Case Name:
R. v. Dove

Between
Her Majesty the Queen, and
Wally Dove and Sonya Zenz

[2004] O.J. No. 4992

[2004] O.T.C. 1078

[2005] 1 C.T.C. 299

66 W.C.B. (2d) 593

Court File No. CrimJ(F)6535/02

Ontario Superior Court of Justice

O'Connor J.

Heard: September 13-15, 17, 20, 22, 27, 29 and
October 1, 12-15, 19, 2004.
Judgment: December 8, 2004.

(57 paras.)

Counsel:

Robert Goldstein, Esq., for the Department of Justice

Raj Napal, for the Applicant, Wally Dove

Nana Kato, for the Applicant, Sonya Zenz

RULING - S. 11(b) OF THE CHARTER

1 O'CONNOR J.:-- Wally Dove and Sonia Zenz are jointly charged with three counts of evading taxes, making false statements and conspiring to evade taxes. All are charges contrary to s. 239 of the Income Tax Act.

2 The charges were laid on April 16, 1999. This s. 11(b) Charter application commenced September 13, 2004. If unsuccessful, jury selection to hear the trial was to commence on October 25, 2004. The total time between charge and trial is in excess of 65 months. The Crown concedes this delay is sufficient to trigger a review by the court and requires an explanation for it.

The Issues

3 As on all s. 11(b) applications, the overarching issue is whether the time taken to bring Dove and Zenz to trial violated their right to be tried within a reasonable time. Within this general concern, the following specific issues arise:

* Whether the manner in which the preliminary inquiry was conducted, that is piecemeal over 30 months, created unreasonable delay;
* Whether delays in Zenz obtaining a Legal Aid certificate can be considered systemic delay;
* Whether delays in the parties obtaining the approximately 108 transcripts of the preliminary inquiry and pre-trial proceedings in the Superior Court, were excessive and should be considered as systemic delays;
* How should the delays be allocated among the Crown, the Defence or neither;
* If the delay was unreasonable did Dove and/or Zenz suffer prejudice as a result.

Background

4 The Crown alleges that Dove, a Certified General Accountant, and Zenz, a Chartered Accountant, formed a general partnership called Softcom Solutions Partnership (SSP). This partnership was comprised of themselves and 22 others they recruited. The Crown says they conspired together to defraud the Canadian Government and their 22 partners. Specifically, the Crown alleges SSP says it purchased the rights to a software program in 1995 from Softcom International Inc. (SII), a company located in the Cayman Islands. SSP says it paid $2.5M for these rights. The cost of the software program was rapidly depreciated on a straight line basis, as is permitted under the Income Tax Act. As SSP had virtually no sales for two years, it generated large losses. The losses were available to the partners of SSP to write off against other income.

5 The Crown alleges the scheme was a scam. The agreement to purchase the software was created in 1996, a year after the supposed purchase date represented to the investing partners. And SII was not registered in the Cayman Islands until 1996. Its head office was located at a bank there. It was a shell company created by Dove and Zenz that produced no computer software. Further, it is alleged, the $350,000 funds solicited from the partners never went to SII in the Cayman Islands, but to the company's solicitor in Ontario. Most of the funds were eventually disbursed back to the investors.

6 The Crown alleges the software was not worth $2.5M (or the $2.85M valuation the accused produced), but a mere $8,700. The software was not created in the Cayman Islands, but in Ontario by associates of Dove and Zenz.

7 As a result of the scheme the government stood to lose approximately $500,000, the amount of taxes evaded by the investor/partners on their incomes by declaring the fraudulent losses as write-offs.

The Chronology of the Case

8 A history of the significant events of this case between charge and trial is as follows:

1999

April 16	Charges laid
May 14	First Appearance
July 2	Remand
August 20	The crown attorney states disclosure is substantially completed and estimates "... three to five day preliminary inquiry ...". Matter adjourned to permit Dove to obtain legal aid.
September 10	Pre-trial set for November 19.
November 19	The crown attorney states "we have seven weeks commencing May 29th of the year 2000, ending July 24th" for the preliminary inquiry.

2000

May 5	The crown attorney advises the court that Dove will be acting on his own behalf and confirms the prelimi-

	nary inquiry will take seven weeks.
May 18	Dove seeks dismissal of the charges on grounds of delay, among other reasons. Motions adjourned to May 29, the first day of the preliminary inquiry.
May 29	Dove's motion for dismissal for delay heard and dismissed. Preliminary inquiry evidence commences.
May 29-July 24	Preliminary inquiry continues daily. On July 14, the court confirms that an additional ten days has been arranged in February 2001 for continuation.
July 24	Discussion of additional dates for continuation. These include November 21, 2000, January 12, 25, February 1, 6, 7, 8, 13, 14, 15, 16, 19, 20 and 21, 2001 (14 in total). The crown attorney notes that Dove had a preference for three consecutive dates (in January, 2001) rather than piecemeal.
November 21 and on dates above noted, ending February 21, 2001	Preliminary inquiry continues.

2001

February 1	Discussion of the need for additional dates is not recorded; transcript incomplete.
February 21	Last of the scheduled days. No record of any discussion re: scheduling further dates. The court reporter notes: "Due to malfunction of system, the remainder of transcript cannot be provided."
June 28	Discussion of additional dates for continuation. These

	include October 18, 19, 22, 29, 31, November 1, 2, 2001, January 9, 10, 15, 24, 28, 29, 2002.
October 18 and on the dates above noted, to February 6, 2002.	Preliminary inquiry continues (except for January 24, when the crown attorney was ill).

2002

February 27	Crown motion to schedule additional dates for continuation. Neither accused present in person. Dove and Zenz provide letters seeking dates in February, March and April. The Crown seeks March 1. The judge is unavailable until June and adjourns the motion to March 20.
March 20	Discussion of additional dates for continuation. Dove is available in April. The parties and the court are unable to find common early dates. June 4 date set. All agree if earlier dates come open to the court, they will attempt to make themselves available.
June 4 and 6	Preliminary inquiry continues.
June 6	Discussion of additional dates for continuation (submissions). These include July 24, October 1, 2 (these October dates are subsequently found to be unavailable). The crown attorney advises she and the parties have sought additional dates from the trial coordinator "... and she advised us there were not any days she could assist us with."
July 24	Closing submissions commences, but are not completed. The judge attempts unsuccessfully to find

	some dates in September, the earliest she is available. Continuation set for October 16 and 29.
October 16 and 29	Submissions continue and are completed. The court adjourns to November 28 for oral reasons.
November 28	Oral reasons delivered. Dove and Zenz are committed for trial.
December 20	First appearance in the Superior Court.

2003

January 29	Pre-trial conference commences. The crown attorney advises she believes disclosure is completed. The court offers June 9 for pre-trial motions and September 8 to commence the trial. The crown attorney is not available on either date. The pre-trial motions are then set to commence September 15, 2003 for two weeks and the trial is set to commence November 3, 2003.
March 3	Pre-trial continues. Zenz outlines the difficulty she is encountering in obtaining a legal aid certificate.
March 26, 27, 28	Pre-trial continues, dealing with Zenz's legal aid issue, transcripts of preliminary hearing and medical reports.
April 10	Pre-trial continues, including up-date on same issues, now including, the status of Dove's legal aid application.
May 6	The crown attorney is reported to have been injured. The matter is remanded to May 21.

May 21, June 6, 17, July 3, 30	Pre-trial continues; the discussion revolves around the progress of the legal aid applications, denials of same and the status of their appeals. The availability of transcripts of the preliminary hearing is discussed.
August 21	Pre-trial continues; Dove has retained counsel; discussion of the availability of transcripts for the s. 11(b) application tentatively set for December 1 to 5. The trial date of September 15 is vacated and a new date of February 16, 2004 is set (estimated 8 weeks).
October 16, 27	Pre-trial continues; discussions of the difficulty the parties are having obtaining all preliminary inquiry transcripts; dates set for filing facta on all pre-trial motions.
November 14	Pre-trial continues; Pre-trial Motions are set to commence February 16; Trial to commence March 22;
December 8, 18, January 7, 12, 27, 2004	Pre-trial continues; discussions respecting the undelivered transcripts necessary for the Defence to complete the s. 11(b) application material.

2004

February 6	Pre-trial continues; discussions of the material necessary for pre-trial motions; new dates set - pre-trial motions to commence April 13 and trial to commence September 13.
February 25	Pre-trial continues; discussion of the inadequacy of defence material for the pre-trial motions, i.e. medical records and reports.
March 3	Pre-trial continues; new date for pre-trial motions set

	for May 10, dates set for filing of all material.
March 23	Pre-trial continues; further dates are set for the delivery of material on the pre-trial motions.
April 8	Pre-trial continues; May 10 confirmed to commence the pre-trial motions.
May 10	The crown attorney is appointed to the Ontario Court of Justice; The Crown brings a motion to adjourn the pre-trial motions; new dates to hear pre-trial motions are set commencing July 19 and September 13; the trial is confirmed to commence October 25.
July 19 and 20	First two pre-trial motions are argued.
September 13, 14, 15, 17, 20, 22, 27, 29, October 1, 12, 13, 14, 15	S. 11(b) application evidence and submissions are heard.
October 19	Court indicates it will be granting the s. 11(b) application to stay proceedings, effective on the date of delivery of reasons.

9 Of the approximately 65 months it took to bring this matter to trial, almost half, or 30 months, were consumed dealing with the preliminary inquiry in the Ontario Court of Justice. Although the court sat a total of only 70 days, or 14 weeks, these sitting days were spaced out over 30 months. The 70 days were occasionally grouped in blocks of several weeks, or over a few weeks, or a few days and sometimes on single days. The piecemeal hearing of the preliminary inquiry over this time is the major single factor, although not the only one, contributing to the overall time taken on the march to trial. Another significant delay factor was the time required to obtain the transcripts of 108 attendances in the Ontario and Superior Courts. These were all necessary for the hearing of this application.

The Legal Principles

10 The seminal cases of R. v. Askov (1990), 59 C.C.C. (3d) 449 (S.C.C.) and R. v. Morin (1992), 71 C.C.C. (3d) 1 (S.C.C.) established the principles protected by s. 11(b) of the Charter and the factors to be considered and weighed when determining whether the time spent in bringing an accused person to trial breaches his/her Charter rights. Many Canadian courts at all levels have interpreted, referred to, quoted from and applied these now well known principles. It is nevertheless helpful to

start any discussion of s. 11(b) of the Charter with a review of them. The four how long is too long' general factors were described by Sopinka J. at p. 13 of Morin, as including:

> The length of the delay;
>
> Waiver of the time periods;
>
> The reasons for the delay, including
>
> (i) Inherent time requirements of the case;
> (ii) Actions of the accused;
> (iii) Actions of the Crown;
> (iv) Limits on institutional resources, and
> (v) Other reasons for delay, and
>
> Prejudice to the accused.

11 Speaking for the majority, he then analyzed these factors and their application to the balancing process the trial judge must apply to them. He said, "[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." (p. 13). He earlier had identified the individual rights which the section seeks to protect as "... (1) the right to security of the person; (2) the right to liberty, and (3) the right to a fair trial." (p. 12). He went on to note:

> The right to security of the person is protected by 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.

12 Thus, this court must undertake this balancing process', weighing and assessing the various reasons and factors contributing to the 65 months it took to get this case to trial. I must then attribute these factors as being either inherent or neutral, that is, the fault of neither the Crown nor the Defence. Alternatively, these factors may be attributable to either the Crown or the Defence. This latter group will include waivers or actions by a party that result in a delay of the proceedings and will be assessed directly against the party. Delays that are institutionally or systemically caused will generally be assessed against the Crown, even though they are not the result of the Crown's conduct. I must then determine whether the time attributable to the Crown, either directly through the conduct of the prosecutor or otherwise falling to it as being systemic or institutional, less the delay caused by the Defence, amounts to unreasonable delay. If so, I must then determine whether that net delay caused prejudice to the accused. If so, the charges against the accused must be stayed under s. 24(2) of the Charter.

Analysis

> The Length of the Delay

13 As noted, it took 65 months to bring Dove and Zenz to trial. The crown attorney concedes this time is such that an inquiry into the reasons for the delay should be undertaken.

> Waiver of Time Periods

14 At page 15 of Morin, Sopinka J. said that "[I]f 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." Dove and Zenz both argue neither of them waived any time periods. Both were always anxious to seek the soonest available date for the next step in the proceedings. The crown attorney argues that Dove's conduct throughout the time taken to reach trial delayed the process and amounted to a waiver of certain time periods. Particularly his conduct during the preliminary inquiry was the most significant factor in causing it to consume 30 months. He characterizes Dove's conduct as antics' and nonsense generated delay'. Particulars of Dove's so-called antics are discussed below under Reasons for the Delay - Actions of the Accused', where they more appropriately apply.

15 In Morin, at page 15, Sopinka J. said:

> This court has clearly stated 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 the effect that waiver will have on those rights ... As Cory J. described in Askov, supra (at p. 481):
>
> > ... 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.
>
> ... 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.

16 Dove was self-represented at the preliminary inquiry. There was virtually no discussion about his s. 11(b) Charter rights during the numerous attendances in court. It cannot be argued that any waiver was "... clear and unequivocal, with full knowledge of the rights and procedure ..." or that he "... understood its nature and has waived the right provided by that guarantee." I find that virtually none of the 65 month delay in this proceeding can be attributed to the Defence waiving any time periods.

The Reasons for the Delay

(i) Inherent time requirements of the case.

17 Inherent delay is the reasonable time required for the usual and normal steps necessary to bring a matter to trial. It is time that will not be charged against either the Crown or the Defence in the balancing process I must undertake. Inherent time will vary depending on several factors. These include: the complexity of the case; the number of accused; the extent of disclosure to be reviewed by the Defence; whether the accused avails himself of a preliminary inquiry, as is his right; and the time spent at necessary court attendances for pre-trial conferences, setting dates and of course sitting during the preliminary inquiry. In Morin, at p. 16, the court noted the crown attorney describes these steps as intake requirements'. The court then said, "... Whatever one wishes to call these requirements, they consist of activities such as retention of counsel, bail hearings, police and adminis-

trative paperwork, disclosure, etc ...". In both Askov and Morin the Supreme Court suggested guidelines for acceptable inherent delays of between 16 and 18 months as a reasonable total in the average case that is processed at both levels of Court.

18 The crown attorney argues the case at bar is a complex one requiring "... the filing of thousands of pages of evidence and the calling of numerous witnesses ... over 50 search warrants ... offshore entities in a bank and tax secrecy haven ...". While these elements are present in this case, they are not sufficient to extend the usual inherent time periods significantly beyond those routinely required for intake and other expected steps to trial. A close look at the complexity of the scheme alleged against the accused reveals it was relatively straight forward. Although a bank in the Cayman Islands was to be used, the investors, the lawyers and the accused were all situated in Ontario. The alleged fraud on the government was simply an overstatement of the value of a single asset, thus permitting the investors to write off losses. I find the case was only moderately more complex than the average criminal matter.

19 Although considerable paper changed hands during disclosure, much of it comprised the books and records of the accused and their businesses. This material was thus both repetitive and already available and known to them. Although it is acknowledged that disclosure continued to flow almost until trial, it appears it was always provided relatively promptly after it became available to the crown attorney. The Defence was not required to bring any motions for disclosure, nor did they seek any substantial adjournments based on a lack of disclosure.

20 The "tax secrecy haven" status of the Cayman Islands was irrelevant, as the alleged scam did not involve the use of that country's tax laws. It involved the alleged misuse of Canada's Income Tax Act.

21 In summary, I find this case was moderately complex. It involved two accused only, against whom the Crown alleges identical offences. As well, the disclosure, although voluminous, was made on a timely basis and would not have taken the Defence an undue amount of time to absorb and understand.

22 The one factor not usually present in every case that extended the acceptable inherent period was the duration of the preliminary inquiry. During the 30 months to its completion, the court sat for only 14 weeks or about 3 months. Although a small amount of this sitting time can be attributed to the actions of the parties, as discussed below, virtually all of it must be classified as neutral inherent time. The balance of 27 months was time when the system could not provide either time in the judge's schedule or courtroom space. This situation is discussed below under Limits on Institutional Resources.

23 The time between the date the charges were laid and the commencement of the preliminary hearing was 13 1/2 months, from April 16/99 to May 29/00. During this time a judicial pre-trial was held, the court entertained a motion by Dove to dismiss the charges for delay and on November 19/99, seven weeks were set for the preliminary inquiry, commencing May 29/00.

24 Neither side argued the time between April 16/99 and November 19/99, the date of the pre-trial, was anything other than acceptable inherent delay. Defence counsel argued that the full 6 months between setting the date for the preliminary inquiry and the date it commenced exceeded the usual inherent delay guidelines. The crown attorney concedes that 3 1/2 months of this time was excessive and should be allocated to the Crown. I agree with the crown attorney. There must inevitably be some time between the allocating of seven weeks of court time to a preliminary inquiry or

trial and the commencement of it. Thus 2 1/2 months of this time was acceptable inherent delay. As noted, the preliminary inquiry itself sat for 70 days or approximately 3 months, which must be characterized as inherent time.

25 The parties generally agree that several other relatively minor delays, as well as the time spent in court setting dates and on pre-trial conferences, should not be allocated to either side. These also include about two months for intake requirements in the Superior Court. This additional time totals about 4 months. Further, on May 10/04, the crown attorney who had carriage of the file from the outset, was appointed to the Ontario Court bench. This event, most fortunate for her but unfortunate for the speedy resolution of this matter, necessitated a delay of four months to permit another crown attorney to familiarize himself with the file. This time, although not inherent time, should be characterized as neutral. It was no one's fault, nor can it be framed as systemic delay. Thus, the total acceptable inherent and neutral time was between 20 and 21 months, comprised of 7 months intake before the pre-trial; 2 1/2 months between setting the preliminary inquiry date and the commencement of it; 3 months sitting at the inquiry; 2 months intake in the Superior Court; about 2 months miscellaneous; and the 4 months neutral time caused by the appointment of the crown attorney. The total acceptable inherent time was about 21 months (including the 4 months neutral time caused by the appointment of the crown attorney). Twenty-one months is outside the Supreme Court of Canada guidelines of 16 to 18 months for intake and inherent time suggested in Askov and Morin. However, the factors mentioned would extend this to a time that, in the circumstances of this case, is acceptable. Thus, I find a total of 21 months cannot be charged against the Crown or the Defence. It is merely deducted from the 65 months, leaving 44 months to be explained by other reasons for the delay.

(ii) Actions of the Accused

26 For much of this proceeding Dove represented himself. He did not retain counsel until August 2003. The crown attorney argued that the manner in which he conducted his defence, most particularly during the 30 month preliminary inquiry was obstreperous, nonsensical and largely a waste of everyone's time. Some of the time spent at the preliminary inquiry dealt with motions by Dove respecting matters that would not have been advanced by competent counsel on his behalf. For example, he moved to have the court exclude Ms. Lynn Watson, the chief investigator, from the court. The court had ruled at the outset that she was exempt from the order excluding witnesses. He argued at some length that "... the Crown was using this court for criminal purposes ...", allegedly compelling witnesses "... to give evidence against their will." Of course, the witnesses had been served with proper subpoenas and had little choice about giving evidence. He sought to have the charges dismissed on grounds he was not one of the persons named in the indictment. He took the position he had copyrighted his name and sold it. He also took the position that he was a member of the "Nishwinobi" Nation and that, as an aboriginal person, the court had no jurisdiction over him. He presented no evidence that he is aboriginal, nor that the Nishwinobi Nation even exists, nor why the court would not have jurisdiction to hear these criminal charges against him. He wrote lengthy letters to crown counsel, the investigator, and the preliminary inquiry judge demanding compensation for alleged wrongs, including using his copyrighted name without his permission. On several occasions the court adjourned briefly, usually for no more than an hour or two, to permit Dove to consult with duty counsel.

27 The crown attorney argues these antics' by Dove caused frequent and time-costly delays in the proceedings and should be allocated to the Defence side of the ledger on this application. The De-

fence agrees that some time was lost by Dove's conduct. The two sides disagree only as to the total time involved. The crown attorney says about 7 days, while defence counsel suggests only 2 to 3 days were wasted by Dove's conduct. Thus the difference is not significant in the overall scheme of things.

28 The crown attorney concedes that no actions of Zenz, who was represented by counsel at the preliminary inquiry, caused any delays in the inquiry. I find that the conduct of Dove at the preliminary inquiry and of both Dove and Zenz thereafter, in failing to expeditiously obtain legal aid certificates and retain counsel, contributed to the overall delay. It must be time attributed to their side of the ledger. However, the delays occasioned by their conduct during the preliminary inquiry was modest and not significant in the overall panoply of reasons for the matter taking 65 months to reach trial. They did, however, contribute to a significant portion of the delay in the Superior Court, as discussed below.

(iii) Actions of the Crown

29 The crown attorney generally acted expeditiously and in good faith when dealing with her intake and disclosure responsibilities. No delays of any significance can be attributed to the conduct of the Crown in this regard. However, at the preliminary hearing, the Crown called 28 witnesses including 14 of the investor/partners in SSP, most of whom were uncooperative and refused to be interviewed by the crown attorney in advance of giving their testimony. No witness statements could be obtained from them and thus none was provided to the Defence. Further, the testimony of each was generally repetitious of the others. Their evidence took about 14 days or nearly three weeks of sitting time. The Crown also brought a motion to remove Mr. Les Morris as agent for Ms. Zenz's counsel. The motion was dismissed without the court calling on the Defence to reply to the Crown's submissions. The motion took just less than three days.

30 In Morin, at p. 18, Sopinka J. outlines some actions of the Crown that delay a trial which should be investigated, including "... adjournments requested by the Crown, failure or delay in disclosure, change of venue motions, etc." Although the actions of the Crown in this case, mentioned above, do not fall into these specific categories, they are elements of the proceeding under the sole control of the Crown. It seems the Crown could have more efficiently managed some aspects of the preliminary inquiry. The crown attorney has discretion in making trial strategy decisions in the interests of both an accused and the public. However, I query whether it was necessary to call as many of the investor witnesses as she did, given the repetitious nature of their evidence and the low standard of proof the Crown must meet at a preliminary inquiry. Further, one might speculate whether the motion to remove Mr. Morris was entirely necessary.

31 These factors, while they should be considered as conduct of the Crown that contributed to the overall delay, were not egregious nor did they occupy significant amounts of time, totalling only about 16 or 17 days. Again, to echo comments respecting other contributing reasons for delay previously reviewed, the Crown's conduct was a minor contributing factor at best. I would assess the conduct of the Crown at the Ontario Court level caused a delay of about one month.

(iv) Limits on Institutional Resources

32 All of the above factors potentially affecting delay must be considered in this court's analysis of the issue. However, in this case, the primary reason it took 65 months to reach trial was the limitations on institutional resources in the Ontario Court hearing the preliminary inquiry. This factor is

also referred to in the cases as systemic delay. Here, the three months in-court time for the preliminary inquiry took 30 months to complete. An examination of the factors contributing to this situation is undertaken below.

33 About systemic delay, Sopinka J. said at p. 18 of Morin:

> 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 a major source of delay in Askov. As I have stated it is the period that starts to run when the parties are ready for trial but the system cannot accommodate them. [emphasis added].

He then cautioned that courts across the country have differing resource problems. Therefore, strict comparisons between areas and provinces may not assist in the discussion of appropriate or reasonable delay periods. In a perfect world of an endless supply of judges and courtrooms, any delay would be unacceptable. But, as Sopinka J. said at p. 18, "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." Thus, the time frames for taking the necessary steps in both the Ontario and Superior Courts to bring an accused to trial are but guidelines, not to be slavishly applied in every case.

34 However, after recognizing this fact of life', he said at p. 19, "... 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."

35 It is interesting to note that this case emanates from the same court jurisdiction, Brampton in Peel Region, as did Askov some 13 years ago. In Askov, at p. 489, Cory J. spoke his famous and oft-quoted comment about Peel District, "This case therefore represents one of the worst from the point of view of delay in the worst district not only in Canada, but so far as the studies indicate, anywhere north of the Rio Grande." Following this scathing indictment, significant improvements in the pre-Askov situation were instituted by the provincial government. These included the construction in Brampton of a state-of-the-art 39 courtroom building, opened in 2001. However, as is evident from this case and the increasing number of successful s. 11(b) applications being heard in both the Ontario and Superior Courts in this jurisdiction, the resource supply may again be falling behind the judicial demand. Some of the most recent of these cases in which a stay of proceedings was granted are: R. v. Wright, [2003] O.J. No. 4133; R. v. Barnes, [2003] O.J. No. 3217; R. v. Travassos, [2003] O.J. No. 1877 (Ont. Ct. Jus.); R. v. Fuller (2003), 58 W.C.B. (2d) 476, [2003] O.J. No. 3163; R. v. Maka, [2003] O.J. No. 5541; R. v. Nguyen, [2004] O.J. No. 4251; R. v. Patel, [2003] O.J. No. 5778; R. v. Lacapruccia, [2003] O.J. No. 4404; R. v. Skeard, [2003] O.J. No. 5853; R. v. Bogle, [2004] O.J. No. 1213; R. v. White, [2004] O.J. No. 3702; R. v. McGroaty, [2004] O.J. No. 4200; R. v. Singh, [2004] O.J. No. 3980; R. v. Lal, [2003] O.J. No. 3844; R. v. Taylor, [2004] O.J. No. 2594.

36 At the heart of the problem are two administrative practices in the trial management system in the Ontario Court in Brampton (and perhaps at other court facilities in Ontario) that contributed to the extensive delays in this case. First, is the inability or reluctance of the parties and the Ontario

Court, when setting dates for trials or other proceedings, to accurately estimate the real duration of the matter. Second, when the parties and the Court underestimate the time required and the allotted time expires, the Court is unable or unwilling to simply continue hearing the matter until completion.

37 Accurate estimation of time needed, of course, lies primarily with the parties and counsel. However, the Court, especially one presided over by an experienced judge, must be practical and tough in ensuring counsel are addressing all the contingencies of any proceeding that affect the duration of it. These may include everything from witness numbers and witness scheduling (the need to accommodate experts' schedules may cause Court down time), the need for translators (which may slow testimony), foreseeing difficult or reluctant witnesses (who may occupy more cross-examination time than would cooperative witnesses), the participation of self-represented parties (whose unfamiliarity with the law and procedure requires the judge to provide explanations or necessitates down time to allow the party to seek legal assistance), even circumstances like winter weather conditions (which may interfere with parties, counsel and witnesses' timely arrival at court), and the many other contingencies that counsel and judges know from experience will inevitably interfere with the smooth and expeditious running of a trial or preliminary hearing. In this case, the estimates discussed and the time frames set for future sittings were almost always woefully inaccurate. Thus, when a set time expired with many witnesses still to be heard from, it became necessary to go through another estimating exercise that again inevitably was found wanting.

38 In R. v. R.M. (2003), 180 C.C.C. (3d) 49 (O.C.A.), MacPherson J.A. says at page 53:

> However, what I do say is that it is incumbent on the presiding judge and both counsel to explicitly recognize a case that is in trouble and to discuss fully on the record how to deal with the problem. ... If an adjournment of a preliminary inquiry is required, there should not be a pro forma "what is the next available date" conversation. Instead, the time period that has already elapsed should be explicitly acknowledged on the record and there should be a frank discussion about how to solve the problem. The focus of the discussion should be on ways to speed up the proceeding. The presiding judge, the trial coordinator if necessary, and both counsel should attempt quite consciously to schedule the continuation of the preliminary inquiry -- not several months down the road, but at the earliest possible date, taking into account the commitments of the presiding judge and counsel. Then, once a continuation date is set, counsel should explicitly state on the record their position with respect to the implications of the further delay in a Charter s. 11(b) context. [Emphasis added]

39 The second contributing component, the Court's inability to complete matters once started, is perhaps more problematic, but potentially easier to solve. In the Superior Court, in almost all cases, once a trial commences, it runs to conclusion, even when, as is often the case, the original estimation of time has proved inaccurate. Certainly and obviously, in jury cases and matters involving in-custody accused, the "go until finished" rule must prevail. Counsel are aware of the modified rolling list protocol in the Superior Court and take into account the possibility of minor delays when setting dates. However, they are at least secure in the knowledge that when their trial starts, it will in most cases run until completion. In Ontario Court, fixed times are allocated to trials and preliminary inquiries. If the time estimates are inaccurate and exceeded, new dates must be found in the judge's already heavily booked schedule. A further problem exists in the Ontario Court in Brampton - a

chronic shortage of judges. In R. v. Cowell, [2004] O.J. No. 71, Durno J. of the Superior Court said at page 11, "As noted by the trial judge and Duncan J. in Barnes, Peel has suffered from a chronic under-resourcing of judges. The analysis prepared by Hill J. in Meisner, [2003] O.J. No. 1948, supra, illustrates the shortages of judges when compared with similar jurisdictions. The problem has been one of long-standing, and regrettably one chronically ignored." The paucity of judges in this region, together with the Ontario Court's protocol for scheduling judges, staff and courtrooms does not permit sufficient flexibility to allow for a case, once started, to proceed until completion, when the time allotted proves insufficient.

40 In the case at bar, these factors, coupled with the chronic underestimation by all involved of the real time required, resulted in the multiple and lengthy delays between sittings. For example, on November 19, 1999 the court set 7 weeks commencing May 29, 2000. On July 14, 2000, about 6 weeks into this 7 week block of time, when the Court realized that the matter would not finish by the end of the 7 weeks, a further block of 10 days was booked. However, these days could not commence until February of 2001, some 6 1/2 months later. On February 21, 2001, the last of the scheduled 10 days, the matter was adjourned to June 28, 2001, merely to schedule additional dates, not to hear any further evidence. On June 28, 2001 further dates were found in October and November of 2001 and January of 2002. And thereafter additional dates were required and booked in the same, ad hoc, inefficient manner until the preliminary hearing was finally completed on November 28, 2002, 30 months after it commenced.

41 Interestingly, the complement of judges at the Ontario Court at Brampton was recently temporarily enhanced by six judges from outside the Region to assist in a "blitz" of its growing criminal case backlog, bringing the total judges to 23 for the duration of the blitz. As a result of the additional judges' participation, the Court was able to bring its systemic delay parameters back to acceptable limits. This experience makes the argument that the underlying reason why cases in the Ontario Court cannot be heard until finished, is an insufficient judicial complement to serve the current population of the community the Court serves.

42 To summarize respecting the preliminary inquiry, while the Defence must of course play a role in estimating accurately the time requirements for trials and preliminary inquiries, in this case the Defence called no witnesses and spent only a modest and appropriate amount of time cross-examining the Crown's 28 witnesses. In these circumstances, the major portion of the responsibility for the miscalculation of the time needed must be borne by the Crown as it controlled and called the entire list of witnesses. That fact, coupled with a scheduling system that cannot accommodate long matters during consecutive days/weeks, apparently due to an insufficiency of judges, are the underlying reasons for this case exceeding s. 11(b) parameters. Thus, the delays involved in hearing a 3 month preliminary hearing amounted to about 24 months. I have allowed a further 3 months, to the actual sitting time of 3 months as neutral time, for some short adjournments necessary in any lengthy proceeding. This further 3 months can be categorized simply as Other Reasons for Delay as set out in paragraph 47 below. This net balance of 24 months is a time frame that must be characterized as caused by limits on institutional resources and therefore attributable to the Crown. This delay is sufficient, in itself, to find a violation of an accused person's constitutional right to a trial within a reasonable time, provided he/she is able to show they have suffered prejudice as a result.

43 The second area where limits on institutional resources caused delay was in the Superior Court. Dove and Zenz were committed for trial on November 28, 2002. The first attendance is the Superior Court was December 20, 2002. It reached trial on July 19, 2004, when the first of several

pre-trial motions were heard. The total time from committal to trial was 20 months. As noted above, I find that 4 months must be attributed to the intake requirements in Superior Court and the 4 month delay caused by the appointment of the crown attorney to the bench cannot be attributed to either side. Thus, the total neutral time in Superior Court is 8 months, leaving 12 months requiring further explanation and attribution to one side or the other. During this period the parties attended on a continuing pre-trial conference on 16 occasions, between January 29, 2003 and May 10, 2004. On most occasions the discussions revolved around Dove and Zenz's attempts to obtain legal aid certificates, difficulties they were encountering in obtaining the transcripts of the 70 days of the preliminary inquiry, discussing the evidence the parties would call on the pre-trial motions and at trial, and in setting dates for the pre-trial motions and trial. The trial date was postponed three times.

44 The crown attorney argues that Zenz's lack of diligence and cooperation with the requirements of Legal Aid Ontario (LAO) when the matter was before the Superior Court contributed to delays at that level. LAO had requested financial statements and information from her and information from her father respecting his past contributions to her legal expenses and whether he was prepared to continue doing so. The crown attorney says she delayed providing information in a timely manner, resulting in an initial refusal of a certificate. She appealed to two levels of the LAO system and finally, after complying with their requirements, she was successful in obtaining a certificate. She argues her success vindicates her and that any delay in reaching trial caused by the delay in receiving a certificate should not be attributed to her. I disagree. Cooperation with the reasonable requests of LAO from the outset would have considerably shortened the approval period for her certificate. A review of the letters between her and LAO indicate the agency acted reasonably and responsibly, while she was argumentative and reluctant to cooperate.

45 The difficulty and delays in obtaining transcripts in order to commence the s. 11(b) application was an on-going problem for all parties. The sheer volume of them, 108 in total, locating different reporters and a difficulty in paying for them before Dove and Zenz had acquired their legal aid certificates, all contributed to delays and postponements of this application and thus the trial. The final few transcripts were received by the parties only shortly before the commencement of this application on September 13, 2004. It is difficult to attribute fault with any specificity for the transcript delays. The Defence could have been more organized and diligent in pursuing them. In some cases, the various reporters should have produced them more expeditiously. Some were lost or noted as incomplete, (February 1, 2001), or the recording equipment malfunctioned (February 21, 2001).

46 Because the delay in the Superior Court was caused by a combination of Ms. Zenz's self-imposed legal aid difficulties and the transcript problems, it is impossible to allocate responsibility with any diffinity for the overall 12 month delay in the Superior Court that requires explanation. I find a fair attribution would be 9 months of this delay to the Defence and 3 months to the Crown. The Crown's share arises from some of the difficulties in obtaining transcripts of the preliminary inquiry, this being a limit on institutional resources which must be borne by the Crown.

(v) Other Reasons for Delay

47 Under this category are included 3 months of the preliminary inquiry total completion time of 30 months. It takes into account short adjournments and delays due to unexpected absences of witnesses, the illness or unavailability of counsel or the judge for short periods, that occur in any matter that took 70 sitting days to complete. Rather than assessing the full difference between the 30

months and the actual sitting time to the Crown's side of the ledger, it is fair to assume some time during such a lengthy hearing would properly be spent other than sitting in court hearing evidence. This time should not be the fault of either party.

48 A summary of the time allocations in the matter, following the Morin list of factors, is as follows:

The total length of the delay	65 months		
	Allocations		
	Neutral	Defence	Crown
Waiver of time periods	0		
The Reason for Delay			
Inherent time requirements	21 months		
Actions of the Accused		13 months	
Actions of the Crown		1 month	
Limitations on Institutional Resources			27 months
Other Reasons for Delay	3	0	0
Total	24 months	13 months	28 months

49 The 28 months of delay borne by the Crown was unreasonable. It was far in excess of acceptable limits set by the Supreme Court in Askov and Morin and the many cases across the country that have interpreted and applied the principles of those cases.

Prejudice

50 In availing themselves of their s. 11(b) right to trial in a reasonable time, accused persons must show that the alleged unreasonable delay has caused them prejudice. The prejudice that an accused must show is "... impairment of the right to liberty, security of the person, and the ability to make full answer and defence resulting from the unreasonable delay in bringing criminal trials to a conclusion ... implicit in this finding is that prejudice to the accused can be inferred from prolonged delay". Morin, p. 23. Further, the prejudice relied upon must be shown to have arisen from the delay in reaching trial, not that arising from the mere fact of being charged with an offence.

51 Here both accused have shown substantial prejudice to themselves arising from what all parties, including the crown attorney, acknowledge was an inordinate delay in reaching trial.

Wally Dove

52 Dove suffered physical and emotional stress over and above that expected and associated with any accused person awaiting trial on criminal charges. The extensive delays in this matter resulted in his becoming depressed, according to his wife and his doctor. Dr. Rick Lindall performed a psychological assessment of Dove and gave evidence of his findings and treatment of him. He said, "Mr. Dove also had an elevated score on the Major Depression scale, within in (sic) the Severe Syndrome scales ... Mr. Dove reported that he continues to experience psychological/emotional difficulties as a direct consequence of the lawsuit. The symptoms he experiences include: Anxiety, depression, irritability, anger, frustration, apprehensions about health, somatic problems, changes in sleep pattern, diminished libido, disturbing dreams, marital stress, fatigue, and a compromise in cognitive functioning due to stress. The psychological test findings indicate a significant level of affective distress for Mr. Dove in terms of anxiety and depression ...". See Ex. 29. Dr. Warsi, another physician with whom he consulted, said, "He experienced an episode of vasovagal syncope in Dec. 2003 ...". See Ex. 30. In R. v. R.M., [2003] O.J. No. 2055, J.W. Quinn J. of the Ontario Superior Court notes that "The effect of delay upon the health of an accused relates to the security of the person - one of the individual rights of the accused protected under paragraph 11(b)."

53 Dove also suffered financially from the delay in his charges reaching trial. Before the charges were laid, he and his wife owned two houses and lived a comfortable lifestyle. They now have no appreciable assets and have had to borrow money from family and friends, including Ms. Dove's mother who advanced them $130,000 against their home, worth only $100,000.

Sonya Zenz

54 Zenz's financial circumstances have suffered dramatically as a result of the unreasonable delay. Before the charges, she was a practicing Chartered Accountant and had a net worth of about $250,000. Her income has declined substantially during the years leading up to trial, due to the frequent attendances in court. She has been unable to find steady or permanent employment due to the numerous absences necessitated by the sporadic court attendances. She paid her lawyers approximately $178,000 (and owes them a further $150,000) before discharging them and applying for le-

gal aid. She now lives with her mother, has no savings, and is unable to obtain credit cards or even a bank account.

55 The passage of time has impacted her ability to make full answer and defence to the charges. During the preliminary inquiry in 2000, some witnesses, specifically Dennis Dohey and Irene Kiss, had difficulty recollecting events from 1995 to 1997. They would be giving their evidence at trial some nine years after the events at issue, a time frame over which the memories would have faded even more than in 2000. Zenz said she had difficulty remembering specifics of her activities in 1995 without her logbook for that year. It appears it was seized by the Crown and subsequently lost.

56 It is clear that both Dove and Zenz have suffered prejudice of the kind spoken of by Sopinka J. in Morin, in that the delay in this case has affected the security of their person and their fair trial rights, specifically their ability to make full answer and defence.

Result

57 The charges against both accused are stayed. Their s. 11(b) Charter right to be tried within a reasonable time was violated.

O'CONNOR J.