Section 11(b) of the *Charter* gives any person charged with a criminal offence the right “to be tried within a reasonable time.” This right embodies the fundamental precept that “justice delayed is justice denied.” Fundamental as this right is to the criminal justice system, it requires some authority to define the length of time that is reasonable to allow in bringing an accused person to trial. If elected legislators decline to set standards of reasonableness, by default the responsibility for doing so ends up entirely in the hands of the judiciary. That is what has happened in giving guidance on the practical meaning of section 11(b) of the *Charter*. In taking on this responsibility, the courts in effect developed judicial legislation to guide those who administer the justice system. The Supreme Court’s decision in *Askov* was a milestone in the Supreme Court of Canada’s struggle to establish a coherent set of rules and principles on the right to be tried within a reasonable time.

On November 5, 1983, a police surveillance team apprehended Elijah Anton Askov and three other men who were brandishing a sawed-off shotgun and a knife at Peter Belmont, the operator of an “exotic” dancers service, in an attempt to extort money from him. The four men were charged with conspiracy to commit extortion. Askov and two of the men were held in custody until bail was granted on May 7, 1984. Their preliminary hearing took place on September 21, 1984. It took two more years for their trial to begin, and when it did, on September 2, 1986, their lawyer asked for a stay of proceedings on the ground that the trial had been unreasonably delayed. The trial judge granted the stay, but her order was set aside by the Ontario Court of Appeal. That is the decision the Supreme Court reviewed and reversed in *Askov*.

In *Mills*,¹ the Court’s first decision on section 11(b), rendered in 1986, Chief Justice Dickson and Justice Lamer wrote a lengthy opinion on how courts should interpret the right. But their opinion did not win the support of other justices. In a series of section 11(b) cases following *Mills*, the Court dealt with various factors to be taken into account in interpreting section 11(b). There was general agreement on the need for a flexible approach to the reasonable time requirement. The different degrees of complexity in criminal cases rule out a standard time for all cases. In each case, the cause of delay must be considered—did the delay result from actions or lack of action by the prosecutors, or from delaying tactics of the accused? There was agreement that an accused could waive the right to a speedy trial but that such a waiver cannot be simply inferred from a failure to complain about delay. But there was a lack of consensus on several other issues. In interpreting the right, what weight should be given to society’s interest in seeing accused persons brought to justice quickly and having fair trials that are not jeopardized by witnesses’ fading memories? What weight should be given to how much the delay has caused prejudice and hardship to the accused? And—a key issue in *Askov*—how should the institutional resources of the court system be taken into account?

Justice Cory’s opinion in Askov, concurred in by Chief Justice Dickson, Justices La Forest, L’Heureux-Dubé, and Gonthier, and on most of its main points by Justices Lamer, Wilson, Sopinka, and McLachlin, brought the Court much closer to a consensus on the interpretation of section 11(b). The justices were in agreement that the cause of the two-year delay between the preliminary hearing and the trial was institutional—a lack of adequate court resources, and that two years was an unreasonable length of time for a delay of this kind. In reaching this conclusion the Court relied on the research of Professor Carl Baar, a leading scholar in the field of judicial studies, showing that in Brampton, in Ontario’s Peel District where the Askov trial was to be heard, time spent awaiting trial was significantly longer for similar types of cases than in other Canadian and U.S. jurisdictions. Baar described the Askov case as representing one of the worst delays in the worst district, not only in Canada but “anywhere north of the Rio Grande.” Sifting through the comparative data on time spent awaiting trial, Justice Cory went on to conclude “that a period of delay in a range of some six to eight months between committal and trial might be deemed to be the outside limit of what is reasonable.” This conclusion was supported by all nine justices. The Court was unanimous in finding that Askov’s and his co-accused’s right to a trial within a reasonable time had been violated, and that there was no basis on which such a violation could be justified.

The justices were also unanimous in their choice of remedy—they directed a stay of proceedings. This meant that Askov and his co-accused would walk. Justice Cory acknowledged that the charges against the accused were very serious and threatening to the community. But the infringement of the accused persons’ rights in this case was also serious. In the Court’s view, any other remedy, such as moving the trial to another venue or recognizing a transitional period to provide time to bolster the system’s resources, would render the right to a trial in a reasonable time meaningless.

The Askov decision broke like a bombshell on the Ontario government. The government responded on two fronts. It moved rapidly to appoint judges to the Provincial Court. Fortunately, Ontario had a pool of well-qualified candidates selected by its Judicial Appointments Advisory Committee ready for appointment. The decision had the effect of enabling the province’s Attorney General to secure more funds for the court system.² That was the good news. But on the prosecutorial side, the news was shocking. The Attorney General announced that thousands of cases in the province’s criminal justice system had no chance of meeting the Askov time requirement, and would therefore have to be terminated, allowing the accused, many of whom were charged with serious crimes, to go free. Between October 22, 1990 and September 6, 1991, 47,000 charges were stayed. When account is taken of cases in which there were multiple charges, this amounts to the termination of approximately 25,000 criminal cases.³

The Askov ruling caused considerable consternation for trial judges faced with the challenge of applying it. The ruling indicated that six to eight months was the outside limit for the period from “committal” to trial. Committal in this context means the finding of the

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³ For an account of the public reaction to Askov, see Kent Roach, The Supreme Court on Trial: Judicial Activism or Democratic Dialogue (Toronto: Irwin Law, 2001) 180-82.
preliminary inquiry judge that the prosecution has enough evidence to justify committing the accused to trial. But what about summary conviction cases, where there is no preliminary hearing? And how should the ruling in Askov be related to previous cases, which had considered that the relevant period for assessing reasonable time was from the laying of charges to trial? When Justice Cory, at a conference of judges and lawyers in the United Kingdom in August 1991, expressed shock at the rigidity with which the Askov rule was being interpreted and surprise at the extent of the decision’s impact, Ontario’s Attorney General Howard Hampton called for a review of the decision.4

Ontario’s Attorney General did not have to wait long for the review. In March 1992, the Supreme Court released its decision in Morin,5 an Ontario case involving a delay of 14 \( \frac{1}{2} \) months in bringing a person charged with driving while impaired to trial. In Morin, while the Court did not repudiate its decision in Askov, it considerably softened its approach to section 11(b). Justice Sopinka, who wrote the main opinion for the Court, said that the provincial courts could take 8 to 10 months from committal to trial as an “administrative guideline” for not unreasonable institutional delay between committal and trial. He emphasized that this was a guideline, not a rigid rule, and acknowledged that, in addition to the time from committal to trial, there would have to be allowance for time between laying the charge and committal. The Court now gave more weight to the need for the accused to demonstrate prejudice caused by the delay. In upholding the Ontario Court of Appeal’s decision that 14 \( \frac{1}{2} \) months was not an unreasonable time for Morin to wait after she was charged to be brought to trial, Justice Sopinka took into account the burgeoning population and increase in criminal caseloads in the district where the trial was to take place.

The Supreme Court’s performance in Askov was not one of its shining hours in the Charter era. After the decision, Professor Baar revealed how the Court had taken mistaken inferences from his comparative data.6 When social science evidence is used in determining factual matters that are relevant to constitutional rights, it is best submitted in the lower courts where it can be subject to thorough examination. The decision also had a tone of moral outrage that indicated a lack of sufficient sensitivity to its practical consequences. Moreover, Canadians may well continue to ask why the Supreme Court regards the termination of proceedings as the only possible remedy for a breach of section 11(b). When an accused is held in custody for a long time while waiting for trial, a judicial order to speed up the trial date seems to be a remedy that is both sensible and just.7

Askov also raises questions about the performance of the political branches. The case exposed shameful conditions in the administration of justice that the Ontario government had allowed to develop in the Peel District of the province. A more alert and responsible government could have done much more to reduce delays in Peel by pushing Crown prosecutors to screen charges more carefully, to disclose more of their case to defence lawyers, and to be more open to negotiating pleas—defence lawyers referred to the district as “no

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7 For a discussion of these options, see Anthony G. Amsterdam, “Speedy Criminal Trial: Rights and Remedies” (1975) 27 Stanford Law Review 525.
deal Peel.”  
And it should not have needed the shock of Askov to wake up the government to the need to appoint more judges. In the United States, a number of states have enacted legislation setting standards for speedy trials. In Canada, where the federal Parliament has exclusive jurisdiction over criminal law and procedure, this option was considered by federal legislators in the early 1980s, but then dropped.

In the Charter era, legislative responsibilities that elected legislators decline to accept are apt to be taken up by the judiciary. Although the legislative effort of the Supreme Court in Askov was clumsy, at least the justices recognized its inadequacies and began the process of correcting their work in Morin. The process of refining time standards for bringing accused persons to trial continues. James Kelly reports that in the 12 years following Askov, the Supreme Court considered trial delay in 22 cases, and that the average time accepted as reasonable in these cases was 16 months.  

Discussion Questions

1. What can we learn from this case about the use of statistical data in judicial decisions interpreting the constitution?
2. How was the Court’s interpretation of section 11(b) modified in subsequent judicial decisions?
3. How would you assess the impact of judicial decisions on section 11(b) on the administration of criminal justice in Canada?

8 Kent Roach, supra note 3 at 181.
**R. v. Askov**

[1990] 2 S.C.R. 1199


Present: Dickson C.J.* and Lamer C.J.** and Wilson, La Forest, L’Heureux-Dubé, Sopinka, Gonthier, Cory, and McLachlin J.J.

* Chief Justice at the time of hearing.
** Chief Justice at the time of judgment.

This is the most important case the Court has rendered on section 11(b) of the Charter, guaranteeing the right to a trial within a reasonable time. Justice Cory’s opinion provides for the first time a clear majority position on the factors to be taken into account in determining whether this right has been violated. The Court found that the accused’s rights were violated primarily because Ontario had failed to provide adequate court resources in the Peel area. Within three months, more than 12,000 cases in Ontario had been either stayed by judges or had charges withdrawn by the Crown for failing to meet the standard established in the *Askov* case, which has generally been interpreted to require a trial between six to eight months after a charge has been laid.

The judgment of Dickson C.J. and La Forest, L’Heureux-Dubé, Gonthier, and Cory J.J. was delivered by

**Cory J.:** Section 11(b) of the Canadian Charter of Rights and Freedoms provides that any person charged with an offence has the right to be tried within a reasonable time. What constitutes an unreasonable delay of a trial must be determined on this appeal. In order to reach a conclusion it will be necessary to consider and apply criteria or factors which should be used to ascertain if a delay is unreasonable and in particular, to consider the consequences of so-called institutional delays.

**Factual Background**

All the appellants, Askov, Hussey, Melo and Gugliotta, were charged with conspiracy to commit extortion against Peter Belmont. As well, Askov, Hussey and Melo were jointly charged with the offences of possession of a prohibited weapon, possession of a weapon for a purpose dangerous to the public peace, pointing a firearm and assault with a weapon. Hussey was also charged with criminal negligence in the operation of a motor vehicle.

[Askov and Melo were arrested on November 12, 1983, Hussey on November 14, and Gugliotta on November 30.]

It is necessary to set out the proceedings following the arrest in some detail. The appellants Melo, Askov and Hussey were initially denied bail. They were detained in custody for almost six months. On May 7, 1984, they were each ordered to be released on a recognizance of $50,000. Gugliotta was released on December 2, 1983 shortly after his arrest on a recognizance of $20,000. The terms of release for all the appellants involved reporting to the police and abstention from communicating with their co-accused. These conditions were varied from time to time to permit more freedom of movement for the appellants. All the applications which were made for more lenient bail conditions were granted. Nonetheless, the appellants remained under considerable restraint.

Askov was re-arrested on an unrelated charge on October 1, 1984.

With three of the accused in custody, the Crown, in a commendable manner, was prepared as soon as December 1983 to set an early date for the preliminary hearing. However, at the request of the appellants the matter was put over to February 14, 1984 when all counsel agreed on a date in the first week of July for the preliminary hearing to be held. At this time it was specifically indicated that an earlier date could be arranged if a request was made by the appellants, but none was forthcoming. When the preliminary hearing commenced on July 4, 1984, it could not be completed because another preliminary had been set for a later day in the same week. As a result, the preliminary hearing could not be completed until September 21, 1984, some ten months after the arrests.

On October 1, 1984, the appellants appeared before Judge Keenan presiding in the assignment court. A trial date was set for the first available date which was October 15, 1985, more than a year away and nearly two years from the date of the initial arrests. Despite what seems far too lengthy a delay, an earlier date could not be set due to other cases which had priority either because the accused was in custody or because the offence date was earlier than that of the case at bar. On October 25, 1985, when it was apparent that the case simply could not be heard during that session, counsel for all the appellants and the Crown appeared and the case was put over for trial to September 2, 1986. When the trial finally began on that date, counsel for the appellants moved to stay the proceedings on the grounds that the trial had been unreasonably delayed. The stay was granted by order of Judge Bolan, the senior judge of the District Court of the Judicial District of Peel. The Crown appealed the order of Bolan Dist. Ct. J. to the Court of Appeal, which set aside the stay and directed that the trial proceed.

**The United States**

In the United States the Sixth Amendment ensures that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” The United States Supreme Court
considered the issue in *Barker v. Wingo*, 407 U.S. 514 (1972). In that case Barker, who was charged with murder, was brought to trial five years after the murder was committed. The delay was caused by the necessity of trying an accomplice beforehand. This prerequisite trial was extremely complicated; the accomplice was tried no less than six times. During this ongoing process, Barker initially had agreed to continuances or adjournments. He only began to assert his right to a speedy trial three and one-half years after the charges were laid.

The court held that a flexible approach should be taken to cases involving delay and that the multiple purposes or aims of the Sixth Amendment must be appreciated. Powell J., giving the reasons for the court, recognized the general concern that all persons accused with crimes should be treated according to fair and decent procedures. He particularly noted that there were three individual interests which the right was designed to protect. They were:

(i) to prevent oppressive pre-trial incarceration;
(ii) to minimize the anxiety and concern of the accused; and
(iii) to limit the possibility that the defence will be impaired or prejudiced.

However, Powell J. went on to observe that unlike other constitutional rights which only have an individual interest, the right to a speedy trial involved the added dimension of a societal interest. He found that a delay could result in increased financial cost to society and as well, could have a negative effect upon the credibility of the justice system. Further, it was noted that a delay could work to the advantage of the accused.

In order to balance the individual right and the communal aspect of the Sixth Amendment, the U.S. Supreme Court adopted an approach of *ad hoc* balancing “in which the conduct of both the prosecution and the defendant are weighed” (p. 530). The balancing is undertaken by reference to four factors identified by Powell J. as the test for infringement of the right to a “ speedy trial.” They are as follows:

(i) the length of the delay;
(ii) the reason for the delay;
(iii) the accused's assertion of the right; and
(iv) prejudice to the accused.

The first factor is the triggering mechanism or threshold determination of the excessiveness of the delay. If that delay appears *prima facie* excessive, the Court must then consider the three remaining factors to determine whether the accused has been deprived of the Sixth Amendment right.

Position in Canada Subsequent to the Passing of the Charter

Immediately following the passage of the *Charter*, the approach taken by the U.S. Supreme Court in *Barker v. Wingo*, supra, was widely approved and adopted.

The issue was first considered by this Court in *Mills v. The Queen*, supra. Lamer J. in his dissenting reasons called into question the appropriateness of adopting the American approach in the Canadian setting. . . . Although he favoured a flexible balancing test, he rejected the approach taken in *Barker v. Wingo*, supra. His difference with the reasoning in that case was grounded on the proposition that in the context of the Canadian *Charter*, the s. 11(b) right was by its very nature an individual right and that the provision did not have a collective or societal dimension.

Since there was no need to balance any interest of society, the test did not need to take into account the conduct of the parties, particularly that of the accused. As well, actual prejudice to the accused did not need to be considered, as actual prejudice is also a component of society’s interest in a fair trial.

The Court next examined the application of s. 11(b) in *R. v. Rahey* [[1987] 1 S.C.R. 588]. Rahey was charged with six counts of making false returns in his income tax forms and one count of wilful income tax evasion. His trial before a provincial court judge began six months after he was charged. In the eleven-month period which followed the closing of the Crown’s case there were no fewer than nineteen adjournments, all initiated by the trial judge. For nine of these adjournments, Rahey made no objection. When the judge ordered further adjournments, he contended that they constituted a violation of his s. 11(b) *Charter* rights. He brought an application to stay before the Supreme Court of Nova Scotia and later an appeal to this Court where a stay of proceedings was granted.

Four judges delivered written reasons. Lamer J., with Dickson C.J. concurring, restated his position in *Mills*, but extended the “transitional period” to include the period up to the issuance of the reasons in *Rahey*. Wilson J., with Estey J. concurring, maintained her position set forth in *Mills* and referred again to the necessity of focussing on the prejudice resulting from the unreasonable delay and not upon the prejudice flowing from the charge. Le Dain J., with Beetz J. concurring, supported the approach taken by the U.S. Supreme Court in *Barker v. Wingo*. . . .

In *R. v. Conway*, [1989] 1 S.C.R. 1659, Conway sought to obtain from this Court a stay of proceedings to prevent a third trial which would take place more than five years after the initial charge of murder had been laid.
Conway was charged with first degree murder in connection with the stabbing death. Some sixteen months after he was charged, the accused was tried and convicted of the included offence of second degree murder. An appeal was taken and one year later a new trial was directed by the Court of Appeal. It was agreed that there was no time lost during the period from the launching of the appeal until the order was given by the Court of Appeal directing a new trial. Conway then had difficulty finding a counsel to represent him at the second trial. It was conceded that the problem arose in no small part from Conway's own actions.

L'Heureux-Dubé J., writing for the majority of a panel of five judges, which included Dickson C.J. and La Forest J., dismissed the appeal and rejected the stay. She held that the overall delay did not prevent the accused from obtaining a fair trial. . . . The critical factor in the decision was the conduct of the accused Conway who was responsible for much of the delay. It was held that the rest of the delay was justified by the inherent time requirements of the case. Further, it was noted that it was impossible to conclude that the accused had been prejudiced.

The facts in R. v. Smith, [1989] 2 S.C.R. 1120, are relatively straightforward. Smith was charged with theft. The preliminary inquiry could not be scheduled until over a year had passed from the time he was charged. The institutional reasons which caused this delay arose from the scheduling of the preliminary hearing for four days in August, at a time when the provincial court judges were on holiday. The preliminary hearing could not be rescheduled until late in December because the investigating officer was unavailable before that date. Once again the scheduled December date came within a holiday period for provincial court judges and a further adjournment was required. When the case finally came to trial, an application was brought for a stay which was granted.

In this Court, Sopinka J., writing for all members of the Court, upheld the stay. He recognized that there was still a considerable disagreement as to the factors that should be taken into account on the balancing process and also with regard to the composition of the constituent components of the prejudice issue. However, he was of the view that the problem did not have to be dealt with in light of the facts of the case.

On the facts of Smith, Sopinka J. determined that the length of time was longer than could be justified particularly in light of the cause of the delays.

Purpose of Section 11(b)
I agree with the position taken by Lamer J. that s. 11(b) explicitly focusses upon the individual interest of liberty and security of the person. Like other specific guarantees provided by s. 11, this paragraph is primarily concerned with an aspect of fundamental justice guaranteed by s. 7 of the Charter. There could be no greater frustration imaginable for innocent persons charged with an offence than to be denied the opportunity of demonstrating their innocence for an unconscionable time as a result of unreasonable delays in their trial. The time awaiting trial must be exquisite agony for accused persons and their immediate family. It is a fundamental precept of our criminal law that every individual is presumed to be innocent until proven guilty. It follows that on the same fundamental level of importance, all accused persons, each one of whom is presumed to be innocent, should be given the opportunity to defend themselves against the charges they face and to have their name cleared and reputation re-established at the earliest possible time.

Although the primary aim of s. 11(b) is the protection of the individual's rights and the provision of fundamental justice for the accused, nonetheless there is, in my view, at least by inference, a community or societal interest implicit in s. 11(b). That community interest has a dual dimension. First, there is a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law. Second, those individuals on trial must be treated fairly and justly. Speedy trials strengthen both those aspects of the community interest. A trial held within a reasonable time must benefit the individual accused as the prejudice which results from criminal proceedings is bound to be minimized. If the accused is in custody, the custodial time awaiting trial will be kept to a minimum. If the accused is at liberty on bail and subject to conditions, then the curtailments on the liberty of the accused will be kept to a minimum. From the point of view of the community interest, in those cases where the accused is detained in custody awaiting trial, society will benefit by the quick resolution of the case either by reintegrating into society the accused found to be innocent or if found guilty by dealing with the accused according to the law.

There are as well important practical benefits which flow from a quick resolution of the charges. There can be no doubt that memories fade with time. Witnesses are likely to be more reliable testifying to events in the immediate past as opposed to events that transpired many months or even years before the trial. Not only is there an erosion of the witnesses' memory with the passage of time, but there is bound to be an erosion of the witnesses themselves. Witnesses are people; they are moved out of the country by their employer; or for reasons related to family or work they move from the east coast to the west coast; they become sick and unable to testify in court; they are involved in debilitating accidents; they die and their testimony is forever lost. Witnesses too are concerned that their evidence be taken as quickly as possible. Testifying is often thought to be an ordeal. It is something that weighs on
the minds of witnesses and is a source of worry and frustration for them until they have given their testimony.

It can never be forgotten that the victims may be devastated by criminal acts. They have a special interest and good reason to expect that criminal trials take place within a reasonable time. From a wider point of view, it is fair to say that all crime disturbs the community and that serious crime alarms the community. All members of the community are thus entitled to see that the justice system works fairly, efficiently and with reasonable dispatch. The very reasonable concern and alarm of the community which naturally arises from acts of crime cannot be assuaged until the trial has taken place. The trial not only resolves the guilt or innocence of the individual, but acts as a reassurance to the community that serious crimes are investigated and that those implicated are brought to trial and dealt with according to the law.

The failure of the justice system to deal fairly, quickly and efficiently with criminal trials inevitably leads to the community's frustration with the judicial system and eventually to a feeling of contempt for court procedures. When a trial takes place without unreasonable delay, with all witnesses available and memories fresh, it is far more certain that the guilty parties who committed the crimes will be convicted and punished and those that did not, will be acquitted and vindicated. It is no exaggeration to say that a fair and balanced criminal justice system simply cannot exist without the support of the community. Continued community support for our system will not endure in the face of lengthy and unreasonable delays.

Further, implicit support for the concept that there is a societal aspect to s. 11(b) can be derived from the observation that the last thing that some wish for is a speedy trial. There is no doubt that many accused earnestly hope that the memory of a witness will fail and that other witnesses will become unavailable.

I believe the inferred societal interest should be considered in conjunction with the main and primary concept of the protection of the individual's right to fundamental justice. This is closer to the views expressed by Wilson J. in Mills, supra. At some level, the conduct of and prejudice to the accused must be examined. Although it must be recognized that the primary goal of s. 11(b) is the protection of the individual's interest in fundamental justice, nevertheless that same section contains a secondary and inferred societal interest that should not be ignored. If the recognition of both the primary individual interest and the inferred societal interest is accepted as the true aim of s. 11(b), then I think the various factors which should be taken into consideration in determining whether there has been an unreasonable delay can be clarified and set forth in a consistent test.

Factors to Be Taken into Account in Determining Whether or Not There Has Been an Infringement of Section 11(b)

(i) The Length of the Delay

It is clear that the longer the delay, the more difficult it should be for a court to excuse it. This is not a threshold requirement as in the United States, but rather is a factor to be balanced along with the others. However, very lengthy delays may be such that they cannot be justified for any reason.

(ii) Explanation for the Delay

This category referred to by Sopinka J. in Smith, supra, may be usefully subdivided with the aspects of systemic delay and conduct of the accused amplified.

(a) The Conduct of the Crown (or Delay Attributable to the Crown)

Generally speaking, this category will comprise all of the potential factors causing delay which flow from the nature of the case, the conduct of the Crown, including officers of the state, and the inherent time requirements of the case. Delays attributable to the actions of the Crown or its officers will weigh in favour of the accused. For example, the nineteen adjournments initiated by the trial judge in Rahey or the unavailability of judges because of holidays in Smith are examples where the actions or the lack of actions of Crown officers weighed against the state in the assessment of the reasonableness of the delay.

It is under this heading that the complexity of the case should be taken into account. Complex cases which require longer time for preparation, a greater expenditure of resources by Crown officers and the longer use of institutional facilities will justify delays longer than those that would be acceptable in simple cases.

(b) Systemic or Institutional Delays

On a more specific level, the question of delays caused by systemic or institutional limitations should also be discussed under the heading of delays attributable to the Crown. This factor will often be the most difficult to assess. A careful and sensitive balancing will be required in order to properly assess the significance of this aspect of delay. First, let us consider the problem from the point of view of society. Section 11(b) applies to all Canadians in every part of our land. In a country as vast and diverse as ours, the institutional problems are bound to differ greatly from province to province and from district to district within each province. Differences of climate, terrain, population and financial resources will require different solutions for the problem of providing adequate facilities and personnel. Lack of financial resources may
require imaginative answers to difficult problems, including the provision of temporary facilities. The problems presented and the solutions required will vary between heavily populated centres such as Toronto and Montréal and the sparsely populated districts bordering on Hudson Bay.

Wise political decisions will be required with regard to the allocation of scarce funds. Due deference will have to be given to those political decisions as the provisions of courtroom facilities and Crown Attorneys must, for example, be balanced against the provision of health care and highways. Yet solutions must be found as indeed they have been in many jurisdictions outside Ontario. Similarly situated communities can provide a rough comparison and some guidance as to what time period constitutes an unreasonable delay of the trial of an accused person. That comparison should always be made with the more efficient of the comparable jurisdictions.

The right guaranteed by s. 11(b) is of such fundamental importance to the individual and of such significance to the community as a whole that the lack of institutional resources cannot be employed to justify a continuing unreasonable postponement of trials. . . .

Where inordinate delays do occur, it is those who are responsible for the lack of facilities who should bear the public criticism that is bound to arise as a result of the staying of proceedings which must be the inevitable consequence of unreasonable delays. Members of the community will not and should not condone or accept a situation where those alleged to have committed serious crimes are never brought to trial solely as a result of unduly long delays. It is a serious consequence with potentially dangerous overtones for the community. It is right and proper that there be criticism of the situation when it occurs.

The response to the question of “how long is too long” as it applies to institutional delay will always be difficult to fashion in our country. The question must be answered in light of the particular facts of each case. There can be no certain standard of a fixed time which will be applicable in every region of the country. Nonetheless, an inquiry into what is reasonable in any region should not be taken in isolation and must, of necessity, involve a comparison with other jurisdictions. Consideration must be given to the geography, the population and the material resources of the province and district. The comparison of similar and thus comparable districts must always be made with the better districts and not with the worst. . . .

To summarize, when considering delays occasioned by inadequate institutional resources, the question of how long a delay is too long may be resolved by comparing the questioned jurisdiction to the standard maintained by the best comparable jurisdiction in the country. The comparison need not be too precise or exact. Rather, it should look to the appropriate ranges of delay to determine what is a reasonable limit. In all cases it will be incumbent upon the Crown to show that the institutional delay in question is justifiable.

(c) The Conduct of the Accused (or Delay Attributable to the Accused)

As Lamer J. so cogently observed in Mills, it is a fundamental precept of our criminal justice system that it is the responsibility of the Crown to bring the accused to trial. Further, the right to be tried within a reasonable time is an aspect of fundamental justice protected by s. 7 of the Charter. It follows that any inquiry into the conduct of the accused should in no way absolve the Crown from its responsibility to bring the accused to trial. Nonetheless, there is a societal interest in preventing an accused from using the guarantee as a means of escaping trial. It should be emphasized that an inquiry into the actions of the accused should be restricted to discovering those situations where the accused’s acts either directly caused the delay (as in Conway), or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial. . . .

In addition, since the protection of the right of the individual is the primary aim of s. 11(b), the burden of proving that the direct acts of the accused caused the delay must fall upon the Crown. This would be true except in those cases where the effects of the accused’s action are so clear and readily apparent that the intent of the accused to cause a delay is the inference that must be drawn from the record of his or her actions.

(iii) Waiver

While the question of waiver could be discussed under factor (ii)(c) above (Delay Attributable to the Accused), for reasons of clarity, I prefer to examine the issue separately.

The accused should not be required to assert the explicitly protected individual right to trial within a reasonable time. It is now well established that any waiver of a Charter right must be “clear and unequivocal . . . with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process.” See Korponay v. Attorney General of Canada, [1982] 1 S.C.R. 41, at p. 49. The failure of an accused to assert the right does not give the Crown licence to proceed with an unfair trial. Failure to assert the right would be insufficient in itself to impugn the motives of the accused as might be the case with regard to other s. 11 rights. Rather 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. Although no particular magical incantation of words is required to waive a right, nevertheless the waiver
must be expressed in some manner. Silence or lack of objection cannot constitute a lawful waiver.

In sum, the burden always rests with the Crown to bring the case to trial. Further, the mere silence of the accused is not sufficient to indicate a waiver of a Charter right; rather, the accused must undertake some direct action from which a consent to delay can be properly inferred. The onus rests upon the Crown to establish on a balance of probabilities that the actions of the accused constitute a waiver of his or her rights.

(iv) Prejudice to the Accused
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. . . . Nevertheless, it will be open to the Crown to attempt to demonstrate that the accused has not been prejudiced. This would preserve the societal interest by providing that a trial would proceed in those cases where despite a long delay no resulting damage had been suffered by the accused.

Application of the Principles to the Case at Bar
As the disposition of this case will ultimately turn on the factors headed (ii) Explanation for the Delay, particularly (b) Systemic or Institutional Delay and (c) Delays Attributable to the Accused; and (iii) Waiver, I need but briefly deal with the factors titled (i) The Length of the Delay and (iv) Prejudice to the Accused.

(i) The Length of the Delay
No matter what standard of measure is used or what test is applied, the trial in this case has been inordinately delayed.

The experienced trial judge who has presided for many years in Peel District described the delay as “clearly excessive and unreasonable.” It is interesting to note that the delay at issue in Mills was nineteen months, in Rahey eleven months, and in Smith one year. Although the period of delay in Conway is comparable to that of this case, it must be remembered that in that case the delay was directly attributable to the actions of Conway.

The period of delay in the case at bar is so lengthy that unless there is some very strong basis for justifying the delay, which becomes clear from an examination of the other factors, then it would be impossible for a court to tolerate such a delay.

(ii) Prejudice to the Accused
The trial judge found that the appellants had been prejudiced by the delay. In support, he noted the lengthy period of incarceration for three of the appellants and the restrictions contained in the bail terms. Those conditions of bail included curfews, a direction not to associate with the co-accused and a system of regular reporting to the police. There has been no attack on these findings. Consequently, it is impossible to say that the Crown discharged the burden that rested upon it to show that the delay caused no prejudice to the appellants. As a result, the prejudice suffered by the appellants weighs against the Crown and cannot be used to excuse the length of delay.

(iii) Explanation for the Delay

(a) Delays Attributable to the Crown
It is clear that delays cannot be attributable to any action of the Crown. At no time did the Crown make any requests for adjournments or take any step that delayed the trial of the action in any way.

There is nothing in the case that is so complex or inherently difficult that it would justify a lengthy delay.

(b) Systemic or Institutional Delay
This trial was to be heard in Brampton, in the District of Peel in Ontario. This district has long been notorious for the inordinate length of time required to obtain a trial date. The delays are said to be caused by lack of facilities. The evidence submitted contains a study done by Prof. Carl Baar, Director of the Judicial Administration Program at Brock University. From the research and comparative studies that he has undertaken, Professor Baar has concluded that the Peel District (referred to as Brampton by Professor Baar) experiences extremely long delays that are out of the ordinary compared to the rest of Ontario, the rest of Canada or the United States. He notes that the situation has arisen partly as a result of rapid urban growth and the presence of a very large international airport which generates a great many drug-related offences. He also finds that a shortage of court space and judges are significant factors which contribute to the lengthy delays. His research indicates that comparatively speaking it is without doubt one of the worst districts in Canada, if not the worst, in terms of delays between committal and trial. Ontario can take no pride in this situation and must indeed bear the responsibility for it.

It is apparent that the situation in Peel District has been in a deplorable state for many years. Something is terribly wrong. As Justice Zuber noted the situation is “enormously complex” and there is no “magic solution” or “quick fix.” Nonetheless, something must be done. Urgent attention to the situation is required. The response of the Government of Ontario has been neither overwhelming nor particularly successful. A program
known as the Delay Reduction Initiative instituted by the 
Government is summarized in the Chaloner affidavit. . . .

The most recent statistics set forth in the Chaloner affida-
vit for the period from October 1988 to December 1989 
clearly indicate that in four of the six target areas, including 
Peel District, there is no visible long-term trend towards 
improvement of the mean average time of case delays. . . .

The only conclusion which can be drawn from an analysis 
of the material filed is that the problem of systemic delay in 
Peel has not and cannot be resolved simply by introducing a 
more efficient casework management system. More resources 
must be supplied to this district perhaps by way of additional 
Crown Attorneys and courtrooms. This conclusion cannot 
come as a surprise. The problem has existed for many years, 
back at least as far as 1981. . . .

The extent and gravity of the problem in Peel is brought 
home by reference to the comparative study done in 1987 by 
Professor Baar. The study illustrated that in Canada, New 
Brunswick and Quebec were best able to bring their cases to 
trial within the thirty to ninety-day range. In terms of the time 
taken to completely dispose of a case from committal to dis-
position, the median total time in New Brunswick’s lower 
courts (provincial courts) was 152 days. The median total 
time in upper courts (s. 96 courts) was 72 days. By compari-
son, in Ontario the best district was London with a median 
total time of 239 days and the median upper court time of 
105 days. Toronto, Ottawa and St. Catherines were all close 
together with median total times of between 315 and 349 days, 
and upper court times between 133 and 144 days.

Professor Baar wrote that “[b]y all measures used in the 
study, Brampton District Court was significantly slower than 
any other location studied: median total time was 607 days 
and median upper court time was 423 days.” Nor can any 
comfort be drawn by comparison to the United States. Profes-
sor Baar concluded that the Peel District is generally substan-
tially slower than the slowest United States jurisdictions. 
Further, he noted that the delay in the present case was longer 
than ninety per cent of all cases in terms of median total time 
among those heard even in 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.

If it should be argued that the statistics from New Brun-
swick cannot represent a basis for comparison, then surely those 
from Quebec can and do provide a guide for comparison. A 
review of the recent statistics kept by the courts in Montréal,
Longueuil and Terrebonne by comparison reveals how very 
unsatisfactory and intolerable is the state of affairs in Peel.

At Montréal, for the 5½ month period beginning January 
8, 1990, the delay between the date of remitting a case for 
trial at the next assize and the date of trial is 82½ days. This 
figure includes the time for all trials save one which was remit-
ted by the Court of Appeal for a second trial. If from this fig-
ure are deducted those cases where the defence either requested 
an adjournment or brought a motion such as certiorari, the 
time was 60 days.

In the District of Terrebonne, taking into account all the 
cases before the Superior Court, the delay between remission 
for trial and trial is 91.5 days. If one case with exceptional cir-
cumstances is deleted, the waiting period drops to 86 days.

In the District of Longueuil, the waiting period for trial is 
90.5 days. Once again, if the exceptional cases are deleted, the 
waiting period drops to 66.75 days.

The average time in the three districts to commence a trial 
is 84.3 days and if from the total there is deducted those cases 
where a second trial was directed or the defence requested an 
adjournment, the waiting period is only 63.5 days.

Making a very rough comparison and more than doubling 
the longest waiting period to make every allowance for the 
special circumstances in Peel would indicate that a period of 
delay in a range of some six to eight months between com-
mittal and trial might be deemed to be the outside limit of 
what is reasonable. The usual delays in Peel are more than 
four times as long as those of busy metropolitan districts in 
the province of Quebec and the delay in this case is more than 
eight times as long. The figures from the comparable districts 
demonstrate that the Peel District situation is unreasonable 
and intolerable.

The delay in this case is such that it is impossible to come 
to any other conclusion than that the s. 11(b) Charter rights 
guaranteed to the individual accused have been infringed. As 
well, the societal interest in ensuring that these accused be 
brought to trial within a reasonable time has been grossly 
offended and denigrated. Indeed the delay is of such an inor-
dinate length that public confidence in the administration of 
justice must be shaken. . . . Yet, that trial can only be under-
taken if the Charter right to trial within a reasonable time has 
not been infringed. In this case that right has been grievously 
infringed and the sad result is that a stay of proceedings must 
be entered. To conclude otherwise would render meaningless 
a right enshrined in the Charter as the supreme law of the 
land. . . .

This conclusion should not be taken as a direction to build 
an expensive courthouse at a time of fiscal restraint. Rather, 
it is a recognition that this situation is unacceptable and can 
no longer be tolerated. Surely an imaginative solution could 
be found that would rectify the problem. For example, court-
room space might be found in other nearby government 
buildings. Or perhaps an interim solution could be achieved 
by the installation of portable structures similar to those used.
in the school system. If the children who represent the most precious resource of the nation can be taught in portable classrooms, then as a temporary solution trials can take place in similar accommodation.

Arguments can always be raised as to why interim solutions should not be used. Yet, imaginative cooperation can surely resolve these problems. If temporary structures cannot be used for criminal cases for reasons of security, then the criminal trials might proceed in the courthouse while the civil cases are heard in the nearby government buildings or portable buildings.

Another temporary solution might be to encourage changes of venue. . . .

These tentative suggestions may very well be unworkable. But some solution must be found to eradicate this malignant growth of unreasonable trial delay that constitutes such an unacceptable blight upon the administration of justice in Peel District.

(c) Delay Attributable to the Accused
In order to consider this factor, it is necessary to examine the conduct of the accused in order to ascertain whether it was such that it excused the delay by in effect bringing it about. At the outset, I would repeat that in this case it is clear that there was no direct action on the part of the appellants which resulted in any delay apart from that which occurred prior to the preliminary hearing. . . .

The complete transcript also reveals that there was no evidence to even support a finding that the appellants had a concealed plan to wait until the delay was unreasonable before complaining or bringing a motion. . . .

(iv) Waiver
. . . On the facts of this case there was no explicit waiver of their rights by the appellants. . . .

The silence of the appellants or their failure to raise an objection to a long delay is certainly not enough in the circumstances to infer waiver. Rather, the onus rests upon the Crown to demonstrate that the actions of the accused amounted to an agreement to the delay or waiver of their right.

In summary, the appellants did not specifically waive their s. 11(b) rights. Neither can it be inferred from their actions that they waived those rights.

The foregoing review indicates that there is no basis upon which this delay can be justified and as a result, a stay of proceedings must be directed. Courts may frequently be requested to take such a step. Fortunately, Professor Baar's work indicates that most regions of this country are operating within reasonable and acceptable time limits with the result that such relief will be infrequently granted. However, in situations such as this where the delay is extensive and beyond justification there is no alternative but to direct a stay of proceedings.

The following are the reasons delivered by

LAMER C.J.: I agree with Justice Cory's resolution of this appeal and with most of his reasons. However, with respect, I am unable to accept his position that one of the objectives of s. 11(b) of the Canadian Charter of Rights and Freedoms is the protection of a societal interest in speedy trials. I also respectfully disagree that prejudice suffered by the accused resulting from the delay is a factor to be considered when determining the "reasonableness" of the delay.

Societal Interest
As I stated in my reasons in Mills v. The Queen, [1986] 1 S.C.R. 863, at pp. 917-18, reasons in which Dickson C.J. and Wilson J. concurred, and in which I still firmly believe, while society may have an interest in the efficient functioning of the criminal justice system, this interest is not what s. 11(b) is designed to protect. . . .

Prejudice
Cory J. adopts the consideration of "prejudice" from Wilson J.'s position in Mills, at p. 967:

There may, indeed, be an irrebuttable presumption in favour of prejudice flowing from the fact of an accused's being charged with a criminal offence but that is not protected by s. 11(b) of the Charter. The prejudice arising from anxiety, stress and stigmatization by family and friends also exists where the accused is tried within a reasonable time. What the accused has to demonstrate under s. 11(b), in my opinion, is that he has suffered an impairment of his liberty and security interests as a result of the Crown's failure to bring him to trial within a reasonable time, not as a result of the Crown's having charged him.

In Mills, I took the position that because of the very nature of our criminal justice system, a certain degree of prejudice, including, at p. 920, "stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction," will inevitably be imposed upon an individual charged with a criminal offence and will thereby infringe the rights of liberty and security of the person. Therefore, there exists an irrebuttable presumption of prejudice from the moment the charge is laid. . . .

Making prejudice affecting the fairness of the trial a relevant consideration for s. 11(b) sets a precedent which could have dangerous consequences for the scope of other Charter
rights. For example, s. 10(b) of the Charter guarantees the right, upon arrest or detention, to be informed of the right to retain and instruct counsel without delay. Suppose an individual is arrested and there is considerable delay in advising him or her of the right to retain counsel. Even if the individual later states that had he or she been promptly informed of the right to retain and instruct counsel, he or she would not have done so because of financial considerations, the rights guaranteed under s. 10(b) have still been restricted. This person may not have suffered any prejudice, but surely his or her rights have been infringed. Of course, lack of prejudice would be a consideration when fashioning a remedy under s. 24(1) or when applying s. 24(2). But the absence or presence of prejudice is not, in my respectful view, in any way relevant to the initial issue of Charter breach.

The following are the reasons delivered by Wilson J.:.

[Justice Wilson concurred with Chief Justice Lamer on whether section 11(b) protects a societal as well as an individual interest. On the issue of the relevance of prejudice to the accused, she sided with the Cory majority—an accused should bear the onus of proving that the delay harmed his or her interests.]

The following are the reasons delivered by Sopinka J.: I have had the benefit of reading the reasons for judgment prepared in this appeal by Chief Justice Lamer and Justice Cory. I am of the view that this appeal must be allowed for the reasons given by Cory J., with the exception of his reference to a societal interest. In this respect, I agree with Lamer C.J.’s comments concerning the purported societal interest in s. 11(b) of the Canadian Charter of Rights and Freedoms.

The following are the reasons delivered by McLachlin J.: I agree in substance and result with the reasons of Justice Cory. I wish to add only the following comments relevant to the process of determining whether a trial has unreasonably been delayed.

Like Cory J., I see s. 11(b) of the Canadian Charter of Rights and Freedoms as designed to serve both the interests of the accused and the interests of the prosecution, as well as the interests of society generally. This requires adoption of a balancing approach such as that which has prevailed in the United States, “in which the conduct of both the prosecution and the defendant are weighed”: Barker v. Wingo, 407 U.S. 514 (1972), per Powell J., at p. 530.

Two elements must be assessed under s. 11(b). The first is the length of the delay. The second is its reasonableness.

The length of the delay is to be determined by the norms usually prevailing in similar jurisdictions, as Cory J. suggests. The question at this stage is whether the delay is prima facie excessive. If it is not, it is unnecessary to pursue the analysis further. If it is, it is necessary to go on to consider whether the delay is reasonable, notwithstanding its length.

The reasonableness of the delay may depend on a variety of factors... The ultimate question in each case is whether, after considering all relevant factors, the prima facie excessive delay can be justified as reasonable.

The factors to be considered will often pull in opposite directions. Thus, it is impossible to dictate in advance how the balancing is to be done in each case. Yet certain parameters can be suggested. The accused will rarely be entitled to the benefit of s. 11(b) where the Crown can show that the accused caused the delay or has suffered no prejudice as a consequence of the delay. On the other hand, lengthy and avoidable delay caused entirely by the Crown’s sloppiness or inattention, or by unjustified delays in the legal system, will frequently entitle an accused to the benefit of s. 11(b).

In this case, the delay is prima facie excessive; indeed it is grossly excessive. We must therefore proceed to the second stage of the analysis to ask whether it is reasonable. The trial judge found that the accused had been prejudiced by the delay. As for the cause of the delay, the defence neither caused the delay nor agreed to it; I agree with Cory J. that failure to protest the delay should not be determinative against the accused in this case. Here the prosecution caused the delay. That delay was not due to inherent difficulties in the case but to systemic or institutional causes. Notwithstanding ample time since the advent of the Charter to increase the ability of the courts in Peel County to process their heavy trial lists within a reasonable time, this has not been done. Taking these factors together, the result is clear. The delay cannot be justified; it is unreasonable.

I would allow the appeal and direct a stay of proceedings.