

ONTARIO COURT OF JUSTICE

B E T W E E N :

Her Majesty The Queen

— **AND** —

John Szewczyk

APPLICATION UNDER SUBSECTIONS 11(b) AND 24(1) OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Before Justice of the Peace Kenneth W. Dechert
Heard on February 17th, 2012 and May 7th, 2012
Reasons for Judgment released on October 29th, 2012
Provincial Offences Court – Burlington, Ontario

G. Larson for the prosecution
F. Alfano representative for the defendant John Szewczyk

Statutes, Regulations and Rules cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, ss. 11(b) and ss. 24(1);
Courts of Justice Act, R.S.O. 1990, c. C.43, as amended to February 9th, 2011, s. 109; ss. 109(1) and ss. 109(2.1);
Highway Traffic Act, R.S.O. 1990, c. H.8, as amended to February 9th, 2011, s. 128;
Provincial Offences Act, R.S.O. 1990, c. P.33, as amended to February 9th, 2011, Part I.

Cases cited:

Barker v. Wingo, 407 U.S. 514 (1972);
Mills v. The Queen, [1986] 1 S.C.R. 863 (S.C.C.);
Regina v. Allen (1996), 100 C.C.C. (3d) 331; [1996] O.J. No. 3175 (Ont. C.A.);
Regina ex. rel. City of Toronto v. Andrade, [2011] O.J. No. 4245; 2011 ONCJ 470 (Ont. C.J.);

Regina v. Askov et. al., [1990] 2 S.C.R. 1199 (S.C.C.);
Regina v. Aujla, 2010 ONCJ 531 (Ont. C.J.);
Regina v. Beason (1983), 36 C.R. (3d) 73 (Ont. C.A.);
Regina v. Bennett (1991), 64 C.C.C. (3d) 449; [1991] O.J. No. 884 (Ont. C.A.);
Regina v. Brace (2010), 261 C.C.C. (3d) 455 (Ont. C.A.);
Regina v. Conway, [1989] 1 S.C.R. 1659 (S.C.C.);
Regina v. Donaldson, 2010 ONCJ 3 (Ont. C.J.);
Regina v. Emanuel, [2012] O.J. No. 709 (Ont. Sup. Ct.);
Regina v. Farokhshadfar, [2001] O.J. No. 6015 (Ont. C.J.);
Regina v. Godin, [2009] 2 S.C.R. 3; 2009 SCC 26 (S.C.C.);
Regina v. Gregorczyk, [2012] O.J. NO. 846 (Ont. C.J.);
Regina v. Harrison, [1991] O.J. No. 881 (Ont. C.A.);
Regina v. Hawkins (1991), 6 O.R. (3d) 724 (Ont. C.A.); *aff'd* (1992), 11 O.R. (3d) 64 (S.C.C.);
Regina v. Hussain, [2005] O.J. No. 158 (Ont. C.J.);
Regina v. Jamieson (1981), 64 C.C.C. (2d) 550 (Ont. C.A.);
Regina v. Kalanj, [1989] 1 S.C.R. 1594 (S.C.C.);
Regina v. Khan, 2011 ONCA 173; 277 O.A.C. 165 (Ont. C.A.);
Regina v. Syed Khan (unreported – January 7th, 2011 – Halton Provincial Offences Court file no. 95128045) (Ont. C.J.);
Regina v. Lahiry, [2011] O.J. No. 507; 2011 ONSC 6780 (Ont. Sup. Ct.);
Regina v. M.(R.) (2003), 180 C.C.C. (3d) 49 (Ont. C.A.);
Regina v. MacDougall (1998), 128 C.C.C. (3d) 483 (S.C.C.);
Regina v. Meisner (2003), 57 W.C.B. (2d) 477 (Ont. Sup. Ct.);
Regina v. Morin [1992] 1 S.C.R. 771 (S.C.C.);
Regina v. N.N.M. (2006), 209 C.C.C. (3d) 436; [2006] O.J. NO. 1802 (Ont. C.A.);
Regina v. Omarzadah, [2004] O.J. No. 2212 (Ont. C.A.);
Regina v. Philip (1993), 80 C.C.C. (3d) 167 (Ont. C.A.);
Regina v. Rahey, [1987] 1 S.C.R. 588 (S.C.C.);
Regina v. Satkunanathan (2001), 152 C.C.C. (3d) 321 (Ont. C.A.);
Regina v. Schertzer, [2009] O.J. No. 4425; 2009 ONCA 742 (Ont. C.A.);
Regina v. Sharma, [1992] 1 S.C.R. 814; (1992), 71 C.C.C. (3d) 184 (S.C.C.);
Regina v. Smith, [1989] 2 S.C.R. 368 (S.C.C.);
Regina v. Smith, [1989] 2 S.C.R. 1120 (S.C.C.);
Regina v. Tran, 2012 ONCA 18 (Ont. C.A.);
Regina v. Tremblay, [1987] 2 S.C.R. 435 (S.C.C.);
Regina v. W.(A.J.) (2009), 257 O.A.C. 11 (Ont. C.A.);
Regina v. Wong, [2012] O.J. No. 4480 (Ont. C.J.).

Ruling on subsections 11(b) and 24(1) *Charter* Application

K.W. DECHERT, J.P. (orally):

[1] Under Certificate of Offence no. 1260-5496591A, the defendant/applicant John

Szewczyk, hereinafter referred to as “the defendant”, stands charged that he on the 9th day of February, 2011 at 1:27 a.m., at Highway 403 westbound near King Road in the City of Burlington, did commit the offence of speeding – 134 km./hr. in a posted 100 km./hr. zone, contrary to section 128 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, as amended to February 9th, 2011. The provisions of Part I of the *Provincial Offences Act*, R.S.O. 1990, c. P.33, as amended to February 9th, 2011, hereinafter referred to as the “P.O.A.”, are applicable to this proceeding.

[2] The trial of the subject proceeding commenced before me on the 17th day of February, 2012, during the 9:00 a.m. tier of cases in the Burlington Provincial Offences Court. At that time, prior to arraigning the defendant on the subject charge, I took steps to review the defendant’s Notice of Constitutional Question, dated September 17th, 2011, made pursuant to section 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended to February 9th, 2011, by which document the defendant commenced an Application under subsections 11(b) and 24(1) of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, hereinafter referred to as the “Charter”.

[3] I began reviewing the document at 10:57 a.m. on the day of the trial. At that time, I considered the issue of whether or not the said Notice of Constitutional Question met the requirements of form as mandated by subsection 109 (2.1) of the *Courts of Justice Act*, *supra*. as well as the issue of whether the Attorney General of Canada had been properly served with the said Notice, in accordance with subsection 109(1) of the said Act. I received legal submissions on these issues from both the defendant’s representative and the prosecutor between 10:57 a.m. and 11:55 a.m., following which time I reserved my judgment pertaining to the procedural sufficiency of the subject Notice of Constitutional Question until sometime during the 1:30 p.m. tier of cases on that date.

[4] The subject trial proceeding including the defendant’s *Charter* Application was recalled by the prosecutor at 3:51 p.m. on the said date. At that time, I rendered my decision respecting the procedural sufficiency of the subject Application. I determined that the defendant’s Notice of Constitutional Question had been prepared in substantial compliance with the provisions of subsection 109 (2.1) of the *Courts of Justice Act*, *supra* and that the said Notice had been properly served on the Attorney General of Canada on September 17th, 2011, via a telephone transmission of a facsimile of the document, in accordance with subsection 109(1) of the said Act. I therefore determined that the defendant’s *Charter* Application was properly before me for hearing and determination at the outset of his trial of the subject charge.

[5] Following my ruling pertaining to the procedural issues relative to the *Charter* Application, at 4:29 p.m. the defendant was arraigned on the subject charge and entered a plea of not guilty. I then became seized of the trial of the proceeding including the pre-trial hearing of the *Charter* Application. The Court then determined that the trial of the subject proceeding, including the hearing of the pre-trial Application could not be completed on the subject date, due to the pending closing of the Court for the day. The continuation of the trial proceeding, including the hearing of the defendant’s *Charter* Application, was then adjourned to May 7th, 2012, at 9:00 a.m. in the Burlington Provincial Offences Court.

[6] On May 7th, 2012 at 9:00 a.m., I reconvened the trial of the subject proceeding. At that time, I proceeded with the hearing of the defendant's *Charter* Application, commencing at 9:01 a.m.

[7] At the outset of the hearing, both the defendant's representative and the prosecutor advised the Court that they were not intending to tender any verbal or affidavit evidence during the hearing of the Application. The parties advised that they were content to rely upon the contents of the Court documentation associated with the subject charge, together with the contents of the transcript of the Court proceedings of February 17th, 2012 in this proceeding, as the evidentiary foundation for the subject Application. At a later point in time during legal submissions, the parties agreed to certain facts pertaining to the issue of the provision of disclosure of prosecution evidence and other relevant information in the prosecution file, of which I took judicial notice.

[8] Following the entry of certain documents, including the said transcript, as evidentiary exhibits to the subject Application, I received legal submissions pertaining to the issues on the Application from both the defendant's representative and the prosecutor throughout the course of the morning until 12:44 p.m., when the hearing was completed. I then reserved judgment on the defendant's Application and the matter was then adjourned until October 29th, 2012 at 9:00 a.m. in the Burlington Provincial Offences Court, for my judgment on the Application and for trial continuation.

[9] It should be noted that the proceeding was adjourned to the said date, as that date represented the earliest date which the court administration could provide for a full day trial. I was of the view that a full-day special hearing was required in order to permit me to render my oral judgment pertaining to the Application and to thereafter accommodate the completion of the trial of the subject charge on that date, if necessary.

[10] While I acknowledge that the court administration was able to accommodate the reconvening of this proceeding for a one-half day hearing on July 9th, 2012 at 1:30 p.m. and that both the prosecution and defence were available for the continuation of the trial at that time, I was of the view that I required approximately three months to consider and write my decision pertaining to this Application, including the time reasonably required to obtain a transcript of the proceedings of May 7th. Furthermore, I was of the view that a one-half day period of time was not sufficient to accommodate the completion of both my judgment and the trial of the subject charge. I therefore suggested that the proceeding be reconvened for my judgment and for possible trial continuation no earlier than August 7th, 2012, so as to afford me sufficient time to prepare my judgment and to permit the court administration to find and reserve one full day for the delivery of my judgment on the *Charter* application and thereafter conduct and complete the trial of the speeding charge, depending on my ruling on the Application.

[11] As stated above, the earliest day that the court administration could offer for the continuation of this trial proceeding for a full day, was October 29th, 2012. As both parties were available on this date, the subject charge was adjourned to that date at 9:00 a.m., for trial continuation.

[12] During the trial of this proceeding, the prosecution was represented by Mr. G. Larson. The defendant was represented by his legal representative, Mr. F. Alfano.

THE DEFENDANT'S NOTICE OF CONSTITUTIONAL QUESTION

[13] In a Notice of Constitutional Question dated September 17th, 2011 and filed in the Burlington Provincial Offences Court on September 21st, 2011, the defendant advised that the Notice constituted an Application under subsections 11(b) and 24(1) of the *Charter*, for a remedy “in relation to an act or omission of the Government of Ontario”. He stated that the question was to be argued on February 17th, 2012, at 9:00 a.m. at 2051 Plains Road East, Burlington.

[14] In the said Notice, the defendant went on to state, in part, as follows:

...

The following are the material facts giving rise to the constitutional question:

1. The Applicant [defendant] was charged on February 9th, 2011 with the following offence(s):
Speeding 134 km/hr in a 100 km/hr zone, HTA, s. 128, 1260-5496591A.
2. The matter is currently scheduled for trial on February 17th, 2012.
3. The overall delay from the date the charge was laid and the currently scheduled trial date is 12 months and 8 days which is *prima facie* unreasonable and accordingly a section 11(b) inquiry is warranted.
4. At no time did the Applicant waive the constitutionally protected right to a trial within a reasonable time.
5. The delay in this matter is the direct result of a lack of institutional resources relative to the volume of charges to be processed in this jurisdiction.

...

[15] The Notice of Constitutional Question was served on both the Attorney General of Canada and the Attorney General of Ontario by facsimile transmission, on September 17th, 2011. It was personally served upon the Office of the Prosecutor for the City of Burlington, on September 21st, 2011.

THE EVIDENCE

[16] At the outset of the continuation of the hearing of the *Charter* Application on May 7th, 2012, I entered a number of documents as exhibits to the Application.

[17] The defendant's “Notice of Intention to Appear and Request for First Attendance” signed by the defendant on February 22nd, 2011, was marked as exhibit #1. In the Notice of Intention to Appear, filed with the Provincial Offences Court in Burlington, Ontario on February 22nd, 2011, the defendant stated, in part, as follows:

I, John Szewczyk of 760 Mohawk Road W., Apt. 1215, Hamilton, Ontario ... (re:

offence number 5496591A) - (offence date – Feb. 9, 2011) wish to give notice of my intention to appear in court to enter a plea of not guilty at the time and place set for the trial respecting the charge set out in the Offence Notice or Parking Infraction Notice.

...

I intend to challenge the Provincial Offences Officer's evidence. I request that the officer attend the trial.

...

I intend to appear in court to enter a plea at the time and place set for the trial and I wish that it be held in the English language.

...

[18] In the said "Request for First Attendance", dated February 22nd, 2011, found on the reverse side of the aforesaid Notice of Intention to Appear document, the defendant acknowledged the following information contained on the "Request" form:

I understand that if I cannot attend on the assigned date that I, or an agent acting on my behalf, must attend in person to request a postponement in writing. Only one postponement will be considered. I also understand that if an appointment is not scheduled for me when I, or an agent acting on my behalf, attend the Court to request a First Attendance Meeting, a notice with the date, time and location of my First Attendance Meeting will be mailed to me within two weeks to the address provided above. If I do not receive a notice within 30 days of today's date, I understand that it is my responsibility to contact the Court to obtain that information.

[19] The "First Attendance Notice" issued to the defendant in this proceeding, establishing a "first attendance appointment" in the subject proceeding for March 28th, 2011 at 9:30 a.m., was marked as exhibit #2 to this proceeding. This notice contained, in part, the following information:

To: John Szewczyk, 1215-760 Mohawk Road W. Hamilton, Ont. L9C 6P6

This notice will confirm that a first attendance appointment has been scheduled in the English language, on the 28th day of March, 2011 at 9:30 a.m. at 2051 Plains Road E. Burlington, On. L7R 5A5, regarding the offence of SPEEDING - HIGHWAY TRAFFIC ACT section 128.

You or a representative authorized by you to act on your behalf must appear at the above time.

At the time fixed for your appointment, a prosecutor will be available to discuss the charge(s) with you or your representative.

If you or your representative do not attend in person at the time fixed for this appointment, a Notice of Trial will be issued. If you do not attend the trial, a justice may enter a conviction against you in your absence.

...

[20] The "Request for Postponement of First Attendance Appointment", signed by the defendant on March 23rd, 2011, was marked as exhibit #3. This document confirmed that on March 23rd, 2011, the defendant attended the Burlington Provincial Offences Court and filed the aforesaid "Request" in order to seek a new date for his first attendance appointment with

a prosecutor relative to the subject charge under certificate of offence no. 5496591A. In the document, the defendant noted that his reason for requesting a postponement of the scheduled March 28th, 2011 first attendance appointment was that he had another appointment that day. The document indicated that a member of the administrative staff of the Burlington Provincial Offences Court rescheduled the first attendance appointment for the subject charge for April 11th, 2011 at 9:30 a.m. and that the “new date” for the appointment was given to the defendant, in person, on March 23rd, 2011.

[21] The “Notice of Trial” in this proceeding, issued to the defendant by the Clerk of the Burlington Provincial Offences Court, dated May 6th, 2011, was marked as exhibit #4. At the bottom portion of the document the Clerk of the Court purports to state that he/she certified that a copy of the said “Notice of Trial” was sent by mail to the defendant on May 9th, 2011. It is noted, however, that the box adjacent to the statement “sent by mail to the defendant” on the Notice, has not been checked by the Court Clerk. For purposes of this proceeding, there does not appear to be any dispute that the subject Notice of Trial was sent by the Burlington Provincial Offences Court to the defendant, by ordinary mail on May 9th, 2011.

[22] The Notice of Trial states, in part, as follows:

To: John Szewczyk, 1215-760 Mohawk Road W. Hamilton, On, L9C 6P6

You are charged with the following offence:

On the 9th day of February, 2011, at 1:27 a.m. at HWY 403 Burlington

You did commit the offence of SPEEDING contrary to the HIGHWAY TRAFFIC ACT section 128

...

Take notice that on the 17th day of February, 2012, at 9:00 a.m.

Your trial will be held in room:

#2,

2051 Plains Road E. Burlington, On L7R 5A5

(905) 637-1274

This will conform that you have chosen to challenge the evidence of the Provincial Offences Officer.

Your trial will be held on the date and time noted above at the Ontario Court of Justice shown. You and your witnesses should be ready for your trial at that time.

If you do not appear, you will be deemed not to dispute the charge and the court may convict you in your absence without further notice.

Issued at BURLINGTON POA COURT this 6th day of May, 2011.

[23] The defendant’s Notice of Constitutional Question in this proceeding, dated September 17th, 2011, together with the affidavit of service of Alyssa Henderson, sworn on the 17th day of September, 2011, confirming service of the Notice of both the Attorney General of Canada and the Attorney General of Ontario, by facsimile transmission on September 17th, 2011 and the attached “transmission verification reports”, were marked collectively as exhibit #5.

[24] The transcript of the trial proceedings before me in this matter of February 17th, 2012, was marked as exhibit #6 thereto.

[25] Additionally, in considering the subject Application, I have taken judicial notice of Certificate of Offence # 1260-5496591A, setting out the particulars of the subject charge of February 9th, 2011 as signed by the issuing provincial offences officer, K. Winiarski. In the certificate, the provincial offences officer certifies that he served an Offence Notice personally upon the person charged on the offence date. Furthermore, I have taken judicial notice of the date stamp on the certificate, which confirms that the said provincial offences officer filed the Certificate in the Ontario Court of Justice, P.O.A. Office at 2051 Plains Road East, Burlington, Ontario, on February 11th, 2011.

[26] During the course of his legal submissions in respect of the subject *Charter* Application, the prosecutor stated that the defendant failed to attend for his scheduled first attendance meeting with the prosecutor on April 11th, 2011. The defendant's representative did not object to the Court taking judicial notice of this fact.

[27] Furthermore, during the course of their respective legal submissions in this proceeding, both parties acknowledged that the defendant's representative first requested disclosure of the information and evidence relevant to the subject charge from the prosecution on May 16th, 2011. The parties agreed that the defendant's representative submitted a further request for disclosure on June 27th, 2011, when he had not received a response from the prosecution relative to the first request and that the prosecution eventually provided the defendant's representative with the requisite disclosure of evidence and information on November 16th, 2011.

[28] During his submissions in this proceeding, the defendant's representative advised that he was not proffering any verbal or affidavit evidence to the Court pertaining to the issue of any prejudice that the defendant may have suffered to his rights to security of the person, to liberty or to a fair trial, as a result of the degree of the alleged trial delay. In that regard the defendant's representative argued that the Court should be able to draw an inference that the defendant's individual rights as stated above have been impaired by the length of the purported delay in the trial of the proceeding.

[29] Furthermore, during the course of his legal submissions on this Application, the prosecutor advised the Court that he was not going to be adducing any verbal or affidavit evidence relative to the issue of any inferred prejudice allegedly suffered by the defendant relative to the claimed degree of trial delay attributable to either actions of the prosecution or to institutional/systemic factors.

CHRONOLOGY OF EVENTS

[30] On February 9th, 2011, Provincial Offences Officer K. Winiarski personally served an Offence Notice on the defendant charging him with the subject offence. This Offence Notice corresponded with Certificate of Offence number 1260-5496591A, issued by Officer Winiarski. The said Certificate of Offence was filed in the Ontario Court of Justice, P.O.A.

Office, 2051 Plains Road East, Burlington, Ontario on February 11th, 2011.

[31] On February 22nd, 2011, the defendant attended in the Burlington Provincial Offences Court and filed both a Notice of Intention to Appear and a Request for First Attendance in respect of the subject Certificate of Offence, with the Court.

[32] In accordance with the defendant's request for a first attendance meeting with the prosecutor, the administration officials of the Burlington Provincial Offences Court issued a First Attendance Notice to the defendant advising him that his first attendance appointment with the prosecutor in respect of the subject charge, had been scheduled for March 28th, 2011 at 9:30 a.m. in the Burlington Provincial Offences Court. It is likely that this Notice was sent to the defendant within a period of two weeks from the time that he filed his First Attendance Request with the Court on February 22nd, 2011.

[33] On March 23rd, 2011, the defendant attended in the Burlington Provincial Offences Court to file his Request for Postponement of First Attendance Appointment. By filing this document, the defendant sought to reschedule his March 28th, 2011 first attendance meeting. Once the defendant filed this postponement request with the court, the administration officials re-scheduled the first attendance appointment with the prosecutor for April 11th, 2011, at 9:30 a.m. in the Burlington Provincial Offences Court.

[34] On April 11th, 2011, the defendant failed to attend for his scheduled first attendance appointment with the prosecutor. Therefore, the administrative office of the Burlington Provincial Offences Court took steps to issue a Notice of Trial in the subject proceeding to the defendant in accordance with statements made by him in his Notice of Intention to Appear, dated February 22nd, 2011.

[35] On May 6th, 2011, the Clerk of the Burlington Provincial Offences Court issued a Notice of Trial to the defendant, which was sent to him by ordinary mail on May 9th, 2011. In this Notice, the Clerk fixed the trial of the subject charge for February 17th, 2012, at 9:00 a.m. in court room #2 at the Ontario Court of Justice located at 2051 Plains Road East, Burlington, Ontario. The Notice of Trial was sent to the defendant at his address in Hamilton, Ontario, as recorded in his Notice of Intention to Appear.

[36] On May 16th, 2011, the defendant's representative applied to the Office of the Prosecutor for the City of Burlington seeking disclosure of prosecutorial evidence and other relevant information pertaining to the subject charge. As the defendant's representative had not received the requested disclosure by June 27th, 2011, he re-applied for disclosure on that date. The Office of the Prosecutor for the City of Burlington eventually replied to the representative's request by providing the disclosure materials to him on November 16th, 2011.

[37] On September 17th, 2011, the defendant's representative prepared the subject Notice of Constitutional Question in this proceeding, to be argued at the time of the trial of the subject proceeding on February 17th, 2012. The representative's assistant served the said Notice on the Attorneys General of Canada and Ontario, by facsimile transmission on September 17th, 2011. The office of the defendant's representative served the Notice on the Office

of the Prosecutor for the City of Burlington on the 21st day of September, 2011 and the Notice and the relevant affidavit of service was then filed in the office of the Burlington Provincial Offences Court on that date.

[38] On the 17th day of February, 2012, the defendant appeared with his representative before me, in the Burlington Provincial Offences Court for the trial of the subject charge. The trial was set to commence during the 9:00 a.m. tier of Part I Provincial Offences Act cases, during which time there were 27 other individual charges scheduled for trial.

[39] The prosecutor called the defendant's case at 10:57 a.m. At that time he indicated that the matter was to proceed by way of a trial, beginning with the hearing of the defendant's *Charter* Application as evidenced by the Notice of Constitutional Question which the defendant filed with the Court on September 21st, 2011. The prosecutor indicated that he was ready to proceed with the trial and he requested that the defendant be arraigned on the subject charge.

[40] The defendant's representative advised the Court that he was ready to proceed with the both the trial of the subject charge as well as his client's preliminary Application for a stay of the subject proceedings under subsection 24(1) of the *Charter*.

[41] At that point in time, I began to review the defendant's Notice of Constitutional Question and the supporting documentation proving service of the Notice, prior to proceeding with the arraignment of the defendant on the subject charge. Upon reviewing the documentation, I discovered an irregularity in the formal sufficiency of the Notice of Constitutional Question. The irregularity related to a discrepancy between the facsimile transmission number for the Attorney General of Canada as shown on the defendant's Notice before me and that mandated by the form of the Notice of Constitutional Question established by the Regulations made pursuant to the *Courts of Justice Act*. In light of the fact that the defendant's representative used a facsimile transmission number other than the one shown on the regulatory form, I had an initial concern as to whether or not the Attorney General of Canada had been properly served with the Notice of Constitutional Question on September 17th, 2012.

[42] Upon discovering the discrepancy relative to the facsimile transmission telephone number for the Attorney General of Canada, the prosecutor argued that the defendant's Notice was not properly before the Court, as the form filed with the Court did not strictly comply with the form mandated by the Rules of Civil Procedure as required by subsection 109(2.1) of the *Courts of Justice Act*.

[43] In light of the procedural issue before me relative to the formal validity of the defendant's Notice of Constitutional Question, I invited legal submissions from both parties relative to the issues raised and as to whether the subject Notice of Constitutional Question was properly before me for determination at the subject time. I received the legal submissions of the parties on the issue until approximately 11:55 a.m. when I reserved my decision until after the lunch break, to be rendered sometime during the 1:30 p.m. tier of cases.

[44] At 1:30 p.m., I returned to the court room to preside over the afternoon tier of Part I *Provincial Offences Act* trials. I noted that at that time there were 21 cases before me scheduled for trial in addition to the defendant's matter held down for my procedural decision. The prosecutor recalled the defendant's trial matter at 3:51 p.m. At that time, I rendered my decision, finding that the subject Notice of Constitutional Question had been made in substantial compliance with the regulatory form despite the discrepancy relative to the facsimile transmission telephone number for the Attorney General of Canada. I ruled that the *Charter* Application filed could proceed before me during the trial of the proceeding at that time.

[45] In light of my ruling and after engaging in some discourse with the parties as to whether the defendant should be arraigned at that time; at approximately 4:15 p.m., I decided that in light of my procedural decision, I should be seized of the trial of the matter including the *Charter* Application.

[46] The defendant was arraigned on the subject charge at 4:29 p.m. at after the defendant entered a plea of not guilty the charge, the trial of the subject matter was adjourned to May 7th, 2012, at 9:00 a.m., for trial continuation and the hearing of the defendant's subsection 11(b) and 24(1) *Charter* Application, due to lack of time. I then closed Court for the day at 4:33 p.m.

[47] At the time of the adjournment of the trial, the prosecutor advised the Court that May 7th, 2012, was the earliest day that the court administration could offer for a potential full day trial, to accommodate not only the hearing of the subject *Charter* Application, but the completion of the trial of the offence on its merits, if necessary. The Court then adjourned the subject proceeding to May 7th, 2012, reserving the whole day for the continuation of the trial in this matter.

[48] In adjourning the proceeding at approximately 4:31 p.m., I stated the following:

...Mr. Szewczyk, if you could stand then please, your matter sir, is adjourned to Monday May 7th, 2012, at 9 a.m. in number one court in this building in Burlington, for argument of the Notice of Constitutional Question, the application under sections 11(b) and 24(1) of the *Canadian Charter of Rights and Freedoms*, and for a possible trial as well on that date. So it is essentially marked as a trial continuation date, but with the acknowledgment that this Notice of Constitutional Question has intervened at the outset of the trial today and is adjourned for the purposes of the – primarily for the purposes of the argument of the application under section 24(1) of the *Canadian Charter of Rights and Freedoms*. ...

[49] The trial of the subject proceeding was reconvened on May 7th, 2012, commencing at 9:00 a.m. in the Burlington Provincial Offences Court. At that time, the defendant attended with his representative and was ready to proceed with the trial continuation, including the hearing of the *Charter* Application. The prosecutor seized with the matter attended before me and indicated that he was ready to proceed with the trial continuation and the hearing of the Application.

[50] During the reconvened trial of May 7th, 2012, I received legal submissions relative to the defendant's *Charter* Application from the parties, between 9:01 a.m. and 10:55 a.m.

and further between 11:20 a.m. and 12:30 p.m., when the hearing of the Application was completed. I then advised the parties that I was going to reserve my judgment on the *Charter* Application given the complexity of the arguments which were presented to me.

[51] I suggested that I needed approximately three months to consider and write my judgment on the Application, given my busy judgment writing schedule at that time and given my desire to obtain a transcript of the proceedings of May 7th, 2012 to assist me in the writing of my judgment in this matter. Furthermore, I stated that the matter should be re-scheduled for a special full day trial, so as to ensure that there was adequate time available not only for the delivery of my oral judgment relative to the *Charter* Application, but also for the trial of the subject charge on its merits and to its completion, if necessary.

[52] The court clerk/monitor then advised that the earliest date that the court administration could provide for the continuation of the trial in this proceeding was July 9th, 2012 at 1:30 p.m. for purposes of a one-half day hearing. Both the prosecutor and the defendant's representative advised that they were available on that date however I stated that I did not believe that that date would afford me the proper amount of time to complete my judgment in this matter, given the status of my judgment writing schedule at that time. I also felt that the Court needed to reserve one full day for this proceeding to ensure its completion on the next trial date. In stating my thoughts in this regard, I suggested that the matter be reconvened no earlier than August 7th, 2012, but that hopefully an adequate amount of trial time could be found for this matter sometime in the month of August 2012.

[53] The court clerk/monitor then advised that other than the July 9th, 2012 date, the earliest date available for a special trial of one-half day or more was October 29th, 2012. In rejecting the July 9th, 2012 date as an appropriate date for my judgment and possible trial continuation, I made the following comments:

Well, as I say I think the July 9th might just be a little too early. In any event it's that situation of the half day and I think that what I would say is this; I don't think a half day is going to be enough, especially since it's in the afternoon and to deal with my judgment and the different issues that I have to try and deal with here, and also then to start a trial and, you know, with the anticipated view that it's going to be competed that day. ...

[54] After I made the aforesaid comments, at 12:44 p.m. I adjourned the subject proceeding to October 29th, 2012 at 9:00 a.m. in the Burlington Provincial Offences Court for a full day for purposes of the delivery of my judgment on the defendant's *Charter* Application and possible trial continuation.

THE LAW

Canadian Charter of Rights and Freedoms ("Charter")

[55] The following portions of the *Charter* are relevant to the defendant's application herein:

ss. 11(b) Any person charged with an offence has the right... (b) to be tried

within a reasonable time.

ss. 24(1) Anyone whose rights and 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.

Relevant Common Law

[56] The defendant stands charged with an offence prosecuted under the procedure codified in Part I of the P.O.A. Accordingly, the following comments made by Doherty J.A. in paragraph 3 of his endorsement decision in *Regina v. Omarzadah*, [2004] O.J. No. 2212 (Ont. C.A.), are apposite. In denying the prosecution application for leave to appeal a decision of a provincial offences appeals court granting a stay of proceedings in circumstances where a Part I prosecution for a speeding offence took 14 months to be tried, Mr. Justice Doherty stated, in part, as follows:

...

The applicant is concerned that the reasons below will be taken as establishing a six-month guideline for prosecutions under Part I of the POA. The applicant is concerned that delays beyond six months will be treated as presumptively unconstitutional. The reasons below should not be read as authority for that proposition. The analysis of s. 11(b) provided in *R. v. Morin*, [1992] 1 S.C.R. 771 applies to POA prosecutions. To the extent that guidelines are helpful where s. 11(b) claims are advanced in prosecutions under Part I of the POA, the *R. v. Morin* summary conviction guidelines should govern. Even those guidelines, however, should not necessarily be strictly applied. It must be acknowledged that any ‘stigma’ arising out of the delay in the trial of charges like speeding is virtually non-existent. In allocating finite resources, the state is entitled to give some priority to the speedy resolution of more serious allegations.

...

[57] In his decision, written on behalf of the Supreme Court of Canada in *Regina v. Godin*, [2009] 2 S.C.R. 3 (S.C.C.), Cromwell J. summarized the methodology used to determine whether or not one’s subsection 11(b) rights have been violated, in paragraph 18 therein, as follows:

The legal framework for the appeal was set out by the Court in *Morin*, [*supra.*] at pp. 786-89. Whether delay has been unreasonable is assessed by looking at the length of the delay, less any periods that have been waived by the defence, and then by taking into account the reasons for the delay, the prejudice to the accused, and the interests that s. 11(b) seeks to protect. This often and inevitably leads to minute examination of particular time periods and a host of factual questions concerning why certain delays occurred. It is important, however, not to lose sight of the forest for the trees while engaging in this detailed analysis. As Sopinka J. noted in *Morin*, at p. 787, “[t]he general approach... is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which [s. 11(b)] is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay.”

[58] In his decision in *Regina v. Morin*, [1992] 1 S.C.R. 771 (S.C.C.), Sopinka J. writing on behalf of the majority of the Court, defined the purpose of section 11(b) of the Charter, in

paragraphs 26 to 30 of his decision, as follows:

The primary purpose of s. 11(b) is the protection of the individual rights of accused. A secondary interest of society as a whole has, however, been recognized by this Court. I will address each of these interests and their interaction.

The individual rights which the section seeks to protect are: (1) the right to security of the person, (2) the right to liberty, and (3) the right to a fair trial.

The right to security of the person is protected in s. 11(b) by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.

The secondary societal interest is most obvious when it parallels that of the accused. Society as a whole has an interest in seeing that the least fortunate of its citizens who are accused of crimes are treated humanely and fairly. In this respect trials held promptly enjoy the confidence of the public. As observed by Martin J.A. in *R. v. Beason* (1983), 36 C.R. (3d) 73 (Ont. C.A.): ‘Trials held within a reasonable time have an intrinsic value. The constitutional guarantee enures to the benefit of society as a whole and, indeed, to the ultimate benefit of the accused...’ In some cases, however, the accused has no interest in an early trial and society’s interest will not parallel that of the accused.

There is, as well, a societal interest that is by its very nature adverse to the interests of the accused. In *Conway* [[1989] 1 S.C.R. 1659 (S.C.C.)], a majority of this Court recognized that the interests of the accused must be balanced by the interests of the society in law enforcement. This theme was picked up in *Askov* [[1990] 2 S.C.R. 1199 (S.C.C.)], in the reasons of Cory J. who referred to ‘a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to law’. As the seriousness of the offence increases so does the societal demand that the accused be brought to trial. The role of this interest is most evident and its influence most apparent when it is sought to absolve persons accused of serious crimes simply to clean up the docket.

[59] In his decision in *Regina v. Godin, supra*. Cromwell J. acknowledged the societal interest which is adverse to the interests of the accused, by noting that “there is a strong societal interest in having serious charges tried on their merits”.

[60] In describing the general approach to be taken in determining whether an individual’s right to be tried within a reasonable time has been denied, Sopinka J. in *Morin, supra*. remarked that the reasoning does not involve “the application of a mathematical or administrative formula”. He went on to state that a Court considering such an issue should engage in “a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of the delay”. In this regard, the jurist determined that the following factors be considered in analyzing the reasonableness of the length of any particular delay in bringing the trial of a charge against an accused person to its completion:

1. the length of the delay;
2. waiver of time periods;

3. the reasons for the delay, including
 - a) inherent time requirements of the case,
 - b) actions of the accused,
 - c) actions of the Crown,
 - d) limits on institutional resources, and
 - e) other reasons for the delay; and
4. prejudice to the accused.

[61] Mr. Justice Sopinka went on to define the judicial approach relative to the consideration of an accused person's contention that his/her rights under subsection 11(b) of the Charter had been infringed, in paragraph 32 of his decision in *Morin, supra.*, as follows:

The judicial process referred to as 'balancing' requires an examination of the length of the delay and its evaluation in light of other factors. A judicial determination is then made as to whether the period of delay is unreasonable. In coming to this conclusion account must be taken of the interests which s. 11(b) is designed to protect. Leaving aside the question of delay on appeal, the period to be scrutinized is the time elapsed from the date of the charge to the end of the trial. See *R. v. Kalanj*, [1989] 1 S.C.R. 1594 (S.C.C.). The length of this period may be shortened by subtracting periods of delay that have been waived. It must then be determined whether this period is unreasonable having regard to the interests s. 11(b) seeks to protect, the explanation for the delay and the prejudice to the accused.

[62] In commenting on the "role of the burden of proof" in section 11(b) applications, Mr. Justice Sopinka adopted the views of the Supreme Court of Canada in *Regina v. Smith*, [1989] 2 S.C.R. 1120 (S.C.C.), in finding that in an application for a judicial determination that an accused person's subsection 11(b) rights had been infringed, the "ultimate or legal burden of proof" rests on the accused throughout.

[63] The Court in *Smith, supra.* stated, however, that "a case will only be decided by reference to the burden of proof if the court cannot come to a determinate conclusion on the facts presented to it". It was noted that "although the accused may have the ultimate or legal burden, a secondary or evidentiary burden of putting forth evidence or argument may shift depending on the circumstances of each case". In that regard, the Court made the following comments:

...For example, a long period of delay occasioned by a request of the Crown for an adjournment would ordinarily call for an explanation from the Crown as to the necessity for the adjournment. In the absence of such an explanation, the court would be entitled to infer that the delay is unjustified. It would be appropriate to speak of the Crown having a secondary or evidentiary burden under these circumstances. ...

[64] In her decision in *Regina v. Aujla*, 2010 ONCJ 531 (Ont. C.J.), Zisman J. defined the roles of both the applicant and the Crown in subsection 11(b) applications as follows:

The onus to establish a breach of section 11(b) is on the applicant. It is the Crown's responsibility to ensure that trial proceedings are not unduly delayed.

[65] In *Morin, supra*. Sopinka J. defined each of the factors which he determined to be associated with an analysis of the reasonableness of any particular trial delay.

[66] In addressing the factor of the length of the delay, the said jurist stated that an inquiry into an allegation of unreasonable delay “should only be undertaken if the period is of sufficient length to raise an issue as to its reasonableness”. In this regard, he went on to state as follows:

If the length of the delay is unexceptional, no inquiry is warranted and no explanation for the delay is called for unless the applicant is able to raise the issue of reasonableness of the period by reference to other factors such as prejudice. If, for example, the applicant is in custody, a shorter period of delay will raise the issue.

[67] In discussing the issue of waiver of time periods in *Morin, supra.*, Sopinka J. stated that “if by agreement or other conduct the accused has waived in whole or in part his or her rights to complain of delay then this will either dispose of the matter or allow the period waived to be deducted”. He went on to state that “in order for an accused to waive his or her rights under s. 11(b), such waiver must be clear and unequivocal, with full knowledge of the rights the procedure was enacted to protect and of the effect that waiver will have on those rights”. He noted that waiver “requires advertence to the act of release rather than mere inadvertence”.

[68] Mr. Justice Sopinka explained that waiver could be explicit or implicit. In defining the concept of implicit waiver, he adopted the following comments made by Cory J. in *Askov, supra*:

...there must be something in the conduct of the accused that is sufficient to give rise to an inference that the accused has understood that he or she had a s. 11(b) guarantee, understood its nature and has waived the right provided by that guarantee.

[69] In his concluding remarks pertaining to implicit waiver, Sopinka J. stated as follows:

...If the mind of the accused or his or her counsel is not turned to the issue of waiver and is not aware of what his or her conduct signifies, then this conduct does not constitute waiver. Such conduct may be taken into account under the factor “actions of the accused” but it is not waiver. As I stated in *Smith, supra*, which was adopted in *Askov, supra*, consent to a trial date can give rise to an inference of waiver. This will not be so if consent to a date amounts to mere acquiescence in the inevitable.

[70] In her unreported decision in *Regina v. Syed Khan*, (Halton Provincial Offences Court file no. 95128045) (Ont. C.J.), dated January 7th, 2011, Madam Justice R. Zisman, sitting as a P.O.A. Appeal Court, ruled that a defendant charged with a Part I P.O.A. offence and who requests a first attendance appointment with the prosecutor at the same time as he/she files his or her Notice of Intention to Appear, implicitly waives the period between the date when the first attendance appointment was requested and the date of the actual appointment with the prosecutor.

[71] In upholding the decision of the trial justice of the peace, denying the appellant's *Charter* application seeking a stay of the subject H.T.A. charge under subsection 24(1) of the *Charter*, Zisman J. stated, in part, as follows:

...in my view, first of all *Morin* is very clear that the eight to twelve months is simply a guideline and not a fixed time period and everything has to be considered and balanced. And, the overall delay is concerning and that raises the issues raised in *Askov* and *Morin*. In other words, the length of delay is-even if you take off the three months, is something that one has to look at in terms of is that a reasonable delay and, in my view, it is not. It is a lengthy delay and it raised the *Morin* issue.

So then we have to look at whether there is a waiver to any of the time periods and, in my view, there is an implicit waiver by Mr. Khan in this case by agreeing to the first attendance. So I would deduct those three months. If I look at the reasons for the delay as required by *Morin*, I agree that on a speeding ticket that there are no inherent delays in terms of getting a case ready, but the actions of the defendant become relevant in terms of asking for an administrative delay. ...I think the Justice of the Peace was correct. That in all of the circumstances it is not an unreasonable delay in view of the fact that part of the confusion is caused by the defendant and there is no prejudice to him, in my view.

...

[72] It is noted that in reaching her decision that a person who requests a first attendance appointment with a prosecutor in respect of a Part I P.O.A. charge, accepts a delay in the setting of a trial date, Madam Justice Zisman characterized the procedure as "an administrative process", noting that "nobody has to agree to it". In this regard, the jurist stated that "if you want your trial, you can just stand on your grounds to have a speedy trial", once again remarking that "you don't need to agree to this administrative process".

[73] Furthermore, during her discourse with the defendant's representative in this appeal, Zisman J. maintained that when a defendant requests a first attendance appointment at the time that he/she files the Notice of Intention to Appear, the defendant is, by taking that step, "essentially agreeing to a delay, because he's bypassed the trial. He's going onto his first attendance".

[74] In analyzing the appellant's actions in the subject appeal in requesting the first attendance appointment procedure, Madam Justice Zisman made the following comments:

...

But he doesn't have to agree to it. That's the point that's being raised. He, he doesn't have to agree to a first attendance court. He can just ask – if he fills in the front of this form, right, that says I want a trial date and doesn't check off first attendance he's going to get a trial notice. That's the way I understand the process.

...

So, what he's done is taken an added step. He said, no, no, no. I want to meet with the Crown. I want to see if I can resolve – or the prosecution. That's what he's done. So, he has delayed the process by asking for this administrative hearing. ...

[75] During the course of receiving the parties arguments during this appeal, Madam

Justice Zisman responded to the concern raised by the appellant's representative that the defendant has no control over the timing of the first attendance meeting after he/she has requested the meeting, by noting that a defendant doesn't have to accept a lengthy delay in that regard. The jurist went on to note that in that circumstance the defendant could simply cancel the first attendance, because of the unacceptable delay, thereby causing the court administration to set a trial date.

[76] In paragraphs 40 to 60 of his decision in *Morin, supra.*, Sopinka J. addressed the factor of the "reasons for the delay", including the constituent elements of that factor, identified as "inherent time requirements", "actions of the accused", "actions of the Crown", "limits on institutional resources" and "other reasons for delay". In his introductory remarks pertaining to the factor of the reasons for the delay, the said jurist remarked as follows:

If the application by an accused is not resolved by reason of the principles of waiver, the court will have to consider the other explanations for delay. Some delay is inevitable. Courts are not in session day and night. Time will be taken up in processing the charge, retention of counsel, applications for bail and other pre-trial procedures. Time is required for counsel to prepare. Over and above these inherent time requirements of a case, time may be consumed to accommodate the prosecution or defence. Neither side, however, can rely on their own delay to support their respective positions. When a case is ready for trial a judge, courtroom or essential staff may not be available and so the case cannot go on. This latter type of delay is referred to as institutional or systemic delay. ...

[77] In analyzing the element of inherent time requirements, Mr. Justice Sopinka stated that "all offences have certain inherent time requirements which inevitably lead to delay". In that regard, the jurist noted that the parties in a trial need time to prepare, indicating that "all other factors being equal, the more complicated a case, the longer it will take counsel to prepare for trial and for the trial to be conducted once it begins". The jurist noted that the inherent requirements of complex cases "will serve to excuse longer periods of delay than for cases which are less complex". He went on to state that "account must also be taken of the fact that counsel for the prosecution and the defence cannot be expected to devote their time exclusively to one case".

[78] The jurist submitted that "as well as the complexity of a case there are inherent requirements which are common to almost all cases". He acknowledged that these requirements could be described as "intake requirements". He noted that these requirements "consist of activities such as retention of counsel, bail hearings, police and administrative paperwork, disclosure etc." and that while all of these activities may not be necessary in a particular case, "each activity takes some amount of time". He reasoned that "as the number and complexity of these activities increase, so does the amount of delay that is reasonable", and that "the fewer the activities which are necessary and the simpler the form each activity takes, the shorter should be the delay".

[79] Sopinka J. argued that the length of time necessary for the performance of intake activities for various categories of offences would be influenced by "local practices and conditions and should reflect that fact". He opined that the "intake period" in a particular region would tend to be the same for most offences, suggesting that the period would likely fall

“within a range of a certain number of weeks or months”.

[80] The issue of the reasonableness of the duration of an “intake period” in the context of an offence prosecuted under the procedure codified in Part I of the P.O.A., has been considered in two Ontario provincial offences appeal court decisions.

[81] In his endorsement decision in *Regina v. Hussain*, [2005] O.J. No. 158 (Ont. C.J.), Casey J. found that an “intake period” of “a little less than two months” was a reasonable period relative to offences against the accused of “failing to stop at a red light”, contrary to subsection 144(18) of the *Highway Traffic Act* and “failing to have an insurance card”, contrary to section 3(1) of the *Compulsory Automobile Insurance Act*. In making that finding the jurist observed that in these specific Part I P.O.A. proceedings, the accused filed his Notice of Intention to Appear with the Provincial Offences Office of the Ontario Court of Justice on June 25th, 2003 and that the said office sent a Notice of Trial to the accused on August 21st, 2003. Mr. Justice Casey opined that the period of time between the said two dates (a period of approximately two months) “could be found to be a reasonable intake period”.

[82] Furthermore, in his decision in *Regina ex. rel. City of Toronto v. Andrade*, 2011 ONCJ 470 (Ont. C.J.), Libman J. undertook an extensive review of the issue of the appropriate length of an “intake period” in the context of Part I P.O.A. prosecutions in the City of Toronto. In the decision, Mr. Justice Libman declined to follow Mr. Justice Casey’s decision in *Hussain, supra*, relative to the “assessment of an appropriate intake period” for these types of prosecutions.

[83] After considering the evidence adduced on appeal as to the issue of the “intake period” and in particular the practices and procedures employed by the City of Toronto in processing certificates of offence and notices of intention to appear and in scheduling trial dates, the said jurist concluded, in part, as follows:

I am respectfully of the view, in assessing the merits of the positions put forward by both the appellant and the respondent as to a reasonable intake period, that each fails to fully take into account the legitimate concerns of the other, that is, the high volume of trial requests processed by the municipality in scheduling trials, and the defendant’s right to have a trial promptly scheduled with some consideration as to his/her individual interest and availability in the date and time selected for the proceedings.

That said, I see no reason why a reasonable intake period for a traffic ticket, as a general rule, should exceed a period of between 30-45 days. An intake period in the lesser range of 30 days will be appropriate where the defendant acts promptly within the 15 day window to respond to his/her ticket and files the notice of intention to appear in court for trial, and the officer, in turn files the certificate of offence or offence notice expeditiously in the court office, thereby allowing court administration to have all the necessary documentation within days of the issuance of the ticket. An intake period in the outer range of 45 days will be appropriate where the defendant does not act until the latter part of the 15 day window to respond to his/her ticket and file[s] the notice of intention to appear in court for trial, or the officer does not file with dispatch the certificate of offence or offence notice in the court office, thereby causing court administration to wait a lengthier period before having all the necessary documentation to schedule a trial date.

In either case, an intake period or inherent time requirement of 30 to 45 days should result in provincial offences trials for minor offences being scheduled within approximately two months of the offence date. ...

[84] In his decision in *Regina v. Lahiry*, [2011] O.J. No. 5071; 2011 ONSC 6780 (Ont. Sup. Ct.), Code J. interpreted the decisions of Sopinka J. in *Regina v. Morin*, *supra* and *Regina v. Sharma*, [1992] 1 S.C.R. 814 (S.C.C.) as standing, in part, for the proposition that part of the time between the setting of a trial date for a criminal proceeding and the date of the trial may properly be characterized as part of the inherent time requirements of the case, being as stated by Mr. Justice Code, the time required for a counsel to “accommodate a new case in his calendar” and to prepare for the trial of the matter.

[85] In this regard, in paragraphs 26 and 27 of his said decision, Code J. stated as follows:

The trial judge had insisted, during oral argument of the s. 11(b) Motion, that defence counsel file his letter of instructions to his agent, setting out the earliest available dates that defence counsel was proposing for the trial. The letter was then made an exhibit on the Motion. This is a correct and necessary approach to the calculation of institutional delay. As Sopinka J. put it in *R. v. Morin*, *supra* at pp 16, 18 and 26-27, systemic or institutional delay is ‘the period that starts to run when the parties are ready for trial but the system cannot accommodate them’. He had noted, earlier in his reasons, that ‘time is required for counsel to prepare’ and that ‘counsel for the prosecution and the defence cannot be expected to devote their time exclusively to one case’. Sopinka J. held that this time for counsel to prepare and to clear their calendars when taking on a new case, is part of the inherent time requirements of the case. On the facts of *Morin’s Case*, counsel had sought ‘the earliest date’ for trial and was given a date that was just over thirteen months away. Sopinka J. held that this entire thirteen month period was not systemic or institutional delay. He reasoned as follows:

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

In other words, Sopinka J. allocated about one month as time for counsel to prepare and make themselves available for trial after setting the trial date. Sopinka J’s judgment in *R. v. Sharma* (1992), 71 C.C.C. (3d) 184 at pp. 193-4 [[1992] 1 S.C.R. 814] is to the same effect. The entire period, from the set date appearance to the trial date in that case, was just under twelve months. However, Sopinka J. held that only nine months was systemic delay. He deducted three months because systemic delay runs ‘from the time when the parties were ready for trial’ and he was not prepared to infer that they were immediately ready and available for trial when setting the trial date.

[86] Furthermore at paragraph 34 of *Regina v. Lahiry*, *supra*, Code J. stated as follows:

Finally there is no place for fictions when seeking to prove *Charter* violations. It is rarely true that counsel is immediately available for trial, when setting a date. Whenever counsel take on a new case they complete various preliminary steps dur-

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

[87] Furthermore, in her decision in *Regina v. Tran*, 2012 ONCA18 (Ont. C.A.) at para. 32, Simmons J.A. made the following comments pertaining to the inherent time requirements of a case to permit counsel to prepare for trial once it has been scheduled, as follows:

Second, parties should not be deemed automatically to be ready to conduct a hearing as of the date a hearing date is set. Counsel require time to clear their schedule so they can be available for the hearing as well as time to prepare for the hearing. These time frames are part of the inherent time requirements of the case. Institutional delay begins to run only when counsel are ready to proceed but the court is unable to accommodate them. See *Morin*, at pp. 791-2, 794-5, 805-6. See also *Lahiry*, at paras. 25-37, citing *Morin, R. v. Sharma*, [1992] 1 S.C.R. 814, *R. v. M. (N.N.)* (2006), 209 C.C.C. (3d) 436 (Ont. C.A.), *Schertzer, R. v. Meisner* (2003), 57 W.C.B. (2d) 477 (Ont. S.C.), and *R. v. Khan*, 2011 ONCA 173, 277 O.A.C. 165.

[88] At para. 48 of *Regina v. Tran*, *supra* Madam Justice Simmons made the following comments with respect to the classification of trial delay occasioned by unexpected events during the course of a trial:

...Judges should be cautious about engaging in a minute analysis of the normal vicissitudes of a trial for the purpose of allocating delay to the Crown or to the defence on s. 11(b) *Charter* applications – for example, the need to pause to consider unforeseen developments during the trial, the customary requirement to juggle the line-up and availability of witnesses, insignificant administrative glitches or early adjournments. Except in rare cases where *unreasonable* delay arising from such issues can readily be attributed to one side or the other or to the court system, I would think that delays arising from these sorts of factors during the normal evolution of a trial would be part of the inherent time requirements of the case.

[89] Furthermore in paragraphs 54, 55 and 56 of her decision in *Tran, supra*, Madam Justice Simmons adopted the concept that trial delay caused by the fact that the trial was not able to be completed in the time initially reserved for it, could be classified as institutional delay, or delay related to the inherent time requirements of the case, or delay to be apportioned between the two concepts. In this regard, the jurist stated, in part, as follows:

...As was noted in *Lahiry* [*Regina v. Lahiry*, [2011] O.J. No. 5071; 2011 ONSC 6780 (Ont. S.C.)], there are now a number of cases that address the issue of allocating delay where a trial has to be rescheduled because it was not completed with-

in the originally scheduled time frame.

As stated at para. 67 of *Lahiry*:

These authorities hold that the case must be given priority in the system and that the delays resulting from re-scheduling the trial date will generally be treated as institutional, or as part of the inherent time requirements, or a combination of both, depending on the circumstances. See *R. v. Godin*, 2009 SCC 26; [2009] 2 S.C.R. 3 (S.C.C.); *R. v. Brace* (2010), 261 C.C.C. (3d) 455 at paras. 14-16 (Ont. C.A.); *R. v. Allen* (1996), 100 C.C.C. (3d) 331 (Ont. C.A.), at pp. 347-351; *R. v. Satkunanathan* (2001), 152 C.C.C. (3d) 321 at paras. 43-45 and 54-55 (Ont. C.A.); *R. v. M.(R.)* (2003), 180 C.C.C. (3d) 49 (Ont. C.A.); *R. v. W. (A.J.)* (2009), 257 O.A.C. 11 at paras. 29-43 (Ont. C.A.) and *R. v. Khan, supra* [2011 ONCA 173 (Ont. C.A.)], at paras. 58-71.

The following comments from para. 27 of *Regina v. Allen* (1996), 100 C.C.C. (3d) 331 (Ont. C.A.), are particularly helpful:

When addressing s. 11(b), one must consider the inherent time requirements needed to get a case into the system and to complete that case: *R. v. Morin, supra*, at p. 16. Those time requirements can include adjournments necessitated by the need to find additional court time when initial estimates prove inaccurate: *R. v. Hawkins* (1991), 6 O.R. (3d) 724 at 728 (C.A.), *aff'd*, (1992), 11 O.R. (3d) 64 (S.C.C.); *R. v. Philip* (1993), 80 C.C.C. (3d) 167 at 172-73 (Ont. C.A.). The inherent time requirements needed to complete a case are considered to be neutral in the s. 11(b) calculus. The recognition and treatment of such inherent time requirements in the s. 11(b) jurisprudence is simply a reflection of the reality of the world in which the criminal justice system operates. No case is an island to be treated as if it were the only case with a legitimate demand on court resources. The system cannot revolve around any one case, but must try to accommodate the needs of all cases. When a case requires additional court resources the system cannot be expected to push other cases to the side and instantaneously provide those additional resources.

...

[90] In addressing the element of the actions of the accused in *Morin, supra*, Sopinka J. commenced his analysis by stating that “this aspect of the reasons for the delay should not be read as putting the ‘blame’ on the accused for certain portions of the delay”. The jurist stated that included in this element are “all actions taken by the accused which are voluntarily undertaken”. He noted that actions such as change of venue motions, attacks on wiretap packets, adjournments which do not amount to waiver and attacks on search warrants would fall into this category. He concluded his comments by stating that he “did not wish to be interpreted as advocating that the accused sacrifice all preliminary procedures and strategy, but simply point out that if the accused chooses to take such action, this will be taken into account in determining what length of delay is reasonable”.

[91] In his decision in *Regina v. N.N.M.*, [2006] O.J. No. 1802 (Ont. C.A.), Juriansz J.A. briefly addressed the issue of the effect of the delay in the trial proceedings occasioned by an application under subsection 11(b) of the Charter, made by an accused at the outset of trial. In that regard, Mr. Justice Juriansz made the following comments in paragraphs 64, 65 and

66 of his said decision:

I summarize what happened as follows. The state offered the respondent [the accused] a trial date in early June 2004, some twenty-six months after he was charged. Instead, he chose to set a trial date at the end of November 2004, some thirty-two months after he was charged. Then, he brought a s. 11(b) application that further delayed the trial and argued that the delay to the anticipated completion of the trial would be approximately thirty-seven months after the charges were laid.

The respondent, of course, was entitled to bring the s. 11(b) application. However, the adjournment it caused is attributable to the defence. It is not a question of fault or blame but rather recognition of the reason why the trial was adjourned. As Arbour J.A. said in *R. v. Harrison*, [1991] O.J. No. 881 (C.A.) in relation to a defence application to quash a committal to trial:

The respondent was entitled to move to quash his committals for trial, even if these motions required a postponement of the original trial date. However, he must then accept the reasonable delays that occur as a consequence of this additional step in the pre-trial process.

Of the period in excess of eleven months between May 31, 2004 and the anticipated end of trial on April 9, 2005, I would allocate nine months to the defence. Based on the Crown's concession, I would allocate the two remaining months to inherent time required to deal with the s. 11(b) application, await the court's decision, and to hold the trial.

...

[92] In addressing the element of the actions of the Crown in *Morin, supra.*, Sopinka J. noted that “as with the conduct of the accused, this factor does not serve to assign blame”. He stated that in respect of this element of the factor of the reasons for the delay, the actions under consideration include “adjournments requested by the Crown, failure or delay in disclosure, change of venue motions, etc.”.

[93] In citing an example of such an action, Mr. Justice Sopinka made reference to his decision in *Regina v. Smith, supra.*, where adjournments were sought by the Crown in order to have a particular investigating officer attend the trial. The jurist advised that in the decision he concluded that while there was nothing wrong with the Crown seeking such adjournments, the delays associated therewith could not be relied upon by the Crown to explain away delay that was otherwise unreasonable.

[94] In *Regina v. Lahiry, supra*, Code J. analyzed the factor of the reasons for the delay as follows:

The third factor, reasons for delay, can be the most important and also the most difficult of the four factors in some cases. It does not involve findings of fault, as there can be good or necessary reasons for delay. This factor simply requires an objective analysis of each period of delay in order to determine its cause. The five traditional causes are: the inherent time requirements of the case; any actions of the defence; any actions of the Crown; limits on institutional resources; and other miscellaneous causes, such as judicial delays. Careful analysis of the transcripts of each date where the proceedings were delayed is critically important to this factor. Having objectively determined the cause of each period of delay, based on the

transcripts and any other relevant evidence, this factor then assigns a weight to that period. Some delays are said to ‘weigh against the Crown’, some delays are said to ‘weigh against the defence’ and some delays are said to be ‘neutral’. Needless to say, delays caused by the accused’s own actions ‘will justify’ an otherwise unreasonable period of delay because the accused invariably seeks some benefit from such delays, such as additional time to prepare, to retain counsel, to bring some collateral proceedings, or to try to resolve the case. On the other hand, delays caused by the Crown or by inadequate resources ‘cannot be relied upon ... to explain away delay that is otherwise unreasonable’. Finally, delay due to the inherent requirements of the case ‘is neutral and does not count against the Crown or the accused’. See *R. v. Askov*, *supra.* at pp. 477-481 and 483; *R. v. Morin*, *supra.*, at pp. 16-23; *R. v. MacDougall* (1998), 128 C.C.C. (3d) 483 (S.C.C.) at p. 500.

[95] In considering the element of the limits on institutional resources in *Morin supra.*, Sopinka J. began his analysis by making the following comments:

Institutional delay is the most common source of delay and the most difficult to reconcile with the dictates of s. 11(b) of the Charter. It was the major source of delay in *Askov* [*supra.*]. As I have stated, this is the period that starts to run when the parties are ready for trial but the system cannot accommodate them. In Utopia this form of delay would be given zero tolerance. There, resources would be unlimited and their application would be administratively perfect so that there would be no shortage of judges or courtrooms and essential court staff would always be available. Unfortunately, this is not the world in which s. 11(b) was either conceived or in which it operates. We live in a country with a rapidly growing population in many regions and in which resources are limited. In applying s. 11(b), account must be taken of this fact of life. ...

[96] In analyzing the issue of how the courts are to reconcile the demand that trials are to be held within a reasonable period of time “in the imperfect world of scarce resources”, Mr. Justice Sopinka stated, in part, as follows:

... While account must be taken of the fact that the state does not have unlimited funds and other government programs compete for the available resources, this consideration cannot be used to render s. 11(b) meaningless. The Court cannot simply accede to the government’s allocation of resources and tailor the period of permissible delay accordingly. The weight to be given to resource limitations must be assessed in light of the fact that the government has a constitutional obligation to commit sufficient resources to prevent unreasonable delay which distinguishes this obligation from many others that compete for funds with the administration of justice. There is a point in time at which the Court will no longer tolerate delay based on the plea of inadequate resources. This period of time may be referred to as an administrative guideline. I hasten to add that this guideline is neither a limitation period nor a fixed ceiling on delay. ...

...

The purpose of the suggested period was not therefore that it was to be treated as a limitation period and inflexible. The purpose in expressing a guideline is two-fold. First as I have already indicated, it is to recognize that there is a limit to the delay that can be tolerated on account of resource limitations. Second, it is to avoid each application pursuant to s. 11(b) being turned into a trial of the budgetary policy of the government as it related to the administration of justice. The flavour of such a proceeding can be approached by a perusal of the voluminous record before the

Court in this case.

A number of considerations enter into the adoption of a guideline and its application by the trial courts. A guideline is not intended to be applied on a purely mechanical fashion. It must lend itself and yield to other factors. This premise enters into its formulation. The Court must acknowledge that a guideline is not the result of any precise legal or scientific formula. It is the result of the exercise of a judicial discretion based on experience and taking into account the evidence of the limitations on resources, the strain imposed on them, statistics from other comparable jurisdictions and the opinions of other courts and judges, as well as any expert opinion. ...

[97] In commenting on the application of an administrative guideline relative to the issue of the length of a constitutionally tolerable period of institutional delay, Sopinka J. wrote as follows:

The application of a guideline will also be influenced by the presence or absence of prejudice. If the accused is in custody or, while not in custody, subject to restrictive bail terms or conditions or otherwise experiences substantial prejudice, the period of acceptable institutional delay may be shortened to reflect the court's concern. On the other hand, in a case in which there is no prejudice or prejudice is slight, the guideline may be applied to reflect this fact.

In this case we are dealing with the Provincial Court. The suggested period of institutional delay ranges from 6 to 10 months. The respondent suggests that 8 to 10 months of purely systemic delay would not be unreasonable in the Provincial Court. It admits, however, that it is aiming at institutional delay of no more than 6 to 8 months in Provincial Court. Arbour J.A. in *Bennett, supra*. [*Regina v. Bennett*, [1991] O.J. No. 884 (Ont. C.A.)] suggests 'a delay of 8 1/2 to 9 months in getting a case to trial in the Provincial Court, although not a model of brevity, is not outside the range of reasonableness'.

In *Askov*, [*supra*.] Cory J., after reviewing comparative statistics suggested that a period in the range of 6 to 8 months between committal and trial would not be unreasonable. Based on the foregoing, it is appropriate for this Court to suggest a period of institutional delay of between 8 to 10 months as a guide to Provincial Courts. With respect to institutional delay after committal for trial, I would not depart from the range of 6 to 8 months that was suggested in *Askov*. In such a case this institutional delay would be in addition to the delay prior to committal. This reflects the fact that after committal the system must cope with a different court with its special resource problems. It is therefore essential to take into account the inevitability of this additional institutional delay.

[98] In addressing the final element described as "other reasons for delay" in *Morin, supra*., Sopinka J. identified a circumstance where the actions of a trial judge could be the cause of delay. In considering this scenario, the jurist was reminded of the circumstances in the case of *Regina v. Rahey*, [1987] 1 S.C.R. 588 (S.C.C.), wherein the trial judge initiated adjournments of the trial proceeding on nineteen separate occasions over a period of eleven months, after the accused had moved for a directed verdict. The jurist noted that while this form of delay was "not institutional in the strict sense" it could not "be relied upon by the Crown to justify the period under consideration".

[99] In concluding his comments relative to this element of the reasons for the delay,

Mr. Justice Sopinka stated that “other delays that have not been mentioned may weigh against the accused, but in most cases delays will weigh against the Crown for the same reason as was discussed in *Rahey, supra.*”.

[100] In paragraphs 61 to 64 of his decision in *Morin, supra.*, Mr. Justice Sopinka made the following comments pertaining to the factor to be considered on assessing the reasonableness of any trial delay; that being the factor of prejudice to the accused:

Section 11(b) protects the individual from impairment of the right to liberty, security of the person, and the ability to make full answer and defence resulting from unreasonable delay in bringing criminal trials to a completion. We have decided in several judgments, including the unanimous judgment in *Smith, supra.*, that the right protected by s. 11(b) is not restricted to those who demonstrate that they desire a speedy resolution to their case by asserting the right to a trial within a reasonable time. Implicit in this finding is that prejudice to the accused can be inferred from prolonged delay. In the American concept of this principle, expounded in *Barker v. Wingo*, [407 U.S. 514 (1972)] the inference is that no prejudice has been suffered by the accused unless he or she asserts the right. While the observation of Dubin C.J.O. in *Bennett [supra.]* that many, perhaps most, accused are not anxious to have an early trial may no doubt be accurate, s. 11(b) was designed to protect the individual, whose rights are not to be determined on the basis of the desires or practices of the majority. Accordingly, in an individual case, prejudice may be inferred from the length of the delay. The longer the delay the more likely that such an inference will be drawn. In circumstances in which prejudice is not inferred and is not otherwise proved, the basis for the enforcement of the individual right is seriously undermined.

This Court has made clear in previous decisions that it is the duty of the Crown to bring the accused to trial (see *Askov, supra.*, at pp. 1225, 1227, 1229). While it was not necessary for the accused to assert her right to be tried within a reasonable time, strong views have been expressed that in many cases an accused person is not interested in a speedy trial and that delay works to the advantage of the accused. ...

As noted by Cory J. in *Askov, supra.*, ‘the s. 11(b) right is one which can often be transformed from a protective shield to an offensive weapon in the hands of the accused’ (p. 1222). This right must be interpreted in a manner which recognizes the abuse which may be invoked by some accused. The purpose of s. 11(b) is to expedite trials and minimize prejudice and not to avoid trials on the merits. Action or non-action by the accused which is inconsistent with a desire for a timely trial is something that the court must consider. This position is consistent with decisions of this Court in regard to other Charter provisions. For example, this Court has held that an accused must be reasonably diligent in contacting counsel under Charter s. 10(b) (*R. v. Tremblay*, [1987] 2 S.C.R. 435; *R. v. Smith*, [1989] 2 S.C.R. 368). If this requirement is not enforced, the right to counsel could be used to frustrate police investigation and in certain cases prevent essential evidence from being obtained. Nonetheless, in taking into account inaction by the accused, the Court must be careful not to subvert the principle that there is no legal obligation on the accused to assert the right. Inaction may, however, be relevant in assessing the degree of prejudice, if any, that an accused has suffered as a result of delay.

Apart, however, from inferred prejudice, either party may rely on evidence to either show prejudice or dispel such a finding. For example, the accused may rely on evidence tending to show prejudice to his or her liberty interest as a result of

pre-trial incarceration or restrictive bail conditions. Prejudice to the accused's security interest can be shown by evidence of the ongoing stress or damage to reputation as a result of overlong exposure to 'the vexations and vicissitudes of a pending criminal accusation' to use the words adopted by Lamer J. in *Mills*, *supra*, [*Mills v. The Queen*, [1986] 1 S.C.R. 863 (S.C.C.)] at p. 919. The fact that the accused sought an early trial date will also be relevant. Evidence may also be adduced to show that delay has prejudiced the accused's ability to make full answer and defence.

Conversely, the prosecution may establish by evidence that the accused is in the majority group who do not want an early trial and that the delay benefited rather than prejudiced the accused. Conduct of the accused falling short of waiver may be relied upon to negative prejudice. As discussed previously, the degree of prejudice or absence thereof is also an important factor in determining the length of institutional delay that will be tolerated. The application of any guideline will be influenced by this factor.

[101] In his decision written on behalf of a unanimous panel of the Supreme Court of Canada, in *Regina v. Smith* [1989] 2 S.C.R. 1120 (S.C.C.) at para. 42, Sopinka J. made the following comments concerning the issue of prejudice in the subsection 11(b) analysis:

Having found that the delay is substantially longer than can be justified on any acceptable basis, it would be difficult indeed to conclude that the appellant's s. 11(b) rights have not been violated because the appellant has suffered no prejudice. In this particular context, the inference of prejudice is so strong that it would be difficult to disagree with the view of Lamer J. in *Mills* and *Rahey* that it is virtually irrebuttable. It is a more difficult question in contexts in which greater resort is made to this factor because the case is otherwise closer to the line. In such circumstances, the accused may wish to bolster the presumption that there is prejudice by leading evidence that there has been unusual prejudice by reason of special circumstances. On the other hand, the Crown may wish to assert that a delay which is not excessively beyond the norm should be excused because there has been minimal prejudice. Should the accused or the Crown in such circumstances be precluded from arguing or leading evidence to show what the actual prejudice was? This is a question that will have to be resolved, but that is not necessary to a decision in this case. ...

[102] Furthermore, in his decision written on behalf of a majority of the Supreme Court of Canada in *Regina v. Askov*, *supra*, Cory J. made the following brief statement pertaining to the concept of inferred prejudice, at para. 67:

The different positions taken by Members of the Court with regard to the prejudice suffered by an accused as a result of a delayed trial are set forth in *Mills* and *Rahey*. Perhaps the differences can be resolved in this manner. It should be inferred that a very long and unreasonable delay has prejudiced the accused. ...

[103] In *Regina v. Godin*, *supra*, the Supreme Court of Canada reversed the decision of the majority of the Ontario Court of Appeal panel, [2008] O.J. No. 2316, which set aside the stay of the criminal charges, as ordered by the trial judge, [2007] O.J. No. 5660, based upon unreasonable delay.

[104] In summarizing the basis for his decision to allow the appeal of the decision of the majority of the Ontario Court of Appeal in this proceeding, Mr. Justice Cromwell, writing on

behalf of the unanimous Court, stated as follows:

For the reasons that follow, I would allow the appeal and restore the stay of proceedings entered by the trial judge. This is a straightforward case and needed only modest amounts of court time, yet the delays far exceeded the guidelines set out by the Court in *R. v. Morin*, [1992] 1 S.C.R. 771. Virtually all of this delay was attributable to the Crown and no explanation was offered for it. There was some evidence of prejudice to the appellant and, when defence counsel tried to get earlier dates, his correspondence was ignored. In the result, what had started out as a summary conviction prosecution had not yet gone to trial more than two years later. In all of the circumstances, the trial judge in my respectful view was correct to conclude that this delay was unreasonable.

[105] In specifically commenting on the period of delay leading up to the trial date in the Superior Court of Justice, Cromwell J. wrote as follows:

On the scheduled date for the preliminary inquiry (September 15, 2006), the case was nearly 16 months old and therefore substantially outside the *Morin* guidelines. Unfortunately, the preliminary inquiry could not proceed as scheduled. The case was not reached until well into the afternoon as a result of other matters on the court's docket. Insufficient court time remained to proceed with the preliminary inquiry and it had to be postponed. Eventually, the preliminary inquiry was held on February 5, 2007, roughly 21 months after the charges had been laid. This period is more than double the *Morin* guideline for institutional delay in the provincial courts. No explanation has been offered about why more priority was not given to dealing with this matter which by then was in obvious s. 11(b) difficulty.

Following committal in February of 2007, trial was set in Superior Court for November 2007, roughly 30 months from the laying of the charges. The trial judge stayed the proceedings for unreasonable delay in June of 2007.

To sum up: this was a straightforward case requiring only modest amounts of court time; the delays substantially exceeded the *Morin* guidelines; virtually all of the delays are attributable to the Crown and virtually none of them to the appellant; and the Crown offered no explanation of the three critical elements that accounted for most of the delay which is attributable to it.

[106] As part of his analysis of the appellant's claim that his constitutional right to be tried within a reasonable time had been violated, Mr Justice Cromwell examined the sub-issue of whether the appellant had suffered prejudice to the individual rights which, as stated by Mr. Justice Sopinka in *Morin, supra*, section 11(b) "seeks to protect", as a result of the subject trial delay. In reaching his decision that the appellant had suffered some degree of impairment to his individual rights, Cromwell J. noted that there was some evidence that the appellant had suffered actual prejudice to his liberty interests given the fact that he had been subject to "restrictive bail conditions" for a period of more than two years.

[107] The said jurist, however, re-affirmed the principle expounded by Sopinka J. in *Morin* that "prejudice may be inferred from the length of the delay". In reaching his decision to restore the trial judge's decision to stay the charges against Mr. Godin, Mr. Justice Cromwell noted that in light of the excessive period of trial delay in this proceeding, "it was reasonable... to infer as the trial judge did that the prolonged exposure to criminal proceedings resulting from the delay gave rise to some prejudice". In his concluding comments relative

to this appeal, the said jurist remarked that “the length of the delay and the evidence supported the trial judge’s inference that some prejudice to the appellant resulted from the delay”.

[108] In commenting on the methodology to be employed in assessing the factor of “prejudice to the accused” in the context of the subsection 11(b) analysis, in paragraphs 29, 30 and 31 of his decision in *Godin, supra*, Cromwell J. stated as follows:

The Court of Appeal disagreed with the trial judge’s analysis of prejudice and found that any prejudice to the accused’s interest in a fair trial was too speculative to be considered. Partly on this basis, the Court of Appeal found that the delay was not unreasonable. I respectfully disagree. In light of the length of the delay, of the Crown’s failure to explain the multiple delays adequately, and of the prejudice to the accused’s liberty and security interests – if not also to his interest in a fair trial – the delay in this case was unreasonable.

Prejudice in this context is concerned with the three interests of the accused that s. 11(b) protects: liberty, as regards to pre-trial custody or bail conditions; security of the person, in the sense of being free from stress and cloud of suspicion that accompanies a criminal charge; and the right to make full answer and defence, insofar as delay can prejudice the ability of the defendant to lead evidence, cross-examine witnesses or otherwise to raise a defence. See *Morin, [supra.]*, at pp. 801-3.

The question of prejudice cannot be considered separately from the length of the delay. As Sopinka J. wrote in *Morin*, at p. 801, even in the absence of specific evidence of prejudice, “prejudice may be inferred from the length of the delay. The longer the delay the more likely that such an inference will be drawn”. Here, the delay exceeded the ordinary guidelines by a year or more, even though the case was straightforward. Furthermore, there was some evidence of actual prejudice and a reasonable inference of a risk of prejudice.

...

[109] In his decision, in *Regina v. Lahiry, supra*, Code J. summarized the analysis to be performed in considering the issue of prejudice to an accused occasioned by trial delay, as follows:

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

[110] After commenting on the issue of prejudice as set out above, Mr. Justice Code went on to provide direction as how a Court should apply its assessment to each of the four factors enunciated in *Morin, supra*, which he described as being (i) “the overall length of delay from the laying of charges until the trial concludes”; (ii) “waiver of any individual time periods”;

(iii) “the reasons for the various periods of delay”; and (iv) “prejudice to the particular interests of the accused protected by s. 11(b)”. In that regard, he stated as follows:

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

[111] In his summary conviction appellate decision in *Regina v. Emanuel*, [2012] O.J. No. 709 (Ont. Sup. Ct.), Code J. made the following comments as to the circumstances where a jurist might properly be able to infer that an accused person has experienced prejudice to his/her individual rights, resulting from the length of the particular trial delay:

The total period of delay caused by the Crown and by lack of institutional capacity, as analyzed above, was eight months. This was the period of unreasonable or unjustified delay. Knazan J. calculated the total period of unjustified delay as eleven months, given his differing characterization of the various periods of delay and his omission of the final two months of delay, as already set out above. He went on to hold that:

Mr. Emanuel is presumed to suffer prejudice from this delay ... In addition to any assumed prejudice, he submitted an affidavit describing how hard the delay has been on him. [Emphasis added].

I disagree with the trial judge, that s. 11(b) prejudice can be ‘presumed’ or ‘assumed’ from eleven months of unjustified delay, and certainly not from eight months of unjustified delay. The law is that prejudice can be inferred from ‘a very long and unreasonable delay’, that is, from delay that is ‘substantially longer than can be justified on any acceptable basis’. See: *R. v. Askov et al* (1990), 59 C.C.C. (3d) 449 at 474 and 482-4 (S.C.C.); *R. v. Morin* (1992), 71 C.C.C. (3d) 1 at 23-4 (S.C.C.); *R. v. Smith* (1989), 52 C.C.C. (3d) 97 at 111 (S.C.C.). For example, prejudice can be inferred from unjustified delays that are ‘more than double the *Morin* guideline for institutional delay in the provincial courts’. See: *R. v. Godin* (2009), 245 C.C.C. (3d) 271 at 277 (S.C.C.).

The systemic delay in this case was either under or within the *Morin* guidelines, whether calculated as seven months (as I calculate it) or ten months (as the trial judge calculated it). An additional one month of Crown delay cannot possibly convert delay that is within the guidelines into ‘very long’ or ‘substantially longer’ unjustified delay, from which prejudice can be inferred.

...

[112] In his provincial offences appeal decision in *Regina v. Farokhshadfar*, [2001] O.J. No. 6015 (Ont. C.J.), Libman J. overturned the decision of Justice of the Peace Ng denying the defendant’s application for a stay of proceedings relative to an alleged violation of his rights under subsection 11(b) of the Charter, in respect of a prosecution under Part I of the P.O.A. In the trial level decision, Justice of the Peace Ng determined that even though the period of trial delay in this proceeding being 14 months, was “on the long side”, there was “not sufficient prejudice” to the defendant to justify the granting of a stay of the charge.

[113] In overturning the decision of the trial Justice of the Peace and entering a verdict of

an acquittal on appeal, Mr. Justice Libman made the following remarks in paragraph 8 of his decision:

The very short time lines that govern under the *Provincial Offences Act* make it clear that speedy justice is the hallmark of proceedings under this Act. And the period of delay here resulted, in my opinion, in violation of the defendant's Charter of Rights, whether or not the Justice of the Peace was satisfied that prejudice was apparent or not. ...

[114] Mr. Justice Libman's comments in *Farokhshadfar*, *supra*, seem to suggest that the existence of prejudice to the defendant resulting from unreasonable trial delay is not a necessary factor when one is assessing whether a defendant's subsection 11(b) rights have been infringed, in the context of an excessive period of delay in bringing a Part I P.O.A. charge to trial.

[115] The jurist's decision in *Farokhshadfar* is similar to his determination in *Regina ex. rel. City of Toronto v. Andrade*, *supra*, wherein he upheld the decisions of the trial Justices of the Peace in ordering stays of proceedings under subsections 11(b) and 24(1) of the Charter, relative to charges prosecuted under the procedure set forth in Part I of the POA of "obstruct plate" and "unreasonable noise" under the *Highway Traffic Act*, against the defendant Mr. Andrade, and of "speeding" under the *Highway Traffic Act*, against the defendant Mr. Hariraj. In *Andrade*, Mr. Justice Libman concluded that the rights of the said defendants under subsection 11(b) had been violated, relative to periods of institutional delay of 9 months in respect of Mr. Andrade, and 10 months in respect of Mr. Hariraj, even though there was no evidence before the court of prejudice to either defendant, occasioned by the institutional delay.

[116] In paragraphs 90 to 94 of his decision in *Andrade*, *supra*, Mr. Justice Libman justified his said conclusion as follows:

Weighing Competing Interests

The final step in the s. 11(b) analysis is to weigh the competing interests between the state and the accused. As McLachlin J. (as she was then) stated at para. 87 in *Morin*, 'The task of a judge in deciding whether proceedings against the accused should be stayed is to balance the societal interest in seeing that persons charged with offences are brought to trial against the accused's interest in prompt adjudication. In the final analysis, the judge, before staying charges, must be satisfied that the interest of the accused and society in a prompt trial outweighs the interest of society in bringing the accused to trial.'

The *Highway Traffic Act* forms an important part of the public welfare legislative fabric in this province by which motorists and other users of the roadway are governed. Indeed, the rules of the road are set out for the protection of society as a whole. Not surprisingly, this statute gives rise to a very substantial number of cases before the Ontario Court of Justice. There is thus a societal interest in the effective and vigorous prosecution of highway traffic offences, particularly where harm or the potential for harm is present.

On the other hand, there is nothing particularly complex about the charges against these two defendants. Highway traffic infractions are not impervious to Charter s. 11(b) scrutiny. The defendants exercised their respective options to have trials,

and provided timely notice of their intention to rely on the right to be tried without unreasonable delay. The processing and scheduling of their trial dates was based on an unreasonable administrative procedure, emphasizing the charging practices of officers who issued the tickets, and their availability for trial only, as opposed to any consideration of the interests of the defendants; there has also been significant institutional delay which exceeds the administrative guideline period. Despite there being no evidence of prejudice to the defendants, as will not infrequently be the case in Part I provincial offences proceedings, this must be balanced by the public interest in a fair, efficient and timely process for bringing such matters to trial.

It is therefore my respectful opinion, having regard to the totality of the circumstances, that the interest of the defendants and society in a prompt trial outweighs the societal interest in bringing the accused persons to trial.

Conclusion

Courts, as Horkins J. observed in *Donaldson* [*Regina v. Donaldson*, 2010 ONCJ 3 (Ont. C.J.)] at para. 53, have a ‘constitutional mandate’ to stay charges where an accused’s protected rights under s. 11(b) are violated. Having balanced the competing interests to the best of my ability, I conclude, as did Justices of the Peace Wichman and Begley, that the defendant’s s. 11(b) Charter rights have been violated, and that the stays of proceedings imposed at trial due to unreasonable delay were warranted.

...

[117] In the case of *Regina v. Rahey*, *supra*, the majority of the Supreme Court of Canada determined that a stay of proceedings is the minimum remedy for an infringement of s. 11(b), because, in that circumstance, the court has lost jurisdiction to proceed. In that regard, Lamer J. (as he then was) made the following comments in paragraph 51 of the decision:

It is, in other words, open to the courts to take preventative 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.

ANALYSIS

[118] In attempting to reach a decision pertaining to the defendant’s subsections 11(b) and 24(1) Charter application herein, I must remind myself that it is not appropriate to resolve the issues raised by the application by means of a “burden of proof” approach. As stated by Sopinka J. in *Morin*, *supra*, while it is acknowledged that in such subsection 11(b) applications, the applicant (accused) “has the ultimate or legal burden throughout”, the preferred approach to the judicial determination of such applications is through a “balancing” of the “interests which the [subsection] is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay”.

[119] In this regard, the said jurist identified four factors, including their constituent elements, which a Court should consider in analyzing the reasonableness of the purported delay in bringing the trial of a charge to completion. Many jurists considering applications under subsections 11(b) and 24(1) of the Charter, subsequent to the release of the decision in *Morin, supra*, have described the consideration of these four factors as the “legal framework” for the analysis of such applications.

[120] I will now apply each of those factors relative to the judicial determination of the reasonableness of the length of delay in the completion of the trial of an offence, as identified in *Morin, supra*, to the facts of the case at bar.

The Legal Framework

(i) The Length of the Delay

[121] I have determined the overall length of the delay in this proceeding to be 20 months and 18 days. That time frame is comprised of the period between February 11th, 2011, when the certificate of offence herein was filed with the Burlington Provincial Offences Court, and October 29th, 2012, being the anticipated completion of the trial of the subject offence.

[122] In my view, the overall delay in this proceeding is of sufficient length to raise an issue as to its reasonableness. The length of the delay is certainly exceptional and it warrants an inquiry into the reasons for the delay.

(ii) Waiver of Time Periods

[123] The defendant has not explicitly waived his rights under subsection 11(b) of the *Charter* in respect of the subject charge.

[124] The prosecutor argues, however, that the defendant’s actions in requesting a first attendance appointment at the time that he filed his Notice of Intention to Appear in this proceeding, constitute an implicit waiver of his rights under subsection 11(b) of the *Charter*, between the date that he requested the appointment on February 22nd, 2011 and the date of the postponed first attendance appointment on April 11th, 2011. In support of this proposition, the prosecutor relies on the conclusions reached by Zisman J. in her decision in *Regina v. Syed Khan, supra*, in which she determined that the period of time between the defendant’s first attendance appointment request and the date of his first attendance meeting with the prosecutor, prior to a trial date for the matter being set, was a time frame which had been implicitly waived by the defendant.

[125] As I stated in my decision in *Regina v. Wong*, [2012] O.J. No. 4480 (Ont. C.J.), while I acknowledge that I am bound by the principles enunciated by Madam Justice Zisman in *Regina v. Syed Khan, supra*, I am of the view that the facts of the case at bar are distinguishable from those in *Syed Khan*. I do not, therefore, believe that I am bound by the opinion of the learned Justice that the period of time in the case at bar between February 22nd, 2011 and April 11th, 2011, which might be described as the “first attendance appointment pe-

riod”, was a period of time that the defendant had implicitly waived and therefore a period to be excluded from the subsection 11(b) calculus. In considering the facts of the case at bar and comparing those facts with the similar facts in the *Regina v. Wong, supra*, I find that the defendant’s actions in requesting a first attendance appointment with a prosecutor and subsequently requesting the appointment be postponed, fall short of waiver. On the other hand the defendant’s actions in that regard may be properly characterized as voluntary, strategic actions, which ultimately contributed to the delay in scheduling a trial date for the proceeding.

[126] As stated above, in *Wong, supra*, I determined that the facts in *Syed Khan, supra*, were distinguishable from the facts in *Wong*, “when I compare[d] those facts with the comments made by Sopinka J. in *Regina v. Morin, supra*, relative to the concept of implicit waiver”. In reaching my said determination, I made the following comments in paragraphs 127 to 132 of *Wong, supra*:

In her unreported decision in *Regina v. Syed Khan, supra*, rendered on January 7th, 2011, Madam Justice Zisman found that an approximate three month period between the time that the defendant filed his “Request for First Attendance” form with the court until the date of the first attendance appointment, was a period for which the defendant, Mr. Khan had implicitly waived his section 11(b) *Charter* rights. In reaching this decision, the jurist noted that the defendant voluntarily sought an opportunity to attempt to resolve the charge against him, through a pre-trial meeting with the prosecutor. She was able to draw a reasonable inference that by accepting the first attendance appointment, the defendant was content to wait until the first attendance meeting itself and explore that opportunity prior to asking the Court to fix a trial date.

While I acknowledge that I am bound by the principles set out in this decision, as they relate to first attendance appointments, I am of the view that Madam Justice Zisman’s decision is distinguishable from the facts of the case at bar, when I compare the facts with the comments made by Sopinka J. in *Regina v. Morin, supra*, relative to the concept of implicit waiver.

In the case at bar, the defendant filed her Notice of Intention to Appear and Request for First Attendance on the date of the alleged offence (May 17th, 2010). There is no evidence before the Court whereby I could reasonably infer that at the time of filing those two documents the defendant was aware of her rights under subsection 11(b) of the *Charter*, understood those rights and was consciously giving up her said rights by asking for a first attendance appointment relative to the subject charge.

It is acknowledged that on June 11, 2010, the defendant attended in the Burlington Provincial Offences Court and requested a postponement of the initial first attendance appointment scheduled for July 12th, 2010. The actions of the defendant in seeking to re-schedule the first attendance appointment permits me to draw a reasonable inference that the defendant wanted an opportunity of meeting with a prosecutor to attempt to resolve the subject charge and that she was content to wait until the conclusion of the first attendance procedure before requesting the issuance of a Notice of Trial.

On the other hand, the defendant’s action in seeking to re-schedule the first attendance appointment, because she was “going to be out of town” on July 12th, 2010, is not consistent with a finding that she knew that she had a right to be tried of the charge within a reasonable time and was willing to unequivocally give up that right up until the time of the first attendance meeting.

In my view the mere fact that the defendant requested a first attendance meeting with the prosecutor and subsequently requested that it be re-scheduled, does not mean that the defendant understood that she was giving up her constitutional right to be tried of the subject offence within a reasonable time, relative to the time between the filing of the request for the meeting and the date of the meeting. The period of time between May 17th, 2010 and August 16th, 2010, cannot therefore be considered to be a period of time over which the defendant has implicitly waived her subsection 11(b) *Charter* rights.

[127] As I found in *Regina v. Wong, supra*, there is no evidence before me relative to the conduct of the defendant herein in requesting a first attendance appointment in this matter and in subsequently seeking to postpone the timing of the appointment, upon which I could draw a reasonable inference that in taking the said steps, he understood, as stated by Cory J. in *Regina v. Askov, supra*, and as adopted by Sopinka J. in *Regina v. Morin, supra*, that he “had as. 11(b) guarantee, understood its nature and [had] waived the right provided by that guarantee”.

[128] For the reasons stated above, I am of the view that the “first attendance appointment period” in this proceeding being the time between February 22nd, 2011 and April 11th, 2011 may not be properly characterized as a period of trial delay which has been implicitly waived as a result of the defendant’s actions and conduct at the time. I will re-visit the subject period of trial delay when analyzing the reasons for the delay during this period under the categories of “inherent time requirements” and the “actions of the accused”.

(iii) The Reasons for the Delay

(A) *Inherent Time Requirements*

[129] The issues to be resolved relative to this element are:

1. whether or not there are any “intake requirements” associated with the subject speeding offence?;
2. what would be a reasonable length of an “intake period” for the subject offence?;
3. whether the period between the date of the abandoned first attendance appointment with a prosecutor on April 11th, 2011 and the date when the defendant’s representative first applied to the prosecutor for disclosure on May 16th, 2011 (a period of 1 month and 6 days), should be characterized as a period of time relative to the inherent time requirements of the case?;
4. whether a portion of the period of trial delay between the end of the first trial date in this matter on February 17th, 2012 and the second trial date on May 7th, 2012, should be allocated as being part of the inherent time requirements of the case?;
5. whether a portion of the period of trial delay between the end of the second day of trial on May 7th, 2012 and the anticipated completion date

for the subject trial on October 29th, 2012, should be allocated as being part of the inherent time requirements of the case?

[130] In considering issues numbers one and two relative to whether there are any “intake requirements” associated with the subject speeding charge and if so a determination of a reasonable length of any period to undertake such intake activities as part of the inherent time requirements of the case, I find that there are necessary intake activities associated with minor Part I P.O.A. offences such as speeding. In reaching this conclusion, I have followed the principles enunciated by Sopinka J. in *Morin, supra*, that “all offences have certain inherent time requirements which inevitably lead to delay”, and that some of these requirements are common to “almost all cases”. In the decision, Mr. Justice Sopinka noted that these requirements could be referred to as “intake requirements”, and that they would consist of “activities such as retention of counsel, bail hearings, police and administrative paperwork, disclosure etc. ...”

[131] While I acknowledge that the offence for which the defendant is charged is a minor, absolute liability offence under the *Highway Traffic Act*, which is being prosecuted by means of the procedure, codified in Part I of the P.O.A., there are, nevertheless, certain “intake” activities associated with the prosecution of the offence. These activities are limited to police and administration paperwork and the preparation of disclosure for the defendant. It is, therefore, reasonable to afford the prosecution a neutral period of time to complete these activities. This period may be described as an “intake period”.

[132] In considering the issue of the length of an intake period for the subject offence, I have taken into account the fact that the defendant proceeded expeditiously in filing his Notice of Intention to Appear with the P.O.A. Court thirteen days following the date of the alleged offence, on February 22nd, 2011. He, therefore, applied for a trial within the fifteen day window to respond to his P.O.A. Offence Notice, afforded to him under Part I of the P.O.A. Furthermore, I note that the provincial offences officer who served the Offence Notice upon the defendant on February 9th, 2011, filed the corresponding Certificate of Offence with the Court on February 11th, 2011.

[133] In determining the appropriate length of the intake period in this matter, I am persuaded by the reasoning of Libman J. in *Regina ex. rel. City of Toronto v. Andrade, supra.*, where he stated that he saw “no reason why a reasonable intake period for a traffic ticket, as a general rule, should exceed a period of between 30 to 45 days”. The jurist went on to say that “an intake period in the lesser range of 30 days will be appropriate where the defendant acts promptly within the 15 day window to respond to his/her ticket and files the notice of intention to appear in court for trial, and the officer, in turn, files the certificate of offence or offence notice expeditiously in the court office, thereby allowing court administration to have all the necessary documentation within days of the issuance of the ticket”.

[134] Mr. Justice Libman went on to state, however, that “an intake period in the outer range of 45 days will be appropriate where the defendant does not act until the latter part of the 15 day window to respond to his/her ticket and file the notice of intention to appear in court for trial or the officer does not file with dispatch the certificate of offence or offence

notice in the court office, thereby causing court administration to wait a lengthier period before having all the necessary documentation to schedule a trial date”.

[135] After considering all of the relevant factors in the determination of the appropriate length of the intake period in this proceeding, I am of the view that the period of forty-five days, between February 23rd, 2011 and April 8th, 2011, would constitute a reasonable intake period. In reaching this conclusion, I have taken into consideration the actions of the defendant in responding to the Offence Notice within the requisite fifteen day response period, the fact that the Certificate of Offence was filed with the P.O.A. Court, two days following the offence date, as well as the nature of the subject charge. Furthermore, I have taken into the consideration the fact that the defendant did not file his Notice of Intention to Appear in this matter until the thirteenth day after the date of the offence; during the latter part of the fifteen day window to respond to the traffic ticket. In light of these circumstances, in accordance with the reasoning stated in *Regina ex. rel. City of Toronto v. Andrade, supra*, I am of the view that a 45-day period, running from the date following the filing of the Notice of Intention to Appear on February 22nd, 2011, would constitute a reasonable and justifiable intake period relative to the subject charge.

[136] Furthermore, I am satisfied that the 45-day period commencing on February 23rd, 2011 and ending on April 8th, 2011 would be an adequate period of time to permit all necessary pre-trial activities to be completed by the prosecution, including police paperwork, the preparation of disclosure as well as court administrative activities pertaining to the scheduling of a trial date for the subject charge. Accordingly, I find the 45-day intake period to be an inherent time requirement for the subject proceeding. The period of time will be treated neutrally such that it will not weigh against either the prosecution or the defendant.

[137] During the course of legal argument in this *Charter* Application, I learned that following the issuance of the Notice of Trial in this proceeding on May 6th, 2011, establishing a trial date of February 17th, 2012, the defendant’s representative applied to the prosecutor for the City of Burlington for disclosure on May 16th, 2011.

[138] In light of this fact, it is reasonable for the Court to infer that following the abandonment of the defendant’s first attendance appointment with the prosecutor on April 11th, 2011, occasioned by the defendant’s failure to attend the scheduled appointment, the defendant’s representative was not in a position to adequately represent the defendant at his trial until he had first had an opportunity to apply for prosecution disclosure.

[139] It was incumbent on the court administration to issue the defendant a Notice of Trial as soon as possible after the completion of the first attendance meeting with the prosecutor, if a resolution of the charge had not been reached at the time of the meeting or if the defendant failed to attend for the meeting. The Clerk of the Court issued the Notice of Trial on May 6th, 2011 and it was mailed to the defendant on May 9th, 2011. It is clear that as of the date when the Notice of Trial was issued, the defendant’s representative was not in a position to competently defend the defendant on the subject charge, because he had not yet applied for disclosure on behalf of the defendant. He required a reasonable period of time to prepare for the trial. The fact that he hadn’t applied for disclosure until after the time that the trial

date was fixed is in my view indicative of the fact that the representative wasn't ready to proceed with the trial when it was set on May 6th, 2011 and that he wasn't actually prepared to defend the defendant on the subject charge until at least May 16th, 2011, when he applied to the prosecutor from the City of Burlington for disclosure.

[140] According to the *dicta* Mr. Justice Code in *Regina v. Lahiry, supra*, and Madam Justice Simmons in *Regina v. Tran, supra*, it cannot be assumed that defence counsel are immediately available to represent their clients on the date set for trial. According to Mr. Justice Code in *Lahiry* “whenever counsel take on a new case they complete various preliminary steps during the intake period. Once they have taken these steps and are ready to set a date for trial, they need to set aside sufficient time in their calendars to prepare the new case for trial and to then conduct the trial”. Furthermore in *Tran*, Madam Justice Simmons stated that “...parties should not be deemed automatically to be ready to conduct a hearing as of the date a hearing date is set. Counsel require time to clear their schedule so they can be available for the hearing as well as time to prepare for the hearing. These time frames are part of the inherent time requirements of the case. ...”

[141] Furthermore, it is important to remember the definition of institutional delay established by Mr. Justice Sopinka in *Regina v. Morin, supra* when he stated: “Institutional delay is the most common source of delay and the most difficult to reconcile with the dictates of s. 11(b) of the *Charter*. It was the major source of delay in *Askov, [supra]*. As I have stated, this is the period that starts to run when the parties are ready for trial but the system cannot accommodate them. ...” The fact that the defendant’s representative did not apply for prosecution disclosure until May 16th, 2011, in my view, shows that the defendant was not ready for the trial in this matter until at least that point in time. The period of institutional delay to the time of the first trial date in this proceeding should not, therefore, commence until May 17th, 2011. The period of time between April 11th, 2011 and May 16th, 2011 is therefore properly characterized as being part of the inherent time requirements of the case. That time frame, being a period of 1 month and 6 days will therefore be treated in a neutral fashion such that it does not weigh against either the prosecution or the defendant.

(B) Actions of the Accused

[142] At the outset of the first trial date in this proceeding on February 17th, 2012, the defendant sought to argue his application for *Charter* relief herein. The trial began on February 17th, 2012, however, it was not completed on that date and the matter was adjourned until May 7th, 2012 for trial continuation and specifically to allow for the pre-trial hearing of the subsections 11(b) and 24(1) *Charter* Application.

[143] In his decision in *Regina v. N.N.M., supra*, Mr. Justice Juriansz opined that while the accused was “entitled” to bring a subsection 11(b) application, the adjournment of the trial proceeding, caused by the application was “attributable” to the accused. In support of this position the said jurist cited the *dicta* of Arbour J.A. (as she then was) in *Regina v. Harrison, supra*, where she stated that while the accused/respondent “was entitled to move to quash his committals for trial”, resulting in a postponement of the original trial date, “he must then accept the reasonable delays that occur as a consequence of this additional step in

the pre-trial process”.

[144] In applying the law as stated in *N.N.M., supra* to the facts of the case at bar, it is, in my view, clear that the defendant’s *Charter* Application intervened on the first trial date thereby taking precedence to the prosecution of the trial of the subject charge at that time. The legal submissions relative to the merits of the *Charter* Application took approximately three hours to complete on May 7th, 2012. It was not therefore reasonable to expect that the Application could have been completed through to judgment on February 17th, 2012. The adjournment of the trial of the charge on its merits on February 17th, 2012, pending the completion of the hearing of the *Charter* Application, was reasonable given the complexity of the legal issues relative to this particular Application. In accordance with the ruling of the Ontario Court of Appeal in *Regina v. N.N.M., supra*, the responsibility for reasonable delays to the trial of the subject charge on its merits, associated with the defendant’s pre-trial Application herein, must be borne by the defendant.

[145] The question which then comes to mind is what reasonable period of trial delay should be attributable to the actions of the defendant in commencing the subsection 11(b) *Charter* Application on the date of the trial herein. While I accept the ruling of Juriansz J.A. that some of the responsibility for the trial delay associated with the hearing of the *Charter* Application on the trial date should be allocated to the defendant, I do not think it to be reasonable that the Application should have been delayed a further period of 2 months and twenty days, being the period of delay between February 18th, 2012; the day after the first trial date in this proceeding, and the second trial date on May 7th, 2012.

[146] Accordingly, I am disposed to allocate the responsibility for the 2 month and twenty day period of trial delay between February 18th, 2012 and May 7th, 2012, such that one-half of that period, between February 18th, 2012 and March 27th, 2012, a period of 1 month and 10 days, be attributable to the actions of the defendant in commencing the subsection 11(b) application on the trial date and thereby supplanting the time available to proceed with the trial of the subject proceeding on its merits. In reaching this conclusion I have followed the reasoning enunciated by Juriansz J.A. in paragraphs 64, 65 and 66 of his decision in *Regina v. N.N.M., supra*. The said 1 month and 10 day period is therefore categorized as being trial delay occasioned by actions of the accused/defendant. That period of time will therefore weigh against the defendant in the context of the subsection 11(b) calculus.

[147] The balance of the trial delay between the first and the second trial dates in this matter (a period of 1 month and 10 days between March 28th, 2012 and May 7th, 2012) in my view, may properly be attributable to the inherent time requirements of the case and therefore be considered neutrally for purposes of the subsection 11(b) calculus. In arriving at this conclusion in this regard, I have adopted the comments made by Doherty J.A. in his decision in *Regina v. Allen, supra*, where he stated as follows:

When addressing s. 11(b), one must consider the inherent time requirements needed to get a case into the system and to complete that case: *R. v. Morin, supra*. Those time requirements can include adjournments necessitated by the need to find additional court time when initial estimates prove inaccurate: *R. v. Hawkins* (1991), 6 O.R. (3d) 724 at 728 (C.A.), *aff’d*, (1992), 11 O.R. (3d) 64 (S.C.C.); *R.*

v. Philip (1993), 80 C.C.C. (3d) 167 at 172-73 (Ont. C.A.). The inherent time requirements needed to complete a case are considered to be neutral in the subsection 11(b) calculus. The recognition and treatment of such inherent time requirements in the s. 11(b) jurisprudence is simply a reflection of the reality of the world in which the criminal justice system operates. No case is an island to be treated as if it were the only case with a legitimate demand on court resources. The system cannot revolve around any one case but must try to accommodate the needs of all cases. When a case requires additional court resources the system cannot be expected to push other cases to the side and instantaneously provide those additional resources.

[148] In the case at bar, the trial commenced on February 17th, 2012. On that date, the Court considered the procedural validity of the defendant's *Charter* Application and received submissions on that issue for approximately one hour in the morning of the said date. The matter was then held down until the afternoon for my judgment respecting the procedural issue as to whether the form of the subject Notice of Constitutional Question filed met the formal requirements of the *Courts of Justice Act*, to allow the matter to proceed before me for a hearing at that time. At approximately 3:51 p.m. on February 17th, 2012, I rendered my decision respecting the procedural objection before me, ruling in favour of the defendant. At that point in time, being approximately 4:15 p.m., it was decided to adjourn the matter to a new day for trial continuation and the hearing of the *Charter* Application. The earliest date available to the P.O.A. Court the parties and I, was May 7th, 2012 for a special hearing at that time.

[149] In my view, an inadequate amount of time was set aside for the hearing of the *Charter* Application on February 17th, 2012, however, given the fact that the Application with all of its legal complexity intervened and took precedence over the hearing of the trial on its merits on February 17th, 2012, a special hearing date allowing at least one-half day of trial time needed to be found to ensure that the hearing of the Application could have been completed on the next reconvened date. It was not unusual then for the matter to be adjourned to a date 2 months and 20 days in the future, to find open court room space to accommodate a hearing of three hours or more.

[150] While the first one-half portion of the 2-month and 20-day period of delay from February 18th, 2012 to May 7th, 2012, may properly be attributable to the actions of the defendant in commencing the subject subsection 11(b) application on the first trial date, the second one-half portion of that period is attributable to the inherent time requirements of the case in accordance with the *dicta* of the Ontario Court of Appeal in *Regina v. Allen, supra*, as adopted by the Ontario Court of Appeal in *Regina v. Tran, supra*.

[151] Once the parties had completed their submissions on the subject *Charter* Application, following a three-hour hearing, I reserved judgment on the Application. I felt that I needed a period of approximately three months to render my judgment with adequate reasons. The court administration was able to offer a date for a one-half day block of trial time, on July 9th, 2012, approximately two months after the date that the hearing of the subsection 11(b) Application was completed. I rejected this date for two reasons; one, I was of the view that given my personal and judicial schedule at that time I would not be able to craft my

judgment in this matter for delivery before the court any time earlier than August 7th, 2012. Furthermore, I was firmly of the view that given the complexity of the issues involved in this *Charter* Application, that a full day of trial time would be required to accommodate not only the delivery of my judgment in respect of the Application, but to also ensure that the trial of the subject charge on its merits could be completed on the next trial date.

[152] The court administration advised that after July 9th, 2012, the earliest date it could provide for a special trial of one-half day or longer was October 29th, 2012. As that date was available to both the parties and myself, the matter was adjourned to October 29th, 2012 for my judgment on the subject *Charter* Application and for trial continuation, if necessary.

[153] In my view, the period of delay of 5 months and 22 days between May 8th, 2012 and October 29th, 2012, should be allocated as follows:

1. The period between May 8th, 2012 and July 7th, 2012 – This period of time of two months is a reasonable period of time to allow the Court to reserve on its judgment on the *Charter* Application and craft a reasoned judgment, in light of the fact that the Application is related to a charge of speeding prosecuted by way of the simplified procedure codified in Part I of the P.O.A. This period of trial delay is therefore allocated to the category of the actions of accused, in accordance with the reasoning enunciated in *Regina v. N.N.M.*, *supra*;
2. The period of time between July 8th 2012 and August 7th, 2012 – This period of trial delay of one month represents the period of time in excess of a reasonable period needed to craft the judgment directly related to the *Charter* Application. It is, however, an objectively reasonable period of time over and above the time required by the Court to craft its judgment on the subsection 11(b) Application, to permit the court administration to re-arrange its court room resources to accommodate a one-day block of trial time to ensure the completion of the trial of the subject charge on the next trial date, if necessary. Accordingly, the period of trial delay between July 8th, 2012 and August 7th, 2012, a period of one month, may properly be allocated to the inherent time requirements of the case, in accordance with the reasoning expounded on in both *Regina v. Allen*, *supra*, and *Regina v. Tran*, *supra*.
3. The period of time between August 8th, 2012 and October 29th, 2012 – The period of trial delay beyond August 8th, 2012 in this proceeding represents the period of time when the parties are ready for my judgment respecting the *Charter* Application and the continuation of the trial on its merits, if necessary, but the system cannot accommodate them. Accordingly this period of time, that of 2 months and 22 days, is directly attributable to institutional or systemic factors.

[154] The remaining periods of time to be considered under the element of the actions of the accused are the periods beyond the expiry of the 45-day intake period in this proceeding on April 8th, 2011, but prior to the date when the defendant failed to attend for his re-scheduled first attendance appointment on April 11th, 2011, and the initial period of time from the date when the Certificate of Offence was filed with the P.O.A. Court on February

11th, 2011 and the date when the defendant filed his Notice of Intention to Appear and Request for First Attendance in this proceeding, on February 22nd, 2011.

[155] As stated by Sopinka J. in *Morin, supra*, the element of the “actions of the accused” is relevant to those actions which are “voluntarily undertaken” by him or her and “which may have caused delay”. The jurist went on to identify a number of procedural or strategic motions or applications which might be pursued by an accused prior to trial and which could either cause or contribute to trial delay. He noted that it would be appropriate to take such actions into account in the process of assessing the reasonableness of the length of any particular trial delay.

[156] The defendant received the Offence Notice relative to the subject charge on February 9th, 2011. The Certificate of Offence related to the Offence Notice was filed in the Burlington Provincial Offences Court on February 11th, 2011. The defendant failed to attend in the Burlington Provincial Offences Court to file his Notice of Intention to Appear and Request for First Attendance until February 22nd, 2011. In my view this 11 day period of trial delay (between February 11th, 2011 and February 22nd, 2011) is clearly attributable to the voluntary actions of the defendant in failing to file his Notice of Intention to Appear and Request for First Attendance as soon as possible after he received the Offence Notice, thereby contributing to the delay involved in the administrative process of fixing a trial date and issuing a Notice of Trial. This period of delay therefore weighs against the defendant in the subsection 11(b) analysis.

[157] The period of trial delay from and including April 9th, 2011 and April 11th, 2011, a period of three days, is, in my view, directly attributable to the actions of the defendant, in requesting a postponement of his first attendance appointment in this matter from March 28th, 2011 to April 11th, 2011. This period of trial delay weighs against the defendant in the subsection 11(b) analysis.

[158] At the time that the defendant filed his Notice of Intention to Appear on February 22nd, 2011, he also filed a “Request for First Attendance”. In taking this voluntary step and choosing the option of meeting with a prosecutor in an attempt to reach a resolution to the charge, it would appear that the defendant understood that in electing the first attendance appointment procedure he was acquiescing in the temporary suspension of the issuance of a Notice of Trial until after the time of the first attendance appointment.

[159] On March 23rd, 2011, the defendant attended in the Burlington Provincial Offences Court to seek a postponement of his scheduled March 28th, 2011 first attendance appointment with a prosecutor. In this regard, he elected to re-schedule his appointment from March 28th, 2011 to April 11th, 2011. This appeared to be a voluntary act on the part of the defendant. It is therefore logical to conclude that by taking the step to postpone the initial first attendance meeting and re-schedule it, the defendant wanted to exercise his option to meet with the prosecutor and to attempt to achieve a resolution of the subject charge, prior to the issuance of a Notice of Trial, setting a date for the trial of the charge.

[160] An objective consideration of the defendant’s actions in this regard, leaves me with

only one rational conclusion; that the defendant voluntarily exercised his option to meet with the prosecutor prior to setting a trial in the matter, fully understanding that a trial date for the charge would not be set until the completion of the first attendance meeting process.

[161] Accordingly, the defendant's actions of February 22nd, 2011 in requesting a first attendance appointment rather than seeking the immediate issuance of a Notice of Trial and applying for a postponement of the initial first attendance appointment, rescheduling it for April 11th, 2011, may be properly described as strategic actions taken by the defendant, which, in turn, contributed to a delay in the scheduling of a trial date for the subject charge.

(C) Actions of the Crown

[162] The prosecution has not taken any steps in this proceeding, which has directly contributed to the trial delay.

(D) Limits on Institutional Resources

[163] In the foregoing paragraphs, I have identified a number of time periods within the time span between February 11th, 2011 and October 29th, 2012; the overall period of trial delay in this proceeding. Any period of time not specifically identified above falls in the category of institutional delay, being that period of time which "starts to run when the parties are ready for trial but the system cannot accommodate them".

[164] In summary therefore, I have apportioned the 20-month and 18-day period of trial delay relative to the subject charge, as follows:

1. **February 11th, 2011 to February 22nd, 2011** – Delay attributable to the actions of the defendant. This 11-day period of trial delay weighs against the defendant for purposes of the subsection 11(b) calculus;
2. **February 23rd, 2011 to April 8th, 2011** – Delay attributable to the inherent time requirements of the case being a reasonable "intake" period. This 1-month and 16-day period of trial delay is considered to be neutral time in terms of the subsection 11(b) calculus, which does not weigh against either the prosecution or the defendant;
3. **April 9th, 2011 to April 11th, 2011** – Delay attributable to the actions of the defendant. This 3-day period of trial delay weighs against the defendant for purposes of the subsection 11(b) calculus;
4. **April 11th, 2011 to May 16th, 2011** – Delay attributable to the inherent time requirements of the case to allow the defendant's representative to prepare for trial by ordering disclosure from the office of the prosecutor. This 1-month and 6-day period of trial delay is considered to be neutral time which does not weigh against either the prosecution or the defendant;
5. **May 17th, 2011 to February 17th, 2012** – Institutional or systemic delay. This period of trial delay of 9 months, from the date that the defendant's representative is deemed to be prepared to defend the defendant on the charge, until the first trial

date for the proceeding, weighs against the prosecution for purposes of the subsection 1(b) calculus;

6. **February 18th, 2012 to March 27th, 2012** – Delay attributable to actions of the defendant in commencing the *Charter* Application on the first trial date. This period of trial delay of 1 month and 10 days weighs against the defendant for purposes of the subsection 11(b) calculus;
7. **March 28th, 2012 to May 7th, 2012** – Delay attributable to the inherent time requirements of the case to find additional court time for the trial of this matter, due to an inaccurate estimate of the trial time initially reserved by Court administration. This 1-month and 10-day period of trial delay is considered to be neutral time which does not weigh against either the prosecution or the defendant for purposes of the subsection 11(b) calculus;
8. **May 8th, 2012 to July 7th, 2012** – Delay attributable to the actions of the defendant. This 2-month period of trial delay represents a reasonable amount of time for the Court to craft its judgment on the defendant's *Charter* Application and therefore weighs against the defendant for the purposes of the subsection 11(b) calculus, in accordance with the principles set out in *Regina v. N.N.M.*, *supra*;
9. **July 8th, 2012 to August 7th, 2012** – Delay attributable to the inherent time requirements of the case. This period of time represents a reasonable period of time to allow the administration to find Court resources to accommodate a one-day trial in this matter, if necessary. This 1-month period of trial delay is neutral time, which does not weigh against either the prosecution or the defendant for purposes of the subsection 11(b) calculus;
10. **August 8th, 2012 to October 29th, 2012** – Institutional or systemic delay. This 2-month and 22-day period of trial delay is considered to be a period of time during which all parties, including the seized trial Justice of the Peace, are ready to proceed with the continuation of the trial proceeding, but the system is unable to accommodate the required trial time. The subject period of delay weighs against the prosecution for purposes of the subsection 11(b) calculus.

(E) Other Reasons For the Delay

[165] There are no other reasons for the delay in this proceeding.

(iv) Prejudice to the Accused

[166] After completing my analysis of the reasons for the trial delay in the subject proceeding, I conclude that of the 20-months and 18-days of delay, 11 months and 22 days of that period may be attributable to institutional or systemic factors, which weigh against the prosecution. A period of 3 months and 24 days weighs against the defendant as being a period of trial delay related to the actions of the defendant in causing or contributing to the delay. Finally, the balance of the overall trial delay, being a period of 5 months and 2 days, is attributable to the inherent time requirements of the case, which is considered to be neutral

time which does not weigh against either the prosecution or the defendant.

[167] There is no evidence before me which establishes on a balance of probabilities that the defendant has experienced actual prejudice to the rights which subsection 11(b) seeks to protect; being the right to liberty relative to the concept of pre-trial incarceration or restrictive bail conditions, the right to security of the person referable to the right to seek to minimize the anxiety, concern and stigma of exposure to criminal proceedings and the right to a fair trial, referable to the concept of attempting to ensure that trial proceedings take place while evidence is available and fresh. I acknowledge, however, that prejudice to any or all of the said individual rights may be inferred from the length of the delay attributable to institutional or systemic factors or to the actions of the Crown/prosecution in contributing to the trial delay.

[168] In order to be able to draw a reasonable inference that an accused has suffered prejudice to any of his or her individual rights, the period of trial delay must be, as stated by Cory J. in *Regina v. Askov*, *supra*, “very long and unreasonable” or as stated by Sopinka J. in *Regina v. Smith*, *supra*, “substantially longer than can be justified on any acceptable basis”. In his decision in *Regina v. Emanuel*, *supra*, Code J. opined that prejudice could not be “presumed” or “assumed” from eleven months of unjustified delay. The said jurist suggested that prejudice to an accused person’s individual rights to liberty, to the security of the person or to a fair trial could be inferred in circumstances, such as in the case of *Regina v. Godin*, *supra*, where the “unjustified” trial delay was “more than double the *Morin* guideline for institutional delay in the provincial courts”.

[169] In the case at bar, the defendant’s representative argues that in light of the length of the institutional or systemic delay in this proceeding, I should be able to draw a reasonable inference that the defendant’s rights to security of the person and to a fair trial have been impaired by the degree of the unjustified delay in bringing the subject speeding charge, a minor, absolute liability offence under the *Highway Traffic Act*, to trial.

[170] As stated above the portion of the overall trial delay in this proceeding which may be related to institutional or systemic factors and which weighs against the prosecution is a period of eleven months and 22 days. This period of institutional delay exceeds the *Morin* summary conviction guidelines by a differential of between one month and 22 days and three months and 22 days. The trial delay attributable to institutional or systemic factors may not, therefore, be considered to be constitutionally tolerable.

[171] On the other hand, as stated by Mr. Justice Sopinka in *Regina v. Morin*, *supra*, the 8 to 10 month guideline for constitutionally tolerable periods of institutional or systemic trial delay “is neither a limitation period nor a fixed ceiling on delay”. The said jurist went on to state that the application of a guideline will also be influenced by the presence or absence of prejudice. He noted that the guideline for acceptable periods of institutional delay might be shortened in circumstances where an accused is in custody or is experiencing restrictive bail conditions. On the other hand, it is noted that in circumstances where there is no prejudice or the prejudice is slight, the guideline might be lengthened to reflect the absence of impairment to the identified rights that section 11(b) of the *Charter* is designed to protect.

[172] In this case, the defendant is charged with a speeding infraction under a Part I P.O.A. Certificate of Offence. Accordingly, there are no concerns that his right to liberty has been prejudiced by the subject trial delay. Similarly, there is no basis upon which I can infer that the defendant has suffered an impairment of his right to the security of the person occasioned by the length of the trial delay. In this regard, I am reminded of the comments made by Mr. Justice Doherty in his leave to appeal decision in *Regina v. Omarzadah, supra*, where he advised that while the *Morin* summary conviction guidelines should generally govern to prosecutions under Part I of the P.O.A., even those guidelines should not necessarily be strictly applied. He went on to state as follows:

...It must be acknowledged that any ‘stigma’ arising out of the delay in the trial of charges like speeding is virtually non-existent. In allocating finite resources, the state is entitled to give some priority to the speedy resolution of more serious allegations.

[173] In considering the length of the institutional delay in this proceeding to today’s date, I find that considering the nature of the offence before me that the length of the delay is justifiable and acceptable. I find that the *Morin* summary conviction guidelines may be expanded to include the extent of the institutional delay in this proceeding.

[174] I reach this decision based on the fact that there is no evidence before me that the defendant has suffered any actual prejudice as a result of the delay. Furthermore, the period of institutional delay in this matter is not so long “that it cannot be justified on any acceptable basis”. Accordingly, I find that I am not able to draw a reasonable inference that prejudice to either the defendant’s right to security of the person or his right to a fair trial has resulted from the extent of the institutional delay in this proceeding.

[175] In reaching my decision that the 11-month and 22-day period of institutional delay in this proceeding is justifiable, I have afforded significant weight to Mr. Justice Doherty’s comments that “any ‘stigma’ arising out the delay in the trial of charges such as speeding is virtually non-existent” and that “in allocating finite resources, the state is entitled to give some priority to the speedy resolution of more serious allegations”. I agree with the comments of the learned appellate court Justice that the state is justified in allocating a greater portion of limited public resources to allegations more serious than speeding infractions.

[176] When I consider the persuasive comments of Mr. Justice Doherty relative to the priority to be given to the prosecution of speeding charges relative to other more serious allegations, in the context of the fact that it is obvious that the defendant’s right to liberty has not been harmed by the trial delay and that there is a very low probability that the defendant has suffered any impairment of his right to security of the person, I am of the view that the 11-month and 22-day period of institutional delay relative to the trial of the subject speeding charge is not so long that it cannot be considered justifiable in the circumstances. In light of my finding in this regard, I am not able to draw a reasonable inference that the defendant has suffered prejudice to either his right to security of the person or his right to a fair trial, as a result of the aforesaid period of institutional delay. The defendant has not proffered any evidence to attempt to show that he has suffered actual prejudice to any of the rights sought to be protected by subsection 11(b) of the *Charter*, occasioned by the close to 12 months of in-

stitutional trial delay in this proceeding.

[177] Accordingly, I find that there is no evidence before me which shows that the defendant suffered prejudice to his individual rights which subsection 11(b) seeks to protect, as a result of the trial delay in this matter attributable to institutional or systemic factors. The defendant has therefore failed to establish, on a balance of probabilities, that he has suffered prejudice to his individual rights as a consequence of the institutional trial delay associated with the subject speeding charge.

Balancing the interests of the Defendant and the Interests of Society

[178] The defendant is charged with a minor traffic offence which is prosecuted under the informal procedure codified in Part I of the P.O.A.

[179] As I acknowledged in my subsection 11(b) *Charter* decision in *Regina v. Gregorczyk*, [2012] O.J. No. 846 (Ont. C.J.), according to the Ontario Court of Appeal in *Regina v. Jamieson* (1981), 64 C.C.C. (2d) 550 (Ont. C.A.), the P.O.A. was intended to establish a speedy, efficient and convenient method of dealing with offences under Acts of the Legislature and under regulations or by-laws made under the authority of an Act of the Legislature.

[180] Furthermore, I acknowledge the views of Mr. Justice Libman contained in *Regina v. Farokshadfar*, *supra*, where he noted that “the very short time lines that govern under the *Provincial Offences Act* make it clear that speedy justice is the hallmark of proceedings under this Act”. Similarly, in his decision in *Regina ex.rel. City of Toronto v. Andrade*, *supra*, the said jurist stated that infractions prosecuted under Part I of the P.O.A. “consist of matters for which the defendant may receive, at most, a fine, and the accompanying stigma of conviction, if any, is minor...” Furthermore, in the same decision Libman J. noted that “the short time lines under Part I of the *Provincial Offences Act* serve to place a premium on speedy justice...”

[181] In the said decisions, Mr. Justice Libman submits that in light of the underlying philosophy of Part I of the P.O.A. emphasizing the speedy and efficient resolution of minor regulatory offences, the lack of evidence that a defendant has suffered prejudice as a result of an unjustifiable period of trial delay, should not be a determinative factor as to the issue of whether there has been a violation of his/her rights under subsection 11(b) of the *Charter*. In the view of the said jurist, the lack of evidence of prejudice in a given situation must be balanced “by the public interest in a fair, efficient and timely process” for bringing Part I P.O.A. matters to trial.

[182] I respectfully disagree with this proposition. The Supreme Court of Canada has declared that before a finding may be made that an accused person’s rights under subsection 11(b) of the *Charter* have been infringed, there must be some evidence before the Court that the accused person has suffered either actual or inferred prejudice to any of the individual rights which subsection 11(b) seeks to protect.

[183] The absence of proof of any prejudice to any of the defendant’s individual rights occasioned by the 11-month and 22-day period of institutional or systemic trial delay, rela-

tive to the subject speeding charge can lead me to only one conclusion; that the defendant's right to be tried of the subject offence within a reasonable time, has not been infringed. Accordingly, I do not need to engage in an exercise of balancing the interests of the defendant and society in ensuring that trials of Part I P.O.A. charges be conducted in a prompt and efficient manner, against the societal interest in ensuring that such charges are tried on their merits.

THE DECISION

[184] In adjudicating the defendant's subsections 11(b) and 24(1) *Charter* Application, I have undertaken a judicial balancing of the interests which subsection 11(b) of the *Charter* is designed to protect against the factors which have either inevitably led to trial delay or have otherwise been the cause of the delay.

[185] After assessing and balancing these factors, I have determined that of the 20-months and 18-days of overall trial delay in this proceeding from February 11th, 2011 to October 29th, 2012, a period of 11 months and 22 days is attributable to institutional or systemic delay for which the prosecution is responsible.

[186] Furthermore, I have determined that the defendant has not established, on a balance of probabilities, that he suffered either actual or inferred prejudice as a result of the degree of institutional or systemic trial delay relative to the subject speeding charge.

[187] Accordingly, I am satisfied on a balance of probabilities, that the defendant's right to be tried of the subject offence within a reasonable time under subsection 11(b) of the *Charter*, has not been infringed. The defendant is not, therefore, entitled to a remedy under subsection 24(1) of the *Charter*.

[188] The defendant's application under subsections 11(b) and 24(1) of the *Charter* is therefore denied.

Released: October 29th, 2012

Signed: "Justice of the Peace Kenneth W. Dechert"