

residence and saw him sitting in his chair. They did not know whether he was asleep or dead. They discovered, of course, that he had been shamming, that he had done this for the purpose of getting sympathy from his girl-friend.

Section 98(1) of the *Criminal Code* provides in part:

98(1) Where a person is convicted of an indictable offence in the commission of which violence against a person is used, threatened or attempted and for which the offender may be sentenced to imprisonment for ten years or more or of an offence under section 83...

The section goes on to provide that in those circumstances the court, in addition to sentencing the offender, shall make an order prohibiting the offender from having in his possession a firearm or any other matter or item referred to in the section for a period of time not less than five years and not exceeding 10 years.

Section 98(2) provides that where a person is convicted of certain offences

... other than an offence referred to in subsection (1), in the commission of which violence against a person was used, threatened or attempted, the court, judge, justice or magistrate, as the case may be, may...

impose a prohibition order.

The position of the Crown is that the phrase "a person" in s. 98(1) includes a person such as Vandermeulen in this particular case. I disagree. I think that the phrase "a person" relates to some person other than the accused. Accordingly, I would grant leave to appeal, but dismiss the appeal.

MACFARLANE J.A.:—I agree.

CHEFFINS J.A.:—I agree.

CRAIG J.A.:—Leave is granted, but the appeal is dismissed.

Appeal dismissed.

RAHEY v. THE QUEEN

Supreme Court of Canada, Dickson C.J.C., Beetz, Estey, McIntyre, Chouinard, Lamer, Wilson, Le Dain and La Forest JJ. May 14, 1987.*

Constitutional law — Charter of Rights — Enforcement of rights — Court of competent jurisdiction — Accused alleging that right to trial within reasonable time infringed — Allegation that infringement result of 11 month delay by magistrate in delivering judgment on motion for directed verdict — In circumstances superior court court of competent jurisdiction — Accused may properly apply to superior court for remedy — Canadian Charter of Rights and Freedoms, ss. 11(b), 24.

Constitutional law — Charter of Rights — Trial within reasonable time — Department of National Revenue beginning investigation into accused's affairs in 1978 — Accused's tax liability reassessed and charges of income tax evasion laid in 1981 — Taking of evidence before magistrate commencing in March, 1982, and completed in November, 1982 — Magistrate then reserving for 11 months on application for directed verdict before dismissing application — Numerous adjournments during 11-month period — Accused's assets in hands of receiver pending completion of criminal proceedings — Accused's right to trial within reasonable time infringed by trial judge's delay in rendering judgment on directed verdict motion — Stay of proceedings appropriate remedy in circumstances — Factors to be considered in determining whether right to trial within reasonable time infringed — Canadian Charter of Rights and Freedoms, ss. 11(b), 24.

The accused was first investigated by members of the Department of National Revenue in 1978, at which time all of his books, records and documents were seized. In 1980, the accused's tax liability was reassessed and in 1981, the accused was placed in receivership by the Minister of National Revenue. In August, 1981, the accused was charged with tax evasion over a period of six years. Taking of evidence in the accused's case began before a magistrate in March, 1982, and after many adjournments was completed in November, 1982. In December, 1982, an application was brought by the accused for a directed verdict and this was adjourned for approximately one month. Over the ensuing 11 months the case was repeatedly adjourned for judgment on the application. Near the end of the 11-month period counsel for the accused wrote to the Crown requesting that the charges be withdrawn in view of the delay. The Crown applied for *mandamus* to compel the magistrate to render a decision and the accused then applied to the superior court to dismiss the charges on the basis that his right to trial within a reasonable time had been infringed. The following day the magistrate rendered a short decision dismissing the accused's application for a directed verdict. A few days later the accused's application to the superior court was heard and the application was granted and the charges dismissed. The Crown then appealed to the Nova Scotia Supreme Court, Appellate Division and the appeal was allowed on the basis that the accused had not been able to show any prejudice by reason of the delay. On appeal by the accused to the Supreme Court of Canada, held, the appeal should be allowed and a stay of proceedings ordered.

Court of competent jurisdiction

Per Lamer J., Dickson C.J.C., Beetz, Estey, Wilson and Le Dain JJ. concurring:

*Chouinard J. took no part in the judgment.

An *general rule* in an extant case the trial court is a court of competent jurisdiction for the purposes of s. 24(1) of the *Canadian Charter of Rights and Freedoms*. However, the superior court should also have constant, complete and concurrent jurisdiction for a s. 24(1) application and while the superior court should decline to exercise this discretionary jurisdiction unless, in the opinion of the superior court and given the nature of the violation or any other circumstance it is more suited than the trial court to assess and grant a remedy that is just and appropriate; this was clearly a case where the superior court should exercise jurisdiction. In this case, although the trial court was a court of competent jurisdiction it would be preferable that the matter be dealt with by the superior court since the delay in trying the accused which is being challenged as unreasonable is the result of the trial judge's own inaction for 11 months while deliberating on the motion for a directed verdict.

Per La Forest J., McIntyre J. concurring. While as much as possible issues of unreasonable delay should be dealt with by the trial judge there must at all times be a court of competent jurisdiction to which resort can be had to determine whether an accused's constitutional right to be tried within a reasonable time has been infringed. Whenever there is no other court seised with the proceedings or where the court so seised is unable to provide an effective remedy then the superior court may exercise jurisdiction. This was clearly such a case since the complaint of unreasonable delay was directed at the delay of the trial judge himself so that his capacity to consider what remedy was appropriate and just in the circumstances was obviously impaired. While in most cases where the superior court does exercise jurisdiction it should confine its jurisdiction to remedying the existing delays and not attempting to remedy past delays, in exceptional cases the nature of the delay will be such as to call for an end to the proceedings. In such a case the trial judge's involvement in the delay may make it inappropriate for him to deal with the matter and it would thus be not only proper but essential for the superior court to grant a remedy if the rights guaranteed by the Charter are to be fully protected. In this case, the superior court judge quite properly exercised her discretion to grant a remedy under s. 24(1) notwithstanding the fact that the delay complained of was no longer ongoing since the judge had rendered a judgment on the application for a directed verdict.

Unreasonable delay: factors to be considered

Per Lamer J., Dickson C.J.C. concurring. The test of reasonableness under s. 11(b) of the Charter involves a balancing of the inherent impairment of the accused's interests as of the moment he was charged, from the very fact of being prosecuted, such impairment becoming increasingly pronounced with the passage of time, against three other factors: (1) waiver of time periods, (2) time requirements inherent in the nature of the case, and (3) limitation to institutional resources. The accused need not show actual impairment to render s. 11(b) operative. While prejudice underlies the right under s. 11(b) actual prejudice need not be, indeed is not, relevant to establishing a violation of s. 11(b). There exists an irrebuttable presumption that as of the moment of the charge, the accused suffers a prejudice that the guarantee in s. 11(b) is aimed at limiting and that the prejudice increases over time. The accused's ability to mount a full and fair defence was not relevant to a determination of whether there had elapsed an unreasonable period of time. Such a factor is to be considered in determining whether an accused's right to a fair trial as guaranteed by s. 11(d) has been violated but not whether a s. 11(b) violation has taken place. Prejudice is, however, a factor to be considered when determining whether a remedy additional to a stay of proceedings should be

granted where there has been a violation of s. 11(b). Since s. 11(b) protects an accused against over-long subjection to a pending criminal case and aims to relieve against the stress and anxiety which would continue until the outcome of that case the time-period to be considered runs until the completion of the case with the determination of guilt or innocence. In this case the 11 month delay while the application for a directed verdict was pending was unreasonable and where as here challenged under the Charter, must be explained. In this case no explanation was offered. While waiver of time-periods by the accused may be a factor in determining whether a delay is unreasonable it could not be said that in the circumstances of this case the accused's consent to the many adjournments requested by the trial judge was an unequivocal waiver. Acquiescence to a delay that is requested by the judge in whose hands the fate of a motion for a directed verdict lies must be assessed differently than acquiescence to those delays and proceedings that are made at the request of the Crown. When the unjustified 11-month delay is inserted into the over all period of time from when the accused was charged his rights under s. 11(b) have clearly been infringed.

Per Wilson J., Estey J. concurring. In determining whether or not the delay in disposing of charges against the accused was reasonable prejudice to the accused resulting from the delay is very relevant. If the passage of time has prejudiced the accused in his ability to make full answer and defence to the charges brought against him, as was found by the superior court judge in this case, then there was no reason to exclude this from consideration in determining whether or not the delay was reasonable. While such prejudice may also be relevant in considering a violation of s. 11(d) this does not preclude its consideration under s. 11(b). In this case there was evidence before the court upon which the superior court judge could properly have found an impairment of the accused's liberty and security interests arising specifically from the delay in disposing of the charges against him. So long as *viva voce* testimony played a fairly central role in the case it was open to a judge to infer that the passage of time will dull memories, particularly where, as in this case, the events are routine bookkeeping transactions which occurred 10 years earlier. It was enough that the accused could demonstrate that *viva voce* testimony was an important element in the case. It was then open to him to buttress this claim by leading evidence as to the ordinary and unmemorable nature of the events that witnesses were being asked to recall and the over all time span that they covered. The accused's liberty and security interests were also impaired by the receivership. The accused had shown a direct causal link between the delay in the criminal proceedings and the ongoing receivership. Finally, in the context of judge-generated delay it is unfair to deem waiver on the basis of a consent to the judge's adjournment of the case as opposed to a consent to a Crown request for an adjournment. In general, the defence is in a very delicate position when it comes to complaining about the conduct of a trial and waiver should not be deemed to have occurred where counsel has consented to judge generated adjournment.

Per Le Dain J., Beetz J. concurring. The factors to be considered and weighed in determining whether there has been an infringement of the right to be tried within a reasonable time are: (a) whether the delay complained of is *prima facie* unreasonable having regard to the inherent time requirements of the particular case; (b) the reasons or responsibility for the delay, having regard to the conduct of the prosecution and the accused including the question of failure to object or waiver, as well as the conduct of the court and any responsibility which may be reasonably assigned to the unacceptable inadequacy of institutional resources; (c) the prejudice caused to the accused by a particular delay. Prejudice caused by delay to an

accused's right to a fair trial and in particular his right to full answer and defence is a relevant consideration in determining whether there has been an infringement of the right to be tried within a reasonable time. Although it is not essential to such a determination it is a factor which, if established, is entitled to particular weight. Where, as in this case, the issues turn to some significant extent on testimony such prejudice may be inferred from the lapse of an unreasonable period of time. However, the effect of the delay in this case on the accused's business, because of the possible relationship between the criminal proceedings and the receivership, was not a factor or circumstance to be taken into account. The assessment of the prejudice caused to the accused's security interests should not take the particular circumstances of an accused into consideration.

Per La Forest J., McIntyre J. concurring: Section 11(b) of the Charter does not merely guarantee a right to be brought to trial within a reasonable time, it guarantees a right which extends to the trial itself and ensures that a decision is rendered promptly. It therefore clearly encompasses the conduct of a judge in rendering a decision. To the extent that the lapse of time between the laying of the charge and the rendering of judgment is genuinely unavoidable and can be said to arise purely from the fact of the charge then there can be no question of unreasonable delay. The principal interests of the accused relevant to trial within a reasonable time are the liberty interests which may be impaired either by imprisonment or by bail conditions; the security interests, which as a general rule are impaired by the anxiety, stress and stigmatization arising out of the delay which in this case included the seizure of the accused's assets; the fair trial interest which may be impaired in this context to the extent that delay foreseeably damages the ability to present an effective defence. In this case, the security interests of the accused were substantially impaired and as found by the superior court judge the trial judge's delay had also seriously prejudiced the accused's ability to conduct his defence. There is, however, no requirement that the accused prove actual prejudice to his defence in order to establish that the delay he faced was unreasonable. While prejudice to the right of the accused to a fair trial may help to justify the claim under s. 11(b) it cannot be regarded as essential to it. The impairment of these interests must in making a determination of reasonableness be balanced against any proper reasons for delay advanced by the Crown. In this case, no reasons were advanced and the only justification that could possibly be advanced for the delay was the consent of the accused. Any consent, however, must be clear and unequivocal and fully informed. Silence on the part of the accused in the face of delay cannot automatically be taken as consent to it. Given that the delay in this case is caused by the judge himself the consent of the accused to the request for adjournments was largely *pro forma*. The accused could not reasonably have refused and demanded an immediate decision.

Unreasonable delay: appropriate remedy

Per Lamer J., Dickson C.J.C., Estey and Wilson J.J. concurring: Inherent in the constitutional right to be tried within a reasonable time is the right not to be tried beyond that point in time and thereafter no court has jurisdiction to try the accused or order that he be tried in violation of that right. After the passage of an unreasonable period of time no trial, not even the fairest possible trial, is permissible. While it is open to the courts to take preventative measures based on their inherent power to control the process prior to an actual violation of s. 11(b), where on balancing the various factors the court determines that the accused's right to be tried within a reasonable time has already been contravened, a stay of proceedings will be the appropriate minimum remedy. It is not necessarily the only remedy and

it may be that in certain cases dismissal of the charges is appropriate. Where, however, an accused chooses, as in this case, to challenge the process before the end of the trial under s. 11(b) of the Charter he then elects to put a definitive but premature end to the process instead of a final determination on the issue of guilt or innocence and in such case the proper remedy is a stay of proceedings. Accordingly, the appeal should be allowed and the proceedings stayed.

Per Le Dain J., Beetz J. concurring: A stay of proceedings is the appropriate and just remedy for an infringement of the right to be tried within a reasonable time. This is not because a breach of s. 11(b) is properly characterized as a jurisdictional defect but simply because some other remedy such as an order to expedite the proceedings, that would compel the trial of an accused beyond a reasonable time, cannot be regarded as appropriate and just.

Per La Forest J., McIntyre J. concurring: There cannot be any single remedy for an accused whose trial has not been held within a reasonable time. Reasonableness is a flexible concept and a delay may be more or less unreasonable having regard to all the circumstances requiring that the remedy be adjusted accordingly. Section 24(1) of the Charter requires the court to provide a remedy for delay that is appropriate and just in the circumstances. That mandate is consistent with the notion that in a criminal context there can only be one remedy for a breach of s. 11(b). That a stay of proceedings is the only remedy which is appropriate stems from the concept that unreasonable delay raises a jurisdictional question, but this approach has previously been rejected. What is an appropriate remedy in the circumstances must be determined having regard to the interests protected by s. 11(b). Often the most obvious remedy would be to expedite the proceedings. In selecting a remedy the reviewing court should bear in mind such factors as the length and nature of the delay, seriousness of the offence with which the accused is charged, the nature of the injuries suffered by the accused and any prejudice to the accused's defence inherent in the delay. In this case the offence while serious was not one involving the safety of the public. As well, the fact that the accused's business was under seizure throughout the proceedings imposed a far greater burden on him than on most accused. In this case the trial judge's conduct amounted to a breach of s. 11(b). The delay was described by the courts below as shocking for which there was no adequate explanation. In the circumstances, although the court should not generally resort to a stay of proceedings as a means of combatting delay there are cases where this is the proper course and this was one of those cases. Accordingly, the appeal should be allowed and a stay of proceedings ordered.

Mills v. The Queen (1986), 26 C.C.C. (3d) 481, 29 D.L.R. (4th) 161, [1986] 1 S.C.R. 863, 52 C.R. (3d) 1, 47 N.R. 241, 21 C.R.R. 76; *Barker v. Wingo* (1972), 407 U.S. 514; *Strunk v. United States* (1973), 412 U.S. 431, *disc'd*

Duncan v. Louisiana (1968), 391 U.S. 145; *Re Regina and Benson* (1983), 7 C.C.C. (3d) 20, 1 D.L.R. (4th) 218, 43 O.R. (2d) 65, 36 C.R. (3d) 73, 7 C.R.R. 65, *cons'd*

Other cases referred to

Dickey v. Florida (1970), 398 U.S. 30; *United States v. Lovell* (1966), 383 U.S. 116; *Klopfer v. North Carolina* (1967), 386 U.S. 213; *R. v. Antoine* (1983), 5 C.C.C. (3d) 97, 148 D.L.R. (3d) 149, 41 O.R. (2d) 607, 31 C.R. (3d) 136, 1 C.R.R. 126; *R. v. Heaslip et al.* (1983), 9 C.C.C. (3d) 480, 36 C.R. (3d) 309, 1 C.R.R. 251; *R. v. Jewitt* (1986), 21 C.C.C. (3d) 7, 20 D.L.R. (4th) 651, [1986] 2 C.R. 128, 47 C.R.

(3d) 103, [1986] 6 W.W.R. 127, 61 N.R. 169; *R. v. Cameron* (1982), 70 C.C.C. (2d) 632, 29 C.R. (3d) 73, [1982] 6 W.W.R. 270, 22 Alta. L.R. (2d) 1, 39 A.R. 194, 1 C.R.R. 289; aff'd 3 C.C.C. (3d) 496, 31 C.R. (3d) 287, [1983] 2 W.W.R. 671, 6 C.R.R. 37; *United States v. Loud Hawk* (1986), 106 S. Ct. 648; *United States v. MacDonald* (1982), 466 U.S. 1; *United States v. Ewell* (1966), 383 U.S. 116; *Smith v. Hooey* (1969), 393 U.S. 374, *R. v. Robins* (1844), 1 Cox C.C. 114; *Moore v. Arizona* (1973), 414 U.S. 25.

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(b), (d), 24
Criminal Code, ss. 606(1)(a) (am. 1985, c. 19, c. 137(1)), 738(1) (rep. & sub. 1974-75-76, c. 93, s. 87(1))
Habeas Corpus Act, 1679 (U.K.), c. 2
Income Tax Act, R.S.C. 1962, c. 148 (am. 1970-71-72, c. 63), s. 239 (am. 1980-81-82-83, c. 163, s. 68)
Liberty of the Subject Act, U.S.N.S. 1967, c. 164

Treaties and conventions referred to

European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222

APPEAL by the accused from a judgment of the Nova Scotia Supreme Court, Appellate Division, 13 C.C.C. (3d) 297, 63 N.S.R. (2d) 276, 11 C.R.R. 272, allowing an appeal by the Crown from a judgment of Glube C.J.T.D., 9 C.C.C. (3d) 385, 61 N.S.R. (2d) 385, allowing an application by the accused to dismiss the charges of tax evasion and making false or deceptive returns contrary to s. 239 of the *Income Tax Act* (Can.).

J.E. Fichaud, for accused, appellant.

E. Bowie, Q.C., and *D. Richard*, for the Crown, respondent.

DICKSON C.J.C. concurs with LAMER J.

BEETZ J. concurs with LE DAIN J.

ESTEY J. concurs in part with LAMER J. and concurs with WILSON J.

MCINTYRE J. concurs with LA FOREST J.

LAMER J.:— There are two issues that are raised in this appeal, namely, whether the Supreme Court of Nova Scotia was a court of competent jurisdiction for the purposes of an application pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms*, and whether the right of the appellant to be tried within a reasonable time, guaranteed by s. 11(b) of the Charter was infringed. As was decided in *Mills v. The Queen* (1986), 26 C.C.C. (3d) 481, 29 D.L.R. (4th) 161 [1986] 1 S.C.R. 863, the Supreme Court of Nova Scotia is a court of competent jurisdiction to grant a remedy under s. 24(1) of the Charter, and, given the circumstances of this case,

it quite properly chose to exercise that jurisdiction. Furthermore, given the criteria I advanced in *Mills*, I am of the view that the delay in this case was unreasonable and in violation of the appellant's rights under s. 11(b) of the Charter. I would therefore grant a stay of proceedings.

Facts

In May, 1978, the Minister of National Revenue commenced an investigation of the appellant for alleged contraventions of the *Income Tax Act*, R.S.C. 1952, c. 148, as amended. As a result of that investigation, the appellant was charged in September, 1981, under s. 239(1)(a) and (d) of the Act with six counts of making false or deceptive returns for the taxation years 1972-77 and one count of wilful evasion of taxes in the amount of \$129,665.22. On March 28, 1980, the appellant was reassessed under the Act for the years 1972-77. Notices of objection to the reassessment were filed by Mr. Rahey on June 20, 1980. The appeal was stayed by the Minister of National Revenue under s. 239(4) of the Act until the completion of the criminal proceedings. On January 9, 1981, on an application by the Minister of National Revenue to the Supreme Court of Nova Scotia, an order was granted placing all the property and assets of Mr. Rahey and his associated companies in the hands of a receiver, where it is my understanding they still remain.

The information was sworn against Mr. Rahey on August 10, 1981. In October of that year he pleaded not guilty to all counts. The trial began before Judge McIntyre, a provincial magistrate, in March, 1982. There were five adjournments during the proceedings and the Crown finally closed its case in November, 1982. There was then an adjournment until December 13, 1982, at which point the defence moved for a directed verdict. The proceedings were adjourned until January 21, 1983, for Judge McIntyre's decision. The following adjournments, which were initiated by Judge McIntyre for his decision on the defence's motion for a directed verdict, resulted in the delay which is the subject of the application by Mr. Rahey, as he argued that it constituted an unreasonable delay in his trial proceedings.

January 21, 1983 — adjourned to February 4;
 February 4, 1983 — adjourned to February 18;
 February 18, 1983 — adjourned to March 4;
 March 4, 1983 — adjourned to March 18;
 March 18, 1983 — adjourned to April 8;
 April 8, 1983 — adjourned to April 22;
 April 22, 1983 — adjourned to May 13;
 May 13, 1983 — adjourned to May 27;

May 27, 1983 -- adjourned to June 6;
 June 6, 1983 -- adjourned to June 17;
 June 17, 1983 -- adjourned to July 8;
 July 8, 1983 -- adjourned to July 22;
 July 22, 1983 -- adjourned to August 6;
 August 6, 1983 -- adjourned to August 19;
 September 2, 1983 -- adjourned to September 16.

On September 16, 1983, Crown counsel appeared before Judge McIntyre concerning the delay. Matters were then adjourned until September 30th, and thereafter postponed four more times:

September 30, 1983 -- adjourned to October 14;
 October 14, 1983 -- adjourned to October 28;
 October 28, 1983 -- adjourned to November 18;
 November 18, 1983 -- decision on motion, adjourned to December 9.

The appellant attended before the court on each of the dates listed above. In the autumn of 1983, defence counsel wrote Crown counsel requesting that he contact the judge and demand a decision. On September 16, 1983, Crown counsel appeared in court at which time Judge McIntyre stated that a written decision would be rendered by September 30th. On September 29th, the pre-arranged date for the 30th was cancelled and defence counsel again wrote Crown counsel alleging a violation of the appellant's constitutional rights and requesting that the Crown withdraw the charges against Mr. Rahey. On October 19th the request was repeated.

The Crown refused the request and on November 1, 1983, filed an originating notice for an order in the nature of *mandamus* to require Judge McIntyre to render his decision on the motion for a directed verdict. On November 14, 1983, Mr. Rahey made an application pursuant to s. 24(1) of the Charter for an order dismissing the charges against him. This application was based on an alleged violation of s. 11(b) of the Charter and was presented to the Supreme Court of Nova Scotia.

On November 15, 1983, and filed November 18, 1983, Judge McIntyre finally rendered a decision dismissing the motion for a directed verdict. After a brief review of the case, he concluded as follows: "The Court does find that adequate evidence has been adduced to require the accused to meet the charges preferred."

The appellant's only complaint is with the delay between December, 1982, and November, 1983, caused by Judge McIntyre's continuing failure to come to a decision.

Legislation

Although the appeal has its roots in the provisions of the

Income Tax Act, the only relevant legislation for the purposes of the disposition of this case is ss. 11(b) and 24(1) of the Charter.

11. Any person charged with an offence has the right

(b) to be tried within a reasonable time;

24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The judgments

Nova Scotia Supreme Court

Glube C.J.T.D. granted the application for an order dismissing the charges against Mr. Rahey: 9 C.C.C. (3d) 385, 61 N.S.R. (2d) 385, 133 A.P.R. 385.

She dealt first with the question of whether the Nova Scotia Supreme Court was a court of competent jurisdiction for the purposes of an application under s. 24(1) of the Charter. She recognized that generally the trial court, in this case the Provincial Court, would have jurisdiction for a s. 24(1) application. However, given the special circumstances of the situation, she concluded that it would have been inappropriate for Mr. Rahey to have brought his application before the Provincial Court judge [at p. 392 C.C.C.].

I find this is not an appropriate application to be heard by the provincial court, which obviously had jurisdiction. I agree that, generally, it is preferable for such applications to be made to the court hearing the matter but on the facts and circumstances of this case I find that this is a case of unusual or special circumstances, because of the delay in rendering the decision on the directed verdict, and it is appropriate before the Supreme Court of Nova Scotia. I find the court has jurisdiction.

Glube C.J.T.D. assessed the question of unreasonable delay in light of the four factors set out by Powell J. of the Supreme Court of the United States in *Barker v. Wingo* (1972), 407 U.S. 514, namely, the length of the delay, the reason for the delay, the assertion by the accused of his right and the prejudice to the accused.

Glube C.J.T.D. held that, given the nature of the decision the trial judge had been asked to make, his delay was "shocking, inordinate and unconscionable". In general, a decision on a motion for a directed verdict is a brief one and there was no justification in Judge McIntyre's decision for an 11-month delay in reaching his conclusion. She also found that the accused had adequately asserted his right. Finally, she held that the judge's delay had

Regardless of how it is phrased, the courts below have agreed that this delay was unreasonable. The Court of Appeal differed in result because it found that there was no evidence that the unreasonable delay caused prejudice to the accused.

In my reasons for judgment in *Mills*, I elaborated upon what I think should be the test for determining whether or not there has been an unreasonable delay under s. 11(b). I indicated that, in my opinion, the fundamental purpose of s. 11(b) is to secure, within a specific framework, the more extensive right to liberty and security of the person of which no one may be deprived except in accordance with the principles of fundamental justice. In my view, s. 11(b) is aimed at protecting, in a specific manner and setting, the rights set forth in s. 7 though, of course, the scope of s. 7 extends beyond those manifestations of the right to liberty and to security of the person which are found in s. 11(b).

Limitations on the liberty of the accused such as pre trial detention are easily and objectively ascertainable. However, the liberty interest of the accused may also be impaired by restrictions on the free movement of the individual imposed while he is released on bail.

As regards the security of the person, I am of the view that, in the context of s. 11(b), the concept of security of the person should not be restricted to physical integrity. Rather, it should encompass protection against "overlong" subjection to the vexations and vicissitudes of a pending criminal accusation". Anthony Amsterdam, "Speedy Criminal Trial: Rights and Remedies", 27 Stan. L. Rev. 525 at p. 533 (1975). These vexations and vicissitudes include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, and uncertainty as to the outcome and sanction.

In my view, such forms of prejudice leading to impairment of the security of the person may, in and of themselves, constitute a violation of s. 11(b) if allowed to fester over long.

To those aspects of the liberty and security interests, the American courts have added a third, the right to a full and fair defence in a criminal trial, long recognized in Anglo American case-law. In the case of *Barker v. Wingo*, *supra*, at p. 632, Mr. Justice Powell, on behalf of the United States Supreme Court, identified the three interests which the speedy trial right was designed to protect:

(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused, and (iii) to limit the possibility that the defence will be

impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

The defendant will be prejudiced, it is suggested, by delays which lead to the loss of defence evidence, the death or disappearance of key defence witnesses or other forms of impairment of the defence: *Dickey v. Florida* (1970), 398 U.S. 30 at p. 42; *United States v. Ewell* (1966), 383 U.S. 116 at p. 120.

Many Canadian courts, including the courts below in the present case, have suggested that this third factor, prejudice to the accused, be considered with the others in determining whether there has been a violation of s. 11(b). I am of the view, however, that such prejudice, which impairs the ability of the accused to mount a full and fair defence, goes to the fairness of the trial and is more properly related to the right to a fair trial than to the right to be tried within a reasonable time. Under our Charter, the two rights are conceptually distinct and are protected by different sections. Section 11(b) is designed to ensure that the trial occurs with minimal delay whereas ss. 7 and 11(d), among others, ensure that the trial itself is fair. The following comments, although on a separate issue, none the less well illustrate the distinction:

... s. 11(b) ensures only that a rapid judicial determination of formal charges will be achieved, whereas ss. 7 and 11(d) provide the overriding guarantee that the integrity of the entire process will always be a matter of prime concern for the court. [“Re Canadian Charter of Rights and Freedoms, s. 11(b): The Relevance of Pre Charge Delay in Assessing the Right to Trial Within a Reasonable Time”, *per* Graham Garton of the Federal Department of Justice, 46 Nfld. and P.E.I.R. 177 (1981), at p. 180.]

The distinction between the two rights is fundamental. The “fair hearing” and “fundamental justice” provisions of ss. 11(d) and 7 require that a wider and, to some extent, a different range of factors be considered in the analysis of the delay: the conduct of the Crown may be properly considered, timely assertion by the accused of his right and disclosure of the nature of the impairment thereto may be required, remedial relief will be more varied, and the length of time elapsed will generally be a less critical factor than under s. 11(b) and is to be considered in a different light, given the difference of purpose for so doing. Indeed, a trial might well be considered unfair because matters were brought to trial too fast.

The American approach identifies the interest in a fair and full defence as part of the rationale for the speedy trial right. This approach appears to be predicated upon the particular wording and structural features of the American Constitution, which differ

considerably from the Charter. Mr. Justice White wrote in *Duncan v. Louisiana* (1968), 391 U.S. 145 at pp. 148-9:

The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Powell v. Alabama*, 287 U.S. 46, 67 (1932), quoting from *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926), whether it is "basic in our system of jurisprudence," *In Re Oliver*, 333 U.S. 261, 273 (1948); and whether it is "a fundamental right, essential to a fair trial," *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964); *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

(Emphasis added.)

In *Klopfer v. North Carolina* (1967), 386 U.S. 213, the Supreme Court held that the Sixth Amendment right to a speedy trial extended to the states by reason of the Fourteenth Amendment due process clause. In so doing, however, the court further blurred concepts which, under the Canadian Charter, are quite distinct. The result in the United States is a combination of the liberty, security and defence interests under the mantle of the speedy trial guarantee. It is this very combination which has led to many of the difficulties faced by the American courts in elaborating the right and which is at the root of a number of the criticisms which have been directed against the landmark decision of *Barker v. Wingo*, *supra*; see for example, H. Richard Uviller, "Barker v. Wingo: Speedy Trial Gets a Fast Shuffle", 72 *Colum. L. Rev.* 1376 (1972); A. Amsterdam, *loc. cit.*

As a result of this analysis, although I am in substantial agreement that the test to be adopted is a balancing test, I differ with the American court on the elements which are to be considered and the factors which are to be weighed in that test. The reason why and the extent to which I disagree derive from the distinction between the Canadian Charter's separate and more thorough treatment of "the fair trial right" and the American situation.

In my view, our test of reasonableness involves a balancing of the inherent impairment of the accused's interest as of the moment he is charged from the very fact of being prosecuted, such impairment becoming increasingly pronounced with the passage of time, against three other factors: (1) waiver of time periods, (2) time requirements inherent in the nature of the case, and (3) limitations to institutional resources.

The interests of the accused which are protected by s. 11(b) have already been identified as the liberty and security of the person. With respect to the security of the person, I do not believe that actual impairment need be proven by the accused to render the section operative. An objective standard is the only realistic means through which the security interest of the accused may be protected under the section. Otherwise, each individual accused would have the burden of demonstrating that he or she has subjectively suffered a form of anxiety, stress or stigmatization as a result of the criminal charge. We are dealing largely with the impairment of mental well being, a matter which can only be established with considerable difficulty at considerable cost.

As Mr. Justice Brennan noted in *Dickey v. Florida*, *supra*, at p. 54:

... there is usually little chance of conclusively showing the harm sustained by an accused as a result of public accusation. One commentator has stated that "there is no way of proving the prejudice to the accused which occurs outside the courtroom ... the public suspicion, the severing of family and social ties, and the personal anxiety". Note, The Right to a Speedy Criminal Trial, 52 *Col. L. Rev.* 846, 864.

Neither should the varying degrees of sensitivity as between individual accused be the focus of the courts' analysis. A subjective approach would not only place a well nigh impossible burden of proof on most accused but might also lead to an unacceptable measure of inequality of treatment.

The proper approach, in my view, is to recognize that prejudice underlies the right, while recognizing at the same time that actual prejudice need not be, indeed is not, relevant to establishing a violation of s. 11(b).

This approach is predicated upon two propositions. First, prejudice is part of the rationale for the right and is assured by the very presence of s. 11(b) of the Charter. Consequently, there exists an irrebuttable presumption that, as of the moment of the charge, the accused suffers a prejudice the guarantee is aimed at limiting, and that the prejudice increases over time.

Secondly, subjective prejudice is irrelevant when determining unreasonable delay. That type of prejudice will, however, be relevant to a determination of appropriate relief.

Thus, I respectfully disagree with the courts below and, in my respectful view, whether Rahey's ability to mount a full and fair defence was or was not impaired is not relevant to a determination of whether there has elapsed an unreasonable period of time. It is a factor to consider when addressing a s. 11(b) violation, but not a

s. 11(b) violation. Prejudice is, however, as I have mentioned in *Mills*, a factor to be considered when deciding whether a remedy additional to a stay should be granted.

There is another issue to be addressed in this appeal. It was raised by the Court of Appeal but not decided because of their finding no prejudice to support a violation. It relates to the space of time to be considered. Indeed, the delay of which the appellant complains is not the delay between the time the charge was laid and the moment that the accused was brought to trial, but rather the amount of time that it took for the magistrate, during the trial and after a motion for a directed verdict, to render his decision on that motion. The question raised by the Court of Appeal is whether the right is protected and the goal of s. 11(b) achieved, if the trial commences within a reasonable time from the charge, even if it is thereafter adjourned on numerous occasions and is abnormally and unusually prolonged.

As I have already said here and in *Mills*, s. 11(b) protects against an over-long subjection to a pending criminal case and aims to relieve against the stress and anxiety which continue until the outcome of the case is final. The delay in the present case occurred prior to a determination of guilt or innocence and thus, while the case was pending, the appellant continued to be subjected to stress and anxiety. The appellant attended before the court whenever Judge McIntyre adjourned the proceedings and was put under the stress of 19 appearances in court, each one ending unsatisfactorily. To terminate the protection afforded by s. 11(b) as of the moment the trial is commenced without also considering as relevant the delay that may occur thereafter would be to disregard the purpose of that provision and would unduly emasculate the protection it was sought to afford. The stigma of being an accused does not end when the person is brought to trial but rather when the trial is at an end and the decision is rendered. The computation cannot end as of the moment the trial begins, but rather must continue until the end of the saga, all of which must be within a reasonable time.

In passing I should like to add the following comment. Although it may be argued that the appeal period and the time which it takes to finally determine an appeal may also be relevant in the calculation of s. 11(b) delays, that issue does not arise here nor was it raised by the courts below and it need not and should not be addressed at this time.

Having thus determined that a delay that has occurred after the beginning of the trial is part of the delay that is to be calculated

under s. 11(b), we must now determine whether the delay from the moment Rahey was charged with the offence until Judge McIntyre rendered his decision was unreasonable. The investigation into the affairs of the appellant was commenced in May, 1978. In September, 1981, the charges were laid against him. One month later, in October, 1981, he pleaded not guilty to the charges. The trial began 17 months later, in March, 1982. The Crown closed its case in November, 1982, and the motion for a directed verdict was pleaded on December 13, 1982. On November 15, 1983, only after a motion by Rahey for an order dismissing the charges against him because of an unreasonable delay in the proceedings, Judge McIntyre delivered his decision, dismissing the motion for a directed verdict and ordering that the trial continue. Thus, a further 11 month delay was added to the trial process.

The charges against the appellant were complicated and involved the making of false or deceptive tax returns over a period of six years. A lengthy pre-trial and trial process may, therefore, have been foreseeable. However, the 11 month delay was the result of inaction on the part of the trial judge when faced with a decision that generally is made within a few days. Glube C.J.T.D. called his delay "shocking, inordinate and unconscionable". The Court of Appeal referred to his "disgraceful slowness". In the words of s. 11(b), the delay is unreasonable and, if challenged under the Charter, it must be explained. Even if these 11 months are inserted into other explained or justifiable periods of delay, if the over-all period of time elapsed since the charge as a result of the delay is *prima facie* unreasonable, there is still a need for an explanation and none was offered.

The Crown argued that the delay in these proceedings "might have been obviated or ameliorated if [Rahey] had declined to consent to the numerous adjournments, or raised his concerns with the Crown or magistrate much earlier, or sought mandamus himself long before". The Crown added that "this weighs in the balance against him now".

As I indicated in *Mills*, waiver of time periods by the accused may be a factor in determining whether a delay is unreasonable. If an accused requests, causes or consents to a delay, it should normally be excluded from consideration when assessing reasonableness, but such waiver must be clear, unequivocal and informed. Furthermore, such waiver merely excludes the time that is waived from the calculation of a reasonable time and does not affect the right itself. Although Rahey did not consent to the

19 adjournments requested by Judge McIntyre, his behaviour is not, in my respectful view, an unequivocal waiver. Section 738(1) of the *Criminal Code* requires the consent of both parties if there is to be an adjournment of the trial for more than eight clear days. Rahey, wanting to be co-operative and surely not unmindful of the fact that the delay was at the request of the judge who was in the process of deliberating on a motion for a directed verdict, acquiesced to the adjournments, one by one. His numerous consents to extend the time for the decision by the judge resulted in a delay of 11 months. Had he been asked at the outset to do so, he probably would not have consented to wait 11 months for a decision on his motion, such decisions usually being made in a few days.

Acquiescence to a delay that is requested by the judge in whose hands the fate of a motion for a directed verdict lies must be assessed differently than acquiescence to those delays in proceedings that are made at the request of the Crown. It is not unlikely that an accused will consent to a short delay when the judge is deliberating on the motion for a directed verdict. That judge is in a position of authority and the accused would be well advised by counsel to extend to the judge every courtesy. Such behaviour, however, cannot be seen as a waiver for the entire 11-month delay. Throughout the trial Rahey acted in such a manner as to indicate his desire to speed up the trial. He signed written admissions of fact constituting 46 pages and his counsel, on numerous occasions, agreed to leading questions, accepted the authenticity of documentation, and waived objections. Had Rahey known at the outset that his consent would result in a delay of almost one year to present his evidence, he is unlikely to have been so forthcoming with his consent.

The time elapsed from the moment of the charge until the closing of the Crown's case was, though lengthy, not in violation of the accused's rights under s. 11(b) given "the time requirements inherent in the nature of the case". However, when the unjustified additional lapse of time caused thereafter by the trial judge is inserted into the over all period of time, this accused's rights under s. 11(b) have, in my respectful view, been clearly infringed.

Remedy

Now to turn to the remedy. Again in *Mills*, I have explained why a stay is the minimal remedy. If an accused has the constitutional right to be tried within a reasonable time, he has the right not to be tried beyond that point in time, and no court has juris-

diction to try him or order that he be tried in violation of that right. After the passage of an unreasonable period of time, no trial, not even the fairest possible trial is permissible. To allow a trial to proceed after such a finding would be to participate in a further violation of the Charter. In *Barker v. Wingo* (1972), 407 U.S. 514 at p. 522, Mr. Justice Powell wrote:

The amorphous quality of the right also leads to the unattractively severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only possible remedy.

Chief Justice Burger later wrote in *Strunk v. United States* (1973), 412 U.S. 434 at p. 440, "In light of the policies which underlie the right to a speedy trial, dismissal must remain, as [Powell J. in] *Barker* noted, 'the only possible remedy'". The same is true, in my view, under s. 11(b), in that a trial cannot be allowed to proceed subsequent to a finding that a violation has occurred.

I am also in substantial agreement, however, with the following passage of Martin J.A. in *Re Regina and Beason* (1983), 7 C.C.C. (3d) 20 at p. 43, 1 D.L.R. (4th) 218 at p. 241, 43 O.R. (2d) 65 (Ont. C.A.).

In my opinion there may well be cases where, balancing all the various factors . . . it will be apparent that the point is being approached, although it has not yet been reached, when any significant continuation of the delay in the trial of an accused person will result in an abridgment of his constitutional right to be tried within a reasonable time. In those circumstances the court, in the exercise of its inherent power to control its own process, may direct that the trial proceed at an early date and dismiss the charge if the Crown fails to proceed on that date.

It is, in other words, open to the courts to take preventive measures, based on their inherent power to control their process, prior to an actual violation of s. 11(b). Where, however, on balancing the various factors, the court decides that the accused's right to be tried within a reasonable time has already been contravened, a stay of proceedings will be the appropriate remedy. It is not necessarily the only remedy, for additional remedies may be just and appropriate in the circumstances of the case. The stay is a minimum remedy, to which others may be added, such as, possibly damages, if it be proved that there was malice on the part of the Crown and resulting prejudice.

Given Glube C.J.T.D.'s dismissal of the charges in this case, I think something should be added as regards acquitting an accused.

There will be cases where an accused will be entitled to more than a stay and where the appropriate remedy will be an acquittal. This point has not been raised in this court nor in any of the courts below and, in my view, as little as possible should be said on the point in this case. However, this much might be said. If an accused chooses, as in this case, to challenge the process before the end of the trial under s. 11(b) of the Charter, he or she then elects to put a definitive but premature end to the process instead of a final determination of the issue of guilt or innocence. In such a case, the proper remedy is, in my respectful view, a stay.

I would, therefore, allow this appeal and order that the proceedings against Rahey be stayed.

WILSON J.:—The facts of this case are fully set out in the reasons of my colleague, Mr. Justice Lamer, and I will not repeat them here.

I agree with my colleague and with Madam Justice Gibe, for the reasons given by them, that Madam Justice Gibe had jurisdiction to hear the s. 24(1) application and properly exercised her discretion in deciding to do so in the circumstances of this case.

I agree also with my colleague and with Madam Justice Gibe that the appellant's right to be tried within a reasonable time under s. 11(b) of the *Canadian Charter of Rights and Freedoms*, was infringed in this case. Madam Justice Gibe dismissed the charges against the appellant [9 C.C.C. (3d) 385, 61 N.S.R. (2d) 385, 133 A.P.R. 385] on the basis that dismissal was the appropriate remedy in this case but in so doing she assumed that she had the remedial flexibility to grant an order expediting the trial instead. I think she was wrong on this point. I agree with Lamer J. that a finding that s. 11(b) has been infringed goes to the jurisdiction of any court to put the accused on trial or to continue with the charges against him. For clarification of my position on this aspect I want to stress the following. An application for relief under s. 24(1) can only be made by a person whose right under s. 11(b) has been infringed. This is clear from the opening words of s. 24(1). The applicant must have satisfied the court that the reasonable time referred to in the section has already expired. If it has not already expired the accused may, of course, be entitled to claim other relief but not under s. 24(1) for a violation of s. 11(b). He may be able to claim in the alternative for relief outside s. 24(1), e.g., for an order expediting his trial, in case the court should find on his s. 24(1) application that the reasonable time has not yet expired but is fast approaching. But, in my view, what the

court cannot do is find that his right has been violated, i.e., that the reasonable time has already expired, and still press him on to trial. For to do so is to deprive him of his right under s. 11(b) in the pretext of granting him a remedy for its violation. It follows, therefore, that I cannot agree with my colleague, Mr. Justice La Forest, that there is a panoply of remedies available under s. 24(1) for the violation of s. 11(b).

Mr. Justice La Forest's conclusion in this regard seems to be based in part on the language of s. 24(1) to the effect that the applicant may apply to the court "to obtain such remedy as the court considers appropriate and just in the circumstances". My colleague, however, overlooks the fact that s. 24(1) is a provision of general application which may be invoked by anyone whose rights under any of the rights sections of the Charter have been violated. What is an appropriate remedy for a violation of one right may not be appropriate for the violation of another. Accordingly, s. 24(1) is necessarily expressed so as to confer on a court of competent jurisdiction a broad discretion as to remedies. The remedy or remedies, as the case may be, must be tailored to the particular right which has been violated. This does not mean, however, that all remedies are available for the violation of all rights. For the violation of some rights only one remedy may be available. For the violation of others a choice of remedies may be available. I believe that only one remedy — a stay of proceedings — is available under s. 24(1) where jurisdiction has been lost by the passage of an unreasonable period of time prior to the disposal of criminal charges against an accused.

The other factor relied upon by my colleague in support of a variety of remedies being available under s. 24(1) for violation of s. 11(b) in his view that the contours of the right under s. 11(b) are shaped by the available remedies under s. 24(1). I find it difficult to see how the broad and general language of s. 24(1) can provide any helpful guidance as to the content of the rights enumerated in the Charter. But even if my colleague's approach is correct, and I cannot think that it is, then it must be equally applicable to all other rights for the violation of which s. 24(1) affords a variety of remedies. Reference to the discretionary remedies available in order to determine whether there has been a rights violation will remove all certainty from the content of our fundamental rights and make it virtually impossible, except *ex post facto* when the matter comes before the court, to determine whether a violation has occurred or not. It should be added that the more uncertain the content of fundamental rights, the more difficult it is for prose-

editorial authorities to ensure that their actions accord with those rights. I do not doubt that more than one remedy may be available for the violation of some rights but the discretion of the court is confined to the remedy. It cannot, in my view, under any circumstances extend to the question of whether or not there has been a violation. That is not a matter of discretion; that is a matter of law as to which there can only be a yes or no answer. The answer cannot, in my opinion, be — maybe, depending on the appropriate remedy.

I pause here to emphasize that it is rights that are guaranteed under the Charter, not remedies. The content of those rights cannot, in my opinion, be determined by the procedural context. This would be to have the tail wag the dog. Remedies follow upon the violation of rights. It must first be determined that a violation has occurred before remedies are considered. It is the remedy which must be tailored to the right and not vice versa.

It will undoubtedly be difficult in some cases to decide whether a lapse of time in bringing an accused to trial has passed the reasonable mark or not. It is a question of degree and I agree with my colleague that all the circumstances of the case have to be considered by the court in making that determination. However, the courts are well accustomed to delineating the parameters of reasonableness. They decide, for example, whether real estate transactions have been closed within a reasonable time, whether physicians have taken reasonable care in treating their patients, whether the victims of tortious conduct have taken reasonable steps to mitigate their damages. They are, in my view, equally capable of deciding something much closer to home, namely, whether an accused has been brought to trial within a reasonable time. If he has, then there has been no violation of s. 11(b) and s. 24(1) has no application. If he has not, then the prerequisites for a remedy under s. 24(1) are met. But that remedy cannot, in my opinion, be an extension of time to proceed with the trial. For that would be to compound the violation.

Of course, we must be concerned, as my colleague points out, if someone who (it seems) might well be found guilty of the offence charged escapes his or her just deserts because of a violation of s. 11(b). But it is the answer to this to set the accused's rights at naught? Or is it, rather, to ensure the efficient working of the system? To pose the question is, I believe, to answer it.

I have already indicated that I agree with Lamer J. that the appellant in this case was not tried within a reasonable time. I have, however, a point of disagreement with my colleague which

appears from our respective reasons in *Mills v. The Queen* (1986), 26 C.C.C. (3d) 481, 29 D.L.R. (4th) 161, [1986] 1 S.C.R. 863. I believe that in assessing whether or not the delay in disposing of charges against an accused was reasonable or not, prejudice to the accused resulting from the delay is very relevant. I cannot accept a "water-tight compartment" approach to Charter rights. I believe that the same factors which are relevant and entitled to consideration in relation to an alleged violation of one right may also be relevant and entitled to consideration in relation to an alleged violation of another. To say otherwise may well be to deny an accused the full measure of protection which the right he asserts was intended to provide.

If the passage of time has prejudiced the appellant in his ability to make full answer and defence to the charges brought against him, and Madam Justice Gube found in this case that it had, I see no good reason to exclude this from consideration in deciding whether or not the delay was reasonable. I agree, however, with my colleague that it may also be relevant on an alleged violation of s. 11(d). But the one does not, in my opinion, preclude the other. The simple fact is that one of the direct consequences of delay may be prejudice to a fair trial. Prejudice to a fair trial may arise, of course, from other causes. It would be to return to the "forms of action" to say that you must choose between s. 11(b) and (d) in a case like the present because the factors relevant to each are mutually exclusive. This is too confining an approach for a constitutional document framed in broad and generous terms.

I believe that there was evidence before the court on which Madam Justice Gube could properly have found an impairment of the appellant's liberty and security interests arising specifically from the delay in disposing of the charges against him. I think that MacKeigan C.J.N.S. [13 C.C.C. (3d) 297, 63 N.S.R. (2d) 275, 11 C.R.R. 272] was in error in characterizing Gube C.J.T.D.'s decision [9 C.C.C. (3d) 385, 61 N.S.R. (2d) 385] in terms of a "presumption" of prejudice unsupported by any evidence [13 C.C.C. (3d) 297, 63 N.S.R. (2d) 275, 11 C.R.R. 272]. She did not, in my view, "presume" prejudice or impairment in the way suggested by my colleague, Lamer J. in *Mills*, *supra*. Rather she examined the transcript, found extensive *viva voce* testimony, noted that some of the events dated back to 1971, and that in many instances witnesses could not recollect details of the transactions, and then *inferred* that the appellant's ability to make full answer and defence had been impaired by the extra 11 eleven months' delay. It is true that if the appellant had been able to pinpoint the exact

manner in which his defence strategy was undermined by memory loss, the claim of prejudice would have been that much stronger. However, it seems to me that so long as *viva voce* testimony played a fairly central role in the case, it is open to a judge to infer that the passage of time will dull memories, particularly if, as in this case, the events are routine book-keeping transactions which occurred 10 years earlier. I do not believe that the appellant could be expected to produce subjective evidence of memory loss on the part of the witnesses. I think it should be sufficient for the judge, as Glube C.J.T.D. did in this case, to ascertain memory loss objectively or to infer it from the passage of time and that the burden on the appellant should be limited to demonstrating that *viva voce* testimony was an important element in the case. I think it was also open to the appellant to buttress this claim by leading evidence as to the ordinary and unmemorable nature of the events the witnesses were being asked to recall and the over-all time-span that they covered. This would seem to be relevant to the weight to be given to his claim of prejudice.

I agree with Madam Justice Glube that the accused's liberty and security interests were also impaired by the receivership. The appellant was reassessed by the Minister on March 28, 1980. He filed a notice of objection to that reassessment shortly thereafter. However, consideration of the reassessment and his objection was stayed under s. 239(4) of the *Income Tax Act*, 1970-71-72 (Can.), c. 63, which permits the Minister to do so where the same issue is the subject of a criminal prosecution. A court order placing the appellant's assets in receivership was then obtained pending the decision on the reassessment. Thus, delay in the criminal proceedings caused a corresponding delay in the appeal of the reassessment which in turn caused a delay in dissolving the receivership. In these circumstances, it seems to me, that the appellant succeeded in establishing a direct causal link between the delay in the criminal proceedings and the ongoing receivership. He was completely disabled from carrying on his business during this period. I see no reason why the civil impact of criminal proceedings cannot constitute prejudice to the accused resulting from delay under s. 11(b).

I wish to emphasize, however, the point I raised in my reasons in *Mills*, *supra*, namely, that the impairment or prejudice we are concerned with under s. 11(b) is the impairment or prejudice arising from the delay in processing or disposing of the charges against an accused and not the impairment or prejudice arising from the fact that he has been charged. The prejudice arising from

the fact of being charged with a criminal offence is suffered even where the accused is tried within a reasonable time. It is, so to speak, inherent in the system itself. I agree with Lamer J., however, that that prejudice must be kept to a minimum by a speedy disposition of the charges against the accused. If this is not done, then the degree of prejudice will exceed that which is the inevitable concomitant of the system and be directly attributable to the delay under s. 11(b).

A brief comment on waiver of delay. It would be my view that, in the context of judge-generated delay it is unfair to deem waiver on the basis of a consent to the presiding judge's adjournment of the case as opposed to a consent to a Crown request for an adjournment. It is obvious that in this case the defence was inhibited in filing for *mandamus* and I think that in general the defence is in a very delicate position when it comes to complaining about the conduct of a trial. Accordingly waiver should not, in my view, be deemed to have occurred where counsel has consented to a judge-generated adjournment and no such waiver should therefore be deemed to have occurred in this case.

I would allow the appeal, set aside the order of the Nova Scotia Court of Appeal, and order a stay of the proceedings against the appellant.

LE DAIN J.:—I would allow the appeal, set aside the judgment of the Court of Appeal, and order a stay of proceedings. I agree with my colleagues Lamer, Wilson and La Forest J.J., for the reasons given by them that the Supreme Court of Nova Scotia was, in this case, a court of competent jurisdiction within the meaning of s. 24(1) of the *Canadian Charter of Rights and Freedoms* and that the appellant did not waive the right, guaranteed by s. 11(b) of the Charter, to be tried within a reasonable time. As the reasons for judgment of my colleagues indicate, the principal questions on which there are differences of opinion on the factors to be considered and weighed in determining whether there has been an infringement of the right to be tried within a reasonable time, in particular, the extent to which prejudice is a relevant factor and the manner in which it is to be applied, and whether a stay of proceedings must be regarded as the appropriate and just remedy for an infringement of this right.

In my opinion, the factors to be considered and weighed in determining whether there has been an infringement of the right to be tried within a reasonable time may be summed up as follows: (a) whether the delay complained of is *prima facie* unreasonable,

having regard to the inherent time requirements of the particular case; (b) the reasons or responsibility for the delay, having regard to the conduct of the prosecution and the accused, including the failure to object or waiver, as well as the conduct of the court and any responsibility which may be reasonably assigned to the unacceptable inadequacy of institutional resources; and (c) the prejudice caused to the accused by a particular delay. I have found the general approach to the application of these factors by Martin J.A. in the judgments which he delivered on behalf of the Ontario Court of Appeal in *R. v. Antoine* (1983), 5 C.C.C. (3d) 97, 148 D.L.R. (3d) 149, 41 O.R. (2d) 607; *Re Regina and Beason* (1983), 7 C.C.C. (3d) 20, 1 D.L.R. (4th) 218, 43 O.R. (2d) 65, and *R. v. Heaslip* (1983), 9 C.C.C. (3d) 480, 36 C.R. (3d) 309, 7 C.R.R. 267; to be particularly illuminating and helpful.

With respect to prejudice, I agree with Wilson and La Forest J.J., for the reasons given by them, that prejudice caused by delay to an accused's right to a fair trial, and in particular to his right to full answer and defence, is a relevant consideration in determining whether there has been an infringement of the right to be tried within a reasonable time. Although it is not essential to such a determination it is a factor which, if established, is entitled to particular weight. Glube C.J.T.D. found there was such prejudice. The Court of Appeal disagreed with this finding on the ground that there was no evidence to support it. I agree with Wilson and La Forest J.J. that where the issues in a case may turn to some significant extent on testimony such prejudice may be inferred from the elapse of an unreasonable period of time. In the result, I share their view that such prejudice was sufficiently established in the present case to be a relevant factor in the determination whether there had been an infringement of the right to be tried within a reasonable time.

With great respect, I do not share the view, however, that the effect of the delay in this case on the accused's business, because of the possible relationship between the criminal law process and the receivership, is a factor or circumstance to be taken into account and given particular weight in weighing the prejudice caused by the delay. The assessment of the prejudice caused to what have been referred to as the security interests of an accused should not take the particular circumstances of an accused into consideration. That would open the door to a differential application, based on personal circumstances, of the right guaranteed by s. 11(b) of the Charter. A general weight must be given to the prejudice caused to the security interests of an accused by a

particular delay, whether it is presumed, as suggested by Lamer J., or inferred, as suggested by Wilson and La Forest J.J.

Finally, I am of the view, that a stay of proceedings is the appropriate and just remedy for an infringement of the right to be tried within a reasonable time. I do not find it necessary, in support of this conclusion, to characterize such an infringement as going to the jurisdiction to try an accused, although such a characterization may well be justified for other purposes. It is sufficient, in my view, that a remedy, such as an order to expedite proceedings, that would compel the trial of an accused beyond a reasonable time cannot be regarded as appropriate and just. There is no doubt, as suggested by La Forest J. and the critics of the American jurisprudence, that this drastic outcome must inevitably influence the determination whether there has been an infringement of the right to be tried within a reasonable time. This may well ensure that there are compelling reasons for such a determination, which in my opinion is a good thing, but it need not, as the result in the present appeal indicates, and must not, deter a court from applying the guarantee of s. 11(b) in a clear case.

LA FOREST J.:—The question in this case is whether a superior court judge properly exercised her jurisdiction in dismissing charges against the accused because of the unreasonable delay of the trial judge. The case raises, first, the scope and character of the constitutional right, under s. 11(b) of the *Canadian Charter of Rights and Freedoms*, of a person charged with an offence to be tried within a reasonable time, and secondly, the nature of the remedy to be provided for breach of that right. It also raises a preliminary issue of whether the superior court judge properly exercised her discretion to grant the appellant a remedy under s. 24(1) of the Charter.

The relevant provisions of the Charter are as follows:

11. Any person charged with an offence has the right

(b) to be tried within a reasonable time;

24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

For the reasons that follow, I am of the opinion that the time taken to try the appellant in this case was clearly unreasonable, that the superior court judge properly exercised her jurisdiction to

grant relief under s. 24(1), and that in the circumstances she also properly exercised her discretion in dismissing the charges.

Facts

Following an investigation that began in May, 1978, the appellant was charged in September, 1981, under s. 239(1)(a) and (d) of the *Income Tax Act*, R.S.C. 1952, c. 148, as amended, with one count of wilful evasion of taxes in the amount of \$129,665.22, and six counts of making false or deceptive returns. Some months before he was charged, on January 9, 1981, all his property and assets and those of his associated companies were put into receivership, a situation I understand that continues to this day. Trial began before Judge McIntyre of the Provincial Judge's Court of Nova Scotia in March, 1982, and the last Crown witness was heard in December, 1982. At that time, defence counsel moved for a directed verdict dismissing the action.

Argument on the motion to dismiss was heard on December 13, 1982, and proceedings were then adjourned to January 21, 1983, for a decision. However, Judge McIntyre was not prepared to render a decision on that date, and the matter was further adjourned. In fact, 14 more adjournments followed, all at the judge's request and at all of which the appellant was asked to appear in order to preserve jurisdiction, before defence counsel began to protest. Some nine months had then elapsed since the motion was made.

On September 13, 1983, defence counsel wrote to the Crown requesting in the strongest terms that it seek a decision from the judge since it was not appropriate for him to do so. As a result, on September 15th, Crown counsel brought a motion before Judge McIntyre relating to the delay and was promised a decision on September 30th. On September 28th, however, the judge ordered a further adjournment until October 14th. In response, defence counsel again wrote to Crown counsel on September 29th, demanding that the charges against the appellant be withdrawn. He was shocked, he said, to learn that this matter had been adjourned once again, necessitating Mr. Rahey's appearing for the 19th time. He, therefore, claimed that the process had gone on too long, had been totally unfair to the accused, and violated his constitutional rights. He, therefore, requested the Crown to withdraw the charges. That request was repeated on October 19th, after the judge had once again adjourned the proceedings, this time until October 28th. On October 24th, the Crown replied. It refused to withdraw the charges but promised to seek

mandamus if a decision was not rendered on October 28th. When proceedings were again adjourned to November 18th, defence counsel wrote to the Crown on October 28th and 31st, again seeking withdrawal of the charges. The Crown instead filed a motion for *mandamus* on November 1st, returnable on November 18th. In response, defence counsel on November 14th brought an application before the Supreme Court of Nova Scotia under ss. 11(b) and 24(1) of the Charter for an order dismissing the charges.

The following day, November 15, 1983, Judge McIntyre finally rendered a decision dismissing the motion for a directed verdict. After briefly reviewing the case, he concluded: "The Court does find that adequate evidence has been adduced to require the accused to meet the charges preferred."

In summary, then, Judge McIntyre's decision on the motion for a directed verdict was postponed 19 times over a period of 11 months. For nine of those months, defence counsel raised no objection to the delay. On September 13th, however, he at length demanded a decision. When that was not forthcoming, he insisted on withdrawal of the charges by the Crown, first on September 29th and then on October 19th, 28th and 31st. On November 14th, with the Crown's *mandamus* application pending, the defence sought dismissal of the charges under s. 24(1) of the Charter. At issue was the delay from December, 1982, to November, 1983, created by Judge McIntyre's continuing failure to come to a decision.

The courts below

On an application for Charter review, 9 C.C.C. (3d) 385, 61 N.S.R. (2d) 385, Glube C.J.T.D. found that she was a court of competent jurisdiction within the meaning of s. 24(1), since under the circumstances, it would not have been appropriate to apply to the provincial court judge. As she put it [at p. 392]

[G]enerally, it is preferable for such applications to be made to the court hearing the matter but on the facts and circumstances of this case I find that this is a case of unusual or special circumstances, because of the delay in rendering the decision on the directed verdict, and it is appropriate before the Supreme Court of Nova Scotia.

She then turned to the question of unreasonable delay, which she assessed in light of the four factors set out in *Barker v. Wingo* (1972), 407 U.S. 514, namely the length of the delay, the reason for the delay, the accused's assertion of his right and prejudice to the accused. As to the length of the delay and the reasons for it, she held that, given the nature of the decision the trial judge had been asked to make, his delay was "shocking, inordinate and

unconscionable". She noted that defence counsel had throughout the trial acted so as to expedite proceedings and his failure to object to all stages of the 11 month delay should not operate to the detriment of the accused. She, therefore, accepted that the accused had adequately asserted his right. Finally, she held that the judge's delay had seriously prejudiced the accused by impairing his ability to conduct his defence and to carry on business while under a continuing receivership. In her view, this was not a case for simply expediting the trial. The only appropriate remedy in the circumstances, she thought, was to dismiss the charges, which she proceeded to do.

An appeal was then launched to the Nova Scotia Court of Appeal, 13 C.C.C. (3d) 297, 63 N.S.R. (2d) 276, 11 C.R.R. 272. I should perhaps note that such an appeal would not lie by virtue of the Charter, for the reasons given by the majority of this Court in *Mills v. The Queen* (1986), 26 C.C.C. (3d) 481, 29 D.L.R. (4th) 161, [1986] 1 S.C.R. 863. However, a Crown appeal lies under s. 605(1)(a) of the *Criminal Code* from any "judgment or verdict of acquittal", which would cover the present situation: see *R. v. Jewitt* (1985), 21 C.C.C. (3d) 7, 20 D.L.R. (4th) 651, [1985] 2 S.C.R. 128.

After finding that Glube C.J.T.D. was a court of competent jurisdiction, MacKeigan C.J.N.S. (with whom Jones, Morrison, Macdonald and Pace J.J.A. concurred) himself assessed the reasonableness of Judge McIntyre's delay in light of the four factors set out in *Barker v. Wingo*, *supra*. He agreed that the judge had been disgracefully slow in making up his mind. He found, however, that the evidence of prejudice was insubstantial and entirely speculative [13 C.C.C. (3d) 297 at p. 307]:

The record and the representations made by the respondent at trial and on appeal do not reveal what witnesses might now be called or what kind of evidence they might have given which might now be affected by weakening of memory. I can find no evidence of any real or concrete prejudice having been suffered or likely to be suffered. . . .

Accordingly, he allowed the appeal and directed the trial to proceed, without considering the question of waiver.

Jurisdiction

I turn first to the preliminary question of Glube C.J.T.D.'s jurisdiction. As I indicated in *Mills*, *supra*, I share the view of my colleagues that as much as possible issues of unreasonable delay should be dealt with by the trial judge. The trial judge is, after all, in the best position to explore all the circumstances of the delay, and has at his or her disposal the fullest range of criminal remedies, including, for example, a reduction in sentence.

But as I also indicated in *Mills*, there must at all times be a court of competent jurisdiction to which resort can be had to determine whether an accused's constitutional right to be tried within a reasonable time has been infringed. Just as there can be no right without a remedy, so there can be no remedy without a court to enforce it effectively. Consequently, whenever there is no other court seized with the proceedings, or where the court so seized is unable to provide an effective remedy, the superior court of the province may exercise jurisdiction. Clearly this is such a case. The complaint here is directed at the delay of the trial judge himself, so his capacity to consider what remedy is appropriate and just in the circumstances is obviously impaired.

In *Mills*, I also noted that since the trial judge is, as a rule, in the best position to deal with questions of unreasonable delay, the superior court judge should ordinarily confine his or her jurisdiction to remedying existing delays, and not attempt to remedy past delays. In exceptional cases, however, the nature of a delay will be such as to call for an end to the proceedings. Again, the trial judge's involvement in the delay may make it inappropriate for him to deal with it. In such cases it will not only be proper, but essential for the superior court judge to grant a remedy if the rights guaranteed by the Charter are to be fully protected.

In this case it could perhaps be argued, though the Crown did not choose to do so, that Glube C.J.T.D. ought not to have exercised her discretion to grant a Charter remedy once Judge McIntyre had finally rendered his decision. It seems to me that there are two answers to this. First, after 19 adjournments, it may well be that the accused's rights were infringed to such a degree that they could only be remedied by dismissal of the charges, as in fact Glube C.J.T.D. found to be the case. Secondly, and more critically, when the trial judge was himself not merely implicated, but entirely responsible for the alleged breach of the accused's constitutional right, it would have been utterly inappropriate for him to have sat as a judge in what was in effect his own cause. In my view, therefore, Glube C.J.T.D. quite properly exercised her discretion to grant a remedy under s. 24(1), notwithstanding the fact that the delay complained of was no longer ongoing.

Nor do I think that the appellant's capacity to seek a Charter remedy from the superior court ought to have been limited by the fact that the injury of which he complained might also have been redressed by an order for *mandamus* against the trial judge. In general, there is no reason why an accused should be barred from

appropriate constitutional relief by the existence of a prerogative writ. *Mandamus* is by definition a limited remedy, and therefore too narrow a recourse for a person who believes that his Charter rights have been infringed and that he is accordingly entitled to the full range of remedies provided by s. 24(1). Furthermore if, as I have indicated, the accused's rights had arguably been infringed to such a degree that they could only be remedied by dismissal of the charges, *mandamus* would not only be an overly narrow remedy, but an inappropriate one.

While, therefore, the accused's failure to seek either *mandamus* or a Charter remedy at an earlier stage may ultimately have a bearing on the question of his consent or acquiescence to the delay, it could not make it improper for the superior court judge to exercise his discretion to offer relief under s. 24(1) of the Charter.

The scope of s. 11(b)

Section 11(b) of the Charter guarantees to any person charged with an offence the right "to be tried within a reasonable time". A preliminary question, raised in the Court of Appeal but not addressed by the respondent here, is whether that right is merely a right to be brought to trial within a reasonable time, or whether the right extends to the trial itself and thus ensures that a decision is rendered promptly. The former interpretation identifies s. 11(b) with pre-trial interests and would leave the protection of an accused's position at trial to other provisions of the Charter, such as s. 11(d) which requires a fair hearing. The latter interpretation, on the other hand, is based on a less compartmentalized view of the Charter, one that accepts a possible overlap between questions of delay and a fair trial, as well as on a practical recognition that any impairment of an accused's interests created by delay ends not with trial but with judgment. As Brennan J. put it *Dickey v. Florida* (1970), 398 U.S. 30 at p. 45, note 7:

At whatever point delay . . . occurs, the accused can suffer the penalties and disabilities of a prolonged prosecution. His stock of emotional and financial resources continues to be spent. His capacity to defend himself may be undermined.

It seems to me, that any ambiguity in the English text of the Charter in this regard is resolved by the language of the French version, which reads:

11. Tout inculpé a le droit

(b) d'être jugé dans un délai raisonnable

(Emphasis added) While "jugé" can mean "tried" as well as

"judged", it does not mean "tried" in the sense of "brought to trial", which would be more properly expressed as "subir son procès". Rather, it means "tried" in the sense of "adjudicated" and thus clearly encompasses the conduct of a judge in rendering a decision.

Some support for this conclusion may be found in the decision of the European Court of Human Rights in *Wemhoff*, judgment of June 27, 1968, Series A, No. 7. Article 5(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides, in the English version, that "everyone arrested or detained . . . shall be entitled to trial within a reasonable time or to release pending trial". Like the Charter, the French version of the convention expresses this right by means of the word "jugée", which in *Wemhoff* the European Court interpreted as referring to the termination of the trial. It concluded, therefore, that the protection offered by the section extended to "the whole of the proceedings before the court, not just their beginning" (at p. 23).

Quite apart from what may be gleaned from a parsing of the language of s. 11(b) and analogous provisions, however, it seems obvious to me that the courts, as custodians of the principles enshrined in the Charter, must themselves be subject to Charter scrutiny in the administration of their duties. In my view, the fact that the delay in this case was caused by the judge himself makes it all the more unacceptable both to the accused and to society in general. It would be cold comfort to an accused to be brought promptly to trial if the trial itself might be indefinitely prolonged by the judge. The question of delay must be open to assessment at all stages of a criminal proceeding, from the laying of the charge to the rendering of judgment at trial. It was quite proper, therefore, for Glube C.J.T.D. to consider whether Judge McIntyre's decision was given within a reasonable time. It is unnecessary to say anything here about pre-charge delay or delay on appeal.

I should perhaps add that I agree with the point made by Wilson J. in *Mills* that it is essential to distinguish between the impairment of an accused's interests that flows from the charge itself, and the impairment that may flow from delay in the prosecution of that charge. To the extent that lapse of time between the laying of a charge and the rendering of judgment is genuinely unavoidable it can be said to arise purely from the fact of the charge. In such a case there can by definition be no question of unreasonable delay since it could not have been reduced without abandoning the prosecution. Any prejudice suffered by the

accused during that period, grievous though it may be, is a function of the charge. It is not a function of delay, and therefore cannot be redressed under s. 11(b). In analyzing any s. 11(b) claim, therefore, one must overlook the lapse of time inherent in the case, together with any resulting inconvenience to the accused. It need hardly be said, of course, that the courts, bound as they are to uphold the right of the accused to trial within a reasonable time, must carefully scrutinize any lapse of time that is alleged to be, or to have been, unavoidable.

Interrelationship of right and remedy

There is nothing novel about the notion of trial within a reasonable time. Indeed, it is one of the oldest of our legal rights, albeit traditionally one of the least adequately protected. Its genesis goes back to at least *Magna Carta* in 1215, under the 40th article of which King John made the following undertaking: "To none will we sell, to none will we deny, or delay, right or justice". (emphasis added). That promise was repeated 10 years later by King John's son, Henry III, in the words now found near the beginning of the English statute books: "We will sell to no man, we will not deny, or defer, to any man, either Justice or Right" (9 Hen. III, c. 29, s. 2). (Emphasis added.)

The great defect of *Magna Carta*, however, lay in its failure to provide adequate mechanisms for the enforcement of the rights it purported to guarantee. The only redress it established for breach of its terms was a right to seize the King's possessions, a remedy obviously of little use to secure trial within a reasonable time. In practice, the most effective means of enforcing the right to speedy trial guaranteed by *Magna Carta* was the common law writ of *habeas corpus*, but that remedy too, even as improved by the *Habeas Corpus Act*, 1679 (U.K.), c. 2, has serious limitations as a remedy for ensuring trial within a reasonable time. It applies only to what are today indictable offences and only to an accused who has been imprisoned. It places a burden on the accused to insist on his right, and it does not more than guarantee him either release on bail, or ultimately, discharge without prejudice to the Crown's right to lay another information. In sum, it really guarantees liberty rather than a speedy trial, as the title of the Nova Scotia Act preserving the writ makes clear: see *Liberty of the Subject Act*, R.S.N.S. 1967, c. 164. The writ does nothing to prevent a trial from being indefinitely delayed as long as the accused is at liberty.

The broad guarantee of *Magna Carta* has also been given life through the *Criminal Code*, which creates certain mechanisms to ensure that trials proceed within a reasonable time. Thus, in s. 738(1) of the *Code*, the relevant provision here, provides that once trial has begun no adjournment of more than eight days may take place without the consent of both parties. In theory, then, by refusing to consent an accused can at least ensure that his trial is never delayed more than eight days at a time.

In practice, however, an accused's consent to delay may be merely *pro forma*. Where, as in this case, an adjournment is sought by a judge who has before him the accused's motion for a directed verdict, the accused in fact has little choice but to agree. Thus, quite apart from any problem of multiple adjournments, the *Criminal Code* provision fails to ensure that a given adjournment will not give rise to an unreasonable delay. Like *habeas corpus* it does not match the promise made by *Magna Carta*.

Broad then as has been the common law's statement of the right to trial within a reasonable time, the remedies available for its breach of that right are often unsatisfactory, so much so that the right has in practice been left largely unprotected. Indeed, some courts have gone so far as to suggest that no right to trial within a reasonable time existed at common law: see *R v Cameron* (1982), 70 C.C.C. (2d) 532, 29 C.R. (3d) 73, [1982] 6 W.W.R. 270 at p. 272 (Alta. Q.B.).

What sets the Charter apart from this tradition is not solely its constitutional expression of the right, a right known to the common law, after all, for more than 750 years, but also the broad and flexible nature of the remedy it provides for its breach. In other words, it is not only the fact that the right is constitutionally enshrined that requires us to look at it afresh, but that it is reaffirmed in the context of an entirely novel procedural mechanism, one which was obviously intended to be used with flexibility and imagination. Courts, therefore, can no longer treat existing remedies as defining the scope of the right. In effect, the Charter places the guarantee of trial within a reasonable time in a procedural context that empowers the courts to give full meaning to it for the first time.

In attempting to meet this particular challenge, courts can, in my view, derive little support from American jurisprudence, whose usefulness in this specific area is limited by its own restricted view of the remedy available for a delayed trial. The Sixth Amendment to the United States Constitution, drawing on English traditions (see *Klopfer v. North Carolina* (1967), 386 U.S.

213 at pp. 223-5), provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial". That right has been clearly and persuasively articulated in the United States Supreme Court, first by Brennan J., concurring in *Dickey v. Florida*, *supra*, and subsequently and somewhat differently by Powell J. writing for the whole court in *Barker v. Wingo*, *supra*. In the latter case the court identified four factors to be assessed in determining whether the right to a speedy trial had been breached: length of the delay, reason for the delay, the accused's assertion of his right and prejudice to the accused (at p. 530).

The *Barker v. Wingo* approach has found considerable favour with many Canadian courts confronted with the task of applying s. 11(b), including the Nova Scotia Court of Appeal in this case. And I agree that the work done by the American courts in isolating the factors to be taken into account in determining whether a delay is unreasonable is of assistance. I would underline, however, that these factors should not be approached from a catechetical standpoint. The court in *Barker v. Wingo* simply set these factors as among the more important in assessing the reasonableness of the delay. I agree with this. Whether something is reasonable or unreasonable must always depend on all the circumstances.

There is, however, another matter that should be emphasized in assessing the American experience to which, in my view, some of our courts have not had sufficient regard, namely, the remedial context in which the United States Supreme Court defined the right to a speedy trial. In *Barker* itself the court stressed that dismissal of the charge was the "only possible remedy" for a trial unreasonably delayed (at p. 522), a point it reaffirmed a year later in *Strunk v. United States* (1973), 412 U.S. 434 at p. 440. In doing so it necessarily allowed its perception of the appropriate remedy to shape its views of the nature of the right, and more or less ensured that the lower courts would take a hostile approach to it. Few judges relish the prospect of unleashing dangerous criminals on the public. As Professor Amsterdam notes,

[T]he specter of immunizing, of "turning loose", persons proved guilty of serious criminal offenses has been thoroughly repugnant to judges, and they have accordingly held that shockingly long delays do not "violate" the sixth amendment. The amendment has thereby been twisted totally out of shape — distorted from a guarantee that all accuseds will receive a speedy trial into a windfall benefit of criminal immunity for a very few accuseds in whose cases the pandemic failure of our courts to provide speedy trials has attained peculiarly outrageous proportions.

See Anthony G. Amsterdam, "Speedy Criminal Trial: Rights and Remedies", 27 *Stan. L. Rev.* 626 at p. 639 (1976). Amsterdam's

views have been endorsed in this country by Professor Hogg; see Peter Hogg, *Constitutional Law of Canada*, 2nd ed. (1985), p. 764.

The record of the United States Supreme Court itself does nothing to diminish such concerns. In *Barker* the court countenanced a five-year delay, and in *United States v. Loud Hawk* (1986), 106 S. Ct. 648, it supported a seven and a half-year delay. In practice, such results make the right meaningless to most accused.

The concern of judges in this regard has been echoed by academics, who have suggested their own means of restricting the right. As one writer reasons:

The danger that guilty men will be unconditionally released into society is a spectre that cannot lightly be dismissed. Society is justified in seeking some assurance that its legitimate interest in bringing the guilty to justice is not unduly subverted. Therefore, the courts can justifiably place some limitation upon the individual's right to be protected against unavoidable delays in the criminal process.

See Schneider, "The Right to a Speedy Trial", 20 *Stan. L. Rev.* 476 at p. 498 (1968). He goes on to suggest that no delay be found unconstitutional unless it has created a reasonable possibility of prejudice to the accused; see also Note, "Dismissal of the Indictment as a Remedy for Denial of the Right to Speedy Trial", 64 *Yale L.J.* (1955), 1208 at p. 1211.

Why we should follow American precedents, when these have led judges to avoid redressing unreasonable delay and scholars to scurry to find ways of limiting the application of the only remedy there, I fail to understand, particularly when the Charter expressly provides a flexible remedy to avoid these consequences. While it is natural and even desirable for Canadian courts to refer to American constitutional jurisprudence in seeking to elucidate the meaning of Charter guarantees that have counterparts in the United States Constitution, they should be wary of drawing too ready a parallel between constitutions born to different countries in different ages and in very different circumstances, particularly given the substantive implications of both ss. 1 and 24(1) of the Charter. Canadian legal thought has at many points in the past deferred to that of the British; the Charter will be no sign of our national maturity if it simply becomes an excuse for adopting another intellectual mentor. American jurisprudence, like the British, must be viewed as a tool, not as a master.

As I indicated at *Mills* at pp. 567-9 C.C.C. pp. 247-9 D.L.R., pp. 973-6 S.C.R., I do not share the view that there can be only

one remedy for an accused whose trial has not been held within a reasonable time. Reasonableness is a flexible concept, and a delay may be more or less unreasonable having regard to all the circumstances. So the remedy must be adjusted accordingly. I cannot accept that delays may be adjudged to be wholly reasonable one day, so as to deprive an accused of any remedy under the Charter, and wholly unreasonable the next, so that the trial must be aborted. The mandate given the courts under s. 24(1) of the Charter is to provide a remedy for delay that is appropriate and just in the circumstances. That mandate is inconsistent with the notion that in the criminal context there can be only one remedy for a breach of s. 11(b). This was the view of the majority in *Mills*. For McIntyre J., speaking for Beetz and Chouinard J.J., as well, had this to say at p. 501 C.C.C., p. 181 D.L.R., pp. 965-6 S.C.R.:

Section 24(1) . . . provides that the appellant may obtain such remedy as the court considers "appropriate and just in the circumstances". It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion. No court may say, for example, that a stay of proceedings will always be appropriate in a given type of case. Although there will be cases where a trial judge may well conclude that a stay would be the appropriate remedy, the circumstances will be infinitely variable from case to case and the remedy will vary with the circumstances.

The notion that a stay is the only remedy appears to stem from the concept that unreasonable delay raises a jurisdictional question. This approach, too, was fully considered and rejected by the majority in *Mills*, *supra*. McIntyre J. had this to say at p. 500 C.C.C., p. 180 D.L.R., pp. 964-5 S.C.R.:

It has been argued in academic journals that any breach of a Charter right is jurisdictional in nature: . . . A contrary view has been expressed in other writings: . . . As I understand the argument, it would be that where unreasonable delay is found to have occurred in the course of the prosecution of an offence, the court before which the proceeding is taken will thereby have been deprived of jurisdiction to deal further with the case and the prosecution would come to an end. I reject this view. Section 24(1) of the Charter has stated clearly that when a Charter right is infringed or denied, a person may apply to a court of competent jurisdiction for such remedy as the court considers appropriate and just in the circumstances. It has not specified a remedy and has not excluded the court from further participation in the matter. It has authorized the giving of an appropriate remedy by the court. This is not language from which one can infer that whenever a right is infringed in a prosecution the result must be a loss of jurisdiction by the trial court. Rather, it is language vesting the court with power to correct the situation. If one accepts this jurisdictional argument, it would be to mandate a particular result in every case and to prevent the exercise of the discretion given in s. 24(1) to give the appropriate remedy. In my view, the fact that a

Charter right has been infringed does not of itself give rise to jurisdictional error, and I see no basis for the characterization of some Charter violations as jurisdictional while others are not.

For my part, I stated at p. 567 C.C.C., p. 217 D.L.R., p. 973 S.C.R.:

Whatever judge exercises jurisdiction under s. 24(1) of the Charter, be it the trial judge or a court of superior jurisdiction, I do not think its powers of redress for delay are limited to staying the prosecution. Nor do I see unreasonable delay as giving rise to a jurisdictional issue. Under s. 24(1), the power to afford a remedy for the breach of a Charter right is in terms discretionary. A court of competent jurisdiction may grant such remedy as it considers appropriate and just in the circumstances. To categorize unreasonable delay as jurisdictional and to make a stay the only possible judicial response to it, one must not only rewrite s. 24(1), but give the right in s. 11(b) a pre-eminence over other Charter rights which, in my view, neither the language of the Charter nor the accepted values of our society warrant.

I might conclude by observing that many of the factors taken into account in determining whether the delay was unreasonable may also be of assistance in arriving at an appropriate remedy. Thus the length of the delay merits consideration here. This will avoid the drastic consequences inherent in a determination that a delay is unreasonable as opposed to one that is merely reaching that point. The reason for the delay is also relevant. It invites a common-sense balancing and response to delays that are in part attributable to the prosecution and in part to the accused. The remedy can be adjusted as well to respond to the extent of the prejudice suffered by the accused and the interests of society.

To summarize, the right to trial within a reasonable time is an ancient right, whose novelty in the Charter context is primarily a function of the flexible remedy provided to enforce it. In practice, the contours of the Charter remedy will do much to govern the present shape of that right, just as the more limited remedies available at common law governed its shape in the past. That being the case, there can no more be a single notion of breach than there can be a single remedy to meet it, whether in the form of a stay of proceedings or otherwise. The question of breach must, therefore, be assessed in terms of the interests protected by the section and such remedy as the court can provide to secure them.

The interests protected

Protection of the accused's physical liberty *v.*, as the writ of *habeas corpus* illustrates, the most fundamental and widely recognized aspect of the right to trial within a reasonable time. Impairment of this interest, however, does not cease with the release of the accused on bail, as *habeas corpus* might imply. Bail

conditions frequently involve restrictions on freedom of movement, and as the United States Supreme Court has noted, a speedy trial guarantee must seek "to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail": *United States v. MacDonald* (1982), 456 U.S. 1 at p. 8. Any assessment of the effect of delay on an accused's liberty, therefore, must have regard not only to imprisonment but to any conditions attached to release.

Protection of the accused's security, another interest secured by the right to a speedy trial, focuses on the psychological rather than the physical burdens of a pending trial. Since psychological pressures are inherently difficult to establish objectively, however, the parameters of an accused's security interest are inherently elusive, whether viewed in the abstract or in the context of the accused's own situation. However, it is reasonable to infer that the pendency of a criminal trial creates anxiety and concern in any accused, whether or not he or she has ever been charged or convicted before. In addition, as Warren C.J. noted in *Klopper v. North Carolina*, *supra*, at p. 222, a pending trial "may subject [an accused] to public scorn . . . and almost certainly will force curtailment of his speech, associations and participation in unpopular causes". It often limits employment and educational opportunities as well and, as Amsterdam puts it, it ultimately restricts "the liberty to go one's own way owing nobody nothing" (*supra*, at p. 533).

In my opinion, it can at least be inferred that an impact of this nature may be felt by any person who is charged with a criminal offence. Such an inference will generally not only be factually accurate, but will free the accused of the almost insurmountable burden of proving his anxiety. In assessing the reasonableness of any delay, therefore, a court may assume that the accused will have suffered an impairment to his security interest. Whether this assumption should not only amount to an inference but a presumption, as suggested by Lamer J., it is not necessary to consider. For, at all events, while all accused may suffer a degree of prejudice to their personal security as a result of criminal charges, some will necessarily suffer more than others. The assumption that an accused's security of the person is affected by delay should be capable of being strengthened and supplemented by proof of actual prejudice in a particular case. This would, in any case, be relevant to the nature of the remedy that should be afforded.

I turn now to consider the interest in a fair trial. I must, at the outset, say that I do not agree with the view that the right under

s. 11(b) was intended solely to redress intrusions on the liberty or security of the accused. On the contrary, in my view, the effect of delay on the accused's capacity to defend himself must be considered. The accused's interest in a fair trial is as legitimate a purpose of the right to be tried within a reasonable time as his interest in liberty and security. It is true, of course, that the interests in a fair trial are protected under other provisions of the Charter, such as s. 11(d), but not, however, in the same manner as under s. 11(b). Unfairness produced by delay may well be more readily remedied under s. 11(b) than under s. 11(d); indeed any remedy it does receive will often be of a different character.

It seems only natural and just to deal with questions of fairness, in so far as possible, in the context in which they arise. I agree, therefore, with Wilson J.'s conclusion in *Mills* that Charter rights are not to be considered in isolation from one another, so that a finding that a certain interest (such as the right to a fair hearing) is protected under one section of the Charter will preclude the possibility that it may also be protected, tangentially at least, under another section. The fact that protection may be available under s. 11(d) should not prevent an accused from having recourse to s. 11(b) in those cases where the alleged unfairness is demonstrably the product of delay.

In the United States, of course, the interest in a fair trial has been consistently held to be a vital, if not the most vital, component of the right to a speedy trial. In *Duckey v. Florida* (1970), 398 U.S. 30 at p. 41, Brennan J. identified the purpose of a speedy trial in the following terms: "It is intended to spare an accused those penalties and disabilities - incompatible with the presumption of innocence - that may spring from delay in the criminal process."

And in *United States v. Ewell* (1966), 383 U.S. 116 at p. 120, the whole court held that the speedy trial guarantee was designed, *inter alia*, "to limit the possibilities that long delay will impair the ability of an accused to defend himself". That statement has been reaffirmed by the Supreme Court of the United States in several subsequent cases: see *Smith v. Hooey* (1969), 383 U.S. 374 at pp. 377-78; *Barker v. Wingo* (1972), 407 U.S. 514 at p. 532; *United States v. Loud Hawk*, *supra*, at p. 65b.

Significantly, though the authorities are few, the interest in a fair trial appears to have found expression in the very different English jurisprudence on timely trial. Significantly because both the Canadian and American rights, of course, have their genesis there. Indeed, the words of *Magna Carta* clearly imply that

justice delayed is justice denied. As Coke explained in his commentary on that statute:

... the common laws of the realm should by no means be delayed, for the law is the surest sanctuary, that a man can take, and the strongest fortress to protect the weakest of all ... (Coke, 11 *Institutes of the Laws of England*, p. 66 (W. Clarke & Sons, 1817)).

Again, in *R. v. Robins* (1844), 1 Cox C.C. 114 (Assizes), Alderson B., though speaking in the context of a delayed charge, found the delay to be unacceptable because of its impact on the accused's defence:

It is monstrous to put a man on his trial after such a lapse of time. How can he account for his conduct so far back? If you accuse a man of a crime the next day, he may be enabled to bring forward his servants and family to say where he was and what he was about at the time; but if the charge be not preferred for a year or more, how can he clear himself?

It seems to me, then, that historically as well as analytically, the interest in a fair trial must be an important element in any analysis of the protection accorded by the right to trial within a reasonable time.

Finally, prejudice to the fair trial interest of an accused may arise from the inherent nature of his defence. In many cases, delay will *necessarily* (rather than coincidentally) impair the ability to present a defence. A witness may leave the country, or die of a terminal illness, or simply forget the relevant circumstances. Such prejudice, it has been argued, should be excluded from consideration under s. 11(b) on the basis that it is more properly addressed under s. 7 or s. 11(d).

It seems to me, however, that to do so would be to ignore a legitimate distinction between foreseeable prejudice and actual prejudice, and at the same time to draw what I have suggested is an unnecessary distinction between s. 11(b) and ss. 7 and 11(d). It is true that an unreasonable delay cannot be regarded as reasonable simply on the basis that it caused no actual prejudice to the accused's defence. Were it otherwise only delays that impaired that defence would be prohibited, and s. 11(b) would thereby be converted from a right against delay into a right to a fair trial. Since that is clearly not its purpose, there is no basis for requiring the accused to prove actual prejudice to his defence in order to establish that the delay he faced was unreasonable, as the Court of Appeal in fact did here. Prejudice to the right of the accused to a fair trial may help to justify a s. 11(b) claim, but it cannot be regarded as essential to it. I note that the United States Supreme Court has reached a similar conclusion: see *Moore v. Arizona* (1973), 414 U.S. 25 at p. 26. Conversely a reasonable delay will

not become unreasonable simply because a key defence witness disappeared during the course of it, despite the fact that it could be argued that the resulting prejudice to the defence would not have occurred but for the delay.

It seems to me, however, that in certain cases, where delay would involve a *foreseeable impact* on the ability to present an effective defence, proof that *such prejudice in fact resulted* may be taken into consideration as part of the injury that the delay caused to the interests of the accused. Such prejudice would arise, for example, where the defendant's case was either known or ultimately found to depend on eye witness evidence. It might also arise at those stages in the history of a case where a predictable drop occurs in the threshold of witness's memories. And prejudice to an accused's defence clearly might arise from the nature of the case; the circumstances of some offences may well be more forgettable than those of others. In my opinion, therefore, to the extent that prejudice to a fair trial is *inherent* in the delay it should be regarded as simply another interest of the accused that may be placed in jeopardy by that delay.

In summary, then, I would hold that the principal interests of the accused relevant to trial within a reasonable time are first, the liberty interest, which may be impaired either by imprisonment or by bail conditions; secondly, the security interest, which as a general rule is impaired by the anxiety, stress and stigmatization arising out of delay, strongly added to in this particular case by the seizure of the accused's assets; and thirdly, the fair trial interest, which may be impaired in this context to the extent that delay foreseeably damages the ability to present an effective defence. In the present case, it is sufficient to say that the security interests of the accused were substantially impaired, and that the reviewing judge found that the trial judge's delay had also seriously prejudiced his ability to conduct his defence.

I would add that Charter rights are not exclusively and narrowly aimed at the accused. They belong to all of us, and the reasons for the delay may play a legitimate role in assessing the remedy, at least to the extent that it has a tendency to put the administration of justice into disrepute. This value is recognized in s. 24(2) for evidentiary purposes, but it is relevant here as well, and the fact that it is a judge that has caused the delay has serious implications for that value.

It goes perhaps without saying that the impairment to the interests identified above must, in making a determination of reasonableness, be balanced against any proper reasons for delay

advanced by the Crown. I need not enter into a discussion of this matter in the present case, but would by way of example simply note that the type of offence in question, the complexity of the facts in this case, the number of charges, the number of accused, the nature and volume of the evidence and the number of witnesses, must be taken into account. Nor should delay caused by the accused be ignored in assessing the situation. Here, however, there was none and the only justification that could possibly be advanced for the delay was the consent of the accused, a matter to which I shall turn presently.

Remedy

As I have repeatedly indicated, a court of competent jurisdiction is free to employ the full discretion conferred on it by s. 24(1) of the Charter in choosing a remedy for breach of the right to trial within a reasonable time. That choice as McIntyre J. explains in the passage cited earlier will depend on all the circumstances. The Charter clearly tells us that the remedy to be given is that which "the court considers appropriate and just in the circumstances". Often the most obvious remedy is to expedite the proceedings. If a prosecutor dies, for example, and his successor seeks a delay so as to master the case, an accused should advance the prospect of impairment to his interests and seek a limitation to any such delay, instead of waiting until the full delay has taken place and then demanding a stay. The Crown might then be told that it had a limited period within which to proceed, or else face a stay. Otherwise, in selecting a remedy the reviewing judge should bear in mind such factors, for example, as the length and nature of the delay, the seriousness of the offence with which the accused is charged, the nature of the injury suffered by the accused and any prejudice to the accused's defence inherent in the delay. In the present case, it is worth noting that the offence, though serious, is not one that is dangerous to the safety of the public. As well, the fact that the accused's business was under seizure throughout the proceedings imposed a far greater burden on him than on most accused persons.

Disposition

As I stated at the outset, I am of the view that Glube C.J.T.D. was a court of competent jurisdiction, on the basis that the accused could not be expected to seek a remedy from Judge McIntyre, who was himself the author of the delay. Having found a breach of s. 11(b), Glube C.J.T.D. took the position that all remedies were open to her, but nevertheless decided that the only

remedy that was appropriate and just in the circumstances was to dismiss the charges. The Court of Appeal, on the other hand, held that no breach of s. 11(b) had occurred because there was no evidence of any real or concrete prejudice as a result of the delay, so it never reached the question of a remedy. For reasons already given, I do not think the approach taken by the Court of Appeal was the proper one.

It is clear to me that Judge McIntyre's conduct amounted to a breach of s. 11(b). The delay itself was described by both courts below as shocking; there is no adequate explanation for it. The only possible justification for the delay was the consent of the accused, which must, as I have noted, be taken into account in assessing the reasonableness of the delay. Any consent must, however, be clear, unequivocal and fully informed. Silence on the part of the accused in the face of delay cannot automatically be taken as consent to it. The burden of establishing the expeditiousness of a trial is on the State, not the accused, and that burden would effectively be reversed if the accused were required to assert his right to prompt treatment.

At all events, it seems to me that given that the delay in question was caused by the judge himself, the consent of the accused to the judge's requests for continuances was largely *pro forma*, in the sense that he had no real alternative. In each case, he was asked by the judge to consent to a further delay the day before jurisdiction would have been lost. Could he reasonably have refused and demanded an immediate decision? I think it is clear from the tone of the letter written by defence counsel to the Crown, seeking its intervention, that the accused felt unable to address the judge himself on the issue. Nor am I convinced that the demand for a decision amounted to a consent to the previous delay. In my view, the delay caused by Judge McIntyre was unreasonable and in breach of s. 11(b).

In weighing the remedy that should have been accorded to this case, I am particularly affected by the strong views of Glube C.J.T.D. and the Court of Appeal regarding the unreasonableness of the delay, the serious prejudice to the accused arising out of the continuing receivership of his business, and the fact that the delay was caused by a judge. Not only is an accused relatively helpless in the face of such delay, but society as a whole is disturbed by the prospect of injustice arising in the courts themselves. In exercising her discretion to provide a remedy that was appropriate and just in the circumstances, Glube C.J.T.D. heard the evidence and took the relevant factors into account. She accorded

the relief sought from her, which was a dismissal of the charges. It should be noted, however, that while this was formally the order being sought, it is obvious from what transpired that what counsel was really seeking was not to obtain an acquittal but to put an end to the proceedings. In granting the relief sought, I think this is really what Glabe J. had in mind. Under these circumstances, I would dispose of the appeal in the manner proposed by my colleagues. Skeptical though I am of the general use of a stay as a means of combatting delay, there are cases where this is the proper course. In my view, this is one of them.

For these reasons, I would allow the appeal, reverse the judgment of the Court of Appeal and order a stay of proceedings against the appellant.

Appeal allowed; stay of proceedings ordered.

THE REPUBLIC OF ARGENTINA v. MELLINO

Supreme Court of Canada, Dickson C.J.C., Beetz, McIntyre, Lamer, Wilson, Le Dain and La Forest J.J. May 14, 1987.

Appeal — Procedure — Supreme Court of Canada — Extradition — Judge presiding at extradition hearing discharging fugitive on basis that right to be tried within reasonable time infringed — Appeal from such judgment lies to Supreme Court of Canada with leave of that court — Supreme Court Act (Can.), empowering court to grant leave to appeal from any final or other judgment of highest court of final resort in province or a judge thereof — Decision of extradition judge constituting final judgment — Supreme Court having jurisdiction to hear appeal — Supreme Court Act, R.S.C. 1970, c. S-19, ss. 2, 41.

United States of America v. Lank and Green, [1955] S.C.R. 483, overrid

Other cases referred to

Commonwealth of Puerto Rico v. Hernandez (1973), 14 C.C.C. (2d) 209, 41 D.L.R. (3d) 549, [1976] 1 S.C.R. 228; *Hill v. The Queen* (No. 2) (1975), 25 C.C.C. (2d) 6, 62 D.L.R. (3d) 193, [1977] 1 S.C.R. 827, 7 N.R. 373 *sub nom. R. v. Hill*; *Goldbar v. The Queen* (1960), 125 C.C.C. 209, [1960] S.C.R. 60, 31 C.R. 374; *R. v. Gardiner* (1982), 68 C.C.C. (2d) 477, 140 D.L.R. (3d) 612, [1982] 2 S.C.R. 368, 30 C.R. (3d) 289, 43 N.R. 361

Constitutional law — Charter of Rights — Fundamental Justice — Republic of Argentina making application for extradition of fugitive on charge of murder — Fugitive released due to delay in producing sufficient evidence — Seventeen months later second request made for extradition — Judge presiding at extradition hearing discharging fugitive on basis of 17-month delay — Appeal by Argentina allowed — Seventeen-month delay not attributable to Canadian authorities and not constituting abuse of process or breach of principles of fundamental justice — Canadian Charter of Rights and Freedoms, ss. 7, 11(b).

Constitutional law — Charter of Rights — Trial within reasonable time — Application to extradition proceedings — Request made by Republic of Argentina for extradition of fugitive on charge of murder — Fugitive then set free due to delay in producing sufficient evidence — Seventeen months later second request made for extradition — Guarantee to right to trial within reasonable time under Charter not applicable to extradition proceedings — Appeal from order of extradition judge discharging fugitive allowed — Canadian Charter of Rights and Freedoms, ss. 11(b), 21.

Constitutional law — Charter of Rights — Enforcement of rights — Court of competent jurisdiction — Extradition proceedings — Judge presiding at extradition hearing not constituting court of competent jurisdiction for purposes of granting remedy under Charter even if judge is judge of superior court — Following order that fugitive be held for extradition, fugitive entitled to apply for habeas corpus — Judge presiding at habeas corpus proceedings constituting court of competent jurisdiction — Such jurisdiction however, to be exercised with utmost circumspection having regard to fact that final decision with respect to extradition lying with executive — Canadian Charter of Rights and Freedoms, s. 24.

Extradition and fugitive offenders — Defences — Abuse of process — Judge presiding at extradition hearing having no jurisdiction to discharge fugitive on basis that unreasonable delay in implementing proceedings — Extradition judge also not constituting court of competent jurisdiction with power to grant relief under Charter of Rights — Canadian Charter of Rights and Freedoms, s. 24.

The respondent, a fugitive, was charged in the Republic of Argentina with the murder of his wife. After the alleged killing the fugitive left Argentina but shortly after his entry into Canada he was arrested under the *Extradition Act*, R.S.C. 1970, c. E-21, and held in custody until November, 1982, when he was set free as a result of the failure of Argentina to produce the necessary documentation within two months of his arrest as required by art. 14 of the *Extradition Treaty Between the Argentina Republic and Great Britain, 1894* (Can.). In June, 1984, Argentina made a second request for extradition and the fugitive was again arrested. In December, 1984, at the commencement of the extradition hearing an application was made to stay the proceedings due to delay. The extradition judge held that in the absence of any reasonable explanation the 17 month delay between the fugitive's discharge because of evidentiary problems in the first proceedings and the institution of the second proceedings was unreasonable and, accordingly he discharged the fugitive. On appeal by the Republic of Argentina to the Supreme Court of Canada, held, Lamer J. dissenting in part, the appeal should be allowed and the matter remitted to the extradition judge to continue the proceedings.

Per La Forest J., Dickson C.J.C., Beetz, McIntyre and Le Dain J.J. concurring: The extradition judge erred in discharging the fugitive on the basis that his rights under s. 11(b) of the *Canadian Charter of Rights and Freedoms* had been infringed. Section 11 of the Charter has no application to extradition proceedings. This is the case notwithstanding that art. 5 of the *Extradition Treaty Between the Argentina Republic and Great Britain, provides that extradition should not take place if "exemption from prosecution or punishment has been acquired by lapse of time, according to the laws of the state applying or applied to."* This provision was intended to bring into operation statutes of limitations that exist in some countries and was not intended to apply to a provision such as s. 11(b). Section 11(b) is not