. 11(b) of the *Charter*?

Issue #2: Is it an error of law to extend the length of tolerable institutional delay because the accused has suffered only "some", as opposed to "significant" or "substantial" prejudice?

77. The Appellant respectfully submits that the trial judge and the Court of Appeal for British Columbia erred with respect to these issues. Specifically, it is submitted that:

a. institutional delay was improperly accorded "less weight" in the courts below;

b. the tolerable length of institutional delay was incorrectly extended on the basis that the Appellant did not suffer "substantial" or "significant" prejudice. In the alternative, it is submitted that the lower courts erred in failing to find "substantial" prejudice.

PART III – STATEMENT OF ARGUMENT

I. Should institutional delay be accorded "less weight" in the s. 11(b) analysis?

78. Recently, there has been a concerning trend towards according institutional delay less weight than other forms of delay. Some courts, including the trial judge in this case, have relied upon the decision in *Ghavami* for the proposition that "institutional and judicial delays will be accorded less weight than delays actually within the scope of the Crown's ability to expedite proceedings, because they are not the result of voluntary Crown action."

- *R. v. Ghavami*, 2010 BCCA 126 at para. 52.
- *Appellant's Record*, Vol. I, pp. 40-41, 47 at paras. 139-140, 170.
- See also: *R. v. Dumas*, 2012 BCSC 1909 at paras. 70-71; *R. v. Goodkey*, 2013 BCSC 1431 at paras. 59, 82, 134.

79. The Appellant submits that this has never been the law in Canada, and ought not to be the law going forward. Section 11(b) is concerned with the impact of delay on the accused. Institutional delay, like any other delay attributable to the Crown, impacts the accused in the same way and no distinction should be drawn between them.

a. The "Primary" Purpose of Section 11(b)

80. The primary purpose of s. 11(b) is the protection of the individual rights of the accused. As Cory J. explained in *Askov*, the right is intrinsically linked to the presumption of innocence:

> There could be no 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]

- *Askov* at 1219; *Morin* at 786(a-b).

81. In particular, this Court has explained that s. 11(b) protects (1) the right to liberty by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and bail conditions; (2) the right to a fair trial by attempting to ensure the proceedings take place while evidence is available and fresh; and (3) the right to security of the person by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings.

- *Morin* at 786(c-e).

82. In *R. v. Mills*, [1986] 1 S.C.R. 863, Lamer J. (as he then was) elaborated upon the "security of the person" aspect of the right. He referred to it as the need to prevent the "overlong subjection to the vexations and vicissitudes of a pending criminal accusation," including the loss of privacy, stress and anxiety resulting from disruptions of family, social life and work, legal costs and uncertainty as to the outcome and sanction. Justice Lamer concluded that this form of prejudice could not be minimized, as it reflects the day-to-day realities of facing a charge within a public system such as ours:

> As a practical matter, however, the impact of a public process on the accused may well be to jeopardize or impair the benefits of the presumption of innocence. While the presumption will continue to operate in the context of the process itself, it has little force in the broader social context. Indeed many pay no more than lip service to the presumption of innocence. Doubt will have been sown as to the accused's integrity and conduct in the eyes of family, friends and colleagues. The repercussions and disruption will vary in intensity from case to case, but they inevitably arise and are part of the harsh reality of the criminal justice process. [emphasis added]

- *Mills* at 918-920.
- See also: *R. v. Conway*, [1989] 1 S.C.R. 1659 at 1672, 1693; *R. v. Smith*, [1989] 2 S.C.R. 1120 at 1138-1139; *R. v. Rahey*, [1987] 1 S.C.R. 588 at 605-606, 610-611, 642-643, 647; *Morin* 786, 801-803; *R. v. MacDougall*, [1998] 3 S.C.R. 45 at paras. 19, 34; *Godin* at paras. 29, 32, 34.

83. As these cases demonstrate, the prejudice contemplated by s. 11(b) relates to the effect of delay on the accused, not which branch of the state caused it. In particular, the analysis is not concerned with assigning "blame", but rather balancing the various reasons for delay and any

prejudice to the accused, keeping in mind the two-fold purpose of the right. In addition to preventing prejudice, s. 11(b) includes a "secondary" societal interest in (a) seeing that those accused of crimes are treated humanely and fairly, and (b) that those who transgress the law are brought to trial.

- *Morin* at 786-788; 793(g); 794(f).

b. Institutional Delay Should Not Be Accorded "Less Weight"

84. This Court has never accorded institutional delay less weight. Indeed, this Court has recognized from the inception of its jurisprudence that institutional delay impacts the accused in the same way, and ought to be given the same weight. For instance, in *Mills*, Lamer J. rejected the American notion that "more neutral reason[s] such as negligence or overcrowded courts should be weighted less heavily", and held as follows:

> The purpose of s. 11(*b*), however, is not to penalize or sanction misconduct by the authorities. The section is concerned not with abuse of process but with abusive process. The Crown's motives, whatever they may be, do not render a reasonable delay unreasonable nor can they transform an unreasonable delay into a reasonable lapse of time. Thus, whether the delay is the result of malice, negligence or inadvertence is of little import, the remedy being in all cases at least a stay, except, of course, when considering additional remedies, such as damages.
>
> With respect, whether governmental delay is deliberate or not is irrelevant to the determination of the violation. Indeed, the right may be violated, in some circumstances, despite the best intentions and best efforts of the authorities. The function of the doctrine of abuse of process is, therefore, in my view entirely distinct from that of s. 11(*b*). While a reduction in official misconduct may be a consequence of s. 11(*b*), this is not its purpose. In the eyes of the individual accused, it matters little whether the delay is imputable to the authorities or not; what truly matters is the extent to which the delay will impair his or her interests. Section 11(*b*) does not to any extent represent an entrenchment or an extension of the common law doctrine of abuse of process.
>
> ...
>
> Adoption in Canadian law of the third type of reason outlined by Powell J., the "more neutral reason", without limits or ceilings would lead to unacceptable results, as it

> would amount to little more than affixing a constitutional seal of approval upon the *status quo*. Indeed, the problem of systemic delay, that is, delay attributable to the fault of no specific individual actors or actors within the criminal justice system, is the acid test of s. 11(b). [emphasis added]

- *Mills* at 932(j)-934(c), 940(c-e).
- See also: *R. v. Austin*, 2009 ONCA 329 at paras. 64-68.

85. Similarly, in *Askov*, McLachlin J. (as she then was) commented upon the interchangeable nature of Crown and institutional delay, holding that "lengthy and avoidable delay caused entirely by the Crown's sloppiness or inattention, or by unjustified delays in the legal system, will frequently entitle an accused to the benefit of s. 11(b)."

- *Askov* at 1257.
- See also: *Conway* at 1673(e), 1675(i), 1713. In particular, the dissenting reasons of Sopinka J. where he held that "The Crown cannot, however, justify long periods of systemic delay even if such delays are beyond the control of the prosecution."

86. In *Morin*, this Court affirmed many of these principles, but also recognized that we do not live in a perfect world with limitless resources. Thus, to assist in determining when institutional delay has exceeded its tolerable limit, the Court provided a set of "administrative guidelines":

> ...The Court cannot simply accede to the government's allocation of resources and tailor the period of permissible delay accordingly. The weight to be given to resource limitations must be assessed in light of the fact that the government has a constitutional obligation to commit sufficient resources to prevent unreasonable delay which distinguishes this obligation from many others that compete for funds with the administration of justice. There is a point in time at which the Court will no longer tolerate delay based on the plea of inadequate resources. This period of time may be referred to as an administrative guideline... [emphasis added]

- *Morin* at 786, 795-796, 801; *Askov* at 1213(g-i).

87. The Court went on to establish an 8-10 month administrative guideline for Provincial Court cases, allowing an additional 6-8 months for two-stage trials.

88. Throughout its analysis in *Morin*, this Court never mentioned according institutional delay "less weight" than Crown or judicially-caused delay. Rather, the Court recognized that most delays, including those caused by trial judges, will "weigh against the Crown".

- *Morin* at 800; *Rahey* at 649-650.

89. Institutional delay, like "voluntary Crown action", is delay that is not attributable to the accused or neutral requirements. It is attributed to the Crown, in particular, because it has the duty to bring the accused to trial within a reasonable time. The Crown is responsible for the provision of facilities and staff to see that accused persons are tried within a reasonable time and, consequently, it is the Crown who must justify systemic delays resulting from inadequate resources.

- *Askov* at 1224-1226; *Morin* at 793(g), 794(f); *MacDougall* at paras. 24, 49-54, 61.

90. In light of its duty, it may be that in certain circumstances intentional Crown conduct causing delay is worthy of special consideration. However, this does not render institutional delay deserving of less weight than "voluntary Crown actions" which cause delay.

91. The Ontario Court of Appeal recently explained this distinction in *R. v. Austin*, 2009 ONCA 329 and *R. v. Florence*, 2014 ONCA 443. In the latter case, the Crown sought to proceed with a "paper" preliminary inquiry, necessitating a defence application to cross-examine under s. 540(9) of the *Criminal Code*. The defence application was successful and there was delay in order to give effect to the ruling. The Court held that this extra time should be counted against the Crown as a "tactical" decision causing delay, but it was not one "worthy of blame or condemnation". As a result, the Crown delay was of "the same weight as institutional delay."

- *Florence* at paras. 46-50, 60; *Austin* at paras. 64-68.

92. Furthermore, the Appellant submits that there is no principled basis for according institutional delay less weight. To do so would only serve to excuse the state's failure to live up to its

constitutional obligations and encourage further delay. This Court has already held that institutional delay, more than any other reason, "threatens to become the source of justification for prolonged and unacceptable delay."

- *Mills* at 935-936; *Morin* at 794(i-j).

93. Finally, it would be inconsistent with the importance of this right to society at large to accord institutional delay less weight. As this Court has recognized, this right is of such significance to the community as a whole that the lack of institutional resources "can never be used as a basis for rendering the s. 11(b) guarantee meaningless."

- *Askov* at 1224-1225; *Morin* at 795(g).

c. The Trial Judge Erred in According Institutional Delay Less Weight

94. The trial judge found a total of two (2) months Crown delay and 32.5 months institutional delay. Of the latter, 19 months occurred in Provincial Court and was "overwhelmingly" caused by the lack of resources. The trial judge concluded that the total amount of Crown/institutional delay "substantially exceeded" the guidelines in *Morin*, but that on its own did not make the delay unreasonable.

- *Appellant's Record*, Vol. I, pp. 21, 31-32, 40 at paras. 53, 98-103, 138.

95. The trial judge then referred to the decision in *Ghavami* to assist in determining what "weight" should be given to the various causes of delay:

> [139] In relation to the weight to be given to the causes of delay, in *Ghavami*, the Court of Appeal stated at para. 52:
>
> > Inherent time requirements should receive little if any weight, because they are not attributable to either the state or the accused, and because some delay is inevitable. Actual or inferred prejudice to the accused will be accorded a certain weight, but it may be counter-balanced by delay caused or contributed to by the deliberate actions of the defence. Correspondingly, if the organs of state - Crown, justice system, or judiciary - are responsible for some part of the delay, then the public

> interest will be entitled to less weight when balanced against the accused's right to a timely trial, because the protectors of the public interest have failed to live up to the standard expected of them. However, institutional and judicial delays will be accorded less weight than delays actually within the scope of the Crown's ability to expedite proceedings, because they are not the result of voluntary Crown action.
>
> [140] Applying these comments, while in general the organs of the state are responsible for the delay, the delay in this case was primarily institutional, resulting from a shortage of judicial resources. As I have noted, the Crown was responsible for underestimating the time required for the preliminary inquiry but that mistake accounts for a relatively small part of the delay. The Crown was also unavailable to continue the preliminary inquiry on February 3, 2011 but this was a minor contributor to the overall delay.
>
> ...
>
> [143] If in this case I was persuaded that there was *significant* prejudice, given all of the factors, most notably the length of the delay and the causes of the delay, I would have little hesitation in concluding that the delay was unreasonable, and that Mr. Jordan's s. 11(b) rights had been infringed. Where, as here, the charges are serious, the delays are primarily institutional, the prejudice is not substantial in relation to the section 11(b) interests, and Mr. Jordan's approach has been passive, in balancing all of the factors, I am not persuaded that Mr. Jordan has established a breach of s. 11(b) of the *Charter*. [emphasis added]

- *Appellant's Record*, Vol. I, pp. 40-41.

96. The Appellant submits that there can be no question that the trial judge, relying on *Ghavami*, accorded less weight to institutional delay. His finding in this regard was even more explicit with respect to the co-accused, Ms. Gaudet:

> [170] Many of the same factors that pertain to Mr. Jordan's application continue to apply. The charges against Ms. Gaudet are serious. Ms. Gaudet was not responsible for the delay, which was largely institutional. The institutional nature of the delay, and the delay flowing from the joint proceedings is entitled to less weight than other reasons for delay within the control of the Crown. There is nothing on the record to indicate that Ms. Gaudet actively sought a speedy trial, although in the circumstances there was probably little that she could have done.

- *Appellant's Record*, Vol. I, pp. 46-47.

97. The Appellant submits that it was an error to accord institutional delay less weight. It excused, at least in part, the state of its constitutional obligation to provide the necessary resources to try the Appellant within a reasonable time. It also necessarily skewed the ultimate balancing process by mitigating the importance of institutional delay, the leading cause of delay in this case.

98. It must be remembered that this was a "very straightforward" case according to the Crown, involving surveillance, search warrants, and a very common type of drug dealing. This is not a case where there were thousands of interceptions or complicated investigative techniques.

99. Nonetheless, there was an excessively long period of delay, particularly in Provincial Court. It took almost one year to obtain four days in Provincial Court, and exactly another full year to complete the preliminary inquiry once it did not finish within its allotted time.

100. Given the jurisdiction in which this case took place, it is hardly surprising that it took so long to complete the preliminary inquiry. As the Delay Report outlines, Surrey Provincial Court was one of the worst jurisdictions for delay in British Columbia. For example, as of September 2011, the average delay between arraignment and trial for a ½ day trial in Surrey was 15 months.

- *Appellant's Record*, Vol. IV, pp. 86, 119.

101. A cursory review of s. 11(b) cases arising out of Surrey from this same timeframe only confirms the dire nature of the situation. In *R. v. Pridy*, 2011 BCPC 325, the Associate Chief Judge of British Columbia granted a stay in relation to an impaired driving case that took 18 months to get to trial between 2010 and 2011. His Honour held that the source of delay was institutional and well-known for some time:

> [21] The current delays being experienced in the justice system are not ones that can be described as temporary or unforeseen, nor do they stem from a sudden upswing in case volumes overwhelming the system. Clearly, the cause of the

> problem is a court with a significant and chronic reduction in complement despite the provision to government of timely and detailed information outlining the shortage, as well as the potential consequences of failing to address it.

- *R. v. Pridy*, 2011 BCPC 325 at paras. 9, 15, 21, 30.

102. Similarly, in *R. v. Ayers*, 2010 BCPC 86, the trial judge granted a stay for a case that took place between 2008 and 2010. In that judgment, Surrey was referred to as a "problem child" for delay. It was noted that there had been institutional difficulties in the jurisdiction from at least 1997 and that the delays in Surrey were "notorious". The trial judge held that it was inappropriate to "impose a moratorium on *Charter* rights because of a chronic lack of resources."

- *R. v. Ayers*, 2010 BCPC 86 at paras. 11, 19-20, 24; *Morin* at 798(b).
- For other jurisdictions, see also: *R. v. Blattler*, 2012 BCPC 35 at para. 57; *R. v. Ghislieri*, 2010 BCPC 321 at para. 21; *R. v. McComber*, 2010 BCPC 255 at para. 27.

103. In the case at Bar, there was a total of 19 months institutional delay in Provincial Court in addition to the two (2) months of Crown delay and 8.5 months of inherent delay. The Crown/institutional delay was more than *double* the upper guideline set out in *Morin*, in a jurisdiction where the caseload had apparently been constant over a substantial period of time. As this Court explained in *Morin* and *Sharma*, the administrative guidelines are to be considered "excessive" in such circumstances.

- *Morin* at 797(i), 798(b); *R. v. Sharma*, [1992] 1 S.C.R. 814 at 827-828.

104. The Appellant submits that this delay was caused primarily by two factors: lack of institutional resources and a failure to prioritize this case in the system. Once committal was ordered, 29 months into the case, it still took another 16 months to obtain a trial date. The day after committal, Crown counsel openly discussed the delay problems in the case, but nonetheless set the Appellant's trial 16 months into the future, even though his counsel was available for an earlier trial date.

- *Godin* at para. 15; *R. v. Fridleifson*, 1999 BCCA 351 at para. 9; *R. v. Satkunananthan*, 2001 CanLII 24061 (ONCA) at paras. 44-46; *R. v. Ralph*, 2014 ONCA 3 at paras. 15, 17; *R. v. Richards*, 2010 ONSC 6202 at para. 58-69, 73.

105. Though the trial judge addressed some of these issues, it is submitted that they were not accorded the proper weight, likely because of his reliance on *Ghavami*. The trial judge's weighing of the factors reflects only passing consideration of the excessively long and "unexplained" nature of the delay. As a result, it is submitted that institutional delay and its impact on the Appellant was improperly diminished in the overall *balancing* of the factors.

II. Can the length of tolerable institutional delay be extended in circumstances where "some", but not "substantial" prejudice has been found?

a. Legal Submissions

106. In *Morin*, this Court explained that the administrative guidelines for institutional delay could be adjusted depending on the presence or absence of prejudice. In particular, Sopinka J., on behalf of the majority, explained the interplay between these two features of the test:

> The application of a guideline will also be influenced by the presence or absence of prejudice. If an accused is in custody or, while not in custody, subject to restrictive bail terms or conditions or otherwise experiences substantial prejudice, the period of acceptable institutional delay may be shortened to reflect the court's concern. On the other hand, in a case in which there is no prejudice or prejudice is slight, the guideline may be applied to reflect this fact.
>
> ...
>
> Conversely, the prosecution may establish by evidence that the accused is in the majority group who do not want an early trial and that the delay benefited rather than prejudiced the accused. Conduct of the accused falling short of waiver may be relied upon to negative prejudice. As discussed previously, the degree of prejudice or absence thereof is also an important factor in determining the length of institutional delay that will be tolerated. The application of any guideline will be influenced by this factor.
>
> ...

> ... While one cannot use institutional resources to nullify the right to be tried within a reasonable time, one also cannot use rapidly changing local conditions to compel a general amnesty. Based on the above factors, I would allow a period for systemic delay which is in the upper range of the guideline. In my view, a period in the order of 10 months would not be unreasonable. While I have suggested that a guideline of 8 to 10 months be used by courts to assess institutional delay in Provincial Courts, deviations of several months in either direction can be justified by the presence or absence of prejudice. [emphasis added]

- *Morin* at 789(i-j), 798(e-g), 803(d-e), 807(d-f).

107. Similarly, in *Seegmiller*, the Ontario Court of Appeal noted that where there is a heightened societal interest in the trial, "the absence of meaningful prejudice can lengthen the period of delay that is constitutionally tolerable". In that case, the accused was charged with sexual assault arising out of the rape of a young woman at his home. The accused was immediately released on conditions that were "not onerous". Including a preliminary hearing, it took approximately 27 months to bring the accused to trial, of which 20 months was considered Crown or institutional delay (i.e. two (2) months beyond the upper guideline set out in *Morin*). The Court found that the prejudice to the accused was "minimal, at most", and concluded the delay was not unreasonable.

- *Seegmiller* at paras. 25, 28-31.

108. These cases make clear that the administrative guidelines for institutional delay operate on a "sliding scale". The presence of substantial prejudice, like "restrictive bail terms", can serve to shorten the guidelines, and the absence of prejudice (or slight prejudice) can lengthen the period of tolerable institutional delay.

- *Richards* at paras. 32-34, 37, 72.

109. These cases do not, however, appear to resolve what should happen when a trial judge, as in this case, finds evidence of "some" but not "substantial" prejudice. The Appellant submits that this Court's decision in *Godin* strongly suggests that no adjustment to the administrative guidelines should be made in such circumstances.

110. In *Godin*, the accused was charged with sexual assault, unlawful confinement and uttering threats, all in relation to his ex-girlfriend. It took 30 months to bring the accused to trial within a two-stage process, almost all of which was attributable to institutional or Crown delay. The Court acknowledged prejudice to the accused's liberty and security interests, and inferred a risk of prejudice to the accused's right to make full answer and defence. In so finding, this Court noted that the delay "exceeded the ordinary guidelines by a year or more..." In balancing the various factors, this Court concluded that there was "some" prejudice to the appellant as a result of the delay, and therefore his rights under s. 11(b) had been infringed. The Court made no mention of extending the guidelines because there was a lack of "substantial" or "significant" prejudice.

- *Godin* at paras. 29, 31, 34, 37, 39, 41.
- See also: *Richards* at paras. 32-34, 37, 72.

b. Application to the Facts

111. Due to the length of delay, the trial judge concluded that "some degree of prejudice should be inferred". He also found that the Appellant had "suffered some degree of actual prejudice, relating primarily to his interests in security of the person..." These findings were made after considering all factors, including the Appellant's unrelated CSO sentence.

- *Appellant's Record*, Vol. I, pp. 38-39 at para. 130.

112. In balancing the various factors, the trial judge held that the tolerable length of institutional delay should be extended because there was not "substantial" prejudice. It is submitted that the trial judge erred in this regard, as set out below:

> [141] On the other hand, as I have endeavoured to set out, prejudice to the accused in relation to any of his s. 11(b) interests is not substantial. An absence of meaningful prejudice can lengthen the period of delay that is constitutionally tolerable: *R. v. Seegmiller* (2004), 191 C.C.C. (3d) 347, 192 O.A.C. 320 (Ont. C.A.), para. 25. This is an obvious consequence of the balancing process.

...

> [143] If in this case I was persuaded that there was significant prejudice, given all of the factors, most notably the length of the delay and the causes of the delay, I would have little hesitation in concluding that the delay was unreasonable, and that Mr. Jordan's s. 11(b) rights had been infringed. Where, as here, the charges are serious, the delays are primarily institutional, the prejudice is not substantial in relation to the section 11(b) interests, and Mr. Jordan's approach has been passive, in balancing all of the factors, I am not persuaded that Mr. Jordan has established a breach of s. 11(b) of the *Charter*. [emphasis added]

- *Appellant's Record*, Vol. I, p. 41.

113. In dismissing the co-accused's application, which involved a total of 34.5 months of Crown/institutional delay, the trial judge made a similar finding:

> [171] Bearing in mind all of the relevant factors, in the case of Ms. Gaudet the lack of substantial prejudice leads me to conclude that the delay is not beyond the limits of institutional tolerance pursuant to s. 11(b). [emphasis added]

- *Appellant's Record*, Vol. I, p. 43, 47 at paras. 151, 171.

114. It is submitted that the absence of "substantial" or "significant" prejudice should not permit an extension of tolerable institutional delay. Where, as in this case, "some" prejudice has been found, no deviation in the guidelines should occur, and the balancing of factors should proceed accordingly.

- *Richards* at paras. 32-34, 37, 72.

115. While it may be that the absence of prejudice can extend the length of tolerable institutional delay to some degree, surely this Court did not intend to allow for deviations of over a year where "some" prejudice has been found. If that were the case, this Court would not have allowed the appeal in *Godin* where there was also only "some" prejudice and the delay was 12 months beyond the upper guideline set out in *Morin*.

116. Moreover, allowing such drastic deviations due to the absence of "substantial" or "significant" prejudice is incompatible with this Court's reasoning in previous cases. This Court has confirmed that prejudice can be inferred from the length of delay and proof of specific prejudice is not invariably required to establish a violation. In *Godin*, it was stated that the "longer the delay the more likely that such an inference will be drawn." It has also been held that proof of actual prejudice need only be resorted to when the matter is "close to the line" or "where no inference as to prejudice can be drawn from the length of the delay". If deviations of over a year were permitted, it would render these various pronouncements effectively meaningless.

- *Godin* at paras. 31, 38; *Morin* at 812; *Smith* at 1138; *Richards* at para. 35; *R. v. Cheng*, 2010 NLCA 27 at para. 8; *R. v. Taylor*, 2010 NLCA 26 at para. 21.

117. Requiring "substantial" or "significant" prejudice is also inconsistent with the nature of the remedy in s. 11(b) cases. A stay of proceedings arising from a breach of s. 11(b) is not considered an "extraordinary" result, reserved only for the "clearest of cases". Rather, it is the minimum remedy available if any violation is found to exist.

- *R. v. Steele*, 2012 ONCA 383 at paras. 30-33; *Rahey* at 614-615.

118. The Appellant submits that the appropriate approach is the one that has been undertaken in other jurisdictions outside of British Columbia. In Ontario and Newfoundland, for example, there has not been an express requirement for "substantial" prejudice, even in serious cases, provided that institutional delay has exceeded the guidelines considerably.

- *Steele*; *R. v. H.(B.)*, 2009 ONCA 731; *Taylor*; *Cheng*.

119. Even in serious cases, however, courts have been prepared to infer "significant" prejudice as a result of lengthy institutional delay. For example, in *Ralph*, the Ontario Court of Appeal agreed that when "an accused has had to wait almost three years for trial, even a trial as relatively complex as the appellant's, it is proper to infer significant prejudice."

- *Ralph* at para. 16; *R. v. Williamson*, 2014 ONCA 598 at paras. 57, 67; *Satkunananthan* at paras. 63-67.

120. Requiring an unduly high level of prejudice also serves to undermine the broader policy behind s. 11(b) of the *Charter*. The eminent G. Arthur Martin J.A. explained this concept in one of the earliest appellate decisions regarding s. 11(b):

> The policy underlying the constitutional guarantee of a trial without unreasonable delay is not, however, predicated exclusively in the more obvious forms of prejudice to an accused such as the impairment of the right to make full answer and defence that may be caused by unreasonable delay. Nor is the constitutional guarantee merely a recognition of the anxiety and social stigma that an accused charged with a criminal offence may suffer. Trials held within a reasonable time have an intrinsic value. The constitutional guarantee enures to the benefit of society as a whole and, indeed, to the ultimate benefit of the accused, even though he may wish to put off the confrontation which a trial involves. If innocent, the accused should be cleared with a minimum disruption of his social and family relationships. If guilty, he should be found guilty and an appropriate disposition made without unreasonable delay. His interest is best served by having the charge disposed of within a reasonable time so that he may get on with his life. A trial at some distant date in the future when his circumstances may have drastically changed may work an additional hardship upon the accused, and adversely affect his prospects for rehabilitation.

- *Re Regina and Beason* (1984), 7 C.C.C. (3d) 20 (Ont. C.A.) at 41.

121. Taking these principles into account, Martin J.A. concluded that even in the absence of actual prejudice, a stay of proceedings will be warranted where there is an "inordinate" length of institutional delay

122. In light of the above, it is submitted that the trial judge erred in requiring the Appellant to establish "substantial" or "significant" prejudice in order to obtain a remedy. The Crown/institutional delay in this case was 34.5 months, nearly *double* the upper end of the guidelines. This was after taking into account a generous amount of inherent delay (10.5 months). This excessive delay, coupled with a finding of prejudice, ought to have sufficed. Instead, the trial judge's erroneous approach led to the tolerable length of institutional delay being improperly extended, and the balancing process being affected accordingly.

123. Finally, it is arguable that the tolerable length of delay ought to have been *shortened* in this case given the stringent nature of the Appellant's bail conditions. After his release from custody, the Appellant spent approximately 42 months on conditions, including 27 months on strict house arrest or abiding by a curfew *solely* in relation to the charges in this case.

- *Richards* at para. 37.

c. There Was "Substantial" Prejudice in this Case

124. The Appellant submits, in the alternative, that there was "substantial" prejudice in this case, and it was an error to conclude otherwise.

125. The trial judge placed little weight on the Appellant's strict bail conditions, which were particularly onerous during the period of delay that took place in Provincial Court. While this case was in Provincial Court, the Appellant spent two (2) months in custody, 19 months on strict house arrest, and abided by a curfew and restrictive conditions for an additional eight (8) months.[3] Over this time, the Appellant was also subjected to numerous police checks, sometimes daily, occurring at all hours of the night.

126. It is hard to imagine a more onerous form of bail. The Appellant's conditions reflected the most restrictive kind of release, akin to a conditional jail sentence. As this Court recognized in *R. v. Proulx*, [2000] 1 S.C.R. 61, house arrest is "punitive" in nature and is specifically aimed at restricting the accused's liberty.

- *Proulx* at paras. 22, 29, 36, 41.

[3] During this time, the Appellant was also on bail for less serious, pre-existing drug charges. However, this bail did not include any house arrest or curfew. There was a reporting condition, and a prohibition on possessing more than one cellular phone: *Appellant's Record*, Vol. IV, pp. 23, 29, 52-55.

127. Yet, the trial judge appears to have placed little to no weight on these points, appearing to focus solely on the 17 months at the end of the case when the Appellant's conditions were similar to a CSO imposed on an unrelated matter. Such a "piecemeal analysis" minimized the unacceptable delay that occurred in Provincial Court and its impact on the Appellant.

- *Appellant's Record*, Vol. I, pp. 36-39, 46 at paras. 119-122, 130-131, 167, 169.
- *Conway* at 1674-1675; *Godin* at paras. 11, 14, 16, 20, 29, 31, 34, 39; *Satkunananthan* at para. 61.

128. As this Court confirmed in *Godin*, the "question of prejudice cannot be considered separately from the length of the delay." Here, it took 45 months to bring the Appellant to trial for what the Crown characterized as a "very straightforward" case. As this Court has held, the longer the delay, the more likely an inference of prejudice will be drawn. In this case, the institutional delay alone (32.5 months) exceeded the *upper* end of the guidelines by nearly *double*. In addition, like in *Godin*, much of this delay remained "unexplained". Accordingly, a strong inference of prejudice was available on the facts, but not drawn.

129. It also appears that the trial judge diminished the prejudice to the Appellant as a result of his alleged passivity. In particular, reliance was placed on his counsel's failure to respond to the Crown's letter which offered to seek an earlier date for a three-week trial. The Appellant submits that this fact must be viewed in its entire context.

130. In its letter, the Crown suggested calling the matter ahead to determine whether earlier dates could be available for a three-week trial, representing a one-half reduction in its time estimate. No explanation was given for why the Crown's estimate had changed so drastically from two months earlier at the fix date hearing, and it does not appear that the Crown ever determined whether there were, in fact, any earlier dates available.

- *Appellant's Record*, Vol. IV, p. 50.

131. Notably, no less than four different lawyers had conduct of this case for the Crown. It is obvious that they all had different visions of how this case would proceed. Initial Crown

counsel (Ms. Jamori) suggested two days for the preliminary hearing. Her successor (Mr. Randhawa) believed four days would be sufficient. Counsel who ended up conducting the preliminary inquiry (Mr. Le Dressay) thought it would take "weeks". He also thought the trial would take six weeks, but then his successor (Ms. Loda) estimated two to three weeks.

- *Appellant's Record*, Vol. I, pp. 98, ll. 23-25, 124-125; Vol. II, p. 142, ll. 42-43; Vol. IV, pp. 47, 50.

132. It is unclear why the Appellant's counsel did not respond to the Crown's letter. Four days earlier he had written to the Crown on this same subject, disagreeing with the revised estimate. Given that it had just taken two weeks to complete the preliminary inquiry, spread over 12 months, this is not surprising in the Appellant's submission. In the end, Mr. Hoem was replaced by Mr. Peck, the Appellant's trial strategy changed and there ended up being no trial. As such, it is unknown whether three weeks would have sufficed.

- *Appellant's Record*, Vol. IV, p. 48-49.

133. In any event, it is apparent from the record that the trial could not be set in 2011, and a six-week window in June-July 2012 was unavailable because of the lack of judges. The Crown proceeded to set the trial in September, knowing that delay was going to be an issue. In these circumstances, it would be speculative to conclude that an earlier date could be found.

- *Appellant's Record*, Vol. I, p. 23 at para. 59; Vol. II, pp. 95-97.

134. Furthermore, the Appellant's conduct was otherwise consistent with an accused who was anxious to get to trial. He almost immediately retained counsel and asked for particulars. Within two weeks of being released on bail, he appeared in court prepared to arraign the matter, even without complete disclosure. Over the next three months, he appeared *in person* four more times while his co-accused dealt with intake issues. Once the preliminary hearing was delayed, his counsel sought early dates with the Crown to "get this thing dealt with as quickly as possible". When it was further delayed to 2011, his counsel again sought an earlier date, but was stymied by Crown counsel's calendar. Then, once the Appellant

was committed, he confirmed on the record that delay was an issue, and appeared *the very next day* in Supreme Court to fix a date for trial. He again sought earlier dates for the trial, but there were no judges available.

- *Appellant's Record*, Vol. I, pp. 2-4, 90-104; Vol. II, pp. 22, 72, 93-97.

135. In these circumstances, it cannot reasonably be said that the Appellant took a "passive approach". Furthermore, this is not a case where the accused's conduct involved "chicanery" in order to delay the trial. While the Appellant may have *feared* his impending trial date and the potential sentence he faced, there is no evidence that he actively *sought* to delay in an attempt to use s. 11(b) as an "offensive" weapon.

- *Appellant's Record*, Vol. I, p. 38 at para. 129
- *R. v. Fawaz*, 2011 BCCA 315 at paras. 35, 37; Code, Michael A., *Trial Within a Reasonable Time.* Toronto: Carswell Thomson Professional Publishing, 1992, at iii-iv.

136. No one is obliged to assist in their own prosecution. It may be that inaction is relevant to assessing prejudice, but the court must be careful not to "subvert the principle that there is no legal obligation on the accused to assert the right" to trial within a reasonable time.

- *Morin* at 801-803; *Askov* at 1219-1222, 1227-1229, 1258.

137. It is the Crown's duty to bring the accused to trial within a reasonable time. The Crown chooses when, how, who and where to indict, and it is they who have the burden of proof at a preliminary inquiry and trial. In these circumstances, it would be unjust to absolve the Crown of responsibility for this long delay simply because a one-page letter was sent seeking the *possibility* of an earlier trial.

- *Fawaz* at para. 35; *Beason* at 41-43; *R. v. Knights*, 1996 CarswellBC 2920 at para. 45.

IV. Conclusion

138. In summary, the trial judge improperly accorded institutional delay less weight. The trial judge's then incorrectly extended the length of tolerable delay on the basis that the

Appellant did not suffer "substantial" or "significant" prejudice. These two errors, which were repeated in the Court of Appeal, resulted in a skewed balancing of the relevant factors, unduly favoring the Crown. As a result, a stay of proceedings was not entered, even though it took 45 months to bring the Appellant to trial on a "very straightforward" case, in circumstances where he did not cause any meaningful delay but nonetheless suffered both actual and inferred prejudice.

139. There is no question that the Appellant faced serious charges. However, society's interest in seeing this case tried on the merits should not permit the Appellant's rights to be abrogated. The ends must not justify the means. This is especially so in a jurisdiction where the problem of institutional under-resourcing is known and chronic. Access to timely justice for Canadians should not depend primarily on the city in which they live.

PART IV – COSTS

140. The Appellant makes no submissions for costs.

PART V – NATURE OF THE ORDER SOUGHT

141. That the appeal be allowed, and a stay of proceedings be entered.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Vancouver, British Columbia, this 17th day of April, 2015.

Richard C.C. Peck, Q.C
Counsel for the Appellant

PART VI – TABLE OF AUTHORITIES

Secondary Sources