

Case Name:
R. v. Lahiry

Between
Her Majesty the Queen, and
Prosenjit Lahiry
And between
Her Majesty the Queen, and
Jose Carreira
And between
Her Majesty the Queen, and
John Davidson
And between
Her Majesty the Queen, and
Jamie Shelson

[2011] O.J. No. 5071

2011 ONSC 6780

Ontario Superior Court of Justice

M.A. Code J.

Heard: October 14 and November 9, 2011.

Judgment: November 16, 2011.

(162 paras.)

*Criminal law -- Appeals -- Grounds -- Question of law -- Appeals by the Crown from four stayed proceedings allowed -- All four cases were drinking and driving cases -- The proceedings were stayed due to violations of section 11(b) of the **Charter** -- The periods of delay found by the trial judges to be unjustified were in the range of seven to 11 months for all four cases -- However, in all four cases, the trial judge erred in the calculation of institutional delay as the entire period from the set date appearance to the trial date was automatically characterized as institutional delay -- Further errors were also committed -- Canadian **Charter** of Rights and Freedoms, 1982, s. 11(b).*

*Criminal law -- Constitutional issues -- Canadian **Charter** of Rights and Freedoms -- Legal rights -
- Procedural rights -- Delay -- Prejudice -- Trial within a reasonable time -- Appeals by the Crown
from four stayed proceedings allowed -- All four cases were drinking and driving cases -- The pro-*

*ceedings were stayed due to violations of section 11(b) of the **Charter** -- The periods of delay found by the trial judges to be unjustified were in the range of seven to 11 months for all four cases -- However, in all four cases, the trial judge erred in the calculation of institutional delay as the entire period from the set date appearance to the trial date was automatically characterized as institutional delay -- Further errors were also committed -- Canadian **Charter** of Rights and Freedoms, 1982, s. 11(b).*

Appeals by the Crown from four stayed proceedings. All four cases were drinking and driving cases. Lahiry was charged with refusing to provide a breath sample, Carreira was charged with impaired driving, Davidson was charged with having care or control of a motor vehicle while impaired by alcohol and Shelson was charged with driving with a blood alcohol content exceeding .08. The periods of delay found by the trial judges to be unjustified were in the range of seven to 11 months for all four cases. In each case, the trial judge found that there had been violations of section 11(b) of the **Charter** and the proceedings were therefore stayed.

HELD: Appeals allowed. In all four cases, the trial judge erred in the calculation of institutional delay. Rather than considering when the parties were ready for trial but could not be accommodated by the system, the entire period from the set date appearance to the trial date was automatically characterized as institutional delay. Further errors were also committed. For example, in Carreira's case, the trial judge erred by allowing Carreira to claim prejudice from delays that he had caused for his own benefit. Also, in Davidson's case, the trial judge never made any findings on the issue of prejudice and in three out of four cases there was no balancing of societal interests. As a result, new trials were ordered.

Statutes, Regulations and Rules Cited:

Canadian **Charter** of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 11(b)

Courts of Justices Act, R.S.O. 1990, c. C-43, s. 14(1), s. 36(1)

Criminal Code, R.S.C. 1985, c. C-46, s. 253(1), s. 254(5)

Counsel:

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Paul Burstein, for the Accused/Respondent, Lahiry.

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REASONS FOR JUDGMENT

M.A. CODE J.:--

A. OVERVIEW

1 Three of these four Crown appeals were argued together, on the same day, as they raise a number of common issues. The fourth appeal was argued shortly afterwards and it too raises similar issues. They are all drinking and driving cases where four different judges of the Ontario Court of Justice stayed proceedings due to violations of the right to be tried within a reasonable time, as set out in s. 11(b) of the *Charter of Rights and Freedoms*. The periods of unjustified delay in all four cases, as found by the trial judges, were in the range of seven to eleven months. I am satisfied that significant errors were made in all four cases, that the stays must be set aside on appeal, and that new trials should be ordered.

2 The one error that is common to all four appeals is the proper calculation of institutional delay. In all four cases, the entire period from the set date appearance to the trial date was automatically characterized as systemic or institutional delay, without further analysis. This is not a correct approach to calculating this particular cause of delay, given that institutional delay only "starts to run when the parties are ready for trial but the system cannot accommodate them", as Sopinka J. put it in *R. v. Morin* (1992), 71 C.C.C. (3d) 1 at p. 18 (S.C.C.). The Court cannot find that a particular period of delay has been caused by systemic congestion until it is first established when counsel were ready to try the case.

B. THE ANALYTICAL FRAMEWORK FOR S. 11(b) MOTIONS

3 It is now well known that the framework for s. 11(b) Motions requires the court to analyze four distinct factors: the overall length of delay from the laying of charges until the trial concludes; waiver of any individual time periods; the reasons for the various periods of delay; and prejudice to the particular interests of the accused protected by s. 11(b). See: *R. v. Smith* (1989), 52 C.C.C. (3d) 97 (S.C.C.); *R. v. Askov* (1990), 59 C.C.C. (3d) 449 (S.C.C.); *R. v. Morin, supra*.

4 Having made findings about each of these four factors, the final balancing stage of analysis requires consideration of the societal interest in a trial on the merits. See: *R. v. Morin, supra* at pp. 12-13; *R. v. Seegmiller* (2004), 191 C.C.C. (3d) 347 at paras. 21-5 (Ont. C.A.); *R. v. Qureshi* (2004), 190 C.C.C. (3d) 453 at para. 41 (Ont. C.A.).

5 The first factor, concerning the length of overall delay, is simply a mechanism for weeding out frivolous applications. It is referred to as "the triggering mechanism or threshold determination of the excessiveness of the delay". It is only necessary to go on and consider the other three factors if the overall period of delay "is of sufficient length to raise an issue as to its reasonableness". See: *R. v. Askov, supra* at p. 466, *R. v. Morin, supra* at p. 14.

6 The second factor, waiver of time periods, can be either express or implied but it "must be clear and unequivocal" and made with "full knowledge of the rights the procedure was enacted to protect". When counsel expressly states, on the record, that s. 11(b) is waived for the period of an adjournment, there is little difficulty in applying this factor. However, a waiver can also be implied, for example, from consent to a period of delay where "a choice has been made between available options" and "the actions of the accused amounted to an agreement to the delay" rather than "mere acquiescence in the inevitable". Once a waiver has been found, that period of delay is simply re-

moved from the s. 11(b) analysis and the overall delay is shortened. See: *R. v. Askov*, *supra* at pp. 481-2 and 494-5; *R. v. Morin*, *supra* at pp. 13-15.

7 The third factor, reasons for delay, can be the most important and also the most difficult of the four factors in some cases. It does not involve findings of fault, as there can be good or necessary reasons for delay. This factor simply requires an objective analysis of each period of delay, in order to determine its cause. The five traditional causes are: the inherent time requirements of the case; any actions of the defence; any actions of the Crown; limits on institutional resources; and other miscellaneous causes, such as judicial delays. Careful analysis of the transcripts of each date where the proceedings were delayed is critically important to this factor. Having objectively determined the cause of each period of delay, based on the transcripts and any other relevant evidence, this factor then assigns a weight to that period. Some delays are said to "weigh against the Crown", some delays are said to "weigh against the defence", and some delays are said to be "neutral". Needless to say, delays caused by the accused's own actions "will justify" an otherwise unreasonable period of delay because the accused invariably seeks some benefit from such delays, such as additional time to prepare, to retain counsel, to bring some collateral proceedings, or to try to resolve the case. On the other hand, delays caused by the Crown or by inadequate resources "cannot be relied upon ... to explain away delay that is otherwise unreasonable". Finally, delay due to the inherent requirements of the case "is neutral and does not count against the Crown or the accused". See: *R. v. Askov*, *supra* at pp. 477-481 and 483; *R. v. Morin*, *supra* at pp. 16-23; *R. v. MacDougall* (1998), 128 C.C.C. (3d) 483 at p. 500 (S.C.C.).

8 The fourth factor is prejudice to those interests of the accused that s. 11(b) seeks to protect, namely, liberty, security of the person, and fair trial. Prejudice to one or more of these interests can be inferred, without extrinsic evidence, from "a very long and unreasonable delay", in other words, from delay that is "substantially longer than can be justified on any acceptable basis". In a case where the period of unjustified delay is "closer to the line", the accused may lead evidence of actual prejudice to one or more of the protected interests, in order to show "that there has been unusual prejudice by reason of special circumstances". See: *R. v. Askov*, *supra* at pp. 474 and 482-4; *R. v. Morin*, *supra* at 23-4; *R. v. Smith*, *supra* at p. 111.

9 At the end of assessing these four factors, the court should arrive at some period of unjustified or unreasonable delay that weighs against the Crown. The court should also arrive at some assessment as to the strength or weakness of the claim to prejudice. It is only unreasonable periods of delay, causing prejudice, which s. 11(b) protects against. As noted above, these factors must then be balanced against the societal interest in a trial on the merits.

10 The above framework can be subtle and complex. I have considerable sympathy for busy Ontario Court of Justice trial judges, trying to manage a crowded docket and, at the same time, engage in this difficult constitutional balancing of interests.

11 I now turn to the particular facts of the four appeals and the errors alleged by the Crown. All parties to these appeals agree that the standard of review is correctness in relation to legal conclusions, such as the proper characterization of a particular period of delay or the unreasonableness of the delay. However, the underlying factual findings can only be reviewed on a standard of palpable and overriding error. See: *R. v. Schertzer et al* (2009), 248 C.C.C. (3d) 270 at para. 71 (Ont. C.A.).

C. THE LAHIRY CASE

12 This case is factually the simplest of the four appeals. The accused Prosenjit Lahiry (hereinafter, Lahiry) was charged with refusal to provide a sample of his breath in an approved roadside screening device, contrary to s. 254(5) of the *Criminal Code*. He was released from the police station on an appearance notice without any bail conditions. It was said to be an extremely simple case with one Crown witness. On January 28, 2011, Moore J. found a violation of s. 11(b) of the *Charter* and stayed the proceedings. The Crown appeals and seeks to set aside the stay.

(i) History of the proceedings

13 The history of the proceedings can be summarized as follows:

- * December 29, 2009: the accused was charged, following his arrest and release two days earlier;
- * February 9, 2010: counsel for the accused appeared by way of an agent, with a designation allowing the accused not to appear. The Crown provided disclosure and the defence requested a three week adjournment to review the disclosure, meet with the client, and conduct a pre-trial meeting with the Crown;
- * March 3, 2010: defence counsel again appeared by way of an agent, with a designation allowing the accused not to appear. Counsel's instructions to his agent were that the matter was now "ready to set a trial date" and that it would "require one day for trial". Counsel advised his agent to attend on the Trial Coordinator in order to "to get one full day". Counsel also advised his agent that his earliest available dates were April 23 and 24 and May 10 to 14, 2010. He had available dates in every month thereafter. Counsel's agent stated on the record that "the earliest date the Trial Coordinator offered was January 28, 2011, which is agreeable to Mr. Rosenthal [defence counsel]". Counsel's agent also stated that "Mr. Rosenthal would like the record to reflect the fact that he had other days available in January and in every month prior to that month for this trial". Nothing was said about why this matter would require "one full day" and nothing was said about s. 11(b) of the *Charter*;
- * January 28, 2011: Moore J. was assigned to the trial. He had the full day available as no other matters had been assigned to his court. Defence counsel had filed a s. 11(b) Motion in advance, returnable on the trial date. It was agreed at the hearing that the reason why "one full day" was required for this very simple one witness case was to accommodate both the s. 11(b) Motion and the trial on the merits. Moore J. allowed the s. 11(b) Motion and stayed the proceedings.

(ii) Overview of the issues and grounds of appeal

14 Aside from the above procedural history, the only other evidence on the s. 11(b) Motion was an affidavit from the accused Lahiry relating to the issue of prejudice. He was a thirty-five year old lawyer with no prior criminal record. He retained counsel soon after being charged and wanted the matter resolved quickly. There was no suggestion of any prejudice to his liberty or fair trial interests. However, his affidavit asserted that he was worried, anxious and depressed, that he had diffi-

culty sleeping, that there was stress in his common law relationship and that his ability to take up offers of employment abroad had been put on hold due to uncertainty about the outcome of the case. Crown counsel cross-examined effectively on the affidavit and established that much of this prejudice was due to the fact of being charged. Lahiry acknowledged that the various forms of stress began as soon as he was charged, that he was not being treated by a doctor, that he was not subject to any terms of bail (such as preventing him from driving), and that he had never had to appear in court prior to the trial date.

15 On this record, the s. 11(b) issues were relatively straightforward. The overall period of delay was thirteen months, which arguably called for some further investigation. There were no waivers. The two factors that required some analysis were the reasons for delay and prejudice.

16 In relation to prejudice, there was no suggestion that this was a case where prejudice could be inferred. The delays were not "very long and unreasonable" or "substantially longer than can be justified", as required by the case law on inferred prejudice. Rather it was a case, at best, where the delays were "closer to the line" and where actual prejudice would have to be proved by extrinsic evidence. The trial judge reviewed the evidence on this point and concluded:

"So, although he [Lahiry] acknowledged under cross-examination that much of the impact was caused by being charged, his point is that as time has gone on, it has caused him more stress, more concern, and has held up his life in more than one way." [Emphasis added].

17 Based on this record, prejudice to s. 11(b) interests could not be a strong factor in the analysis and I do not read the trial judge's reasons as giving it great weight. There was undoubtedly some prejudice but it was not a case like *R. v. Godin* (2009), 245 C.C.C. (3d) 271 at p. 277 (S.C.C.), where prejudice could be inferred from unjustified delays that were "more than double the *Morin* guideline for institutional delay in the provincial courts." Furthermore, there was no prejudice to liberty interests, no prejudice to fair trial interests, and the claim of prejudice to security of the person was attenuated by the trial judge's accurate finding that "much" of this was due to the fact of being charged. Mr. Burstein, counsel for the Respondent on the appeal, fairly conceded that it was not a strong case of prejudice to s. 11(b) interests. See: *R. v. Kovacs-Tatar* (2004), 192 C.C.C. (3d) 91 at paras. 32-35 and 55-6 (Ont. C.A.).

18 The only real factor requiring careful analysis, therefore, was the reasons for delay. Unfortunately, this is where the trial judge erred. The record of proceedings revealed two relevant time periods where there were different causes of delay. In my respectful view, the trial judge erred in his analysis of both periods.

(iii) Reasons for delay: the intake period

19 The first period was from December 29, 2009 to March 3, 2010 during which the parties retained counsel, prepared disclosure, reviewed disclosure, met with the client, obtained instructions, conducted a pre-trial resolution meeting, and then appeared in court and stated on the record that they were now "ready to set a trial date". These activities are all necessary and beneficial, at the beginning of any case. They are referred to as "the neutral intake period" in the case law and they can vary in length, depending on the complexity of the case. In a simple summary conviction drinking and driving case, like *R. v. Morin*, *supra* at pp. 16-17 and 25-6, two months was held to be reasonable. Also see: *R. v. Meisner* (2003), 57 W.C.B (2d) 477 at paras. 30-32 (Ont. S.C.J.) where Hill J.

held that two months was a "normal intake period" in routine drinking and driving cases. In a more complex indictable case of spousal assault and sexual assault, seven and a quarter months was held to be a reasonable intake period. See: *R. v. G.(C.R.)* (2005), 206 C.C.C. (3d) 262 at pp. 265 and 270 (Ont. C.A.). Finally, in a very complex multiple accused police corruption and conspiracy case, *R. v. Schertzer et al*, *supra* at paras. 77-80, the Court held that the neutral intake period extended for over eleven months.

20 The trial judge was very critical of this initial period of delay, focusing on the six weeks that it took for the police and the Crown to provide disclosure in a "very simple straightforward matter" where there is only "one witness for the Crown." He asked:

"... why six weeks, especially when you have such a straightforward simple case, when all the evidence would have been available within a day or two at the most, so I do think the six week period has to be looked at to some extent."

21 At the conclusion of his reasons, the trial judge treated this initial intake period as part of the unreasonable delays that weighed against the Crown:

"I find that the eleven months, or almost eleven months of institutional delay, and even factoring in some delay within the six week initial period, takes this beyond what is acceptable and reasonable ..." [Emphasis added.]

22 With respect, the trial judge erred in his analysis of the intake period. There was no basis for distinguishing binding authorities, like *Morin* and *Meisner*, which have held that two months is a reasonable intake period in simple drinking and driving cases. Furthermore, the trial judge's focus on the fact that it would only take the police a few days to produce disclosure materials, in such a simple case, is an over-simplification of the function of an intake period. The Crown must also review the disclosure materials produced by the police for completeness and must do any necessary editing. It is then the Crown that makes disclosure, usually at a first appearance in court, and not the police. In addition, the accused must use the intake period to find and retain counsel, preferably before the first appearance. In many cases, this involves applications to Legal Aid. Counsel must then interview the client and any witnesses and must secure and preserve any necessary documentary or real evidence. All of these intake activities involve a number of different players and they all take time. The normal six week return date on an appearance notice, issued at the police station, is a reasonable period to carry out these preliminary tasks, before requiring a first appearance in court. Indeed, more time is usually needed after the first appearance to complete these steps. See: *R. v. Ham* 2010 ONCJ 632.

23 It was faintly submitted that a person like Lahiry did not need the initial six week return date on his appearance notice as he was able to quickly retain counsel. Accordingly, his appearance notice should have had a shorter return date. There is no evidence as to the date on which Lahiry actually retained counsel, except that it was after he was charged and prior to the first appearance. In any event, it strikes me as untenable to suggest that the police should shorten or lengthen the initial return date, based on some kind of inquiry into the resources and sophistication of the accused, in order to determine how long it will likely take this particular accused to retain counsel.

24 In conclusion, the initial period of just over two months delay, was necessary and beneficial and should have been accorded no weight in the s. 11(b) analysis.

(iv) Reasons for delay: calculating institutional delay

25 The second period of delay was from March 3, 2010, when the trial date was set, until January 28, 2011, when the trial proceeded. The trial judge treated this entire period of just under eleven months as institutional delay that weighed against the Crown.

26 The trial judge had insisted, during oral argument of the s. 11(b) Motion, that defence counsel file his letter of instructions to his agent, setting out the earliest available dates that defence counsel was proposing for the trial. The letter was then made an exhibit on the Motion. This is a correct and necessary approach to the calculation of institutional delay. As Sopinka J. put it in *R. v. Morin, supra* at pp. 16, 18 and 26-7, systemic or institutional delay is "the period that starts to run when the parties are ready for trial but the system cannot accommodate them". He had noted, earlier in his reasons, that "time is required for counsel to prepare" and that "counsel for the prosecution and the defence cannot be expected to devote their time exclusively to one case". Sopinka J. held that this time, for counsel to prepare and to clear their calendars when taking on a new case, is part of the inherent time requirements of the case. On the facts of *Morin's Case*, counsel had sought "the earliest date" for trial and was given a date that was just over thirteen months away. Sopinka J. held that this entire thirteen month period was not systemic or institutional delay. He reasoned as follows:

"As counsel for the defence did not indicate a readiness for trial but merely a request for the earliest trial date, it is somewhat unclear whether the case for the defence was as yet ready for trial ...I am prepared to infer from the totality of the facts that an institutional delay of about twelve months was involved. This time period is the time from which the parties were ready for trial until the point at which the courts were able to accommodate this case." [Emphasis added.]

27 In other words, Sopinka J. allocated about one month as time for counsel to prepare and make themselves available for trial, after setting the trial date. Sopinka J.'s judgment in *R. v. Sharma* (1992), 71 C.C.C. (3d) 184 at pp. 193-4 (S.C.C.) is to the same effect. The entire period, from the set date appearance to the trial date in that case, was just under twelve months. However, Sopinka J. held that only nine months was systemic delay. He deducted three months because systemic delay runs "from the time when the parties were ready for trial" and he was not prepared to infer that they were immediately ready and available for trial when setting the trial date.

28 In the subsequent case of *R. v. M. (N.N.)* (2006), 209 C.C.C. (3d) 436 at paras. 28, 29 and 90 (Ont. C.A.), Juriansz J.A. gave the judgment of the Court and elaborated on this point concerning the calculation of systemic delay:

In this case counsel did not even put their own availability on the record. Counsel merely stated that November 24, 2003, was the earliest date the court could provide. It is extremely doubtful counsel were available for the preliminary inquiry immediately. Counsel's availability is useful context for assessing the reasonableness of the total delay in the concluding balancing analysis.

It is also worth noting that neither party allotted any time for counsel to prepare for the preliminary hearing. Counsel's preparation time would be part of the inherent time required in this case.

...

Moreover, neither party in this case took into account the preparation time required by counsel. As noted above, Sopinka J. in *Morin* made clear that the time counsel require to prepare for trial and the other steps in the proceeding is inherently required. Defence counsel indicated to the court on November 22, 2004, that he required two weeks to prepare for the s. 11(b) application. The record does not indicate any estimates of counsel as to the preparation time required for trial, the preliminary hearing, the judicial pre-trials, the bail hearings and the other steps of the proceeding.

29 More recently, in *R. v. Schertzer et al*, *supra* at paras. 91-94 and 110-112, the Court treated the entire thirteen month period between setting a date and the preliminary inquiry as "part of the inherent time required to prepare for the lengthy preliminary inquiry". Similarly, the entire ten month period between setting a date and the trial was also "part of the inherent time requirements of the case" because "the date was dictated by defence counsel's availability". In *R. v. Meisner*, *supra* at paras. 35-38, Hill J. set out a similar analysis to the effect that the time defence counsel required to prepare the case and to make dates available in his calendar was "not properly characterized as institutional delay".

30 Most recently, in *R. v. Khan* (2011), 270 C.C.C. (3d) 1 at paras. 32-36 (Ont. C.A.), Karakatsanis J.A. (as she then was) gave the judgment of the Court. In that case, the entire period from setting a date until the preliminary inquiry was eight months and twenty days. The Court inferred from the record that "the parties were not ready to proceed with a preliminary inquiry when the date was first set". Accordingly, the first five months and ten days of this period was treated as "due to the inherent time requirements of the case". Only the last three months and ten days of the entire period was characterized as institutional delay.

31 I appreciate that there has been some uncertainty in the trial courts on this point. In addition, set date courts do not consistently insist that counsel state their earliest available dates for trial on the record. Furthermore, in routine drinking and driving cases, the amount of time needed to prepare for a short trial is not great. Counsel for the Respondents on these appeals submitted that a practice has arisen in busy Ontario Court of Justice set date courts whereby counsel do not state their earliest available dates for trial on the record and they are simply deemed to be immediately available on that set date appearance.

32 I cannot accept this submission for a number of reasons. First of all, the line of binding authority on this point, set out above, is now formidable. Counsel's submission effectively invites me to ignore all these authorities. This is obviously not an option.

33 Second, I do not accept the assertion that there is a practice of not stating counsel's earliest availability on the record. I have seen many s. 11(b) Motion records in the last twenty-five years, both as counsel and as a judge, and in the most persuasive records counsel are frank and forthright and they state when they are available. As officers of the Court, counsel have always acted with integrity, in my experience, in stating when they are actually ready and available to conduct the trial. It would be a very serious violation of counsel's ethical duties if the Court was ever misled on this point.

34 Finally there is no place for fictions when seeking to prove *Charter* violations. It is rarely true that counsel is immediately available for trial, when setting a date. Whenever counsel take on a new case they complete various preliminary steps during the intake period. Once they have taken these steps and are ready to set a date for trial, they need to set aside sufficient time in their calendars to prepare the new case for trial and to then conduct the trial. If the case is lengthy and complex, or if counsel are very busy, it may be some considerable period of time before counsel are ready for trial. To use a simple hypothetical, if counsel has no time in his/her calendar to prepare a new case for trial and to then try it until ten months in the future, and the earliest date that the Court has available for the trial is twelve 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.

35 In the case at bar, the Crown conceded, erroneously, that the entire period from setting the date until the trial proceeded was all systemic delay. The Court is not bound by the Crown's erroneous concessions, especially in constitutional litigation. On occasion, in *Charter* cases, the Supreme Court of Canada has gone so far as to appoint *amicus* or to rely on intervenors to argue against the Crown's concessions. See: Kent Roach, "Not just the Government's Lawyer: the Attorney-General as Defender of the Rule of Law", (2006), 31 Queen's L.J. 598; Grant Huscroft, "Reconciling Duty and Discretion: the Attorney-General in the *Charter* Era", (2009), 34 Queen's L.J. 773.

36 In any event, in this case the trial judge properly insisted that defence counsel file his instructing letter to his agent as an exhibit. As the trial judge put it, "it would have been nice to know what those [earlier available] dates were". As a result, it was clear from the evidentiary record on the s. 11(b) Motion that the earliest dates on which counsel could accommodate this new case in his calendar were in late April or early May of 2010. This would also allow counsel time to properly prepare the case for trial and to prepare his s. 11(b) Motion.

37 As a result, the period of systemic delay in the case at bar, at best, ran from April 23, 2010 until January 28, 2011. In other words, this period of delay was just over nine months rather than just under eleven months. The remaining one month and twenty day period, from March 3 until April 23, 2010, was part of the inherent time requirements of the case as counsel needed time to accommodate a new case in his calendar and needed time to prepare it. This period of just under two months carries neutral weight in the s. 11(b) analysis.

(v) Conclusion

38 Having concluded that there was just under eleven months of systemic delay and some further period of unreasonable delay during the intake period, the trial judge correctly balanced the societal interest in a trial on the merits at the end of his reasons. I am satisfied that if he had not erred in his calculation of the period of systemic delay, and if he had not erred in his characterization of the intake period, he would have reached a different result.

39 The nine months of systemic delay was the only period of unjustified delay and it is squarely within the *Morin* guidelines. Furthermore, the evidence of prejudice was not strong. In these circumstances, there was no proper basis to find a violation of s. 11(b) and the Crown's appeal must be allowed.

40 I should note that I raised concerns during the appeal about why defence counsel had insisted on "one full day" for the trial of this very simple one witness case. On the hearing before Moore J. it was agreed that counsel asked for a full day because he was building in sufficient time for an anticipated s. 11(b) Motion. In other words, it appears that the s. 11(b) Motion itself caused some of the delay. Had counsel set a date for the trial on the merits, which would have required less than a full day, then it is likely that the case would have been given a more timely trial date. This bootstrapping effect of the s. 11(b) Motion seems wrong in principle. Counsel should seek the earliest available date for the trial on the merits. If that date offends s. 11(b) of the *Charter*, then a Motion should be brought on in a timely way, preferably in advance of the trial date. In any event, this issue was not fully developed at first instance and I need not rely on it for purposes of the appeal.

41 I should also note that the Crown argued that one brief passage in the trial judge's reasons suggests that he shortened the *Morin* guidelines in this case, to something less than eight to ten months. I agree with Mr. Burstein's interpretation of this passage, to the effect that the trial judge was just responding rhetorically to a Crown submission that the guidelines should be lengthened. The trial judge correctly set out the law on this point, based on the reasons in *Morin* itself, to the effect that the guidelines can be shortened or lengthened, depending on the existence of actual prejudice. He did not make any findings on the issue of prejudice that would have shortened or lengthened the guidelines.

42 Finally, I note that the trial judge made a forceful plea in his reasons for a new and better scheduling system. He stated that cases like this one, where counsel assert that they are seeking an earlier trial date, should be placed on a "ready list" so that they can be called on short notice, when trial lists collapse and earlier dates become available. He explained:

"I know, from sitting on this bench and having been the Local Administrative Judge here for three years prior to Justice Horkins, day after day after day, at College Park Courthouse, one or more courts sit empty because of the collapse rate. The reason why that is somewhat significant and important is because on a case like this, which is not going to take very long to do, there is some urgency to it, as expressed by the defence. To my mind, it is incumbent upon those who schedule cases, and the Crown who has carriage of the case, to do something about getting a case such as this on sooner."

43 The trial judge's proposal for a new scheduling system makes good sense, although there would be some challenges in implementing it. My only disagreement is that there is an implication in his reasons that "the government" is at fault for not setting up the proposed system. I agree with Mr. Burstein that a pro-active Crown Attorney, concerned about timely justice, could approach the judiciary and suggest a new scheduling system like the one recommended by the trial judge. But scheduling cases is ultimately the responsibility of the judiciary and it is entirely within the Court's own powers to set up the system proposed by the trial judge. It is to be hoped that he and his colleagues will pursue the matter. See: *Courts of Justices Act*, R.S.O. 1990, Chap. C-43, ss. 14(1) and 36(1); *R. v. Valente* (1985), 23 C.C.C. (3d) 193 at 219-222 (S.C.C.); *R. v. Genereux* (1992), 70 C.C.C. (3d) 1 at 20 (S.C.C.).

44 In the result, the appeal is allowed, the stay is set aside and a new trial is ordered. The accused must appear at the College Park Court on the date thirty days from the release of these reasons.

D. THE CARREIRA CASE

45 This is a much more factually complex case, than Lahiry, and it involved a much longer period of overall delay. The accused Jose Carreira (hereinafter, Carreira) was charged with impaired driving and "over 80", contrary to s. 253(1) of the *Criminal Code*. He was held for a bail hearing and released, a day later, on a recognizance with conditions. On April 22, 2010, Bovard J. found a violation of s. 11(b) of the *Charter* and stayed the proceedings. The Crown appeals and seeks to set aside the stay.

(i) History of the Proceedings

46 The history of the proceedings is long and complicated but it divides into a number of discrete periods, some of which are less contentious than others. These periods can be summarized as follows:

The initial intake period

- * September 17, 2007: the accused was arrested and charged. He was released on bail the next day and the case was remanded for a month;
- * October 15, 2007: the Crown provided disclosure. The accused had a card from a lawyer but he had not yet retained counsel. Duty counsel asked for a further one month adjournment;
- * November 19, 2007: the Crown elected to proceed summarily and provided further disclosure. Defence counsel appeared for the accused and requested an adjournment in order to hold a pre-trial meeting with the Crown;
- * December 3, 2007: counsel had not yet arranged a pre-trial meeting with the Crown. An agent for defence counsel requested a further remand in order to do so. The pre-trial meeting between counsel was held on December 8, 2007;
- * December 17, 2007: an agent for defence counsel appeared, confirmed that the pre-trial meeting had been held, and sought a further adjournment in order to obtain instructions;
- * January 14, 2008: defence counsel appeared and sought a further adjournment in order to obtain instructions as to whether the accused "wishes to resolve or proceed to trial";
- * January 28, 2008: defence counsel appeared and advised that "we are ready to set a date for trial" but also advised that it should "be marked on a with or without counsel basis". It was clear that counsel was not yet retained. Counsel asked that the matter be brought back on a date prior to the trial date, in order to "confirm" the trial date. The trial was estimated to require four hours of court time. The court offered September 12, 2008 as a trial date. Defence counsel simply stated "September 12th is available to the defence". He did not state that he had earlier available dates in his calendar and he did not seek the earliest available date. The matter was put over to June 23 to confirm the September 12, 2008 trial date.

47 In his decision finding a violation of s. 11(b) of the *Charter*, the trial judge characterized this initial period of four months and eleven days as "neutral intake", that is, it was part of the inherent

time requirements of the case. Both counsel on the appeal agree with the trial judge's decision on this point, as do I. The parties were engaged in retaining counsel, providing disclosure, taking instructions from the client, and trying to resolve the matter. These are all traditional and beneficial "intake" activities and they should not weigh against either party in the s. 11(b) analysis. It should be noted that the accused often did not appear in court on these early appearances as the Crown had elected to proceed summarily and defence counsel had filed a designation. However, the accused was present when the trial date was set, on a "with or without counsel" basis.

The period between the set date appearance and the first trial date

48 The next time periods in the chronology, after the parties set a first trial date "with or without counsel", are more difficult to characterize. They are as follows:

- * June 23, 2008: defence counsel appeared, together with the accused, on the trial confirmation date and advised that "we're still unfortunately not on record. It's still with or without. Mr. Carreira is aware of what that means in terms of the fact that if he's not fully retained us, he will be on his own on that particular day". The trial date was then confirmed;
- * September 12, 2008: Casey J. was presiding on the first trial date. Defence counsel appeared and advised the Court that he was not yet retained and that he was "not in a position to run the trial today." He requested an adjournment on the further basis that "this is a matter which may be eminently resolvable". He wanted his client to "attend for assessment and counselling with regard to alcohol issues" and counsel would then meet with the Crown and attempt to resolve the matter. The Crown agreed that this "does look like a matter that will move to resolution" and consented to the adjournment. The defence agreed to waive s. 11(b) of the *Charter* and requested a two month adjournment. Casey J. granted the adjournment.

49 In his s. 11(b) decision, the trial judge held that the entire seven month and fifteen day period, from when the trial date was set on January 28, 2008 until the first trial date was adjourned on September 12, 2008, was all institutional delay. This was the only period of unreasonable delay that the trial judge found on the s. 11(b) Motion record. I am satisfied that he erred in treating the entire seven and a half months as institutional or systemic delay for reasons that will be developed below.

The period after the first trial date and prior to setting the second trial date

50 The next periods of delay are less contentious, as counsel had waived s. 11(b) of the *Charter* on the first trial date in order to obtain a two month adjournment. This waiver was then extended on the next appearances, as follows:

- * November 17, 2008: defence counsel advised the court that the accused had completed eight of the sixteen "alcohol counselling sessions" in which he had enrolled and that he needed a further two month adjournment to complete the counselling. Defence counsel confidently stated, "this matter is going to resolve. He's going to be pleading to the charges once he completes the counselling". Section 11(b) of the *Charter* was again waived, the Crown consented, and the further adjournment was granted;

- * January 15, 2009: defence counsel appeared and sought a further short adjournment but now stated, "we're going to be setting a new date for trial." Section 11(b) of the *Charter* was waived for the third time;
- * January 19, 2009: an agent appeared for defence counsel and requested a new trial date. Crown counsel noted, correctly, that the matter was "extremely dated" and she suggested that counsel attend upon the Trial Coordinator to try to find an early trial date. The matter was held down and, when counsel returned, they advised the Court that the date of March 23, 2009 had been obtained from the Trial Coordinator. Nothing was said on the record as to whether counsel had earlier available dates and counsel did not request the earliest available date. It is clear that defence counsel was now retained to conduct what was still estimated to be a four hour trial.

51 The trial judge found that the period of four months and seven days, from the adjournment of the first trial date until the setting of the second trial date, was all covered by counsel's three express s. 11(b) waivers. Both counsel on appeal agree with the trial judge on this point, as do I. He also found that the further period of two months and four days, from the January 19, 2009 set date appearance until the second trial date, was delay caused by the defence. There is some dispute between the parties on this latter point, although I do not think that much turns on it.

The period between the second and the fifth trial dates

52 The history of the proceedings, beginning with the second trial date, is complex and is the subject of dispute between the parties. It is as follows:

- * March 23, 2009: on the second trial date, Bovard J. became seized with the matter and the trial commenced. However, he had other matters on his list and he did not reach Carreira's case until 2:30 p.m. The arresting officer completed her testimony in-chief, providing her observations of various indicia of impairment and tendering the certificate of analysis, with two readings of 210. Counsel conceded that the statutory conditions for admissibility of the certificate had been met but a *Charter* issue had been raised prior to trial. The entire proceedings on this day are set out in a forty-five page transcript, much of which involves submissions. The officer's evidence in-chief is contained in about thirty-two pages of transcript. Counsel attended on the Trial Coordinator and obtained a continuation date of August 26, 2009 for a further half day before the trial judge. The Trial Coordinator offered numerous earlier dates between April 22 and July 20, 2009. On some of these dates the defence was not available, on some the Crown was not available and on some both counsel were unavailable. From July 20 to August 25, 2009, defence counsel was continuously unavailable and he waived s. 11(b) of the *Charter* for this final period of one month and five days;
- * August 26, 2009: the matter resumed before the trial judge. This was now the third trial date. The Crown witnesses were present, the trial judge had dealt with the other matters on his list, and he was ready to proceed. Both Crown counsel and the trial judge had obtained a transcript of the arresting officer's evidence-in-chief from the second trial date. However, defence

counsel had not obtained the transcript and he requested an adjournment. The Crown opposed the adjournment and offered to lend her copy of the transcript to the defence so that he could quickly review it. Defence counsel took the position that this would not be satisfactory as there were "a number of *Charter* issues in play", arising from the officer's evidence, and the accused Carreira would also have "a right to read that [the transcript] as well". This would all take "a couple of hours to get that read for the both of us". The trial judge reluctantly granted the adjournment. He advised that he was sitting in Brampton for three months, beginning on September 8th, and he offered to continue the trial "tomorrow or the next day". Defence counsel waived s. 11(b) of the *Charter* for the period of the adjournment, until the trial judge was back from Brampton, and December 14, 2009 was set as the continuation date;

* December 14, 2009: the trial resumed on what was now the fourth trial date, but not until 3:30 p.m. The trial judge had another trial which took most of the day. When Carreira's case was reached, defence counsel cross-examined the arresting officer. When the case was not completed, counsel attended on the Trial Coordinator's office to obtain a continuation date. The next day, December 15, was offered but both counsel were unavailable. The trial judge was assigned to sit in Family Court in the New Year, for two and a half months, but he offered to come in and complete the Carreira matter on any one of his four non-sitting days in January and February. Defence counsel was unavailable on all four days. He was also unavailable on March 18 and 19. In the result, March 17 and April 6 were set to complete the matter. Defence counsel advised the Court that he may be raising s. 11(b) of the *Charter* as an issue on the continuation date, subject to instructions from his client;

* March 17, 2010: when the trial resumed, on what was now the fifth trial date, defence counsel advised that he would be bringing a s.11(b) *Charter* application on the next date. He had not yet filed it as he was still awaiting some of the transcripts. The trial judge advised that he would give the matter priority over other cases on his list, now that s. 11(b) of the *Charter* had been raised. There was disagreement as to whether defence counsel had already completed his cross-examination of the arresting officer. The Crown and the trial Judge thought that he had but defence counsel thought he had not. He had no transcript of his cross-examination on the prior date and stated that he had "absolutely no clue" how long he would need to complete the cross-examination, that he was "kind of flying in the dark" since he had no transcript, and that he would "just wing it." He proceeded to complete the cross-examination. It extends for thirty pages of transcript. A second officer, who was present at the RIDE check-stop when Carreira was arrested, testified and completed his evidence. It extends for sixty pages of transcript. The breath technician then testified and completed his examination-in-chief. The various Intoxilyzer test records were marked as exhibits. The examination-in-chief extends for twenty pages of transcript. At 4:20 p.m. the trial was adjourned to the April 6 continuation date for

cross-examination of the breath technician. The Crown also intended to call one final witness, a toxicologist who was not expected to "be long at all". The whole of April 6 had been set aside for completion of the trial. The trial judge confirmed that he had no other matters scheduled that day and defence counsel confirmed that there was "sufficient time" to both complete the trial and to argue the s. 11(b) *Charter* issue;

- * April 6, 2010: the transcript of proceedings on this date is incomplete. As a result, it is not entirely clear what happened, although the s. 11(b) *Charter* application was argued and the trial judge reserved judgment;
- * April 22, 2010: Bovard J. gave his reasons for finding a violation of s. 11(b) of the *Charter* and staying the proceedings.

(ii) Overview of the issues and grounds of appeal

53 It can be seen that a number of difficult issues arose, on this record, in relation to the s. 11(b) analytical framework. The overall delay, from September 17, 2007 when charges were laid, until April 6, 2010 when the trial appears to have been completed, was thirty months and 19 days (or just over two and a half years). This obviously was a lengthy period of overall delay and it required further analysis.

54 What the record immediately revealed, however, was a significant number of s. 11(b) waivers. At a minimum, the parties agree that there were five express waivers put on the record by defence counsel, in the presence of the accused. As summarized above, they total nine months: three waivers, from September 12, 2008 to January 19, 2009, totalling four months and seven days; a fourth waiver, from July 20, 2009 to August 25, 2009, of one month and five days; and a fifth waiver from August 26, 2009 to December 14, 2009, of three months and nineteen days. These periods had to be subtracted from the overall delay. In the result, the total time period requiring s. 11(b) analysis was twenty-one months and nineteen days.

55 In addition, the parties were agreed, and the trial judge found, that there was an initial "neutral intake" period of four months and eleven days. This delay was all for good reasons and it carried no weight in the s. 11(b) analysis, as noted above. In the result, the real focus was on the remaining seventeen months and eight days of delay where some difficult issues arose.

56 Unfortunately, the trial judge committed a number of errors in his s. 11(b) analysis. The Crown alleges three reversible errors: first, it is submitted that the trial judge erred in his characterization of some of the periods of delay and in his addition and subtraction of various periods of delay; second, it is submitted that the trial judge erred in his analysis of prejudice; and third, it is submitted that the trial judge failed to conclude his analysis by balancing the societal interest in a trial on the merits.

57 Mr. Little, counsel for the Respondent on the appeal, essentially concedes that these three errors, or some variation on them, were committed. However, Mr. Little goes on to submit that the correct s. 11(b) analysis can be undertaken by the summary conviction appeal court and that it leads to the same result. Accordingly, he submits that the appeal should be dismissed in spite of the acknowledged errors.

(iii) The reasons for the disputed periods of delay and their correct calculation

58 In terms of the first ground of appeal, there are four contentious time periods where the correct characterization and calculation of the delay is in dispute. All four of these periods concern the delay between a set date appearance and a trial date.

The period between the set date appearance and the first trial date

59 The first of these periods is the seven months and fifteen days, from January 28, 2008 when the first trial date was set, until September 12, 2008 when the first trial date was adjourned at the request of the defence. As noted above, the trial judge characterized this entire period as institutional delay. Indeed, it was the only period of institutional delay and there were no periods of Crown delay, according to his analysis. He found that all of the other periods of delay were either neutral, were caused by the defence, or were waived. As a result of a number of mathematical errors, this one period of unreasonable delay became inflated by two months and the trial judge referred to it repeatedly as nine months and nine days. For example, he stated:

"In this case, when the neutral intake period, waiver and defence delays are subtracted from the total delay there is a total delay of nine months and nine days left. ... In this case, I find that considering all of the circumstances s. 11(b) was breached, although the delay is nine months and nine days."

60 Leaving aside the math errors, which converted just over seven months into just over nine months, it was not correct to characterize the entire seven and one half month period as systemic delay. As already discussed at length in my reasons on the Lahiry appeal, systemic delay only begins "when the parties are ready for trial", as Sopinka J. put it in *R. v. Morin*, *supra*. Nothing in this record indicates that the accused was ready for trial on January 28, 2008. He was still in the process of trying to retain counsel, the case had obviously not been prepared for trial, and nothing was put on the record to the effect that the accused was seeking the earliest available date or that he was prepared to proceed on earlier dates. The accused's affidavit, filed on the s. 11(b) Motion, states that he realized he required counsel from the beginning and that he continually made efforts to retain counsel, in spite of financial difficulties. The natural inference from the record is that he needed as much time as possible to raise money in order to retain counsel. Furthermore, at some point in this period while awaiting trial, he did retain counsel and he instructed counsel to seek an adjournment of the first trial date. He and his counsel had decided to embark on a process of alcohol counselling and resolution discussions with the Crown and they no longer needed the first trial date. This body of evidence strongly infers that he was not "ready for trial" during much, if not all of this period. At a minimum, the first trial date became unnecessary to the accused at some point and yet he waited until the morning of trial to bring an adjournment application. In all these circumstances, it is wrong to characterize this entire period as systemic delay. The burden is on the accused on the s. 11(b) Motion to prove the reasons for individual periods of delay. Given the uncertainty in the record, as to whether the accused ever became ready for trial and as to exactly when he decided that he did not want to proceed to trial, the fairest way to allocate this period of delay is to divide it equally between neutral or inherent time requirements of the case and institutional delay. See: *R. v. Taylor*, [2010] O.J. No 1086 (S.C.J.); *R. Makani* 2011 ONSC 4463.

61 Accordingly, this initial period of systemic delay was not seven months and fifteen days but, rather, was three months and twenty-three days.

Delays in re-scheduling trial dates and continuation dates

62 The second, third and fourth disputed periods can be dealt with together as they bear some similarities. In all three instances, new trial dates had to be set because the case had not concluded on the scheduled trial date.

63 On January 19, 2009, resolution discussions came to an end and the parties set a second trial date of March 23, 2009. Nothing was said on the record about counsel seeking an earlier date or having earlier dates available. The trial judge treated this two month period as delay caused by the defence because it was the defence that had adjourned the first trial date. On March 23, 2009, the trial began in the afternoon but was not completed. The parties set August 26, 2009 as the date for continuation. The Court had a number of earlier dates available but one or both counsel were not available. It was agreed that the last month of this period, from July 20 to August 25, was waived because of defence counsel's continuous unavailability. The trial judge treated the first four months of this period as neutral or part of the inherent time requirements of the case, relying on the fact that the initial four hour time estimate for the case had expanded due to the defence filing a *Charter* motion in March, 2009 and the Crown adding a toxicologist to its witness list. Finally, the trial resumed on December 14, 2009 (after another period of defence waiver) and, once again, it was not completed. The parties set March 17th and April 6, 2010 as the new continuation dates. The Court again offered earlier dates but defence counsel was unavailable on all of them. The trial judge treated this period of almost four months as neutral or part of the inherent time requirements of the case, finding that the delay was "largely due to my not being available" as a result of his assignment to a two and one half month rotation in Family Court. He relied on *R. v. Allen* (1996), 110 C.C.C. (3d) 331 at 348 (Ont. C.A.).

64 The correct characterization of these three somewhat related periods of delay, totalling nine months and twenty-four days, is not easy. The failure of the case to proceed on the first trial date was entirely caused by the defence seeking an adjournment in order to complete alcohol counselling and to conduct resolution discussions. However, the failure to complete the case on the other two dates was due to systemic congestion in the court and was also due, in part, to the inherent time requirements of the case having expanded. What is noteworthy on all three occasions is that the Trial Coordinator and Bovard J. gave the case priority and offered very early continuation dates, within no more than a month or two. Counsel were not always available on these early dates, which is understandable, but on all three occasions it appears that continuation dates were set on counsel's earliest available dates which were generally about two to four months away.

65 The defence was clearly responsible for the need to re-schedule the case when it did not proceed on the first and third trial dates. However, institutional congestion was at least partly responsible for the failure to complete the case on the second and fourth trial dates. As the trial judge acknowledged:

"It is impossible to identify the specific reason for this delay, but it is clear that whether it was because I had to continue a trial already started, or there were other cases on the docket that received a higher priority, the Court was not able to accommodate Mr. Carreira's trial on that day because it was too busy." [Emphasis added.]

66 Mr. Little therefore submits, correctly, that some portion of the delay after the case was not completed on the second and fourth trial dates, has to be characterized as institutional delay. Crown counsel on the appeal, Ms. Stokes, does not disagree with this position. I agree that the trial judge

erred in characterizing all of the delay, when the trial was not completed on March 23, 2009 and on December 14, 2009, as neutral.

67 There is now a substantial a body of case law dealing with this issue of re-scheduling a trial that has not commenced or that has not been completed on the scheduled trial date. These authorities hold that the case must be given priority in the system and that the delays resulting from re-scheduling the trial date will generally be treated as institutional, or as part of the inherent time requirements, or as a combination of both, depending on the circumstances. See: *R. v. Godin, supra*; *R. v. Brace* (2010), 261 C.C.C. (3d) 455 at paras. 14-16 (Ont. C.A.); *R. v. Allen, supra* at pp. 347-351; *R. v. Satkunanathan* (2001), 152 C.C.C. (3d) 321 at paras 43-5 and 54-5 (Ont. C.A.); *R. v. M.(R.)* (2003), 180 C.C.C (3d) 49 at paras. 6-9 (Ont. C.A.); *R. v. W.(A.J.)* (2009), 257 O.A.C. 11 at paras. 29-43 (Ont. C.A.); *R. v. Khan, supra* at paras. 58-71.

68 Applying the principles set out in these cases, the defence sought an adjournment of the first trial date in order to pursue resolution discussions. This was a proper and beneficial reason to seek delay. However, the inevitable cost of this decision, should the resolution discussions fail, was that some further delay would be incurred in re-scheduling the case for trial. As long as this further period of delay is reasonably short, it is simply part of the inherent time requirements of the case. When the resolution discussions did fail in the case at bar, the Crown wisely and responsibly noted the need to give the case priority, attended upon the Trial Coordinator and obtained a new trial date that was two months and four days away. This short period of delay, from January 19 to March 23, 2009, was reasonable and necessary and was part of the inherent time requirements resulting from the defence decision to adjourn the first trial date and pursue resolution discussions. The trial judge characterized this period as delay caused by the defence. I would characterize it as neutral.

69 The other two periods of delay, when setting the third and fifth trial dates, should be apportioned as they were partly due to systemic congestion and partly due to the expanding needs of the case. In *R. v. W. (A.J.)*, *supra* at paras. 30 and 33, Rosenberg J.A. gave the judgment of the Court of Appeal and dealt with an analogous situation where a jury trial did not proceed on the March trial date. A mistrial was declared because there was only one judge available to conduct the trial and because another case was given priority. The court offered new trial dates in June and July, within three months of the mistrial, but defence counsel was not available. Rosenberg J.A. apportioned the delay as follows:

The question of how to characterize the resulting delay is a difficult one. It seems to me that in principle, since the mistrial was caused by a systemic failure, the delay until the system is able to again accommodate the trial is properly characterized as institutional delay. Thus, from March 19, 2007 until June 4, 2007, [the first date that the Court was available for continuation of the trial] at least, is institutional delay. ... In this case, the delay from June 4 to July 31 [when the Court had available dates but counsel was unavailable] is properly considered to be neutral. The system was available to hear the case, but defence counsel, for perfectly valid reasons was not. The reason for the delay from June 4 to July 31 was made clear on the record. That delay was not waived but the result of unavailability of defence counsel, who had been prepared for trial on the original date but quite properly had scheduled other matters in the reasonable assumption that the respondent's case would proceed as scheduled: see *R. v. Godin*, 2009 SCC 26, at para. 23.

70 In the case at bar, as noted above, the Court consistently offered early continuation dates. In both instances, when the trial commenced or continued but was not completed, in March 2009 and in December 2009, dates were offered within one month but counsel was not available. The period of institutional delay, when the system could not accommodate the case, is the one month after each of these two trial dates, in other words, a total of two months. The rest of the delay, when the court was available but counsel was understandably not available, is neutral.

71 In conclusion on this ground of appeal, concerning the proper characterization and calculation of the various periods of delay, I am satisfied that the correct totals are as follows:

- * the overall delay was thirty months and nineteen days;
- * waiver of time periods totalled nine months;
- * neutral intake totalled four months and eleven days;
- * inherent time requirements of the case totalled eleven months and fourteen days;
- * the three separate periods of institutional delay totalled five months and twenty-three days (three months and twenty-three days when setting the first trial date, one month when setting the third trial date and one month when setting the fifth trial date).

72 In other words, the only period of unjustified or unreasonable delay in the case was less than six months and it was well under the eight to ten month *Morin* guideline for institutional delay. It would require a very strong case of actual prejudice to find a s. 11(b) violation in these circumstances. This leads to the Crown's second ground of appeal.

(iv) Prejudice to the accused's s. 11(b) interests

73 Mr. Little concedes, correctly, that prejudice cannot be inferred from institutional delays that are within the *Morin* guidelines. In this case, the trial judge found that the institutional delays were seven and one half months, that is, they were below the *Morin* guidelines. I have found that they were just under six months. Accordingly, extrinsic evidence of some unusual prejudice was essential in relation to this factor in the s. 11(b) analysis. The accused Carreira sought to meet this burden by filing an affidavit. He was a forty-six year old Portuguese immigrant. He worked in construction but he was injured at work, after the charges were laid, and became unemployed. Almost nothing appears to have been said on the s. 11(b) Motion about his terms of bail except that they did not prevent him from working. The transcript of the bail hearing was not filed and it was conceded that no bail variation or bail review was ever sought. It appears, from the transcript of the first appearance, that he had some other outstanding charges that were already set for trial. No argument was made that his bail conditions caused prejudice.

74 Carreira's affidavit traces the history of the proceedings. It discloses that he eventually decided, sometime in late 2008 or early 2009, "that I did not want to resolve my matter" and so he instructed counsel "to set a new date for trial." This was more than a year after the charges were laid. He asserted that he "suffered great stress and anxiety", including "many sleepless nights," as a result of the "approximately thirty months" of delay. He worried about the outcome of the trial and its impact on his future. He agreed that the stress began when he was charged. He described waiting in court, on the days when his case was not completed, and how it prolonged his anxiety about the

outcome. It also added to his legal costs. Finally, he worried that "my memory of the details of what occurred is fading", in the event that "it is necessary for me to give evidence in court."

75 In cross-examination, Carreira agreed that he had still not retained counsel for trial by September 12, 2008, the first trial date. It was shortly afterwards that he did retain counsel to conduct the trial. He knew that he needed a lawyer from the time when he was charged, in September 2007, but it took him a year to raise sufficient money to retain his lawyer. He was doing contract work and giving his lawyer money "little by little".

76 The trial judge accepted Carreira's evidence as to the various forms of actual prejudice that he suffered. In particular, the trial judge found that the claim of financial prejudice, in having to pay for multiple trial proceedings, was "reasonable and believable". In addition, the claim of stress and anxiety was accepted "because it is plausible". Finally, the claim that his memory faded over time was accepted as being "logical". The trial judge stressed that he relied on his observations of Carreira, while testifying on the Motion, in making these findings of fact.

77 The Crown does not challenge the trial judge's findings of fact on the issue of prejudice, nor can I. Rather it is his legal analysis and his conclusions as to the legal significance of prejudice in this case that is challenged. In *R. v. Morin*, *supra* at paras. 40, 62 and 64, Sopinka J. stated a number of fundamental propositions about the correct legal approach to this factor of prejudice. In particular, he stated the following:

"Neither side ... can rely on their own delay to support their respective positions.... Action or non-action by the accused which is inconsistent with a desire for a timely trial is something that the court must consider ... Inaction may ... be relevant in assessing the degree of prejudice, if any, that an accused has suffered as a result of delay. ...[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." [Emphasis added.]

78 In stating these propositions, Sopinka J. held that he was giving effect to Cory J.'s assertion in *R. v. Askov*, *supra* at pp. 476, 480-1 and 483, that "the s. 11(b) right is one which can often be transformed from a protective shield to an offensive weapon in the hands of the accused." Cory J. went on to illustrate the point by referring to *R. v. Conway* (1989), 49 C.C.C. (3d) 289 (S.C.C.) as a case where the accused had caused much of the very lengthy delay in that case and then sought to invoke s. 11(b) as a means of remedying the delay. Cory J. stated:

Nonetheless, there is a societal interest in preventing an accused from using the guarantee as a means of escaping trial. It should be emphasized that an inquiry into the actions of the accused should be restricted to discovering those situations where the accused's acts either directly caused the delay (as in *Conway*), or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial. These direct acts on the part of the accused, such as seeking an adjournment to retain new counsel, must of course be distinguished from those situations where the delay was caused by factors beyond the control of the accused, or a situation where the accused did nothing to prevent a delay caused by the Crown.

... Nonetheless, the factual situation presented in *Conway* serves as an example of an extremely lengthy delay which did not prejudice the accused." [Emphasis added.]

79 The principle emerging from these three Supreme Court of Canada authorities is that delay caused by the accused, in order to achieve some benefit that he was seeking, cannot be turned around and used to later argue that he was actually prejudiced in some way by his own delays. Indeed, delay deliberately sought by the accused negatives the normal inference of prejudice that would otherwise be drawn from lengthy delays in a case.

80 Unfortunately, the trial judge did not apply these principles. When making findings of fact on the issue of prejudice to s. 11(b) interests, he stated:

"I accept this evidence [of stress and anxiety] because it is plausible and many courts have held that this type of effect commonly results from having a criminal charge outstanding for a long period of time; and Mr. Carreira's case has been delayed thirty months and nineteen days." [Emphasis added.]

81 The trial judge had already found that large parts of this thirty month overall delay had been caused by the accused. Indeed, he had waived s. 11(b) of the *Charter* for significant periods. The trial judge nevertheless found prejudice on the basis of the entire thirty month period of delay, including delays caused by the accused. In this regard, he failed to apply the principles set out above from *Conway*, *Askov* and *Morin* and failed to consider whether Carreira's conduct, in repeatedly seeking delay, actually negated prejudice in the legally relevant s. 11(b) sense. Mr. Little, very fairly, concedes this error.

82 The trial judge also made a factual error in relation to this point. When he did consider Carreira's conduct, in relation to the issue of prejudice, he stated the following:

"Mr. Carreira behaved in a diligent manner after being charged. He tried to get a lawyer as soon as possible, and went ahead and set a date for trial on a "with or without counsel" basis in spite of not yet having retained his lawyer fully because he wanted to have his case heard as soon as possible. These are all indications that clearly show that Mr. Carreira was trying everything he could do to have his case heard as soon as possible. These actions bolster his assertions that he suffered considerable stress and anxiety, and emotional and psychological difficulties because of this outstanding case." [Emphasis added.]

83 This was a palpable and over-riding factual error. The record revealed, and Carreira conceded in his testimony, that it took him over a year to retain counsel. He successfully adjourned the first trial date in September 2008 because he knew he needed counsel and he had not yet retained counsel and because he wanted to seek alcohol counselling and to have counsel pursue resolution discussions with the Crown. It was sixteen months after he was charged before Carreira was finally ready to set the second trial date, with counsel properly retained for trial. He later adjourned the third trial date on the dubious basis that he had a "right" to obtain and review a short transcript of the arresting officer's evidence in-chief and that it would take him and counsel "a couple of hours" to do this.

84 Carreira is not to be faulted for seeking these delays, although the adjournment of the third trial date is particularly suspect. He simply made choices, asserting that he needed more time for a variety of reasons, and he then made use of it in order to raise money to retain counsel, to seek alcohol counselling, to try to resolve the case, and to review a transcript of one officer's testimony. These were important benefits to him that required time. What he cannot do is take these apparently beneficial delays, which he sought, and then turn them into a sword. In any event, none of this course of conduct could fairly be characterized as "diligent" pursuit of a trial and "trying everything he could to have his case heard as soon as possible", as the trial judge found.

85 For all of the above reasons, I am satisfied that the trial judge erred in his findings of prejudice. These findings were critical to his ultimate conclusion on the s. 11 (b) Motion as he indicated that the case was "close to the line" and that it was only if "serious and significant prejudice" existed that a stay could be justified. He then went on to conclude as follows:

"It's because of the prejudice that Mr. Carreira has suffered that I find that the overall period of delay which the courts have repeatedly said I have to consider does result in a breach of Mr. Carreira's rights under s. 11(b)." [Emphasis added.]

The trial judge should have distinguished between legally relevant prejudice to the accused's s. 11(b) interests, that was caused by the short periods of unjustifiable delay, and should not have allowed the accused to claim prejudice from delays that he had caused for his own benefit. Indeed, these latter delays, caused by the accused for his own reasons, tended to negative the legally relevant prejudice.

(v) Failure to balance societal interests in a trial on the merits

86 At the beginning of his reasons, when instructing himself on the s. 11(b) legal framework, the trial judge correctly set out the requirement that he consider the societal interest in a trial on the merits. Unfortunately, when he completed his analysis of the four relevant s. 11(b) factors, he immediately concluded that there had been a breach and he stayed the proceedings. He never did undertake the final balancing stage where societal interests become part of the analysis. Again, Mr. Little has fairly conceded this error but submits that this Court can do the balancing on appeal.

87 Given that the unjustified periods of delay in this case were not long (indeed the total of the three periods of institutional delay was under the *Morin* guidelines) and given that the evidence of prejudice was attenuated by the accused's own conduct, the final balancing of society's interest in a trial on the merits was important. See: *R. v. Seegmiller, supra*; *R. v. Qureshi, supra*.

88 If this had been a stronger case for finding a s. 11(b) violation, after considering the four main factors, then the trial judge's failure to expressly balance the societal interest might not have made a difference. Given that it was a weak s. 11(b) motion, this essential step in the analytical framework needed to be undertaken. See: *R. v. Hussey* (2008), 233 O.A.C. 157 at paras. 8-9 (C.A.).

89 It must be remembered that, for over twenty-five years now, drinking and driving has been regarded as a very serious offence. Indeed, it has been authoritatively stated that "it has a far greater impact on Canadian society than any other crime", that it is "clearly the crime which causes the most significant social loss to the country", and that "every drinking driver is a potential killer". See: *R. v. Bernshaw* (1995), 95 C.C.C. (3d) 193 at para. 16 (S.C.C.); *R. v. McVeigh* (1985), 22 C.C.C. (3d) 145 at 150 (Ont. C.A.); *R. v. Biancofiore* (1997), 119 C.C.C. (3d) 344 at paras. 19-23

(Ont. C.A.). Given these pronouncements, balancing the societal interest in a trial on the merits is particularly important in drinking and driving cases.

(vi) Conclusion

90 I am satisfied that all three of the Crown's grounds of appeal have merit and that the appeal must be allowed. The three periods of systemic delay in this case were short, totalling less than six months. There were no other unjustified delays. The evidence of prejudice was weak, given the significant contribution to that prejudice from the accused's own conduct. In short, there was no proper basis for finding a violation of s. 11(b).

91 The appeal is allowed, the stay is set aside, and a new trial is ordered. The accused must appear at the Old City Hall Court on the date that is thirty days from the release of these reasons.

E. THE DAVIDSON CASE

92 The accused John Davidson (hereinafter, Davidson) was charged with having care or control of a motor vehicle while "impaired by alcohol", contrary to s. 253(1)(a) of the *Criminal Code*. The charge was stayed by Schneider J. on January 15, 2010 on the basis of a violation of s. 11(b) of the *Charter*. The Crown appeals and seeks to set aside the stay.

(i) History of the proceedings

93 The history of the proceedings is as follows:

- * September 8, 2008: the charge was laid. The accused had been arrested over two weeks earlier, on August 21, 2008, and was released from the police station on a promise to appear. There were no bail conditions. He was also charged on a separate Information with simple possession of cannabis;
- * September 22, 2008: the accused failed to appear and a bench warrant was issued. Later in the day, the accused appeared and the warrant was rescinded. The matter was remanded for another month;
- * October 20, 2008: the federal drug Crown spoke to the matter and asked that the marijuana possession Information be remanded to November 17th in 114 Court at Old City Hall, to await disclosure. He then mistakenly asked that "the impaired [Information] ... be returned to College Park" and it was remanded to November 14, 2008;
- * November 14, 2008: the provincial Crown at College Park Court noted the mistake made on the previous appearance and asked that the impaired care and control Information be remanded back to 111 Court at Old City Hall, to the same date as the drug Information that was in 114 Court, namely, November 17, 2008;
- * November 17, 2008: the impaired care and control Information was now back in 111 Court at Old City Hall, and was separated from the drug Information in 114 Court. Unfortunately, the provincial Crown did not have its brief in Court. She requested a further remand in order to "track down the paperwork". Meanwhile, the accused had been appearing with the assistance of duty counsel on all of these early court appearances and so the

Justice of the Peace advised him, "If you are getting a lawyer, look into that in the meantime";

- * December 18, 2008: the Crown now had its brief in court but the disclosure package for the accused had not yet been vetted. The Crown asked for a further week to review the disclosure and the accused asked to come back on January 15, 2009 when the drug matter was next in court;
- * January 15, 2009: the Crown provided what was described as "a significant amount of disclosure", including the toxicologist's report which was later to become significant. The Crown also advised that "the booking and breath video ... haven't come in yet". Duty counsel advised that the accused had applied for Legal Aid and had been denied a certificate but that he was now "retaining counsel privately". He requested a further adjournment;
- * February 19, 2009: duty counsel advised the court that the accused has "consulted some lawyers but he still would need some more time to retain counsel." In cross-examination on his affidavit, filed on the s. 11(b) Motion, Davidson testified that he "didn't have the money right away" to retain counsel privately. He agreed that it took him "several months to get enough money to hire a lawyer". He also "had to research which lawyer I was going to get". The case was remanded again, although the court began to express concerns about the delays;
- * March 26, 2009: the accused retained Ralph Steinberg as defence counsel. Mr. Steinberg scheduled a pre-trial meeting with the Crown, Louise McNaughton, and it was held on March 25, 2009. Detailed correspondence was then exchanged between the two lawyers, setting out somewhat differing versions of what had happened at the pre-trial. They agreed, however, that two items of further disclosure were now available, namely, the video of the breath test and the Certificate of Analyst, and that the accused would pick these items up the following day in court. There was also agreement that three further items of disclosure had been discussed at the pre-trial meeting and that the Crown was in the process of obtaining them: the accused's M.T.O. driving record; a typed version of one police officer's already disclosed notes; and a revised version of the toxicologist's already disclosed report. Mr. Steinberg's letter also expressed concern about delays in the case. Ms. McNaughton advised that the Crown was prepared to set a date for trial. The day after this pre-trial meeting, Ms. McNaughton appeared in court and Mr. Steinberg sent a letter with his client, requesting a further adjournment "to await ... and ... to review the further disclosure". Ms. McNaughton took the position that disclosure was complete, aside from the three matters noted above, and that the Crown was "prepared to set a one day trial", which was the estimate emerging from counsel's pre-trial meeting. The Justice of the Peace granted defence counsel's request for a further adjournment but stated that on the next appearance, "we set the trial date that day". Duty counsel undertook to advise Mr. Steinberg that on the next appearance "a trial date has to be set";
- * April 23, 2009: once again, Ms. McNaughton appeared in court and Mr. Steinberg sent a letter. Two of the three requested items of disclosure were

provided - the M.T.O. driving record and a typed version of the one of-ficer's notes. Ms. McNaughton stated that the revised toxicologist's report "will not come in before a trial date is set". Defence counsel's letter, once again, sought a further adjournment "to allow for review of the further disclosure ... or to await its provision". A different Justice of the Peace was now presiding and the further adjournment request was granted, contrary to the order that had been made on March 26, 2009;

- * May 21, 2009: during the period of this latest remand, there was a further exchange of correspondence between the two lawyers, revealing more misunderstanding and miscommunication. The one thing that was clear was that Mr. Steinberg insisted on "receiving and considering" the revised toxicologist's report before he would set a date for trial. Ms. McNaughton took the contrary position, that the revised report "is not an obstacle to setting a trial date", noting that they had already agreed that a full day trial had to be scheduled and "once a date is fixed, it can always be revisited by bringing the matter forward", should it become necessary to obtain a further "continuation date". On this May 21 appearance, both lawyers attended in court and set out their respective positions. Mr. Steinberg insisted that the revised toxicologist's report was "rather seminal or very significant in the proof of the case" and would have "implications on the duration of the trial - the nature of the trial". A different Justice of the Peace granted the defence request for a further adjournment;
- * June 25, 2009: during the period of this latest remand, the Crown reiterated its position, by letter dated June 4, 2009, that it was "prepared to set a trial for six hours now and if this matter ends up requiring more time", a further date could be requested. The letter noted that the Crown was still relying on the "previously disclosed" toxicology report, dated October 23, 2008, and that the Crown wanted to "ensure the accused gets the soonest available date." On this June 25th appearance, both counsel attended in court and the Crown provided the revised toxicology report, which had finally been received. It was dated April 23, 2009 and was attached to an affidavit dated May 12, 2009. Counsel still estimated that the case would require one full day for trial. The Crown would call two civilian witnesses who observed the accused, two police witnesses including the breath technician, and the toxicologist. Because a full day was requested, a judicial pre-trial had to be scheduled and a date was obtained within three weeks. Defence counsel also stated, "I expect there will be a delay motion";
- * July 14, 2009: the judicial pre-trial was held before Caldwell J. and a two day trial was set for March 10 and 11, 2010. In addition, the s. 11(b) motion was scheduled for a half day, in advance of trial, on January 14, 2010. Mr. Steinberg said nothing on the record about seeking the earliest available dates nor did he state that he had earlier available dates in his calendar for the two day trial. What he did say was the following:

"Could we mark it, all three dates, with or without counsel. I expect to be retained and I am not retained to that extent this morning."

The accused testified on the s. 11(b) Motion and agreed that he used the time awaiting trial to make payments towards his retainer of counsel. After setting a date for trial, Mr. Steinberg wrote the Crown a further letter asking for one final item of disclosure, namely "the calibration and maintenance records for the breathalyzer machine";

- * January 14 and 15, 2010: the s. 11(b) motion was argued before Schneider J. over a two day period. The motion was successful and the proceedings were stayed.

(ii) Overview of the issues and the grounds of appeal

94 The parties agree that the overall period of delay is calculated from the date the Information was sworn, September 8, 2008, until the scheduled trial date, March 10 and 11, 2010. See: *R. v. Kalanj* (1989) 48 C.C.C. (3d) 459 (S.C.C.). In other words, the relevant total delay in this case is eighteen months and two days. This kind of overall delay for a drinking and driving case required further investigation. The parties also agree that there were no waivers.

95 As a result, the two factors requiring analysis in this case were the reasons for delay and prejudice. Unfortunately, the trial judge made a number of errors in his assessment of these factors. The Crown advances three main grounds of appeal: first, there was no analysis of the individual periods of delay as the trial judge simply stated, in very brief reasons, that the *Morin* guidelines "of eight to ten months should not be exceeded unless we have exceptional or unusual circumstances"; second, the trial judge failed to balance the societal interest in a trial on the merits; and third, when assessing prejudice to s. 11(b) interests, the trial judge failed to take into account conduct by the accused that caused delays. The latter two errors over-lap with errors already discussed above in relation to the Carreira case.

96 Mr. Wright, counsel for the Respondent on the appeal, very fairly concedes the first two errors. Like Mr. Little on the Carreira appeal, Mr. Wright submits that the summary conviction appeal court can do the correct s. 11(b) analysis now and the result will be the same as at trial.

(iii) The reasons for various periods of delay

97 I agree that the trial judge failed to review the various periods of delay and failed to allocate causes to each period. As a result, there is no finding as to a total period of unjustified delay that weighs against the Crown, derived by adding up the systemic delays and the delays caused by actions of the Crown. The trial judge stated that "there is a certain convention applied" where "we deduct a reasonable intake period", but he did not calculate the actual intake period in this case and he did not deduct it from the overall delay. He also failed to calculate those delays that were caused by the Crown and by systemic congestion in the Ontario Court of Justice. The only period of delay that he subjected to any analysis was the time spent waiting for the revised toxicology report. He allocated this delay to the Crown, holding that "it would not have been appropriate to press the setting of a date prior to the receipt of this report, given the centrality of it apparently in the Crown's prosecution." Having found that the Crown caused this delay, however, the trial judge did not go on to determine how much of the overall delay was due to this cause.

98 The reason for the trial judge's failure to engage in any real analysis of the individual periods of delay appears to be due to his understanding of the *Morin* guidelines. In this regard, he stated the following:

"To my mind, the window of appropriate delay which has been set by the Supreme Court and various appellate courts of eight to ten months should not be exceeded unless we have exceptional or unusual circumstances to take it out of that appropriate range. I do not think that has been demonstrated in this particular set of facts." [Emphasis added.]

99 Mr. Wright concedes that the trial judge appears to have treated the *Morin* guidelines as a limitation period, only to be exceeded in exceptional circumstances. This is erroneous. They are only guidelines and they only apply to institutional delay.

100 In this case, the institutional delay was something less than eight months, at the very most, and so it was under the *Morin* guidelines. In any event, even if the guidelines had been exceeded, a careful analysis of the reasons for delay is critically important on any s. 11(b) Motion because the guidelines are flexible and the balancing takes a number of other factors into account. As Sopinka J. stated in *R. v. Morin*, *supra* at paras. 50-52:

"The purpose of the suggested period was not therefore that it was to be treated as a limitation period and inflexible. ...A guideline is not intended to be applied in a purely mechanical fashion. It must lend itself and yield to other factors. ... I have already stressed that a guideline is not to be treated as a fixed limitation period. It will yield to other factors."

101 In its recent decision in *R. v. Schertzer et al*, *supra* at para. 72, the Ontario Court of Appeal dealt with a case where the trial judge failed to analyze some of the individual periods of delay and ascribe causes to them. The Court described the error as "failing to allocate lengthy periods of time to any category in the *Morin* framework". The correct analysis of the reasons for the various periods of delay, which should have been undertaken in the present case, is set out below.

The intake period

102 I have already discussed the purpose of a neutral intake period in the Lahiry appeal. It is arguable that the parties substantially expanded the intake period in this case, beyond the usual norms of about two months for relatively simple drinking and driving cases. As can be seen from the history of the proceedings, set out above, the Crown did not provide initial disclosure until January 15, 2009, which was four months and seven days after the charges were laid. The accused, however, was still making efforts to retain counsel during this period. Indeed, it was not until March 18, 2009 that the accused finally did retain counsel, over six months after the charges were laid. The Crown continued to make ongoing disclosure throughout this period. It is therefore arguable that the entire six months is neutral intake as both parties were engaged in the traditional activities associated with this period and neither party was ready to set a date for trial.

103 The difficulty with this analysis is that it should not have taken the Crown four months to make initial disclosure in this kind of case. Errors were made in sending the Information to the College Park Court, in not having the Crown Brief in court, in not having the vetting completed in a timely way, and in not having the booking and breath room videos available. The Crown concedes

that half of this initial four month and seven day period of delay, from September 8, 2008 when the charges were laid until January 15, 2009 when initial disclosure was finally made, should be allocated to actions of the Crown. The other half should be allocated to the normal intake needs of this kind of case. I agree with this concession.

104 Once initial disclosure was made on January 15, 2009, the next two months of delay were due to the accused's ongoing efforts to retain counsel. Davidson agreed, in his testimony on the s. 11(b) Motion, that he needed time to raise money for a retainer and "to research which lawyer I was going to get". The Crown submits that this was defence delay. Mr. Wright submits that it is part of the inherent time requirements of the case. Not much turns on this point, but I agree with Mr. Wright. The accused was a man of modest means who had been refused Legal Aid and who needed time to raise a private retainer. This is not unreasonable and should be treated as part of the inherent time requirements of this particular case.

105 Mr. Wright submits that this neutral period extends from January 15, 2009 until April 23, 2009 as not only was Mr. Steinberg retained on March 18 but he held a pre-trial meeting with the Crown on March 25, he reviewed the disclosure and made some minor follow-up requests for further disclosure, and he then requested an adjournment on March 26 which was the first date that he went on the record. In short, he had just been retained, he was not yet ready to set a date for trial, and he needed an initial adjournment to get ready. These are all normal intake activities. They were taking place at this late stage because of the lateness of Mr. Steinberg's retainer but they are, nevertheless, neutral intake causes of delay. I agree with Mr. Wright that this entire three month and eight day period should carry neutral weight in the s. 11(b) analysis.

Refusing to set trial dates while waiting for disclosure

106 The real dispute between the parties centres on the further two months of delay, from April 23, 2009 to June 25, 2009, when Mr. Steinberg refused to set a date for trial until he received the revised toxicology report from the Crown. The defence submitted, and the trial judge found, that this was Crown delay. The Crown submits that it is defence delay.

107 Mr. Wright concedes that "initial disclosure", in the *Stinchcombe* sense, had already been made by the Crown. Indeed, disclosure was complete by April 23, 2009 except for the one outstanding item. Mr. Wright also concedes that the revised toxicology report was not essential to any fundamental decisions that the defence had to make, such as plea or election, prior to setting a date for trial. The revised report's only significance, at this stage of the proceedings, was that it might have some impact on the length of the trial.

108 Given these concessions, I am satisfied that defence counsel was wrong in refusing to set a date for trial until he had received the revised toxicology report. There is now a considerable body of binding authority on this point. Beginning with *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 at pp. 13-14 (S.C.C.), the disclosure process envisioned in that seminal decision, was that the Crown would provide "initial disclosure", prior to the accused taking "crucial steps which ... affect his or her rights in a fundamental way", such as election and plea. Thereafter, the Crown was to provide "continuing" disclosure "when additional information is received" in the period leading up to trial.

109 In three subsequent decisions, the Ontario Court of Appeal has stressed the point that disclosure need not be complete before dates are set for trial or preliminary hearing. In *R. v. Kovacs-Tatar*, *supra* at para. 47, the Court dealt with a situation where defence counsel refused to set a date for trial in a sexual assault case until the Crown's expert medical report had been received. In the

case at bar, the defence already had the toxicologist's report and was simply awaiting revisions to it, so the facts are much less sympathetic to the defence position than in *Kovacs-Tatar*, *supra*, where the Court stated:

Something should be said about counsel's refusal to set a date because the expert report was not available. The Crown is obliged to make initial disclosure before the accused is called upon to plead or to elect the mode of his trial. See the comments of Sopinka J. in *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.) at pp. 13-14. In this case, since the Crown had elected to proceed summarily, election of the mode of trial was not an issue. Having regard to the length of time before trial, the appellant's counsel knew the expert's report would be completed many months before the appellant had to plead and the appellant would have had ample time to obtain his own expert's report had he wished to do so. Also, because the obligation of the Crown to make disclosure is a continuing one, the Crown is not obliged to disclose every last bit of evidence before a trial date is set. The defence was not forfeiting its "Stinchcombe rights" by agreeing to set a trial date. Counsel for the appellant did not act reasonably in insisting that he receive the expert report before setting a trial date.

110 Two years later, in *R. v. M.(N.N.)*, *supra* at para. 37, the Court revisited the issue in a case where defence counsel again refused to set a date for trial due to outstanding disclosure requests. Juriansz J.A. repeated what had been said in *Kovacs-Tatar* and emphasized the following:

"Even when the Crown has clearly failed to make mandated disclosure, the defence is not necessarily entitled to refuse to proceed to the next step or to set a date for trial."

111 Most recently, in *R. v. Schertzer et al*, *supra* at paras. 93 and 94, the Court dealt with a case where large amounts of disclosure was still outstanding and counsel, nevertheless, proceeded to set a date for the preliminary inquiry. The court commended counsel for "acting responsibly in accordance with this court's directions". The Court held that setting "a target date for the preliminary inquiry, even though more disclosure was anticipated, is consistent with this court's direction" in *M.(N.N.)* and in *Kovacs-Tatar*.

112 Crown counsel explained on the s. 11(b) Motion that the main reason for asking the toxicologist to revise his report was "to remove some of the information that is not relevant to this case, the marijuana, because the Crown cannot prove any drugs being in Mr. Davidson's system". In his submissions on the s. 11(b) Motion, defence counsel never disputed this explanation for the need to make revisions to the report. He simply asserted that the toxicology report is relevant to "how impairment is going to be proved" and that it was, therefore, "of essential importance and it will be difficult to assess the implications for the length of the nature of the trial without it". Mr. Wright made similar submissions on the appeal, arguing that the defence is entitled to delay setting a date for trial as long as the outstanding disclosure is "of real significance".

113 I am not satisfied that the revisions to the report were "of real significance", given the Crown's uncontradicted assertion that the main reason for the revisions was to remove inflammatory and irrelevant references to intoxication by marijuana (an offence which had not been charged in the particularized Information). Mr. Steinberg must have known the reasons for the revisions to the re-

port, given that the decision to request it emerged out of his pre-trial meeting with the Crown. If he was in any doubt as to the apparently benign reasons for seeking a revised report he could have made inquiries. There was simply no justification for using this minor piece of outstanding disclosure as a device for causing more delay.

114 In any event, as I read the above line of binding authority, outstanding disclosure can often be significant and it still cannot be used to hold up the setting of dates for trial or preliminary inquiry. Sophisticated forensic testing and ongoing investigative steps often take time and they cannot be allowed to hold the process hostage by preventing the setting of timely trial dates. It is only when the missing disclosure is truly material to "crucial steps" in the process, like election and plea, that it will justify delay at these early stages. This is simply common sense. Lawyers can generally adapt and adjust their trial strategy to ongoing disclosure, received from the Crown while awaiting trial. If the Crown is not being diligent in providing disclosure sufficiently in advance of the trial date, then setting confirmation dates and target dates for trial will solve the problem. By bringing the case back to court, a month or two before the target trial date, defence counsel can create a check to prevent dilatory Crown disclosure practices. If the Crown has not completed all important disclosure by the confirmation date, the defence can then adjourn the target trial date and the Crown's actions will have caused the delay.

115 In all these circumstances, I am satisfied that the defence acted unreasonably, in the period from April 23 to June 25, 2009, and that this two months and two days of delay was due to conduct of the defence. The trial judge erred in characterizing this period as delay caused by the Crown.

Delay caused by the judicial pre-trial

116 The next three weeks of delay, from June 25 to July 14, 2009, was caused by the need to hold a judicial pre-trial. The parties agree that this short nineteen day period of delay is part of the inherent time requirements of the case. I agree with this characterization. See: *R. v. Khan, supra* at paras. 44-55; Scott Latimer, "Defining JPT time for s. 11(b) purposes", (2011) 84 C.R. (6th) 244.

Calculating the period of institutional delay

117 The final period of delay is from July 14, 2009, when the date was set for trial, and March 10 and 11, 2010, the trial date. This seven month and twenty-four day period of delay raises the same issues concerning calculation of systemic delay, already discussed above in the Lahiry and Carreira appeals. It should be apparent that even if this entire period was characterized as systemic delay, it is still below the eight to ten month *Morin* guideline. However, for the reasons already set out in the two previous appeals, I am not satisfied that it is accurate to characterize the entire period as systemic delay. Mr. Steinberg did not state on the record that he was seeking the earliest available date and he did not indicate that he had earlier available dates in his calendar for the two day trial. Furthermore, what he did indicate was that he was not yet properly retained. Davidson conceded in his evidence on the s. 11(b) Motion that he needed the time awaiting trial to raise money to pay his lawyer's retainer. In all these circumstances, it cannot be said that the defence was "ready for trial" on July 14, 2009.

118 Given the inadequacies in the record on this point, and given that the burden is on the defence to prove the reasons for delay, I cannot infer that any more than six months of this period of delay was due to institutional causes. Indeed, this may be an overly generous allocation in favour of the defence.

119 In conclusion, the various periods of delay in this case are as follows:

- * the overall delay was eighteen months and two days;
- * the initial neutral intake period was two months and three days;
- * the actions of the Crown caused two months and four days of delay before providing initial disclosure;
- * there was three months and eight days of delay, due to the inherent time requirements of the case, as the accused needed time to retain counsel, to hold a pre-trial meeting with the Crown, to seek some minor additional disclosure, and to get ready to set a trial date;
- * there was then two months and two days of delay caused by actions of the defence, as counsel unreasonably refused to set a date while awaiting the revised toxicology report;
- * there was nineteen days of neutral delay in order to conduct a judicial pre-trial;
- * there was one month and twenty-four days of delay due to the inherent time requirements of the case, as defence counsel had to get properly retained, prepare the case and make time available in his calendar for a two day trial;
- * there was six months of institutional delay.

120 It can be seen that the total period of unjustified delay in this case was eight months and four days. All of the rest of the delay was either caused by the defence or it carried neutral weight in the s. 11(b) balancing.

(iv) Balancing societal interests

121 It is conceded that the trial judge never adverted to the societal interest in a trial on the merits and never took this factor into consideration at the final balancing stage of his analysis.

122 I have already discussed this error above, in the context of the Carreira appeal. In the Davidson case, the eight month total period of unjustified delay was not lengthy. At best, this s. 11(b) Motion was close to the line, depending on proof of some substantial prejudice. In such a case, proper balancing of the societal interest in a trial on the merits was a particularly significant and necessary step in the analytical framework. Accordingly, this error cannot be minimized or overlooked.

(v) Prejudice

123 The third and last ground of appeal advanced by the Crown concerns the trial judge's failure to consider conduct by the accused which caused delay, when assessing prejudice to his s. 11(b) interests. I have already discussed the law relating to this ground of appeal at some length, in the context of the Carreira appeal, and I will not repeat that discussion.

124 The eight month total period of unjustified delay in the present case is not the kind of "very long and unreasonable delay" from which prejudice can be inferred. As in the other two appeals, Davidson took up the burden of proving actual prejudice to his s. 11(b) interests by filing an affidavit on the Motion. There was no suggestion of prejudice to his liberty or fair trial interests. The affidavit relates solely to a claim of prejudice to the accused's security of the person. Davidson worked in construction as a drywaller. He testified that he lost time at work and suffered economically due to the many early court appearances. The number of appearances also increased his legal costs.

However, he was not prevented from working and he still had his job at the time of trial. He had suffered from acid reflux for the past five years, and he believed that this condition had worsened while he awaited trial. There was no medical evidence to support this claim and he conceded "there was other stresses" that caused this condition and that "there's lots of things probably causing it". Finally, he testified that he "suffered a great deal of stress and anxiety with respect to this case being outstanding for so long". The main cause of this stress was that he needs his driver's license to work and so he was concerned about the "uncertainty relating to the possible outcome of this case and its implications for my continued employment and income".

125 The trial judge's reasons concerning the issue of prejudice are as follows:

"If I am reading the older cases correctly, there is no need to prove prejudice, it is to be presumed. But when there is unusual or exceptional prejudice to be relied upon, that would require an evidentiary basis. Now, Mr. Davidson, it is true as [the Crown] says, comes to this situation which I think all would agree a prosecution is stressful, it results in loss of employment and days of work missed with some sort of a gastrointestinal problem. It predates the matter, but I guess that is a two edged sword in that perhaps he comes to court as a bit of a frail or thin skull accused."

126 These reasons are far from clear. The suggestion that prejudice need not be proved, and can be presumed (or inferred) is only correct in the case of "a very long and unreasonable delay", that is, a delay that is "substantially longer than can be justified on any acceptable basis". See: *R. v. Askov*, *supra* at pp. 482-4; *R. v. Morin*, *supra* at pp.23-4; *R. v. Smith*, *supra* at p. 111.

127 There were no such delays in this case and so prejudice did have to be proved. On that point, the trial judge seemed to conclude, in agreement with the Crown, that much of the prejudice was due to the fact of the prosecution, with its attendant financial costs and uncertain outcome, and due to the fact of the pre-existing medical condition. Mr. Wright very fairly conceded that the trial judge "did not make clear or specific findings regarding the issue of prejudice, and so ... [it] may fairly be described as moderate". I agree with this concession.

128 Having found, at best, that the prejudice was moderate, the trial judge failed to take into consideration the actions of the accused that negated prejudice. In this regard, I am not concerned with his delays in retaining counsel. As set out above, it was understandable that an accused of modest means would first try to obtain Legal Aid and, when refused a certificate, would then need time to raise money for a private retainer. I do not agree with the Crown that these delays somehow infer that Davidson was not anxious to proceed with his trial. It simply means that neutral weight attaches to these periods of delay, as noted above.

129 The same cannot be said concerning defence counsel's repeated refusals to set a date for trial, while awaiting the revised toxicologist's report. At this stage, Mr. Steinberg was claiming to be concerned about delay and yet his conduct belies any such concern. It must be assumed that defence counsel took these steps, adding to the delays for no good reason, with the assent of his client. The trial judge erred in failing to take this conduct by the defence into account, as it further diminished the moderate prejudice alleged.

(vi) Conclusion

130 In conclusion, all three grounds of appeal raised by the Crown have merit. The eight month total period of unjustified delay was not lengthy, the systemic delay was under the *Morin* guideline, and prejudice to the accused's s. 11(b) interests was modest at best. In all these circumstances there was no basis for finding a s. 11 (b) violation.

131 The appeal is allowed, the stay of proceedings is set aside, and a new trial is ordered. The accused must appear at the Old City Hall Court on the date thirty days from the release of these reasons.

F. THE SHELSON CASE

132 The last of these four appeals is arguably the most straightforward. The accused Jamie Shelson (hereinafter, Shelson) was charged with "over 80", contrary to s. 253(1) of the *Criminal Code*. He was released from the police station without any bail conditions. On December 9, 2010, Cole J. found a violation of s. 11(b) of the *Charter* and stayed the proceedings. The Crown appeals and seeks to set aside the stay.

(i) History of the Proceedings

133 The history of the proceedings can be summarized as follows:

- * November 10, 2009: the charge was laid. The accused had been arrested two weeks earlier, on October 25, 2009. His promise to appear was returnable six weeks later;
- * December 4, 2009: counsel appeared for the accused and filed a designation with the Court. The Crown provided initial disclosure. Counsel requested an adjournment until January 15, 2010, presumably to review the initial disclosure and to make any follow-up requests for further disclosure;
- * January 15, 2010: counsel again appeared for the accused, pursuant to the designation. The Crown provided further disclosure that the defence had requested. Counsel asked for an adjournment to February 12, 2010, in order to review the further disclosure and to hold a pre-trial meeting with the Crown. That meeting was held on February 2, 2010;
- * February 12, 2010: the parties were now ready to set a date for trial. Defence counsel instructed an agent to appear, pursuant to the designation. The agent advised the Court that she had attended on the Trial Coordinator and sought "a trial date for four hours". She further advised that "the first date offered we accepted" and that date was December 9, 2010. Finally, she advised that "counsel provided me with availability commencing June 10 and then each and every month following". The trial date was set, as well as an earlier confirmation date, as there was disclosure of one officer's notes that was still outstanding;
- * October 5, 2010: Weinper J. was presiding on the confirmation date. Once again, counsel appeared pursuant to the designation. Weinper J. confirmed that all outstanding disclosure had been provided, that counsel was properly retained for trial, and that there was no prospect of resolution. The trial date was confirmed;

- * December 9, 2010: Cole J. was presiding on the trial date. The s. 11(b) Motion had been filed in writing, prior to the trial date. The trial judge heard the Motion and granted the stay of proceedings in what must have been a brief hearing. The entire transcript of proceedings is fourteen pages.

(ii) Overview of the issues and grounds of appeal

134 Defence counsel and the trial judge described the overall delay in this case as thirteen and one half months because they began counting from the date of arrest rather than from the date of charge. This was a minor and insignificant error. See: *R. v. Kalanj, supra*. The accurate period of overall delay was twelve months and twenty-nine days.

135 I am prepared to assume that this period of overall delay merits some further s. 11(b) investigation in a routine drinking and driving case. The parties were agreed that it was not shortened by any periods of waiver.

136 In terms of the reasons for delay, the parties agreed, both at trial and on appeal, that the period of three months and two days, from November 10, 2009 to February 12, 2010, was neutral intake. The record is clear that the parties were engaged in traditional intake activities throughout this period, namely, providing and reviewing disclosure, making follow-up requests for further disclosure, holding a pre-trial meeting, and getting ready to set a date for trial. I agree with counsel's characterization of this initial period. The remaining period of delay, after the neutral intake, was nine months and twenty-seven days.

137 On this record, the only live issues on the s. 11(b) Motion were as follows: first, calculating the systemic delay between the set date appearance and the trial date; second, assessing any prejudice to the accused's s. 11(b) interests; and third, balancing the societal interest in a trial on the merits. Unfortunately, the trial judge never addressed these issues. In brief reasons, he began by referring to the Court of Appeal's decision in *R. v. Kovacs-Tatar, supra*, where his own decision on a s. 11(b) Motion had been reversed. He then stated the following:

But the Court of Appeal did not criticize me, as I read their reasons, for making the general point that the 11(b) motion is one of the few ways that judges have to control delay.

He went on to state that "I am aware of cases in which judges of this Court ... have issued stays for uncomplicated summary conviction cases in lengths of this kind". He then concluded as follows:

Now I reiterate what I said in *Kovacs-Tatar*, if we cannot get an uncomplicated summary conviction matter on in less than a year then something is very seriously wrong. While I do not like to do it, I think matters should be dealt with on their merits, I will continue to do what other judges in this courthouse have done and that is to issue a stay. Thank you. No blame attached to anybody here. It is purely institutional.

138 The Crown alleges broadly in its Notice of Appeal that "the learned trial judge erred by failing to correctly analyze this case in accordance with the relevant established jurisprudence". More specifically, the Crown raises three grounds of appeal: first, the trial judge did not make findings as to the actual period of institutional delay in this case, and never applied the *Morin* guideline for in-

stitutional delay, but instead applied a personal limitation period of "less than a year" for getting "an uncomplicated summary conviction matter" to trial; second, the trial judge did not make findings as to prejudice; and third, the trial judge did not balance the societal interest in a trial on the merits.

(iii) The period of institutional delay in this case

139 The parties agreed, on the Motion at trial and on appeal, that the entire period of nine months and twenty-seven days, between the set date appearance and the trial date, was institutional delay. They also agreed that this period was within the *Morin* guideline.

140 As discussed above in the Lahiry appeal, this is not a correct approach to the calculation of systemic delay. On the s. 11(b) Motion record, filed before the trial judge, defence counsel's agent stated that "counsel provided me with availability commencing June 10". On this record, the period of systemic delay was from June 10 to December 9, 2010, that is, just under six months.

141 When I raised this issue at the hearing of the appeal, Mr. Virk advised that his agent had actually misstated his position. He produced his instructing email to his agent which states:

"Please protect the record regarding 11(b) and advise (after you have obtained a date) that I had availability as early as next month."

The email goes on to set out a list of dates on which Mr. Virk was "NOT available" (and he capitalized the word NOT), beginning June 10. It is apparent that Mr. Virk's agent misapprehended these instructions. Mr. Mitchell, counsel for the Crown on appeal, very fairly agreed that Mr. Virk's email should be admitted on the appeal even though it did not strictly meet the test for "fresh evidence". See: *R. v. Palmer and Palmer* (1980), 50 C.C.C. (2d) 193 (S.C.C.); *R. v. C.(R.)* (1989), 47 C.C.C. (3d) 84 (Ont. C.A.).

142 This issue could and should have been clarified before the trial judge. Nevertheless, it is more important to have an accurate record of the facts that ground the *Charter* Motion and so I admitted the email on appeal. I also allowed Mr. Virk to clarify what he meant by stating "I had availability as early as next month". Mr. Virk agreed that he should have been more precise in his instructions on this point. He simply meant to convey to the Court that the case would require about a month, before he was ready for trial, and that he had dates available in March to try the case.

143 I accept Mr. Virk's clarification. On this record, one month should be characterized as part of the inherent time requirements of the case as counsel needed this time to prepare and to find an available date in his calendar. The remaining eight months and twenty-seven days is the period of systemic delay. It is well within the eight to ten month *Morin* guideline for institutional delay.

144 I agree with the Crown that the trial judge never made a finding as to the actual period of institutional delay in this case and he never applied the *Morin* guideline for institutional delay. In addition, he never made any findings concerning the neutral intake period. Instead, he looked at the overall period of delay and concluded that it was too long. At the beginning of the hearing, having read the s. 11(b) Motion record, he stated the issue as follows:

And what I am being asked to do is, basically, to adjudicate on whether or not 13 1/2 months, whatever way you cut it, 13 1/2 months is an appropriate period of delay for a standard, uncomplicated case.

He applied this same approach at the conclusion of his Reasons, stating that "an uncomplicated summary conviction matter" should come to trial "in less than a year" and so he was issuing a stay.

145 With respect, this is not a correct approach to s. 11(b) analysis. The third factor in the framework that emerges from the *Smith*, *Askov* and *Morin* trilogy requires the Court to assess the causes of delay and to assign weight to individual periods of delay. It is only unjustified periods of delay that carry any weight in the s. 11(b) analysis. The fact that thirteen months of overall delay exceeded the trial judge's personal limitation period of one year for simple summary conviction matters is legally irrelevant. In this case, the first three months and two days of delay was beneficial to the parties. They needed this time to carry out a number of preparatory tasks before they were ready to set a date for trial. This period of delay carried no weight in the s. 11(b) analysis. Furthermore, the period of systemic delay in this case, however it was calculated, was within the *Morin* guideline. A stay of proceedings could only be justified in such a case if there was some significant prejudice to s. 11(b) interests. This leads to the next ground of appeal.

(iv) Prejudice to the accused's s. 11(b) interests

146 Both parties on the appeal agree that the trial judge never made any findings on the issue of prejudice. In addition, Mr. Virk makes a number of important and accurate concessions in relation to this factor.

147 First, he concedes that the s. 11(b) Motion depended on proof of actual prejudice because the only unjustified period of delay - the systemic delay - was within the *Morin* guideline. Prejudice could not be inferred as this was not "a very long and unreasonable delay", as required by the authorities on inferred prejudice. Second, he concedes that the actual prejudice had to be sufficient to justify shortening the *Morin* guideline. Otherwise, the Motion would fail because systemic delay within the guideline, standing alone, could not justify a finding that s. 11(b) had been violated. Finally, he conceded that there was no prejudice to the accused's liberty interests or fair trial interests. Shelson was released on a promise to appear with no bail conditions. He never appeared in court, prior to the trial date. His affidavit, filed on the s. 11(b) Motion, raised a concern that his own "memory of events is fading", in particular, his memory as to "the amount of alcohol I had consumed on the date that I was charged", as well as his interactions "with the police throughout the night". The Crown argued persuasively that these matters would have been covered in Shelson's initial interview with counsel and that the notes of that interview could be used to refresh memory. Mr. Virk did not disagree with the Crown on this point and he did not assert any prejudice to fair trial interests.

148 Accordingly, this factor turned on prejudice to Shelson's security of the person. His affidavit asserted that he "experienced a great deal of stress and anxiety having concerns about the outcome of this case". He stated that he "worried about the possible consequences that a criminal conviction would have on my future and my ability to work and to be employed." More specifically, he worried that "I will lose my job", given that he was "required ... to drive as part of my work". Crown counsel submitted that these forms of stress and anxiety are due to the fact of being charged and prosecuted and that they were common to any drinking and driving case. In an exchange with counsel, during submissions on the Motion, the trial judge appeared to agree with the Crown on this point. Mr. Virk fairly conceded, on appeal, that some of the stress suffered by Shelson was due to the fact of being charged.

149 The real focus of the accused's claim of prejudice was on a medical issue. The trial judge appeared to agree, in the same exchange with counsel, that this was the one aspect of the affidavit that was a potential cause for concern. The accused's affidavit stated the following on this point:

"I have been unable to sleep well. I went to see my doctor as a result, and was prescribed Zopiclone, a drug prescribed for insomnia. The doctor also prescribed Melatonin, another medication to assist with sleeping. I have been taking the medication for a number of months now and its use has intensified over time."

150 The trial judge never made any findings on this issue. There is no supporting medical evidence. It is therefore difficult to determine how severe Shelson's insomnia was or how significant the medication was, in comparison to mild forms of insomnia and common forms of sleeping medication. The affidavit is also vague as to the timing of these developments. No date is given for the visit to the doctor and the number of months that he had been on the medication is not specified.

151 In all these circumstances, and given that the burden of proof is on the accused in relation to this issue, it cannot be said that there was any significant prejudice to his s. 11(b) interests. There was certainly no prejudice of the kind that would justify shortening the *Morin* guideline for systemic delay.

152 I agree with the Crown that the trial judge erred in failing to assess the factor of prejudice. As Mr. Virk concedes, this factor was critical to the s. 11(b) Motion in this case.

(v) Balancing societal interests in a trial on the merits

153 The trial judge did not engage in any balancing of the relevant s. 11(b) factors, including the societal interest in a trial on the merits. He simply concluded that the overall delay was too long and entered a stay.

154 This ground of appeal has been discussed above, in the context of the Carreira appeal. It also has merit in this case.

(vi) Conclusion

155 I am satisfied that all three grounds of appeal are well founded. The systemic delay of eight months and twenty-seven days, in a case where the prejudice to s. 11(b) interests was modest at best, could not support a finding that there had been a violation of the accused's right to trial within a reasonable time.

156 The appeal is allowed, the stay of proceedings is set aside, and a new trial is ordered. The accused must appear at the Metro West Court on the date thirty days from the release of these Reasons.

G. EPILOGUE

157 I should note, in concluding, that counsel for the Respondents on all four appeals submitted that the modern approach to unreasonable delay, and to the *Morin* guidelines, is to take a much "stricter" approach than was taken twenty years ago when *Morin* was decided. In principle, this could be an appealing argument, assuming I understand it. The *Morin* guideline for systemic delay, namely, eight to ten months for summary conviction matters, was developed in a time of crisis and it was hardly a model of expedition by any comparative standards, especially legislative standards in other free and democratic countries. The Court and the Attorney-General clearly hoped to do bet-

ter in the future. Assuming that contemporary data concerning growth in population, numbers of charges, numbers of judges and other relevant trends was taken into consideration, an argument could be made for reconsideration of the *Morin* guidelines.

158 However, one particular weakness in trying to advance this argument in these particular cases under appeal, is revealed by comparing them to *Morin's Case* itself. It will be remembered that Darlene Morin was charged with both impaired driving and "over 80". On the trial date, in early 1989, her counsel argued the s. 11(b) Motion unsuccessfully and then conducted the trial on the merits. The Crown called the arresting officer and the breathalyzer technician and filed one exhibit (the breathalyzer certificate of analysis). No defence evidence was called. The trial evidence was described as "brief, covering only thirty-eight pages of trial transcript". The entire case, including the s. 11(b) Motion, must have taken no more than an hour, or two hours at the most. See: *R. v. Morin* (1990), 55 C.C.C. (3d) 209 at pp. 217-218 (Ont. C.A.).

159 Modern drinking and driving trials, such as the cases under appeal, bear no resemblance to *Morin's Case*. In Lahiry, a full day was set aside for a one witness trial and Motion. In Davidson, two full days were set aside for the trial and a further half day was set aside for the Motion. In Carreira, four hours was scheduled for trial but then it expanded and ended up taking between two and three full days. Four hours was scheduled for the Shelson trial.

160 The Supreme Court of Canada was setting standards for short, efficient, high volume summary trials in *Morin's Case*. The four cases under appeal do not fit this description. There is a good argument that if different standards are to be imposed today, then they must take into account the fact that these trials are no longer short and simple ones like *Morin's Case*. It should also be noted that what counsel refer to as "strict" enforcement of the *Morin* guideline seems to mean that whenever systemic delays exceed eight months there should generally be a stay of proceedings, even in cases like these appeals where there is little prejudice, and irregardless of any societal interest in a trial on the merits. This kind of approach, if I have understood it correctly, is not really a "strict" application of the *Morin* standards. Rather, it is a completely new and very simple approach that involves a significant re-writing of the more subtle and complex methodology that emerged out of the *Smith*, *Askov*, and *Morin* trilogy some twenty years ago.

161 I did not find it necessary to decide the issue of whether the *Morin* standards should be applied more "strictly" in today's environment. I simply note some of the potential flaws in this argument.

162 I wish to thank all counsel on these appeals for the thorough, efficient and effective way in which the cases were argued. Their advocacy exhibited very high standards of professionalism.

M.A. CODE J.