TRANSLATION
FROM FRENCH

# THE RIGHT TO A SPEEDY TRIAL

by

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## SUMMARY

## INTRODUCTION

The adoption of the Canadian Charter of Rights and Freedoms[1] established a number of new rights. One of these, the right of an accused to be tried within a reasonable time,[2] is already sanctioned in the United States[3] and elsewhere in the world.[4] It recognizes the need for speedy settlement of criminal matters by imposing on the Crown an obligation of reasonable diligence:

> The importance of prompt trial of criminal offences in a democratic Society derives from the needs of maintaining public order and preserving individual freedom.[4.1]

## I THE NATURE OF THE RIGHT TO A SPEEDY TRIAL

The right to a speedy trial is both an individual and a collective right. It is an individual right because an accused person is entitled, on the basis of presumed innocence and the right to a full and complete defence, to demand that his case be decided quickly. It is a collective right because it is in society's best interests that the criminal be prosecuted promptly.

In 1970, in DICKEY v FLORIDA,[5] Burger CJ of the US Supreme Court recognized the dual nature of the American right to a speedy trial:

> The right to a speedy trial is not a theoretical or abstract right, but one rooted in hard reality in the need to have charges promptly exposed. If the case for the prosecution calls on the accused to meet charges rather than rest on the infirmities of the prosecution's case, as is defendant's right, the time to meet them is when the case is fresh. Stale claims have never been favored by the law, and far less so in criminal cases.
>
> Although a great many accused persons seek to put off the confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial.[6]

In the same case, Brennan J, who concurred in the reasons given by the Chief Justice, identified clearly the problems which the right to a speedy trial was intended to correct. He began by stressing the interest of the accused in a prompt trial.

> It is intended to spare an accused those penalties and disabilities - incompatible with the presumption of innocence - that may spring from delay in the criminal process . . . . These disabilities, singly or in league, can impair the accused's ability to mount a defense. The passage of time by itself, moreover, may dangerously reduce his capacity to counter the prosecution's charges. Witnesses and physical evidence may be lost; the defendant may be unable to obtain witnesses and physical evidence yet available. His own memory and the memories of his witnesses may fade. Some defenses, such as insanity, are likely to become more difficult to sustain . . . .[7]

Brennan J went on to describe society's interest in the speedy prosecution of a criminal.

> The speedy trial clause protects societal interests as well as those of the accused. The public is concerned with the effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. Just as delay may impair the ability of the accused to defend himself, so it may reduce the capacity of the government to prove its case.

> Moreover, while awaiting trial, an accused who is at large may become a fugitive from justice or commit other criminal acts. And the greater the lapse of time between commission of an offence and the conviction of the offender, the less the deterrent value of his conviction.[8]

The final beneficiary of the right to a speedy trial identified by Brennan J was the public.[9]

> Deliberate governmental delay in the hope of obtaining an advantage over the accused is not unknown. In such a circumstance, the fair administration of criminal justice is imperiled:
>
> The speedy trial clause that serves the public interest by penalizing official abuse of the criminal process and discouraging official lawlessness . . . . . Thus, the guarantee protects our common interest that government prosecute, not persecute, those who are accused of crime.[10]

In Canada, in COGHLIN v R,[11] Callaghan J reiterated these criteria by recognizing the ambivalence of the interests bound together under the right guaranteed by section 11(b) of the Canadian Charter of Rights and Freedoms.

> Such an analysis must secure the values the right protects, which are the ability to make full answer and defence on behalf of the accused and the right of Society to a speedy public trial of a criminal allegation.[12]

In short, section 11(b) of the Charter recognizes that it is in everyone's interest that the criminal proceeding reach a speedy conclusion. However, justice must not be sacrificed for speed.[13]

> The essential ingredient is orderly expedition, and not mere speed.[13.1]

## II THE PARAMETERS OF THE RIGHT TO A SPEEDY TRIAL.

### (A) Period to be considered

#### a- Time elapsed before April 17, 1982

For some time yet, the courts will be faced with the question of the retroactivity of section 11(b) of the Charter. Should the period of time before April 17, 1982 be included in determining the reasonableness of the total time under section 11(b)?

The courts have quickly become divided on this issue. For some, the Charter is not retroactive and therefore the time can be calculated only from April 17, 1982.[14] Others have adopted a middle position: even if the Charter is not retroactive, the case must be considered in its entirety. For this reason, the time elapsed before April 17, 1982 must be taken into consideration, though not given as much weight as the time after that date.[15]

According to a third school of thought, all time elapsed must be given equal weight, including that before April 17, 1982.[16]

Although the full range of available solutions has been explored by the courts, the difficulty remains. On the one hand, it seems unrealistic to consider only the time after April 17, 1982. In this case, the Charter would have a very limited effect on cases which began before it came into force.

On the other hand, it seems unjust to impose on the Crown respect of a right retroactively.[16.1] Serious arguments have been made for the non-retroactivity of the Charter.[17]

b- Time elapsed before charges are laid

Should the time elapsed in the case be computed from the date the offences were committed or from the date the charges were laid? In the United States, the courts have recognized that the time between the commission of the offences and the laying of the charges cannot be considered in terms of the right to a speedy trial, but could perhaps be taken into account under the due process clause.[18]

In Canada, although the power to stay proceedings for abuse of process seems to be recognized,[18.1] it should be emphasized that since the Supreme Court decision in ROURKE v R,[19] the time lapse in laying charges cannot be used as grounds for a motion for abuse of process.[20]

Although the existence of a new motion for abuse of rights[20.1] to deal with the time elapsed before charges are laid has been recognized by some, it must be remembered that the right to a speedy trial granted in section 11(b) applies to a "person charged with an offence",[21] a physical or moral person[22] against whom charges have been laid.[23] Therefore, for some, the constitutional right guaranteed by section 11(b) would apply from the date the charges were laid[24] (the date the informations were sworn), and for others, from the date on which the person appeared in order to respond to the accusations.[25] Where extradition is involved, the fugitive becomes the "person charged with an offence" as soon as there is a charge against him in Canada - that is, when an information is sworn in support of an arrest warrant.[25.1]

In R v ESAU,[26] the defence alleged that the time elapsed since the commission of the offence should be considered because the use of the term "person charged with an offence" did not identify the time period in question. The argument was that "person charged with an offence" only identified the category of persons who could invoke this constitutional right.

Judge Dubienski granted that the argument was clever, but rejected it.

The time between the date on which the offence was committed and the date on which the charges were laid would thus not come under section 11(b).[27] Otherwise, the inviolable principle that indictable offences are not subject to prescription would be directly challenged. Even since the adoption of section 11(b), which refers to a "person charged with an offence", the remarks of Pigeon J, then a Supreme Court justice, are still applicable.

> I cannot find any rule in our criminal law that prosecutions must be instituted promptly and ought not to be permitted to be proceeded with if a delay in instituting them may have caused prejudice to the accused. In fact, no authority was cited to establish the existence of such a principle which is at variance with the rule that criminal offences generally are not subject to prescription except in the case of specific offences for which a prescription time has been established by statute.[27.1]

c- End of the eligible time period

Having determined the starting point for computing the time elapsed, we must now endeavour to define the end point of this period.

Section 11(b) deals with the right "to be tried within a reasonable time". Could it be argued that an application alleging an infringement of section 11(b) submitted at the preliminary inquiry would be premature?[28]

If there were undue delay between the instituting of proceedings and the preliminary inquiry, the accused could not, a fortiori, be tried within a reasonable time.[28.1] It is surely not in the spirit of the right guaranteed under section 11(b) to wait until the trial to rule on the alleged infringement!

At what point can the infringement of the right to a speedy trial no longer be alleged? Could an accused invoke section 11(b) against a judge who was slow in handing down his sentence?

Since the trial ends when a verdict is entered,[29] it would be difficult for an accused to argue successfully that the right guaranteed under section 11(b) extends beyond this verdict.[30]

Consequently, despite views to the contrary,[31] the right guaranteed by section 11(b) should be applied only within the limits of the terms used. The handing down of the sentence and appeal procedures should not come under section 11(b).[32] The courts will undoubtedly have the opportunity to clarify these questions in the near future.

(B) Nature of the delay

> . . . reasonableness or unreasonableness is, something like beauty, in the eyes of the beholder.[33]

The right guaranteed by section 11(b) is defined vaguely and the courts must define it in the light of the facts of each case. Callaghan J referred to the "vagueness of the concept of reasonable time"[34] and McDonald J, referring to the American case of BARKER v WINGO,[35] pointed out the difficulty of determining the exact limits of this right.

> . . . the right to a speedy trial is vague and amorphous in that it is impossible to say definitely and with precision how long is too long in a system where justice is supposed to be swift but deliberate . . . .[36]

The courts were quick to recognize that, in this matter, there could be no general rule of application. The right guaranteed by section 11(b) must be applied on an individual basis in the light of the circumstances of each case.

> The approach we accept is a balancing test in which the conduct of both the prosecution and the defendant are weighed.
>
> A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis.[37]

In Québec, in R v DAIGLE,[37.1] Rothman J echoed these remarks when he wrote:

> The "reasonableness" or "unreasonableness" of any delay cannot, however, be decided in the abstract. It must depend on the particular circumstances of the case.[37.2]

The accused therefore has the right to be tried within a reasonable time, taking into account the circumstances.[38] The cases brought before the courts have provided the opportunity to isolate some elements in light of which one may determine when the right to a speedy trial applies.

a- Length of the delay

The length of the delay is obviously the crucial point around which the right guaranteed by section 11(b) revolves.

The special nature of this factor has been recognized in the United States. The United States Supreme Court has called the length of the delay the "triggering mechanism"[39] which can justify the court's pursuing its study of the causes of the delay.

If, at first view, the delay cannot be considered extraordinary, there is no question of the Sixth Amendment having been infringed. Only where the lapse of time is prima facie extraordinary must the court examine the reasons for the delay.

In Canada, the courts have not in principle[40] recognized such a dividing line with respect to the length of the delay and the examination of its causes. The length of the delay is one of the elements studied in view of section 11(b). However, numerous debates would be avoided if, on the basis of American experience, Canadian courts recognized this demarcation.[40.1]

In any event, whether the delay is studied automatically or analysed only where it appears at first view to be extraordinary, it must be examined in light of the circumstances of the case.

> This Court has stated that the right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances.[41]

However, the burden of establishing that the delay is unreasonable is on the accused.[42] The length of the delay must therefore be assessed in terms of its causes.

b- Causes of the delay

> [Translation] The reasonableness of the delay must be assessed mainly in terms of its causes.[43]

A judge ruling on an alleged infringement of the right guaranteed under section 11(b) of the Charter must first of all identify the sources and causes of the delay.[44] This requires a sequential study of the delay, since the distribution of responsibilities and, therefore, the reasonableness of the delay will be evaluated in terms of the consequences attributable to each party.[44.1]

> The US Supreme Court in Barker has drawn a distinction between neutral reasons for delay, valid reasons for delay, and deliberate delays aimed at hindering a defendant's case.[44.2]

1. The prosecution

If responsibility for the delay lies with the prosecution or the police,[44.3] it must first of all be determined whether there was negligence[45] or bad faith involved in these delays[46]; an example would be a delay for tactical reasons.[47] Furthermore, the Crown must justify those delays for which it is responsible to the satisfaction of the courts. This justification may take various forms, including the following: a backlog of cases in the courts,[48] the nature[49] and number of charges,[50] the complexity of the case and the length of time required for preparation,[51] the amount of evidence to be presented,[52] the number of accused and lawyers involved,[53] the number of witnessess required and their availability,[54] the background to the case,[55] the duration of the preliminary inquiry,[56] and the form of trial selected.[57]

The judge will thus be able to consider the frequency and seriousness of the offences[58] in terms of the public interest.[59]

## 2. The accused

### 2.1 his conduct

The accused can hardly protest delays for which he is responsible.[60] Delays which are due to an avalanche of interlocutory motions and other proceedings,[61] a prolonged cross-examination of Crown witnesses,[62] a series of objections to evidence submitted by the Crown[63] or a voluntary delay by the accused to brief a lawyer, are explained and therefore reasonable delays which cannot be considered an infringement of the right to a speedy trial.

> Moreover, this circuit[64] has indicated that delays caused by defence "manoeuvring" cannot form the basis of a claim of denial of the right to a speedy trial.[65]

The judge must also consider the conduct of the accused when requesting[66] or consenting to[67] adjournments, and the timing of the accused's first allegation that his constitutional right has been infringed.[68]

### 2.2 prejudice suffered

The judge must also check whether the delays protested by the accused have caused him prejudice.[69]

> In the absence of any indication of prejudice to the accused, I do not consider that mere delay, in itself, is sufficient grounds for staying these proceedings.[69.1]

The United States Supreme Court, in BARKER v WINGO,[70] isolated the possible elements of this prejudice.

> Prejudice, of course, should be assessed in light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defence will be impaired.[71]

The fact that an accused is in detention must therefore be considered. However, a distinction must be made between detention for the case in which the delay occurred[72] and detention in another connection (for instance, where an accused is serving a sentence); in the latter case, there would be much less prejudice suffered.[73]

If there were no other aggravating circumstances, detention per se would not constitute sufficient prejudice.

> Finally, spending time in custody is unquestionably a hardship for both the accused and his family and perhaps particularly so in this case. Nevertheless there is no evidence that the accused has been prejudiced in the preparation of his defence or his defence made impossible or more difficult to present.[73.1]

In any case, the courts have always given priority to accused persons who have been denied bail.

It must also be ascertained whether the delay has in some way prejudiced the accused in the presentation of his defence, either through the loss of the pertinent evidence, the faded memory of some witnesses regarding points at issue[74] or the impossibility of locating certain witnesses whose testimony is relevant to the case.[74.1] However, if the testimony is relevant but not essential, an admission from the Crown might remedy the prejudice. This aspect of possible prejudice is summarized well in the following passage.

The ability to prepare an adequate defence, being the most important interest that may be prejudiced by delay of trial, warrants close examination by a reviewing court. Witnesses may die or disappear, their memories may fade, or evidence may be lost.

Even upon close examination, however, TERCERO has failed to show that the 20 months delay between the first and second trials caused any impairment. Every defence witness that testified at the first trial was present at the second trial and all testified then except for TERCERO himself.[75]

It should be noted, however, that the accused's anxiety in itself does not constitute serious prejudice; anxiety is produced by any criminal prosecution and it may just as easily be felt by the victim.[76]

## Certain legal delays

In determining the causes of the delay, the judge may also consider the application of certain legal provisions.

### 3.1 nolle prosequi

The Criminal Code gives the Crown the privilege of entering a nolle prosequi against an accused[77] and reinstituting proceedings within a year of doing so. Thus, in R v MARQUEZ,[78] the Crown entered a nolle prosequi the morning of the trial owing to the absence of some of its witnesses. Some months later, the Crown gave notice that it intended to resume the proceedings. Judge Ferg rejected the accused's claim that this action constituted an infringement of section 11(b). The Crown is entitled to conduct its case as it sees fit,[79] and its right to resume proceedings is provided in the Criminal Code.[80]

### 3.2 adjournments

The various Criminal Code provisions empowering the magistrate conducting the investigation[81] or the trial judge[82] to grant adjournments must also be considered.[83]

The Supreme Court of Canada, in DARVILLE v R,[84] has already defined the conditions for obtaining an adjournment based on the absence of a witness.[85]

### 3.3 the accused who absconds

Sections 431.1(1)(b)(ii) and 471.1(1)(b)(ii) of the Criminal Code, which empower the judge to issue an arrest warrant against the accused who absconds, may prove very relevant to the analysis of delay.[85.1]

### 3.4 special issue

When an accused is judged unfit to stand trial, but becomes fit at a later date, the constitutional right in section 11(b) must clearly be studied in the light of sections 543 et seq of the Criminal Code.[86]

### 3.5 various provisions

Provincial laws providing for a certain period of time between the date of the summons and the date on which it is returnable become important with respect to section 11(b) of the Charter.[87]

If it was concluded that a federal or provincial law resulted in delays that limited the constitutional right guaranteed under section 11(b), a decision would have to be made on whether this restriction was justified under section 1 of the Charter.[88]

## III THE APPROPRIATE REMEDY

### (A) Nature of the remedy

Section 24(1) of the Charter of Rights and Freedoms states:

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

Where there has been an infringement of the right guaranteed under section 11(b), what form can "such remedy as the court considers appropriate and just in the circumstances" take?

In the United States, the speedy trial right is sanctioned in a draconian way: the case is dismissed.

In Canada, section 24(1) of the Charter gives the courts greater discretion. If the right to a speedy trial is infringed, the judge can, for example, grant bail to an accused in custody,[89] set a peremptory trial date[90] or, finally, either order a stay of proceedings[91] or quash the indictment or information and discharge the accused from custody.[92]

The decision to order a permanent stay of proceedings should only be taken as a last resort.

> As an aside, I accept the proposition that a trial judge now has the power to stay a prosecution if the right to be tried within a reasonable time has been infringed or denied. In those circumstances, a stay appears to be an appropriate and in fact, the only remedy available to enforce the rights.[93]

The courts will undoubtedly find other forms of just and appropriate remedy.[93.1] Greenberg J wrote:

> [Translation] Generally, the courts are loath to innovate. They prefer, if and when necessary, to build little by little on precedents. However, where its provisions apply, the Charter encourages, and even compels the courts to take new and sometimes, if necessary, bold steps.[94]

(B) Obtaining the remedy

The desired remedy can be obtained by a motion under section 24(1) of the Charter. But what is the court of competent jurisdiction for such a motion? Does section 24(1) create an independent remedy?

In GRAY v R et al,[95] the accused, alleging an infringement of section 11(b), contested the jurisdiction of the court at the time of his appearance. Under section 24(1), he brought a motion before the Court of Queen's Bench for prohibition and certiorari in aid. The judge acknowledged the infringement of section 11(b), quashed the information and issued a prohibition order.

In MONTGOMERY v R,[96] the applicant, whose trial in Municipal Court was adjourned for a fairly long time, brought a motion before the Superior Court under section 24(1) of the Charter. Boilard J granted it and set peremptory dates for continuation of the trial.

In Irving KOTT v R,[97] the infringement of section 11(b) was alleged by means of a motion to quash the indictment under section 24(1) of the Charter. This motion was denied by the trial judge, and the Superior Court refused to review the decision on a motion for prohibition on the grounds that the trial judge had acted within his jurisdiction.[98]

In COGHLIN v R,[99] on a motion for prohibition, Callaghan J also refused to review the trial judge's decision to grant an adjournment, on the grounds that the trial judge had acted within his jurisdiction.

In LEGGO v R,[100] Prowse J also refused to review on a motion for prohibition the decision of the trial judge who had dismissed an objection under section 11(b),[101] on the grounds that the trial judge had acted within his jurisdiction in making this decision.

Finally, in R v BROOKS et al,[102] Eberle J held that the words "court of competent jurisdiction" in section 24(1) must be interpreted in the light of the acts establishing the competence of the various courts.

What conclusions should be drawn? On the one hand, a decision handed down by a lower court under sections 11(b) and 24(1) of the Charter is within the jurisdiction of this court and therefore cannot be reviewed by means of an extraordinary remedy.[103]

On the other hand, for some,[104] section 24(1) seems to create an independant remedy over which a higher court would always have jurisdiction.

This seems to be a dangerous approach. An applicant could avoid being bound by the non-reviewable decision of a lower court[105] by choosing, during the proceedings, to bring his motion directly before the higher court.

For this reason, the approach advocated by Eberle J[106] appears to be more in keeping with the spirit of our criminal law system. The motion under 24(1) should be brought before the "court of competent jurisdiction" - that is, the magistrate presiding over the inquiry or the trial judge, as the case may be.

## CONCLUSION

Each alleged infringement of section 11(b) must be studied in the light of the facts in the case. In well-administered judicial districts where a trial date can be obtained quickly, could someone who was audacious use section 11(b) to protest the setting of a trial for too early a date? In any case, it will be some time before we know how the Canadian courts will interpret this provision.

> Only years of judicial interpretation will decide what the Charter means in the context of particular fact situations. Indeed, any attempt to formulate immediate and final answers to the Charter would probably result in the stunting of the growth of this "living and organic" social instrument.[107]

## REFERENCES

1 Constitution Act, 1982, UK, 1982, c 11, Schedule "B", Part I (Canadian Charter of Rights and Freedoms). It came into force on April 17, 1982: Canada Gazette, Part II, Vol 116, p 1808; TR-82-97, May 12, 1982, Canada Gazette, Part III, September 21, 1982, p 33.

2 Section 11(b):

> "Any person charged with an offence has the right . . . (b) to be tried within a reasonable time."

3 The Sixth Amendment to the American Constitution ([1982] 1 CRR 15) sanctions inter alia the right of the accused to a prompt trial: "In all criminal prosecutions, the accused shall enjoy the right to speedy trial . . .".

Furthermore, a federal law, the Speedy Trial Act, 18 USC 3161-3174, has been adopted for the purpose of clarifying this right; however, it in no way limits the right provided by the Sixth Amendment, section 3173.

Its constitutionality was recognized in US v MARTINEZ, (1976) 538 F (2d) 921 (USCA, 2nd Cir). For a discussion of this law and its implications, see US v BRAINER, (1981) 515 F Supp 627, at 636 et seq.

In KLOPFER v North Carolina, (1967) 386 US 213, Warren J (at 223 ff) traced the history of the right to a speedy trial back to the Magna Carta of 1215, which stated: "We will sell to no man, we will not deny or defer to any man either justice or right". Notes, The right to a speedy trial, (1968) 20 Stan L Rev 476, at 483.

4 Some international conventions go even further: the trial must be held within a reasonable time or bail must be granted.

Article 5(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) [1982] 1 CRR 43, at 45, provides that anyone arrested ". . . shall be entitled to trial within a reasonable time or to release pending trial". The French version reads: ". . . a le droit d'être jugée dans un délai raisonnable, ou libérée pendant la procédure". Section 6(1) of the same convention is along the same lines and reads in part: "In the determination . . . of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time . . .".

There are similar provisions in articles 9(3) and 14(3)(e) of the United Nations Covenant on Civil and Political Rights, [1982] 1 CRR 19, at 23 and 24.

4.1 NOTES, The right to a speedy criminal trial, (1957) 57 Col L Rev 846.

5 (1970) 398 US 30.

6 DICKEY v FLORIDA, idem, at 37-38. More recently, on March 31, 1982, Burger J, in US v MACDONALD, (1982) 102 S Ct 1497, added to what he had written in 1970 in Dickey.

> The sixth Amendment right to a speedy trial is thus not primarily intended to prevent prejudice to the defence caused by passage of time; that interest is protected primarily by the due process clause and by statutes of limitations.
>
> The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser but nevertheless substantial impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presences of unresolved criminal charges. (at 1502)

7 Ibid, at 41-42.

8 Ibid, at 42.

9 This third interest could actually be included in the second, the societal interest.

10 Ibid, at 43.

11 Ont Sup Ct ruling of September 21, 1982.

12 COGHLIN v R, ibid, at 7. See also ATKINS v State of Michigan, (1981) 644 F (2d) 543, at 547. (USCA, 6th Circuit).

13 DICKEY v FLORIDA, supra note 5, at 47-48.

13.1 SMITH v US, (1959) 306 US 1, at 10 (US Sup Ct).

14 R v MILLS, Ont Prov Ct, July 16, 1982, Judge Baker, at 19; R v DUMONT, Alta Prov Ct, April 30, 1982, Judge Chrumka, at 30; R v FORSBERG, BC Prov Ct, August 18, 1982, Judge Smith, at 3; R v LEGGO, Alta Prov Ct, June 4, 1982, Judge Dinkel, at 4; In re DEMARCO, Ont Cty Ct, July 19, 1982, Judge Kane, at 135; R v MINGO et al (No 2), BC Sup Ct, October 26, 1982, Toy J, at 4; A G Canada v EL MEKIES (No 2), CSM 27-034171-829, December 1, 1982, Claire Barette-Joncas J, at 4.

15 PANARCTIC OIL LTD v R, NWT Sup Ct, July 26, 1982, de Weerdt J, at 12; R v CAMERON, (1982) 6 WWR 270, at 273; BALDERSTONE v R, Man QB, October 15, 1982, Scollin J, at 30-31; R v DAIGLE, CSM 01-008095-819, November 29, 1982, Rothman J, at 7 et seq.

16 R v BEASON and FOSTER, [1982] 1 CRR 197, at 201; (1982) 68 CCC (2d) 540; R v BELTON, (1982) 29 CR (3d) 59, at 68; COGHLIN v R, Ont Sup Ct, September 21, 1982, Callaghan J, at 7; R v BARKEY, Ont Cty Ct, September 10, 1982, Judge Kent, at 5; GRAY v R et al, Sask QB, August 19, 1982, Gerein J; R v KRAMER and MARKUS, Sask Prov Ct, October 15, 1982, Judge Meagher, at 12-13; PRIMEAU v R, Sask QB, September 24, 1982, Estey J; R v HASSELSJO, Ont Prov Ct, May 17, 1982, Judge Charlton; R v RICHARDSON and DABENE, Ont Prov Ct; July 16, 1982, Judge Sherwood, at 13.

16.1 In the United States, it was ruled that the legal provisions concerning speedy trial were not retroactive: PEOPLE v JOHNSON, (1975) 38 NY (2d) 271, at 379.

17 ROLBIN v R, CSM 36-000102-825, October 26, 1982, Boilard J, at 2; R v POTMA, (1982) 67 CCC (2d) 19, at 27-28; (1982) 136 DLR (3d) 69; (1982) 37 OR (2d) 189; EWASCHUK, The Charter: an overview and remedies, (1982) 6 CR (3d) 54, at 86 ff; R v BROOKS and ALEXCEE, BC Cty Ct, May 28, 1982, Judge Hutchison, at 4; R v SHEA, Ont Sup Ct. September 15, 1982, Steele J, at 9; In re GITTENS, (1982) 68 CCC (2d) 438, at 442; Att Gen Can v STUART, FCA, June 18, 1982; R v BURNETT, Ont Prov Ct, November 23, 1982, Judge Darragh, at 3.

18 In US v MARION, (1971) 404 US 307, at 323 ff, White J wrote that the Sixth Amendment does not apply to a delay before the laying of charges: "The framers could hardly have selected less appropriate language if they had intended the speedy trial provision to protect against pre-accusation delay." (at 314-315)

US v ROGERS, (1981) 639 F (2d) 438, at 440 (USCA, 8th Cir); US v MATLOCK, 558 F (2d) 1328; US v JACKSON, 504 F (2d) 337; US v MACDONALD, (1982) 102 S Ct 1497, at 1501; US v LOVASCO, (1977) 431 US 783, 97 S Ct 2044, (1977) 52 L Ed (2d) 752; DILLINGHAM v US, 46 L Ed (2d) 205; 423 US 64.

18.1 R v Claude VERMETTE, CSM 500-01-006136-812, October 1, 1982, Greenberg J; R v Maurice GOGUEN, CSM 500-01-006139-817, November 16, 1982, Biron J, at 7.

19 (1977) 35 CCC (2d) 129.

20 This was translated by Judge Ouellette as "vexations judiciaires" in R v MALONEY et al, CSPM 27-22280-75, April 6, 1978, at 8.

20.1 In R v DAIGLE, CSM 01-008095-819, November 29, 1982, the accused was a former member of the RCMP charged with the abduction and illegal detainment of a potential informer in 1972. These events came to light in 1978, during testimony before the McDonald Commission. The charges were not laid until August 1981.

Rothman J conceded that since ROURKE, supra note 19, the motion for abuse of process can no longer be invoked in a delay in laying charges (at 5), but he stated that under section 11(b) of the Charter, these delays can henceforth be challenged by means of a motion for abuse of rights (at 6). The judge is not taking into consideration the impact of the term "person charged with an offence" in section 11(b).

21 "a person charged".

22 PANARCTIC OILS LTD v R, NWT Sup Ct, July 26, 1982, de Weerdt J, at 11; in R v B and W AGRICULTURAL SERVICES LTD, BC Prov Ct, October 18, 1982, Judge Shupe explained that "person" in section 11(b) applies to a corporation (at 6).

23 R v NORFOLK QUARTER SESSIONS ex p BRUNSON, (1953) 1 All E R 346, at 349.

24 PANARCTIC OILS LTD v R, supra note 22, at 12; R v DUMONT, Alta Prov Ct, April 30, 1982, Judge Chrumka, at 25; R v KRAMER and MARKUS, Sask Prov Ct, October 15, 1982, Judge Meagher, at 10; PRIMEAU v R, Sask QB, September 24, 1982, Estey J; R v PETAHTEGOOSE, Ont Prov Ct, September 28, 1982, Judge Mahaffy; R v MINGO et al (No 2), BC Sup Ct, October 26, 1982, Toy J, at 4.

25 R v BELCOURT, BC Sup Ct, May 31, 1982, Trainor J; R v FORSBERG, BC Prov Ct, August 18, 1982, Judge Smith, at 2. See also: R v HUGHES, 4 QBD 614; R v MALTBY, 7 QBD 18; R v RIDER, (1954) 1 WCR 463.

25.1 A G Canada v EL MEKIES (No 2), CSM 27-034171-829, December 1, 1982, C Barette-Joncas J, at 3.

26 Man Prov Ct, September 1, 1982, Judge Dubienski.

27 R v FORSBERG, supra note 14, at 2; R v BIGGAR, Man Prov Ct, September 16, 1982, Judge Allen; R v BELCOURT, supra note 25; R v MINGO et al (No 2), BC Sup Ct, October 26, 1982, Toy J, at 4.

Professor Friedland, however, does not seem to be of the same opinion; in fact, he holds that the time between the offence and the laying of the charges should be taken into consideration: FRIEDLAND, Legal rights and the Charter, (1982) 24 Crim L Q 430, p 443.

27.1 ROURKE v R, [1978] 1 SCR 1021, at 1043.

28 Re WONG AND MAN and THE QUEEN. (1973) 14 CCC (2d) 117 (BC Sup Ct); PATTERSON v R, (1971) 2 CCC (2d) 227 (SCC).

28.1 In R v.KRAMER and MARKUS, Sask Prov Ct, October 15, 1982, Judge Meagher recognized the validity of a motion under section 11(b) presented before the preliminary inquiry: ". . . because of the very wording of both 11(a) and 11(b), it is conceivable that an application could be brought prior to any Court appearance. For instance, suppose the Crown chose to delay the Court appearance or election for several months or even years." (at 7)

29 R v EAD, 13 CCC 348 (SCC); cited with approval in R v CLARK, 19 CCC (2d) 445, at 447. (CA Alta).

30 Could the part of the reasons for judgment of Lamer J (then a member of the Quebec Court of Appeal) in CASAULT v THEBERGE, (1979) 7 CR (3d) 1, at 8, on the signification of "trial", be cited in support of an extension of the meaning of "trial" for the purposes of section 11(b) of the Charter?

31 In his recent work (Legal Rights and the Canadian Charter of Rights and Freedoms, Ed Carswell, 1982), McDonald J, without expressing his opinion on the matter, cites (on pp 86-87) some decisions of the European Court of Human Rights which recognize that the right of speedy trial provided by article 6(1) of the European Convention on Human Rights (supra note 4) applies also to the appeal process: DELCOURT v Belgium, (1970) European Ct of Human Rights, Series "A", Yearbook 13, 1100; KOEMING v Federal Republic of Germany, (1978) 2 EHRR 170; see also: JACOB, The European Convention on Human Rights, Clarendon Press, Oxford, 1975, p 84.

32 The same position was supported by MOREL, Certain guarantees of criminal procedure, pp 367 ff in TARNOPOLSKY and BEAUDOIN, Canadian Charter of Rights and Freedoms, Ed Carswell, 1982:

> However, the right in question is limited to the trial proper. It follows that the guarantee of s 11(b) very likely could not be successfully invoked with regard to appeal procedures to hasten their conclusion, nor to sentencing, since the accused has been "tried" as soon as a verdict is pronounced." (p 369)

Although it has been recognized by some that the sentence should be handed down without undue delay (US v DELUCA, (1981) 529 F Supp 351, at 354), the American courts have acknowledged the relative scope of the speedy trial right: Corpus Juris Secundum, Vol 22A, 1981 Cumulative Annual Pocket Part, para 467(2).

33 R v BELTON, (1982) 29 CR (3d) 59, at 68.

"It is a maxim of English law that how long a reasonable time ought to be is not defined in law, but is left to the discretion of the judges": Black's Law Dictionary, 5th Edition, West Publishing, under "time", p 1329; cited by MOREL, Certain guarantees of criminal procedure, pp 367 ff, in TARNOPOLSKY and BEAUDOIN, Canadian Charter of Rights and Freedoms - Commentary, Ed Carswell, 1982, p 370.

34 COGHLIN v R, Ont Sup Ct, September 21, 1982, at 7.

35 (1971) 407 US 514 (US Sup Ct).

36 R v CAMERON, (1982) 6 WWR 270, at 275.

37 BARKER v WINGO, 407 US 514, at 530. Mr Gold, in Annual Review of Criminal Law 1982, wrote in the same vein, on p 18: ". . . the proper approach is for the Courts to approach speedy-trial cases on an ad hoc basis, applying a balancing test in the circumstances of the particular cases".

In R v BISHOP et al, Alta Prov Ct, September 10, 1982, Judge McKeekin wrote: "The use of the word "unreasonable" in section 11(b) of the Charter relates to the particular facts and circumstances of any given case". (at 1)

See also: R v KRAMER and MARKUS, Sask Prov Ct, October 15, 1982, Judge Meagher, at 14; PRIMEAU v R, Sask QB, September 24, 1982, Estey J, at 5; R v RICHARDSON and DABENE, Ont Prov Ct, July 16, 1982, Judge Sherwood, at 13.

37.1 CSM 01-008095-819, November 29, 1982.

37.2 R v DAIGLE, ibid, at 6.

38 Compare with R v HAMM, (1976) 28 CCC (2d) 257 (CSC) and MARKS v ROSENBERG and MARKSON, (1927) 61 OLR 1 (Ont Sup Ct).

39 BARKER v WINGO, supra note 37, at 530.

40 In R v CAMERON, (1982) 6 WWR 270, McDonald J seems to have recognized the basis for such a dividing line. (at 278)

40.1 In State v HOLTSLANDER, (1981) 629 P (2d) 702, Donaldson J recognized the usefulness of this approach when he wrote: "First, the length of the delay is used as a screening device to dispose summarily of frivolous claims." (at 705)

41 DICKEY v FLORIDA, (1970) 398 US 30, at 47, per Brennan (US Sup Ct). In examining the provisions of the European Convention on Human Rights (supra note 4), HARRIS wrote (Recent cases on pre-trial detention and delay in criminal proceedings in the European Court of Human Rights, 1970 British Yearbook of Int Law, 87) on the notion of "reasonable time": ". . . the crucial consideration . . . is not time itself, but time in relation to the investigation and trial of a case in a manner consistent with the good administration of justice". (p 99)

42 R v BARKEY, supra note 16, at 5; R v LEGGO, supra note 14, at 6; R v DAIGLE, CSM 01-008095-819, November 29, 1982, Rothman J, at 4-5.

43 R v VERMETTE, CSM 500-01-006136-812, October 1, 1982, Greeberg J, at 33.

44 PANARCTIC OILS LTD v R, supra note 22, at 13; the manner in which motions for adjournment are entered in the court record will become very important and will make it possible to identify which party requested the adjournment. For this reason, expressions such as "adjournment on consent" should be avoided.

The Crown should also record in its files the cause of adjournments for which it is responsible, so as to be able to justify them if necessary.

44.1 This was done by Allen J in R v BELTON, supra note 33, at 68 ff, and Toy J in R v MINGO et al (No 2), supra note 27, at 4. A similar approach is used in the US; for example, in US v SIMMONS, (1964) 338 F (2d) 804 (USCA 2nd Cir), Moore J wrote: "Those characteristics call for an evaluation of all the circumstances . . . . Thus, the 27 months must be broken into several segments in order to determine reasonableness". (at 806)

44.2 State v HOLTSLANDER, (1981) 629 P (2d) 702, at 707 (Sup Ct Idaho).

44.3 A delay will generally violate the right to a speedy trial only if it was caused by those agencies of the government responsible for bringing the defendant to trial, the police and the prosecuting attorneys.

NOTES, The right to a speedy trial, (1968) 20 Stan L Rev 476, p 480.

45 The Crown must show diligence: BALDERSTONE, supra note 15, at 32. GRAY et al v R, Sask QB, August 19, 1982, illustrates a case of negligence. On April 6, 1981, the applicant was served with an appearance notice for April 29, 1980 (not 1981) for a violation of section 236. An information was issued on April 8, 1981, and the appearance notice was confirmed on April 9, 1981. On April 29, 1981, the accused failed to appear and a warrant was consequently issued. On June 8, 1982, the accused was arrested under this warrant and appeared on June 9, 1982. The case was then adjourned to June 14, 1982, at which time the accused alleged that there had been an infringement of section 11(b).

Gerein J found that there had been negligence on the part of the police, and therefore infringement of section 11(b), on the grounds that on April 9, 1981 (date on which the warrant was issued) and June 8, 1982 (date of arrest), the police knew where the accused lived and worked, and could thus not allege that the accused could not be found. The delay therefore resulted solely from lack of action by the Crown. The information was quashed and a prohibition order was issued.

PRIMEAU v R, Sask QB, September 25, 1982, provides a similar illustration. An information for common assault sworn on May 29, 1981 was not served until July 3, 1982 (13 months later), in spite of the fact that (A) the police had known since August 1981 where the accused worked, (B) the accused tried five times unsuccessfully to find out if charges had been laid against him and (C) the accused never evaded the alleged attempts to serve the summons. Estey J therefore quashed the information.

In R v KRAMER and MARKUS, Sask Prov Ct, October 15, 1982, an information had been sworn on June 24, 1982 relating to charges dating from 1979. It turned out that identical informations had been sworn on November 27, 1979 and October 1, 1980, but that they had not been served. Despite a number of representations by the lawyers, the accused were not able to appear until August 3, 1982. Meagher J quashed the informations because the delays resulted from negligence on the part of the Crown.

In R v PETAHTEGOOSE, Ont Prov Ct, September 28, 1982, the Crown brought an information to the attention of the accused a year after it was sworn. This was in spite of the fact that the accused had been sentenced in the meantime on other charges and had appealed. No explanation was given for the delay.

In DICKEY v Florida, (1970) 398 US 30, the United States Supreme Court declared that an 8-year delay between the arrest date and the trial date was unreasonable. The Crown gave no justification for the delay. Burger CJ concluded: "On this record, the delay with its consequent prejudice is intolerable as a matter of fact and impermissible as a matter of law." (at 38).

46 R v BARKEY, supra note 16, at 8; COGHLIN v R, supra note 16, at 10.

47 BARKER v WINGO, supra note 35, at 531.

48 R v BARKEY, supra note 16, at 7; R v DUMONT, supra note 24, at 27; COGHLIN v R, supra note 16, at 9; the pertinence of this factor has also been recognized in the United States: People v HENDERSON, 338 NYS (2d) 522; People v SCACCIA, (1977) 390 NYS (2d).743; People v DEAN, 392 NYS (2d) 134; STRUNK and WAGNER v US, (1972) 412 US 434, at 436; FRANKLIN v Warden, Brookly [Tr: Brooklyn?] House of Detention for Men, 339 NYS (2d) 340; 341 NYS (2d) 604.

49 PEOPLE v DEAN, 412 NYS (2d) 353, 357; 384 NE (2d) 1277; 45 NY (2d) 651; COGHLIN v R, supra note 16, at 17; R v BISHOP et al, supra note 37, at 1.

In R v HASSELSJO, Ont Prov Ct, May 17, 1982, there was a 19-month delay after the swearing of an information for shoplifting of an article worth $7. Judge Charlton wrote that, because of the "seriousness" of the offence and the length of the delays, the Crown should have proprio motu intervened to stay the proceedings. (at 5)

In R v KRAMER and MARKUS, Sask Prov Ct, October 15, 1982, despite the fact that there were complex fraud charges involving 50,000 documents, the Crown displayed negligence in the 2 1/2-year delay.

The nature of the offence must also be considered in terms of the act under which the charges are laid and the existence of any prescription: PANARCTIC OILS LTD v R, supra note 42, at 13.

50 R v BALDERSTONE, supra note 15, at 32; R v BISHOP et al, supra note 37, at 1.

51 R v BARKEY, supra note 16, at 9; BARKER v WINGO, supra note 35, at 531; R v DUMONT, supra note 24, at 28; R v CAMERON, supra note 15, at 275-276. For example, in R v BEASON and FOSTER, [1982] 1 CRR 197, Whealy J came to the conclusion that, because the case was an uncomplicated one of theft that would take a maximum of two days, the delay of three years following the notice was unreasonable.

In COGHLIN v R, supra note 16, the judge noted that the case involved ordinary street violence, and that the evidence was easy to prepare and present.

52 BALDERSTONE v R, supra note 15, at 32.

53 Ibid.

54 BARKER v WINGO, supra note 35, at 531; R v DUMONT, supra note 24, at 28; R v BEASON and FOSTER, supra note 51, at 201; R v BISHOP et al, supra note 37, at 1.

To determine the availability of witnesses, certain factors must be taken into consideration: (A) type of witness (for example, expert witnesses whose time must be reserved well in advance); (B) travel difficulties (allowances must be made for foreign witnesses and those coming a long distance); (C) physical condition (for example, a witness who is ill or injured); (D) time of year (For example, in MONTGOMERY v R, infra note 89, Boilard J noted it was a fact of life in North America that the months of June, July and August were vacation months during which witnesses were not readily available).

55 R v BARKEY, supra note 16, at 8; R v KOTT, CSPM 01-14201-757, September 13, 1982, Judge Lassonde. (This was the first time the case had been brought to court.)

56 R v KOTT, supra note 55: intermittent inquiry lasting 38 days; in R v BISHOP et al, supra note 37, the inquiry was held intermittently over 13 or 14 days.