NOVA SCOTIA COURT OF APPEAL

Citation: R. v. MacIntosh, 2011 NSCA 111

Date: 20111208
Docket: CAC 338534; CAC 333361
Registry: Halifax

Between:

Ernest Fenwick MacIntosh

Appellant

v.

Her Majesty the Queen

Respondent

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Restriction on publication: Pursuant to s. 486.4 of the *Criminal Code*

Judges: Hamilton, Beveridge and Bryson, JJ.A.

Appeal Heard: June 8, 2011, in Halifax, Nova Scotia

Held: Appeals from conviction are allowed, convictions quashed, and a stay entered on all charges, per reasons for judgment of Beveridge, J.A.; Hamilton and Bryson, JJ.A. concurring.

Counsel: Brian Casey and David Bright, Q.C., for the appellant
Jennifer A. MacLellan, for the respondent

486.4 (1) **Order restricting publication – sexual offences –** Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with stepdaughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Reasons for judgment:

INTRODUCTION

[1] The appellant is Ernest Fenwick MacIntosh. Mr. MacIntosh was extradited from India in 2007 to face over 40 charges of having sexually abused nine complainants between 1970 and 1977. He eventually elected trial by Supreme Court Judge. Some charges did not make it past the preliminary inquiry.

[2] The Indictment filed in the Nova Scotia Supreme Court contained 36 counts (18 of indecent assault and 18 of gross indecency) involving six complainants. The appellant applied to have the proceedings stayed based on pre and post-charge delay. The application was heard by the Honourable Chief Justice Kennedy. He dismissed it in a written decision released on March 19, 2010 (2010 NSSC 105).

[3] By consent, the counts in the Indictment with respect to three of the complainants were then severed. This resulted in two Indictments and two trials. The first trial held was before the Honourable Justice Simon MacDonald July 5-9, 2010. In an oral decision, Justice MacDonald convicted the appellant on 14 of the 26 counts. His reasons are reported (2010 NSSC 300). Justice MacDonald sentenced the appellant to four years imprisonment less credit for time spent on remand in Canada. Ancillary orders for a DNA sample and a ban on possessing firearms were made. MacDonald J. declined to make an order restricting the appellant from being at or near public parks under s. 161 of the *Criminal Code* or that he comply with the requirements of the *Sex Offender Information Registration Act* (*SOIRA*) pursuant to s. 490.012 of the *Criminal Code*.

[4] Mr. MacIntosh complains that Kennedy C.J.S.C. was wrong not to stay the proceedings. The appellant also appeals against the conviction and sentence decisions by MacDonald J. The Crown cross-appeals the sentencing decision, alleging MacDonald J. erred in not ordering Mr. MacIntosh comply with the requirements of SOIRA pursuant to s. 490.012 of the *Criminal Code*.

[5] Mr. MacIntosh was tried on the other Indictment before Chief Justice Kennedy in December 2010. In an oral decision of January 31, 2011, Kennedy

C.J. convicted the appellant on four of the ten counts (2011 NSSC 340). A sentence of 18 months consecutive was imposed on April 13, 2011. Mr. MacIntosh has also appealed from those convictions and the sentence imposed. Filings for that appeal have not yet been completed.

[6] I am satisfied that the analysis of the application to stay the proceedings based on post-charge delay was flawed. In my opinion, the motions judge should have found the appellant's right guaranteed by s. 11(b) of the *Charter* was infringed and stayed the proceedings. I would therefore quash the convictions and enter a stay of proceedings.

[7] With respect to the appeal from conviction, I am satisfied that the trial judge erred in a number of respects, including misapprehending important evidence. The judge relied on that misapprehended evidence in convicting the appellant. Even if the charges were not stayed, the convictions cannot stand, and in that case, I would allow the appeal and order a new trial. It is unnecessary to deal with the appeals from sentence.

THE APPLICATION TO STAY THE PROCEEDINGS

[8] The appellant's application for a stay of proceedings was based on ss. 7 and 11(b) of the *Canadian Charter of Rights and Freedoms*. Section 7 was relied upon with respect to pre-charge delay, while s. 11(b) was relevant to the delay from the date the charges were laid to the date of trial.

[9] To obtain a stay for pre-charge delay the appellant needed to establish actual prejudice to his right to a fair trial. In other words, the delay created a situation where he could not truly make full answer and defence to the allegations.

[10] With respect to examining delay that occurs after a charge is laid, the Supreme Court of Canada in *R. v. Morin*, [1992] 1 S.C.R. 771, [1992] S.C.J. No. 25 (Q.L.) affirmed the framework set out in *R. v. Askov*, [1990] 2 S.C.R. 1199, [1990] S.C.J. No. 106 (Q.L.) on the appropriate approach in assessing whether the post-charge delay amounts to an infringement of the right guaranteed by s. 11(b) to be tried within a reasonable period of time . In general, it involves an examination

of the length of the delay and a balancing of the interests s. 11(b) is designed to protect with the factors that caused the delay and societal interests in having a trial on the merits (*Morin*, para. 31). The interests s. 11(b) is designed to protect are impairment of the right to liberty, security of the person, and the ability to make full answer and defence. Prejudice can be inferred from the fact of a prolonged delay. Prejudice can also be established by evidence with respect to those interests.

[11] Before Kennedy C.J.S.C., the appellant argued that his ability to make full answer and defence was prejudiced due to the loss of evidence. The evidence said to be lost included the death of a number of witnesses, and documentary evidence no longer available. The Chief Justice found that the unavailability of the lost evidence was not shown on a balance of probabilities to be prejudicial to the appellant's fair trial rights. In addition, once in Canada, any delay was caused by the appellant. Kennedy C.J.S.C. also found that any prejudice the appellant suffered by reason of his treatment in jail, unfair press, and restrictive bail conditions was caused, for the most part, by the fact of being charged rather than delay.

[12] The appellant's grounds of appeal in relation to the dismissal of his application for a stay based on the Charter are as follows:

> 15. Prior to trial, Macintosh made an application pursuant to s. 7 and s. 11 (b) of the Charter for a stay as a result of the prejudice because crucial evidence to make out his defence had been lost – in particular, the motor vehicle records to establish that he owned a Black LTD at the time of the alleged offences and the only beige motor vehicle he owned and the only baby blue jeep he owned were not purchased until *after* the dates when no further contact occurred with the complainants. The learned applications judge found that the absence of those records did not prejudice the appellant's defence. However, the learned trial judge found the defence unconvincing because "the vehicle information supplied does not cover all the time frame in the indictment, [para. 58];
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> 16. The learned applications judge who decided the s. 7 and s. 11 application applied the wrong legal test to the application, failed to distinguish between the legal tests for s. 7 and s. 11, and erred in finding the time periods during which the accused was awaiting crown disclosure were "delays attributable to the accused";

Section 7 - Pre-Charge Delay

[13] To understand the complaint by the appellant in ground 15, a brief overview of the complainant's allegations and defence response is helpful.

[14] There were three complainants in the trial held before MacDonald J. Two were brothers (DRS and BS), the other, their first cousin (JAH). DRS went to the police in 1995. He said he had been sexually assaulted by the appellant between 1970 and 1975. The assaults consisted of fondling and acts of oral sex at various locations including in a rooming house in Port Hawkesbury (Farquhar House), a hunting cabin, the appellant's car, boat, and a number of residences. DRS estimated that 75% of the assaults occurred in the appellant's car. He described the car as being beige or tan in colour, either a Monte Carlo or similar car.

[15] DRS said it was in 1994 or 1995 he discussed with his cousin JAH that he had been the victim of sexual assaults by the appellant. JAH said he had also been a victim. After this conversation, JAH went to the RCMP in Port Hawkesbury in February 1995 and gave a statement in which he described a single act of oral sex at the Sea King Motel in Bedford, Nova Scotia. At trial, JAH also described being picked up by the appellant in one of the appellant's cars. JAH said the appellant had a blue Jeep Cherokee and a half ton Jeep. He said the appellant drove him in the blue Jeep to the Farquhar House in Port Hawkesbury where fondling and oral sex occurred. JAH said the appellant used one of his cars, the Jeep, either the blue Jeep or the half ton Jeep, to take him to the Sea King Motel in Bedford. The time frame for these allegations was sometime between 1971 and 1977.

[16] The appellant denied that any sexual activity occurred between him and any of the complainants in the time frames alleged. He led evidence that contact between him and any of the complainants ceased when he had run for office in the provincial election of April 1974. The parents and relatives of the complainants were alerted at that time to rumours of inappropriate behaviour by the appellant. DRS was questioned by his parents. He denied any inappropriate contact. The evidence was consistent that DRS, BS and JAH were forbidden from having contact with the appellant from that time frame forward.

[17] The appellant testified he had consensual sexual encounters with DRS and JAH years later, when they were of an age to be legally able to consent. A vigorous defence was advanced. In addition to the evidence led in cross-

examination of the Crown witnesses, there was the appellant's denial, documents and *viva voce* testimony from others, all in an attempt to raise a reasonable doubt about the claims of sexual activity occurring in the time frames alleged in the Indictment. In large measure, the defence sought to establish that the claimed assaults were improbable and that the details surrounding the incidents as described by the complaints could not be true.

[18] The police did not inquire into motor vehicle records until 2000. At that time the information produced by the Registry of Motor Vehicles was scant. With one exception, the Registry was only able to provide a list of vehicles that had been registered to the appellant prior to February 1978. The one transfer of vehicle ownership to or from the appellant prior to that date they could certify was his acquisition on December 22, 1978 of a 1973 Torino station wagon. Other vehicles, including a 1976 Jeep, were simply certified as having been transferred to the appellant "Prior to Feb. 1978 ".

[19] Defence efforts led to the production of a further certificate from the Registry that provided marginally more complete details of the vehicles that had been registered to the appellant prior to 1978. They were a 1976 Jeep, a 1975 Olds, a 1977 Peugeot and a 1979 Torino. In addition, the appellant was able to produce the finance documents for the purchase of the 1975 Olds, showing his purchase of the vehicle from the dealer by way of a conditional sales contract on December 17, 1974. The appellant testified he never owned a Monte Carlo, but he could understand how the Olds might be confused with it. In any event, he did not own the Olds until many months after contact with the family had been terminated – and hence had no opportunity to commit the offences in the vehicle described by DRS.

[20] Similarly, the appellant denied any inappropriate contact with JAH in the time period set out in the Indictment. He admitted that in 1979 or 1980, while on a trip to Halifax to get building supplies, JAH came with him in his blue Jeep. They spent the night at the Sea King Motel in Bedford and he had performed oral sex on JAH, but the act was entirely consensual.

[21] What cars the appellant owned, and when, was relevant. Kennedy C.J.S.C. identified the loss of evidence as being potential witnesses who had died, and the unavailability of business, motor vehicle and police records. Kennedy C.J.S.C.

adopted the Crown submission that prejudice from the unavailability of deceased witnesses was speculative. With respect to the loss of records, he also accepted the Crown's argument that there were sufficient records to enable the appellant to advance his defence. The existence of the appellant's records, and those of the Registry of Motor Vehicles, negated his claim that lost evidence prevented him from being able to make full answer and defence.

[22] The appellant now argues that the conclusion by Kennedy C.J.S.C. was not borne out by the analysis of MacDonald J. when the trial was held with respect to the complaints by DRS, JAH and BS. Ground # 15 references para. 58 of the trial judge's decision as demonstrating there was in fact prejudice to the right of the appellant to make full answer and defence. The appellant argues the trial judge found the defence unconvincing because the vehicle information supplied did not cover the time frames in the Indictment. With all due respect, I am not persuaded that the trial judge rejected the defence due to the lack of confirmation from documentary sources which vehicles were owned by the appellant. I will explain.

[23] The trial judge in fact made reference to the motor vehicle records on three occasions in the course of his reasons. Two are in reference to counts involving DRS as the complainant, and one where JAH was the complainant. Each reference was similar. They are as follows:

> [58] Counts #5 and #6 of the Indictment deal with incidents that are to have allegedly happened in the accused's car at Goose Harbour Road in Guysborough County. In assessing the totality of the evidence and relating it to Counts #5 and #6, I accept DRS's evidence that a lot of these incidents occurred in Mr. MacIntosh's car. Besides denying this took place as explained by DRS, the defence, Mr. MacIntosh argues that it could not have happened in a vehicle as described by DRS because Mr. MacIntosh did not own a vehicle of that nature at that time, according to the exhibits tendered from the Motor Vehicle Department. **However, in that regard, the vehicle information supplied does not cover all the time-frame in the Indictment. I find when I consider the totality of the evidence, especially that of DRS, and as I noted his evidence about the Goose Harbour Road incidents, that he seemed to recall a change in the way his life was with these incidents. His life changed from not being able to ejaculate and then being able to ejaculate as one of the things that sticks out in his mind about the incidents that occurred in that particular location**. Once again, the activity was the same. He said Mr. MacIntosh would unzipper his pants, start feeling his leg, then eventually going up to his penis area. He would then put his mouth on DRS's penis and have oral sexual relations with him. He

> said it was very repetitive in that area, although he couldn't remember each specific time. He said this happened when he was between the ages of 10 and 13, which would place him within the time-frame in the Indictment.
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> . . .
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> [71] As well, I am satisfied that the incidents at Reagan's Dam Road, as referred to by DRS, which was located in the back of * and Mulgrave, and Guysborough, are included in the incidences involving Mr. MacIntosh's car. DRS said these events occurred when he was 12 or 13 years of age, and that he referred to the Dam being built for the oil refinery that was going to be built up in that area. He told about Mr. MacIntosh pulling his vehicle over on the road in that area, and performing oral sex on him. **There was, as I said earlier, reference by Exhibit #1, Tab 6, to show a list of motor vehicles owned by Mr. MacIntosh, however, I'm satisfied, as I say, when you look at the age, and location, and time of the alleged incidents, the Registry of Motor Vehicle's information does not cover that particular time frame. Thus, DRS evidence is believable in a sense that there was an opportunity at that time, and there is no doubt in my mind, that Mr. MacIntosh always had a motor vehicle**.
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> . . .
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> [90] I do accept, however, that he did describe a blue Jeep Cherokee being used by Mr. MacIntosh. **As Ms. MacGrath pointed out, the motor vehicle records indicate that Mr. MacIntosh had the vehicle before 1976, so it is conceivable this vehicle was being used by Mr. MacIntosh at the time to which JAH refers.** [Emphasis added]

[24] To say that the appellant's defence was in fact prejudiced by the lack of records from the Registry of Motor Vehicles presumes that if the records had been available, they would have further or better confirmed his evidence that he did not own the vehicles described by the complainants at the relevant time period of their various complaints.

[25] The trial judge had to make findings of credibility. In doing so, he was required to be alive to the evidence that was relevant to whether the Crown had proven the specific counts set out in the Indictment. As will be detailed later, the Crown agreed certain counts related to specific incidents of assault and oral sex that the complaints said occurred at particular locations. Read in context, the trial judge's references are nothing more than an acknowledgement of the defence arguments to the trial judge why he should not find the various counts to be proven

beyond a reasonable doubt. He did not, as I read his reasons, find the defence, or the appellant personally, to be "unconvincing" simply because the vehicle information supplied did not cover all of the time frame in the indictment.

[26] There was no issue that the appellant owned a motor vehicle in the time period he lived in Port Hawkesbury, and gave rides to DRS on numerous occasions. DRS said he was not really a car person. He did not testify as to the exact make and model of the car he was in when he said he was assaulted by the appellant. Nonetheless, he gave a detailed description of the car. It was uncontested by the Crown and the appellant at trial that the vehicle DRS was in was the appellant's 1975 Oldsmobile. Obviously such a car could not be owned by the appellant before the fall of 1974. The appellant was able to produce documentation showing he purchased the car on December 17, 1974. DRS and others made it plain that there was essentially no further opportunity for DRS to be driven anywhere or be with the appellant alone as children after April 1974. It may well be that the trial judge failed to appreciate the significance of the evidence advanced concerning when the assaults could have taken place and the availability of the car described by DRS, but that is a different issue.

[27] Although the appellant's ground of appeal focussed on the issue of motor vehicle records, his argument on appeal extended to other 'lost evidence' such as the unavailability of witnesses since deceased and business records from the Sea King Motel. I see no error by Kennedy C.J.S.C. in his analysis and conclusion that the appellant had not established on a balance of probabilities his right to make full answer and defence was prejudiced by the lengthy pre-charge delay. I would dismiss this ground of appeal.

Section 11(b) Analysis

[28] With respect, in my opinion, Kennedy C.J.S.C. committed a number of errors in his analysis of the application to stay the proceedings on the basis of post-charge delay. Whether a right has been infringed or denied is a question of law. In resolving such an issue, a court is required to articulate and apply the correct legal principles. On such matters, the standard of review is correctness, but where in order to resolve the legal issue, findings of fact, or mixed findings of fact and law are made, absent an extricable legal error, an appellate court should not intervene

unless clear and palpable error has been shown (*R. v. R.E.W.*, 2011 NSCA 18, para. 31-2).

[29] In *R. v. Askov, supra*, the Supreme Court of Canada settled a number of important issues about the right guaranteed by s. 11(b) of the *Charter*. All of the appellants were charged jointly with conspiracy to commit extortion, some with weapon offences, and one with criminal negligence. The charges were serious. Three of the appellants were denied bail for six months, then released on a recognizance of $50,000 with reporting requirements and other conditions. The bail conditions were relaxed each time application was made.

[30] The appellants were arrested in November 1983. Some delay was requested by the appellants. The preliminary inquiry commenced in July 1984. It was completed in September 1984, ten months after arrest. The trial date was set for October 1985. The trial could not be heard during that court session. It was adjourned to September 1986. At the start of trial, an application was brought claiming the trial had been unreasonably delayed. A stay was requested.

[31] The trial judge granted the stay on the basis that the major reason for the delay was institutional problems, and that the appellants had been prejudiced by the delay due to the six months spent in custody by three of the appellants and the restrictive bail conditions. The Ontario Court of Appeal reversed.

[32] On appeal to the Supreme Court, the stay was unanimously re-instated. The majority opinion was authored by Justice Cory. Cory J. referred to the seminal decision in the United States, *Barker v. Wingo*, 407 U.S. 514 (1972) where the United States Supreme Court adopted a balancing test in relation to the United States' constitutionally guaranteed right to a "speedy trial". In carrying out that exercise, the court identified four factors to consider: the length of the delay, the reason for it, the accused's assertion of his or her right, and prejudice to the accused.

[33] Justice Cory traced the history of the right in cases decided by the Supreme Court of Canada, and identified the similarities and differences in approach. He then distilled and summarized the factors to be taken into account as follows:

[69] From the foregoing review it is possible I think to give a brief summary of all the factors which should be taken into account in considering whether the length of the delay of a trial has been unreasonable.

(i) The Length of the Delay.

The longer the delay, the more difficult it should be for a court to excuse it. Very lengthy delays may be such that they cannot be justified for any reason.

(ii) Explanation for the Delay.

(a) Delays Attributable to the Crown.

Delays attributable to the action of the Crown or officers of the Crown will weigh in favour of the accused. The cases of *Rahey* and *Smith* provide examples of such delays.

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 acceptable in simple cases.

(b) Systemic or Institutional Delays.

Delays occasioned by inadequate resources must weigh against the Crown. Institutional delays should be considered in light of the comparative test referred to earlier. The burden of justifying inadequate resources resulting in systemic delays will always fall upon the Crown. There may be a transitional period to allow for a temporary period of lenient treatment of systemic delay.

(c) Delays Attributable to the Accused.

Certain actions of the accused will justify delays. For example, a request for adjournment or delays to retain different counsel.

There may as well be instances where it can be demonstrated by the Crown that the actions of the accused were undertaken for the purposes of delaying the trial.

(iii) Waiver.

> If the accused waives his rights by consenting to or concurring in a delay, this must be taken into account. However, for a waiver to be valid it must be informed, unequivocal and freely given. The burden of showing that a waiver should be inferred falls upon the Crown. An example of a waiver or concurrence that could be inferred is the consent by counsel for the accused to a fixed date for trial.

(iv) Prejudice to the Accused.

> There is a general, and in the case of very long delays an often virtually irrebuttable presumption of prejudice to the accused resulting from the passage of time. Where the Crown can demonstrate that there was no prejudice to the accused flowing from a delay, then such proof may serve to excuse the delay. It is also open to the accused to call evidence to demonstrate actual prejudice to strengthen his position that he has been prejudiced as a result of the delay.

[34] In applying these principles, Cory J. found that no matter the standard of measure, or test, the trial was inordinately delayed. Although one year was attributable to the request for adjournments by the appellants, there remained a period of two years, which he viewed as so lengthy that unless there was some very strong basis to justify that delay, it would be impossible for a court to tolerate such a delay (para. 71-72). The trial judge found prejudice by the lengthy period of pre-trial incarceration and restrictive bail conditions. The Crown had failed to discharge its burden to show the delay had not caused prejudice (para. 73).

[35] Cory J. noted that the delays were not directly attributable to the actions of the Crown. The problem was the lack of institutional resources in the Peel region. This led him to conclude:

> [90] 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 inordinate length that public confidence in the administration of justice must be shaken. Justice so delayed is an affront to the individual, to the community and to the very administration of justice. The lack of institutional facilities cannot in this case be accepted as a basis for justifying the delay.

[36] There was no waiver of the appellant's right to trial within a reasonable period of time, nor did any direct action on their part cause the two-year delay. Although the charges were serious – extortion and threatened armed violence (with a firearm) which offences tear at the basic fabric of society, and it would be in the best interest of society to have such a trial proceed, a stay was required (para. 91).

[37] As mentioned above, the decision of the Court was unanimous. Separate concurring judgments were penned by Lamer C.J. and Sopinka, Wilson and McLachlin JJ.. Lamer C.J. and Sopinka J. viewed the right guaranteed by s. 11(b) to be solely concerned with the individual's right to trial within a reasonable period of time, and that therefore the object of s. 11(b) did not include the protection of a societal interest in speedy trials. Wilson J. also shared this view (para. 124). McLachlin J. (as she then was) agreed with Cory J. that s. 11(b) serves both the interests of the accused and society and set out concurring comments on the process for the determination whether a trial has been unreasonably delayed. The other four justices agreed with Justice Cory's reasons.

[38] As a consequence of the decision in *Askov*, some 47,000 charges in Ontario were dismissed or withdrawn between October 1990 and September 1991. In *R. v Morin*, the court revisited the dilemma of balancing the rights of individuals to a speedy trial with an administration of justice faced with dwindling resources and a burgeoning case load. The majority reasons were written by Justice Sopinka. The appellant had been stopped for speeding. She showed signs of impairment. A breathalyzer test showed an illegal blood alcohol level. At her first appearance she requested the earliest possible trial date. That date was 14.5 months away. On the day of trial she brought a motion to stay based on her right to trial within a reasonable period of time. The motion was dismissed, granted on appeal to the Summary Conviction Appeal Court, but reversed by the Ontario Court of Appeal.

[39] There was no disagreement amongst the various levels of court that the sole source of delay was attributable to limits on institutional resources. Sopinka J. restated, but did not alter the law as set out in *Askov*. He noted that the primary purpose of s. 11(b) is the protection of the individual rights of the accused. However, based on *Askov*, Justice Sopinka recognized that society also has an interest in seeing speedy trials, as it ensures fair treatment of an accused and recognizes the intrinsic value to trials held within a reasonable time. Society also

has an interest in ensuring those that are charged be brought to trial and this interest increases with the seriousness of the offence (para 30).

[40] The rights that s. 11(b) is designed to protect are the right to security of the person, liberty and the right to a fair trial. Sopinka J. explained:

> [28] The right to security of the person is protected in s. 11(*b*) by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.

[41] The correct approach to assessing if a delay has been unreasonable was restated to be:

> [31] The general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead**[sic]** to delay or are otherwise the cause of delay. As I noted in *Smith, supra*, "[i]t is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable?" (p. 1131). While the Court has at times indicated otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be listed as follows:
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> 1. the length of the delay;
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> 2. waiver of time periods;
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> 3. the reasons for the delay, including
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> (a) inherent time requirements of the case,
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> (b) actions of the accused,
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> (c) actions of the Crown,
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> (d) limits on institutional resources, and
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> (e) other reasons for delay; and

> 4. prejudice to the accused.
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> These factors are substantially the same as those discussed by this Court in *Smith*, *supra*, at p. 1131, and in *Askov*, *supra*, at pp. 1231-32.
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> [32] The judicial process referred to as "balancing" requires an examination of the length of the delay and its evaluation in light of the other factors. A judicial determination is then made as to whether the period of delay is unreasonable. In coming to this conclusion, account must be taken of the interests which s. 11(*b*) is designed to protect. Leaving aside the question of delay on appeal, the period to be scrutinized is the time elapsed from the date of the charge to the end of the trial. See *R. v. Kalanj*, [1989] 1 S.C.R. 1594. The length of this period may be shortened by subtracting periods of delay that have been waived. It must then be determined whether this period is unreasonable having regard to the interests s. 11(*b*) seeks to protect, the explanation for the delay and the prejudice to the accused.

[42] Sopinka J. also revisited the notion of guidelines for what might be acceptable time periods to bring an accused to trial. The Court suggested that a period of institutional delay of between 8 to 10 months in provincial court, and 6 to 8 months after committal for trial (para. 55).

[43] The most recent case from the Supreme Court that has addressed the test for unreasonable delay and its application is *R. v. Godin*, 2009 SCC 26. I will refer to this case later.

[44] Returning to the reasons given in this case, the motions judge correctly observed that the period of time to be considered was from the date of the first Information to trial, a period of almost 14 years. He said it was obvious it was of sufficient length to warrant an enquiry into the reasons for the delay and an apportionment of responsibility (para. 120). In his analysis he divided the delay into two categories – from the laying of the charges to the appellant's extradition from India, and from his return to Canada to the date of trial.

Laying of Charges to Extradition (1995-2007)

[45] The thrust of the motion judge's reasons is that because the appellant was out of the country, all of the delay occasioned thereby was attributable to him, not to the Crown. Therefore, the appellant could not be heard to complain about this delay. Before embarking on an analysis of the pre and post-charge delay, the motions judge said:

> [104] An accused who is out of the country and who is aware he would face charges if he returned to Canada yet chooses to remain outside the jurisdiction **cannot seek to have that time counted against the Crown on an application for unreasonable delay** (*R. v. Graham* 2009 NSSC 196; *R. v. White* [1997] O.J. No. 961). [Emphasis added]

[46] With respect, this is not correct. It is not borne out by general principles nor the law with respect to s. 11(b). I will elaborate.

[47] It is the responsibility of the state to bring any accused to trial. There is no common law duty to assist the police (see *Rice v. Connolly*, [1966] 2 All E.R. 649 at p. 652; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425).

[48] In the context of a right to trial within a reasonable period of time, there is no duty on an accused to bring him or herself to trial. *R. v. Beason* (1983), 7 C.C.C. (3d) 20, [1983] O.J. No. 3151 (Ont.C.A.) is an early s. 11(b) case. Martin J.A. said precisely this at para. 63: "An accused has no duty to bring himself to trial. The Crown has that duty."

[49] This principle has been confirmed by the Supreme Court of Canada. In *Askov*, Cory J. wrote:

> 57 It must be remembered that it is the duty of the Crown to bring the accused to trial. It is the Crown which is responsible for the provision of facilities and staff to see that accused persons are tried in a reasonable time.

[50] This has been re-affirmed in a number of subsequent cases. That is not to say that the actions or inaction by an accused are irrelevant to a s. 11(b) analysis. While the actions by an accused that cause or contribute to delay are assessed in examining the reasons for the overall delay, inaction is not. Inaction by an accused

may be considered when assessing the degree of prejudice. In *Morin,* Sopinka J. explained:

> [62] This Court has made clear in previous decisions that it is the duty of the Crown to bring the accused to trial (see *Askov, supra*, at pp. 1225, 1227, and 1229). While it was not necessary for the accused to assert her right to be tried within a reasonable time, strong views have been expressed that in many cases an accused person is not interested in a speedy trial and that delay works to the advantage of the accused. This view is summed up by Doherty J. (as he then was) in a paper given to the National Criminal Law Program in July 1989 which was referred to with approval by Dubin C.J.O. in *Bennett* (at p. 52) and echoes what has been noted by numerous commentators:
>
> > An accused is often not interested in exercising the right bestowed on him by s. 11(*b*). His interest lies in having the right infringed by the prosecution so that he can escape a trial on the merits. This view may seem harsh but experience supports its validity.
>
> As also noted by Cory J. in *Askov, supra*, "the s. 11(*b*) right is one which can often be transformed from a protective shield to an offensive weapon in the hands of the accused" (p. 1222). This right must be interpreted in a manner which recognizes the abuse which may be invoked by some accused. The purpose of s. 11(*b*) is to expedite trials and minimize prejudice and not to avoid trials on the merits. Action or non-action by the accused which is inconsistent with a desire for a timely trial is something that the court must consider. This position is consistent with decisions of this Court in regard to other *Charter* provisions. For example, this Court has held that an accused must be reasonably diligent in contacting counsel under *Charter* s. 10(*b*) (*R. v. Tremblay,* [1987] 2 S.C.R. 435; *R. v. Smith,* [1989] 2 S.C.R. 368). If this requirement is not enforced, the right to counsel could be used to frustrate police investigation and in certain cases prevent essential evidence from being obtained. **Nonetheless, in taking into account inaction by the accused, the Court must be careful not to subvert the principle that there is no legal obligation on the accused to assert the right. Inaction may, however, be relevant in assessing the degree of prejudice, if any, that an accused has suffered as a result of delay**. [Emphasis added]

See also *R. v. MacDougall,* [1998] 3 S.C.R. 45

[51] The parties filed extensive documentary material on the motion, including transcripts, statements, affidavits, and police records. In addition, the appellant and the investigating officer were cross-examined on their affidavits. Although there was little dispute on the facts, some things remain unexplained. What is clear

is that the appellant moved from Port Hawkesbury to Halifax circa 1981 to continue his involvement in business. In 1987 his employer transferred him to Ottawa and then to Montreal. In August 1994 he accepted employment with a California company. The appellant moved to India to establish an office for that company and lived there until extradited. When he left Canada there were no charges. No one had even complained to the police.

[52] In January and February 1995, DRS and his cousin, JAH gave written statements alleging sexual improprieties by the appellant. JAH's complaint was that a single incident of oral sex occurred in Bedford, Nova Scotia. The RCMP referred the complaint to the Halifax Regional Police. No charge was laid.

[53] On December 4, 1995 the RCMP laid charges against the appellant based on the complaint by DRS. A warrant was issued for the appellant's arrest in February 1996. From the outset, the RCMP knew the appellant resided in India. They had no difficulty in knowing as early as February 1995 where the appellant lived and how to get in touch with him. The first attempted contact with the appellant was in January 1996. Eventually, the investigator, Cst. Deveau spoke directly with the appellant. The evidence was disputed about some of the details of that conversation. With respect to this, the trial judge stressed the appellant's inaction:

> [125] ...Whether he knew about the warrant or not, it is clear that as of that conversation, Macintosh knew he had big trouble in Nova Scotia and yet he takes no action at that time to get to the bottom of the situation, to straighten it out. He is on notice that something of a criminal nature is going on that involves him -- he does nothing in response.

[54] According to Cst. Deveau, the appellant told him that he had no intention of returning to Canada. A year went by. In October 1997 the RCMP attempted to apprehend the appellant by posting alerts at airports and customs. The Deputy Director of Public Prosecutions received a recommendation from the Chief Crown Attorney for Cape Breton on June 17, 1997 that extradition be pursued. It was not until December 17, 1997 that approval was sought from the DPP to initiate the formal request. That request was made on August 14, 1998.

[55] In addition, the RCMP enlisted the aid of the federal government. In late 1997, the appellant was advised by letter from the passport office that his passport would be revoked due to an outstanding criminal charge. It is noteworthy that the

letter was hand delivered to him by officials of the High Commission in New Delhi. A staff sergeant of the RCMP was stationed there as a liaison officer.

[56] The appellant engaged counsel in Ottawa, who in turn hired David Bright, Q.C. to pursue inquiries about any such charges. Ottawa counsel brought proceedings to challenge the government action. By April 16, 1998 he was successful in having the appellant's name removed from the Passport Control List, and confirmation his passport would not be revoked. Despite the alerts, it was the uncontested evidence of the appellant that he continued to travel to and from Canada before and after the passport litigation.

[57] Mr. Bright initially sought disclosure from the Crown in April 1998. The Crown provided disclosure of the file, as it then existed in May 1998. Mr. Bright was advised of the fact of the extradition request, then being handled by the International Assistance Group of the Federal Department of Justice. Requests for further disclosure from this Department were declined.

[58] It is not entirely clear what delayed the extradition request. The materials do disclose a difficulty in DRS being able to identify the appellant from the passport pictures shown to him. DRS contacted JAH and other individuals who then came forward with complaints. All of the charges were laid by 2001. Affidavits were prepared at various times in 2002 and 2003 for use in the anticipated extradition request.

[59] The complete extradition package was ready by July 3, 2003. It was not until July 2006 that the extradition request was forwarded to India. No explanation was ever offered, then or now, for why it took so long to proceed with the extradition request, nor for the three years between when it was admittedly ready for submission and action.

[60] The appellant was arrested in India on April 5, 2007. The motions judge said the appellant contested the extradition. There was evidence that in fact, the appellant was prepared to, and did consent to extradition if he had time to wind up his affairs. Nonetheless, the court in India ruled on April 25, 2007 that the extradition request was proper. On May 26, 2007 India agreed to extradite. The appellant appeared in Provincial Court in Port Hawkesbury Nova Scotia on June 8, 2007. I will refer later to the events between that date and the date of trial.

[61] I have earlier set out the position announced by the motions judge that the appellant was foreclosed from seeking to have the 1995-2007 time frame from counting against the Crown. The motions judge followed up on this in his analysis. He put it this way:

> [132] Macintosh, in possession of this information, does nothing to deal with the matter but rather waits for the authorities to compel his attendance in a Canadian court.
>
> [133] **This is of significance. This is central to the issue.**
>
> [134] I find the situation to be analogous to the situation of the accused in *R. v. R.E.M.*, *supra*. Had Macintosh desired a timely trial on the merits he could have voluntarily returned to this jurisdiction upon being informed of the warrant and the extradition process. [Emphasis added]

[62] In taking this approach, in my opinion, the motions judge erred in law. With respect, he wrongly placed an onus on the appellant to turn himself in to the authorities. This is not the law in Canada. The motions judge referred to two authorities in support of his approach that the time the appellant was in India could not be attributed to the Crown: *R. v. Graham*, 2009 NSSC 196; *R. v. White*, [1997] O.J. No. 961 (Ont.C.A.). He also considered the case of *R. v. R.E.M.*, [2004] B.C.J. No. 1849, aff'd 2007 BCCA 154 to be analogous in support of this view. Again, with all due respect, for the following reasons, I am unable to agree.

[63] In *R. v. Graham*, *supra*, the appellant challenged a refusal by a provincial court judge to hear a *Charter* motion alleging unreasonable delay. MacLellan J., sitting as the Summary Conviction Appeal Court, found the judge should have heard the motion and granted it. Accordingly, he quashed the conviction for assault causing bodily harm and stayed the charge. The facts were that the accused left Nova Scotia in 2003 following an altercation outside a pub. He lived in Thailand for four years, returning every summer for a month.

[64] MacLellan J. did refer to the *White* case as standing for the proposition that if an accused is away or out of the country, and is aware that he would face charges if he returns, but choses to remain away, then time does not run against the Crown. MacLellan J. went on to say that *if* he were to apply that principle, there was in

fact no evidence that the appellant was aware of the outstanding charge, and hence did count all of the time (four years) against the Crown. MacLellan J. accepted that there was no actual prejudice to the accused, but based on *Morin*, inferred prejudice and stayed the charge.

[65] However, *R. v. White*, *supra* does not stand for such a bald proposition. In *White*, the appellant was convicted of fraud involving scientific research tax credits. The scheme involved millions of dollars. The appellant's business premises were searched by Revenue Canada in May 1986. He then moved to the United States. A charge of income tax evasion followed in May 1987. This was not extraditable. In October 1989 he was charged with fraud and forgery under the *Criminal Code*, and was arrested in California on November 2, 1989. Extradition was contested. It was not complete until December 15, 1991.

[66] On arrival in Canada, he was released on bail. His trial commenced September 7, 1993. The time to be examined was from the Income Tax charge until trial, a period of six years and nine months. His motion at trial for a stay based on unreasonable delay was not successful. The trial judge properly attributed the two years to the appellant while he resisted extradition (para. 41). With respect to the delay from May 1987 to November 1989 the trial judge found White to have been evading service. The Court observed that White did not disclose his American address in correspondence with Revenue Canada, instead using his old address in Toronto, then occupied by his wife. He gave no indication he had moved to California. Justices Laskin and Charron (as she then was) authored the reasons for judgment. They wrote:

> **36** Because White knew charges were outstanding against him yet refused to return to Canada, tell the Crown where he was or even contact the Crown through a third party, the delay must be attributable to him **unless the Crown knew his whereabouts and deliberately delayed apprehending him or did not diligently bring him to trial: see *U.S. v. Deleon*.** The evidence before the trial judge reasonably supported his findings that the Crown had taken reasonable steps to find White and that the Crown did not know where White lived until late March 1989. [Emphasis added]

[67] The case referred to by Justices Laskin and Charron in *R. v. White* is *U.S. v. Deleon*, 710 F.2d 1218 (1983), is a decision of the United States Court of Appeals for the Seventh Circuit. There was a three and one-half year delay between the

issuance of a warrant and arrest. The appellant claimed his right to a speedy trial had been violated. The motion was unsuccessful at trial and on appeal. Hoffman J., for the Court, recognized the duty on the state to locate, apprehend and bring a defendant to trial. He wrote:

> The second factor to be considered is the reason for the delay. With respect to this factor we note that the Government, under the Sixth Amendment, has a "constitutional duty to make a diligent good faith effort" to locate and apprehend a defendant and bring that defendant to trial. *Smith v. Hooey*, 393 U.S. 374, 383, 89 S.Ct. 575, 579, 21 L.Ed. 2d 607 (1969); *United States v. McConahy, supra* at 773-74; *United States v. Weber*, 479 F. 2d 331, 332-33 (8th Cir. 1973). The question here is whether the reason for the delay is because the Government breached that duty.

[68] A duty on the state to exercise diligence was later affirmed by the U.S. Supreme Court in *Doggett v. U.S.*, 112 S.Ct. 2686 (1992); 505 U.S. 647 (1992).

[69] The facts here are markedly different than in *White.* The police had information from the very beginning detailing exactly where the appellant was located. The High Commission in New Delhi hand delivered a letter to him in 1997. In 1998 his lawyer contacted the Crown for disclosure. He did nothing to hide or hinder the authorities. If he did 'fight' extradition, that fight lasted only three weeks. That is not to say that the appellant's stance is irrelevant to the speedy trial analysis. But it is not determinative nor central to the outcome. Even if it could be said that the appellant 'refused' to return to Canada voluntarily (the appellant's uncontradicted evidence was that he travelled to and from Canada), this inaction by the appellant is properly accounted for by adding to the inherent time requirements of the case since the formalities of the extradition process will obviously take additional time. In addition, it can play a role in assessing prejudice along with the overall length of the proceedings.

[70] It simply cannot be said that the state made a diligent effort to bring the appellant to trial. There were lengthy periods where the authorities, despite knowing exactly where the appellant was located, did nothing to pursue him. According to the uncontradicted evidence, the authorities said they knew in August 1996 that the appellant would not return voluntarily. At that time, there was one complainant. No evidence was submitted as to why it took years to move ahead. No assessment was undertaken by the motions judge about this delay beyond placing the cause of all of it at the feet of the appellant.

[71] There is some suggestion in the record that the inability of the complainant DRS to identify the appellant from a photographic line up caused a problem in the extradition effort. It was then that DRS spoke with other complainants. Investigators then took statements. The motions judge referred to the suspension of the extradition process to avoid being barred from pursuing potential charges due to the speciality rule (para. 138). That is, the requesting state (Canada) would be precluded from prosecuting an accused for any charges except those on which he was extradited. Concern over the speciality rule may reasonably account for some of the delay in the process, but does not address the delay prior to the surfacing of additional complainants, in completing the extradition affidavits, nor the three years from the time the extradition package was ready until it was submitted to India.

[72] The motions judge also relied on the case of *R. v. R.E.M, supra*. He considered it to be analogous. With respect, the facts in *R.E.M.* are completely different from the case at hand. In *R.E.M.* a complaint was made to the police in May 1988. At that time, the accused was living in the United States, but visited Canada on a regular basis to see his daughter. A charge was laid on July 6, 1988 and the accused was arrested in British Columbia on July 8, 1988. He was released on bail but did not return to court as required on July 18, 1988, nor for a subsequently scheduled hearing. Warrants for his arrest were issued. The accused had received legal advice that he should stay in the United States and not return to Canada, as it was unlikely the Crown would seek his extradition. Other complaints led to further charges. In March 2003 the accused was arrested on an extradition warrant.

[73] On June 10, 2003 he was released on bail on conditions described by the trial judge as “not restrictive”. The preliminary inquiry was held and his trial set to commence on July 19, 2004. He brought a motion seeking a stay. Justice Romilly dismissed the motion. While acknowledging it was the Crown’s responsibility to bring the accused to trial, and there had been “foot dragging” by the Crown, the fact was, the accused had evaded prosecution by fleeing to the United States. Romilly J. wrote:

> **36** Defence counsel drew my attention to the decisions of *R. v. Cardinal* (1985), 21 C.C.C. (3d) 254 (Alta. C.A.); *R. v. White and Sennet* (1997), 114 C.C.C. (3d) 225 (Ont. C.A.) appeal dismissed 114 C.C.C. (3d) 225 (S.C.C.); *R. v.*

> *Knights*, [1996] B.C.J. No. 2870 (B.C.S.C); *R. v. Ryan* (1999), 211 N.B.R. (2d) 1 (N.B. Prov. Ct.); and *R. v. Gorski* (1995), 129 Sask.R. 234 (Sask. Q.B.). The position of the defence is that it is the Crown's obligation to protect the accused's s. 11(b) *Charter* rights. These cases cited by the defence are, however, distinguishable on their facts. The distinguishing factor being that in the case at bar the accused was charged and brought before the Canadian courts and he decided to evade prosecution by fleeing to the United States of America. It is true that the Canadian authorities should have been more diligent in having him extradited but failure to do that on an expedited basis is not the reason for the delay. The main reason for the delay lay squarely at the feet of the accused.

[74] The accused in *R.E.M.* had a legal duty to attend court. His bail conditions required his attendance in court in British Columbia. His action in fleeing the jurisdiction in violation of his legal duty was the main reason for the delay of his trial. In this case, the appellant did not flee the jurisdiction. He did not evade prosecution. Obviously, he did not turn himself in to the authorities on any of his voluntary trips to Canada. As detailed earlier, he had no legal obligation to do so. It was wrong to say that all of the delay from 1995 to his return to Canada in 2007 was caused by him. The motions judge erred in law in attributing this delay to the appellant.

Extradition to Trial

[75] The motions judge examined the time period from the appellant’s first appearance in a Canadian court to his trial. This period was June 8, 2007 to October 28, 2009. His analysis is succinct. He found the first 10 days (from appearance to bail being denied) attributable to “inherent time requirements” and hence neutral. From June 18 to July 23, 2007 the defence had requested and waited for further disclosure. This time he assessed against the Crown.

[76] Election for mode of trial was not entered by the appellant until May 7, 2008. Throughout this time, the defence wrote numerous letters seeking further disclosure. The Crown never argued the requests were somehow improper or a delay tactic. Some of the requests will be detailed later. For this time period, the motions judge reasoned:

> [151] From July 23, 2007 until election on May 7, 2008, Macintosh was seeking further material with respect to motions he wished to bring both in relation to a challenge to the extradition process and a request for a second bail hearing -

> material which was motion specific rather than information as to what evidence was available to support the allegations. The delay involved in dealing with those issues should not be attributable to the Crown. Macintosh, in trying to get this material, suggested adjournments and resisted electing a mode of trial until the Court insisted that the matter move ahead and forced the issue at the May 7, 2008 appearance.

[77] Based on this reasoning, the motions judge concluded:

> [159] I am satisfied that the Defence was responsible for a significant portion of the delay from the point that Macintosh arrives in Canada and bears responsibility for delay of approximately 11 months. The Crown is responsible for delay of approximately one month, five days, and the remainder of the time is attributable to the inherent time requirements of the matter.

[78] In my opinion, the trial judge erred in attributing 11 months of the delay to the appellant. This attribution resulted from misapprehending the evidence which led to a plainly erroneous attribution of delay at the feet of the appellant. The characterization of the disclosure requests made by the appellant from June 2007 to May 2008 were not, with respect, simply seeking material with respect to motions the appellant wanted to bring to challenge the extradition process and a request for a second bail hearing.

[79] The appellant filed on the stay application a volume of disclosure correspondence. Four years prior to the request for extradition to India was submitted, the RCMP and Crown were obviously aware of the need to fulfill their disclosure obligation. On June 25, 2002 the RCMP reviewed the Crown's file. The file did not contain copies of the video or audio statements, the photo lineups and other material. The officer noted "The present disclosure falls far short of what is required by *Stinchcombe*." This is a reference to the seminal decision by the Supreme Court of Canada in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, [1991] S.C.J. No. 83 (Q.L.), where the fundamental importance of timely disclosure was established, including the recognition that it should occur prior to election (para. 28).

[80] The RCMP undertook to provide a proper disclosure package. According to correspondence from the RCMP to the Crown office of August 25, 2002, two disclosure packages were delivered to the Crown on that day. They consisted of

three binders with six videocassettes, along with extra copies to facilitate production thereof to the defence.

[81] The correspondence from July 2007 and following contains requests for information and documentation, some of which may well have only seemed pertinent to a potential challenge to the extradition process. If so, that did not make the request irrelevant to the election to be made.

[82] In any event, there were also requests for information plainly relevant to making full answer and defence. These included the request for the exchanges of communication between the authorities and the various complainants. As demonstrated at trial, the allegations made by at least some of the complainants changed over time as the extradition process unfolded. This information was provided in October 2007.

[83] More significantly, none of the video and audio taped statements from the complainants were provided in a timely fashion. This led to the following request on October 22, 2007:

> Upon our review of the disclosure, it has also come to our attention that we have not been provided with any DVD, video or audio tapes with respect to this matter, including but not limited to the six video cassettes which are referenced in the index to binders No. 1 through 3, and we request that you provide us with copies of these.
>
> We would further request that you advise us whether any of the complainants or anticipated witnesses in this matter have criminal records, as well as current contact information for each of the complainants and witnesses.
>
> Again, we thank you for your efforts to provide us with disclosure in this matter. We do not wish to delay, particularly with Mr. MacIntosh in custody, however we are simply not in a position to make election and plea on October 28, 2007, without full and complete disclosure in this matter. It is our suggestion that we once again put the matter over, until which time the Crown would anticipate being able to provide us with all relevant materials.

[84] This request had to be repeated on November 8, 2007, January 2, 2008, and February 7, 2008. The Crown did not provide these statements to the defence until February 22, 2008. This is despite being ostensibly available to do so since 2002.

[85] Other requests included DRS's affidavit sworn June 29, 1998 concerning his allegations against the appellant. This and other material were not provided until early May 2008. Contrary to the finding outlined above that the defence refused to enter election and/or plea until forced to do so by the court on May 7, 2008, the transcript of the appearance reveals the following:

> **MR. CASEY:** Your Honour, I'm here for the MacIntosh matter that is before you for election and plea. When I was in court last time I indicated that there were still some outstanding disclosure.
>
> **THE COURT:** Right.
>
> **MR. CASEY:** I'm happy to report that the disclosure was provided to me on May 2nd, on Friday.
>
> **THE COURT:** All right.
>
> **MR. CASEY:** And so that indicates we are ready to proceed with out election and plea.
>
> **THE COURT:** Okay.

[86] In sum, in my opinion, the motions judge unreasonably attributed to the appellant 11 months of the delay. Delay while waiting for the Crown to comply with basic disclosure obligations such as the video and audio statements of the complainants and sworn affidavits is attributable to the Crown (see *Morin*, para. 46). This would bring to the total over 12 months delay attributable to the Crown after the appellant's return to Canada. I agree with the motions judge that the remainder of the time is attributable to the inherent time requirements of the case.

[87] Frequently, the real crux to any application for a stay is the assessment of prejudice that must be carried out, in light of the overall length of the delay, the explanation for it, and the interests that s. 11(b) is designed to protect (*Morin*, para. 32). In my opinion, with respect, the motions judge also failed to apply the proper principles in this aspect of his analysis. I will explain.

[88] I have earlier set out the principles established by the Supreme Court of Canada in *Askov* and *Morin*. With respect to prejudice, Cory J. in *Askov* wrote of this factor (para. 69):

> There is a general, and in the case of very long delays an often virtually irrebuttable presumption of prejudice to the accused resulting from the passage of time. Where the Crown can demonstrate that there was no prejudice to the accused flowing from a delay, then such proof may serve to excuse the delay. It is also open to the accused to call evidence to demonstrate actual prejudice to strengthen his position that he has been prejudiced as a result of the delay.

[89] Sopinka J. in *Morin* emphasized that prejudice to an individual's right to liberty, security of the person, and the ability to make full answer and defence can be inferred from prolonged delay (para. 61). In addition, apart from inferred prejudice, the parties may rely on evidence to either show prejudice or dispel such a finding. He said this:

> [63] Apart, however, from inferred prejudice, either party may rely on evidence to either show prejudice or dispel such a finding. For example, the accused may rely on evidence tending to show prejudice to his or her liberty interest as a result of pre-trial incarceration or restrictive bail conditions. Prejudice to the accused's security interest can be shown by evidence of the ongoing stress or damage to reputation as a result of overlong exposure to "the vexations and vicissitudes of a pending criminal accusation", to use the words adopted by Lamer J. in *Mills, supra*, at p. 919. The fact that the accused sought an early trial date will also be relevant. Evidence may also be adduced to show that delay has prejudiced the accused's ability to make full answer and defence.

[90] These principles were revisited by the Supreme Court in *R. v. Godin,* 2009 SCC 26. In May 2005 the appellant in *Godin* was charged with serious offences. They included sexual assault, unlawful confinement and death threats. Nonetheless, the Crown elected to proceed summarily. The trial date was set for three days in February 2006, just nine months later. The trial did not proceed. Late disclosure of forensic tests triggered a re-election by the appellant. On the adjourned date, the preliminary inquiry could not be reached due to other matters on the docket. Eventually, the trial was to be held in November 2007, approximately 2.5 years from the laying of the charges. The trial judge stayed the proceedings. The stay was reversed by the Ontario Court of Appeal on the basis that any prejudice to the accused's interest in a fair trial was too speculative.

[91] The Supreme Court reinstated the stay. Cromwell J. wrote the unanimous reasons for judgment. He again acknowledged that prejudice can be inferred, and that the longer the delay, the more likely such an inference will be drawn. He wrote as follows:

> [30] Prejudice in this context is concerned with the three interests of the accused that s. 11(*b*) protects: liberty, as regards to pre-trial custody or bail conditions; security of the person, in the sense of being free from the stress and cloud of suspicion that accompanies a criminal charge; and the right to make full answer and defence, insofar as delay can prejudice the ability of the defendant to lead evidence, cross-examine witnesses, or otherwise to raise a defence. See *Morin,* at pp. 801-3.
>
> [31] The question of prejudice cannot be considered separately from the length of the delay. As Sopinka J. wrote in *Morin*, at p. 801, even in the absence of specific evidence of prejudice, "prejudice may be inferred from the length of the delay. The longer the delay the more likely that such an inference will be drawn". Here, the delay exceeded the ordinary guidelines by a year or more, even though the case was straightforward. Furthermore, there was some evidence of actual prejudice and a reasonable inference of a risk of prejudice.
>
> . . .
>
> [35] The majority of the Court of Appeal rejected as speculative the appellant's contention that his ability to make full answer and defence had been prejudiced. There was evidence, however, that there was a risk of prejudice to his defence because of the delay. In my respectful view, the majority of the Court of Appeal erred by failing to accord any weight to this risk of prejudice.
>
> [36] The nature of the risk to the appellant's ability to make full answer and defence was well set out by Glithero R.S.J., dissenting in the Court of Appeal, at paras. 69-74. He noted that the case was likely to turn on credibility and, in particular, on cross-examination of the complainant and her boyfriend in light of the DNA test results and prior statements. The dissenting judge concluded that the extra passage of time made it more likely that the ability of the appellant to cross-examine effectively had been diminished.
>
> [37] It is difficult to assess the risk of prejudice to the appellant's ability to make full answer and defence, but it is also important to bear in mind that the risk arises from delay to which the appellant made virtually no contribution. Missing from the analysis of the majority of the Court of Appeal, in my respectful view, is

> an adequate appreciation of the length of the delay in getting this relatively straightforward case to trial. As noted already, prejudice may be inferred from the length of the delay.
>
> [38] Moreover, it does not follow from a conclusion that there is an unquantifiable risk of prejudice to the appellant's ability to make full answer and defence that the overall delay in this case was constitutionally reasonable. Proof of actual prejudice to the right to make full answer and defence is not invariably required to establish a s. 11(*b*) violation. This is only one of three varieties of prejudice, all of which must be considered together with the length of the delay and the explanations for why it occurred.

[92] Similar principles were echoed in *Doggett v. U.S., supra*. Eight years after indictment, the authorities discovered that Doggett was not out of the country, as they believed, but living in the United States. The authorities were found to have lacked diligence in pursuing the appellant. Doggett could not establish actual prejudice to his ability to defend. Souter J., for the majority, wrote of the difficulty in establishing concrete prejudice, and the relationship between delay caused by lack of diligence by the government and presumed prejudice (112 S.Ct. 2686 at pp. 2692-2693):

> **[10,11]** As an alternative to limiting *Barker,* the Government claims Doggett has failed to make any affirmative showing that the delay weakened his ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence. Though Doggett did indeed come up short in this respect, the Government's argument takes it only so far: consideration of prejudice is not limited to the specifically demonstrable, and, as it concedes, Brief for United States 28, n.21; Tr. of Oral Arg. 28-34 (Feb.24, 1992), affirmative proof of particularized prejudice is not essential to every speedy trial claim. See *Moore, supra,* 414 U.S., at 26, 94 S.Ct., at 189; *Barker, supra* 407 U.S., at 533, 92 S.Ct., at 2193. *Barker* explicitly recognized that impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony "can rarely be shown." 407 U.S., at 532, 92 S.Ct., at 2193. And though time can tilt the case against either side, see *id.*, at 521, 92 S.Ct., at 2187; *Loud Hawk, supra,* 474 U.S. at 315, 106 S.Ct., at 656, one cannot generally be sure which of them it has prejudiced more severely. Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, see *Loud Hawk, supra,* at 315, 106 S.Ct., at 656, it is part of the mix of relevant facts, and its importance increases with the length of delay.

. . .

> **[12]** *Barker* made it clear that "different weights [are to be] assigned to different reasons" for delay. *Ibid.* Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. And such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness, cf. *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed. 2d 281 (1988), and its consequent threat to the fairness of the accused's trial. Condoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority. The Government, indeed, can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the Government attaches to securing a conviction, the harder it will try to get it.

[93] Keeping all of these principles in mind, I return to the analysis by the motions judge. In my view, the motions judge placed an evidentiary burden on the appellant to establish that his fair trial rights were impacted by the post-charge delay. The following illustrates:

> [143] I conclude that the unavailability of this so called "lost material" is not shown, on the balance of probabilities, to be prejudicial to the accused.
>
> [144] While the accused is claiming that prejudice is attributable to this period of time such that the charges should be stayed there is no clear evidence as to what that prejudice is, in relation to the trial. The prejudice is not shown.

[94] I see no appropriate consideration by the motions judge of the overall length of the delay and the risk of prejudice to the appellant's ability to make full answer and defence. In fact, the motions judge accepted that it was "probable" that the delay would affect the quality of some of the evidence to be produced by the accused and the Crown. But then simply said, " The trial judge will assess that evidence" (para. 165). With respect, once having found that delay would impact on the quality of the evidence, he should have considered the impact of the overall delay on the appellant's ability to make full answer and defence in the context of

the risk of prejudice on his ability to lead evidence, cross-examine or otherwise raise a defence.

[95] Instead, the motions judge concluded:

> [166] That said, when I apply the approach to this application as set out in R. v. *Morin*, *supra*, I conclude that this is not an appropriate case for a judicial stay.

[96] He then explained:

> [167] The suggested prejudice to the accused at trial is nebulous. It is not shown on the "balance of probabilities" and the delay inference available as to post-charge delay does not justify a stay.
>
> [168] When I balance the interests involved, the right of the accused to a fair trial, the interest in the public in having these matters tried on their merits, I conclude that a stay is not to be had in this matter.
>
> [169] I repeat and emphasize that the accused has been responsible for much of the unfortunate delay herein.
>
> [170] I will not be granting the Applicant's request that these charges be stayed.

[97] I have no difficulty in accepting that the appellant suffered little or no prejudice to his liberty and security interests while he was in India. He did not testify that he did, and it would be wrong to infer such prejudice since he was not subject to any restrictions on his liberty nor under ongoing stress or damage to his reputation by overlong exposure to a pending criminal proceeding. The appellant does not argue for such an inference.

[98] However, the appellant obviously suffered considerably once in Canada. Extensive evidence was led about the physical abuse he suffered at various times throughout the process while incarcerated, the extensive and ongoing wildly inaccurate reporting about the allegations, and the very restrictive bail conditions he was on once interim release was granted. With respect to this prejudice, the motions judge acknowledged it, but discounted it. He said:

> [162] He was beaten at the Cape Breton Correctional Centre. He was held in solitary confinement. He was initially denied bail and was imprisoned from June

> 2007 until April of 2008. He has since been released under restrictive bail conditions. He has received death threats and the publicity surrounding his situation has been both extensive and commonly inaccurate.
>
> [163] I agree with the Crown submission that most of this type of prejudice derives from the laying of the charges rather than delay. The delay may have exacerbated it, but has not caused it.

[99] I have difficulty understanding how 'most of this type of prejudice derives from the laying of the charges rather than delay'. The appellant was incarcerated for 10 months. During that time he was repeatedly assaulted and spent long periods in solitary confinement. Incarceration and then very restrictive bail conditions (house arrest with reporting requirements) are significant prejudice to his liberty and security interests. They just did not happen one day. They continued, quite unnecessarily by the 12-month delay in the Crown failing to fulfill its disclosure obligation.

[100] Ordinarily, the balancing of the competing interests in considering if a violation of the right to a trial within a reasonable period of time has been infringed is entitled to deference (*R. v. R.E.W.*, 2011 NSCA 8, para. 33). I am satisfied that here the motions judge failed to identify and apply the correct legal principles. Most notable was his insistence that the appellant was responsible for the 'unfortunate delay'. I have already set out other examples.

[101] In addition, the motions judge plainly required the appellant to prove actual prejudice, on a balance of probabilities to have been caused by the post-charge delay. This is the correct approach if an accused is seeking a stay of proceedings based on pre-charge delay. While it is also correct to say that an applicant has the overall burden of persuasion to establish that his or her right to trial within a reasonable period of time has been infringed with respect to post-charge delay, that does not mean they have the burden of establishing actual prejudice to their ability to make full answer and defence. A risk of prejudice is enough (per *Godin*).

[102] In *Askov*, Cory J. clearly placed the onus on the Crown to demonstrate that the accused has not been prejudiced in cases where there has been a long delay. His words bear repeating:

> 67 The different positions taken by members of the Court with regard to the prejudice suffered by an accused as a result of a delayed trial are set forth in *Mills*

> and *Rahey*. Perhaps the differences can be resolved in this manner. It should be inferred that a very long and unreasonable delay has prejudiced the accused. As Sopinka J. put it in *Smith*, *supra*, at p. 1138:
>
> > Having found that the delay is substantially longer than can be justified on any acceptable basis, it would be difficult indeed to conclude that the appellant's s. 11(*b*) rights have not been violated because the appellant has suffered no prejudice. In this particular context, the inference of prejudice is so strong that it would be difficult to disagree with the view of Lamer J. in *Mills* and *Rahey* that it is virtually irrebuttable.
>
> 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. Yet, the existence of the inference of prejudice drawn from a very long delay will safely preserve the pre-eminent right of the individual. Obviously, the difficulty of overcoming the inference will of necessity become more difficult with the passage of time and at some point will become irrebuttable. Nonetheless, the factual situation presented in *Conway* serves as an example of an extremely lengthy delay which did not prejudice the accused. However, in most situations, as Sopinka J. pointed out in *Smith*, the presumption will be "virtually irrebuttable".

[103] The appellant identified a number of witnesses who were no longer available. Some died before the charges were laid, some after. The appellant also complained about the unavailability of business records from the Registry of Motor Vehicles and from the motel in Bedford where he was alleged to have travelled with at least two of the complainants. No evidence was led by the Crown as to when these records became unavailable. The Crown argued to the motions judge that such records were 'collateral'. At trial, as I will detail later, the trial judge commented repeatedly that the records from the Registry of Motor Vehicles had no forensic value in rejecting a reasonable doubt had been raised by the appellant. In light of the very lengthy delay from the laying of the charges to trial, the inference was plainly there to be drawn that the appellant would be prejudiced, or there was at least a risk of prejudice in meeting the case to be advanced by the Crown.

[104] Even taking into account the increased time inherent in the case due to inaction of the appellant in returning to Canada, the length of the delay is extraordinary, particularly in light of the already lengthy pre-charge delay. In cases where there has already been such a delay, there needs to be an added

sensitivity and, hence, urgency in bringing an accused to trial. There was no such urgency exhibited by the Crown in this case.

[105] While I see no basis to suggest a deliberate decision to delay, the conclusion is evident that the Crown did not proceed with due diligence. There were lengthy periods of inactivity before and after the influx of additional complainants. There was a period of three years where the Crown had completed the extradition package and did absolutely nothing. Once in Canada, there was again lengthy delay in providing disclosure. While some of the requests for disclosure might not have been reasonably anticipated by the Crown, there was substantial material that should have been readily available but was not. Even if election had been made without the material, lack of production could well have led to the same or worse delays if late disclosure triggered a re-election or adjournment of scheduled proceedings permit the Crown to fulfill its *Stinchcombe* obligations.

[106] The motions judge erred in law in not applying the correct principles. It falls to this Court to do so. The factors to be considered, as directed by *Askov, Morin* and *Godin* can be summarized as follows:

> *The length of the delay* – approximately 14 years is an inordinately long time by any standard;
>
> *Waiver* – the Crown did not suggest to the motions judge or in this Court that the appellant had waived any of the time periods;
>
> *The reasons for the delay* – I would assess the inherent time requirements to be in the area of four years including the enhanced effort that extradition would entail. With respect to the actions of the accused – the only conduct of the appellant identified by the motions judge was the appellant's inaction in not turning himself in and his delay in entering election pending disclosure. The inaction of the appellant did not "cause" the delay, and the delay in making such fundamental decisions as to mode of election pending proper disclosure is not attributable to the appellant.
>
> With respect to the actions of the Crown – the vast majority of the delay was caused by the Crown in delaying pursuit of extradition when they knew exactly where the appellant was – even if some of this delay can be

> explained by inherent time requirements and the perceived need to delay extradition once DRS flushed out additional complainants, there was no explanation as to why it took so long to complete the extradition package nor why for the three years after it was complete, the Crown did nothing. I would add no explanation was offered why the requested video and audio statements, and affidavit of the main complainant were not immediately provided when these materials were documented as being available for production in 2002.
>
> *Prejudice* – in the absence of evidence demonstrating that the delay did not prejudice his fair trial interests, the length is so extraordinary that prejudice or risk of prejudice is inferred. Such an inference will not automatically be drawn, but here it is virtually irrebuttable. In addition, the appellant was not just remanded for 10 months. The motions judge accepted that he was subject to physical violence while incarcerated, and held in solitary confinement. Even after release, it was only on very restrictive bail conditions. He received death threats and suffered through extensive and repeated inaccurate portrayals of his situation and the allegations.

[107] I recognize that society has a strong interest in seeing trials proceed against those charged with serious offences, but the delay and the circumstances here are such that the appellant's right to trial within a reasonable period of time under s. 11(b) of the *Charter* was infringed. It is well accepted that the minimum remedy for such an infringement is a stay of proceedings (see *R. v. Rahey*, [1987] 1 S.C.R. 588, *R. v. Kporwodu* (2005), 75 O.R. (3d) 190 (C.A.), *R. v. Thomson*, 2009 ONCA 771, *R. v. R.E.W.*, 2011 NSCA 18). As a consequence, I would vacate all of the convictions entered by Kennedy C.J.N.S. and MacDonald J. and enter a stay on all charges.

CONVICTION APPEAL

[108] In light of my conclusion with respect to the entry of a stay of proceedings, it is not technically necessary for me to address the substance of the appellant's appeal from conviction. However, given the history of these proceedings, I think it

appropriate to do so. The appellant identified 15 separate grounds of appeal from conviction. In argument they were consolidated into five headings. They are:

1. The trial judge misapprehended the evidence.

2. The trial judge erred by not properly dealing with his findings that the complainants were not truthful.

3. The trial judge erred in not addressing the risk of collusion amongst the complainants.

4. The trial judge failed to give adequate reasons.

5. The verdict is unreasonable.

[109] There is a certain amount of overlap between these issues. If made out, the appropriate remedy for the first four issues is to quash the convictions and order a new trial. For the fifth, the usual remedy is to direct an acquittal. For the reasons I will now develop, the trial judge's reasons are adequate, but reveal a number of errors of law and serious misapprehension of evidence material to his path of reasoning to the convictions under review.

Counts involving JAH

[110] The seminal case on the correct approach to assessing an allegation a trial judge has misapprehended evidence is that of *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193, [1995] O.J. No. 639 (Ont.C.A.) (Q.L.). In that case, the appellant had been convicted on a number of charges of assault, indecent and otherwise, arising from events said to have occurred decades prior to trial. The appellant alleged the verdicts were unreasonable and tainted by the trial judge's misapprehension of the evidence. Doherty J.A. wrote the unanimous reasons for judgment. He identified the difference between a verdict that is unreasonable and one made vulnerable by a misapprehension of evidence:

> **89** In considering the reasonableness of the verdict pursuant to s. 686(1)(a)(i), this court must conduct its own, albeit limited, review of the evidence adduced at trial: *R. v. Burns, supra*, at pp. 662-63 S.C.R., pp. 198-99 C.C.C. This court's authority to declare a conviction unreasonable or unsupported by the evidence does not depend upon the demonstration of any errors in the proceedings below. The verdict is the error where s. 686(1)(*a*)(i) is properly invoked. A misapprehension of the evidence does not render a verdict unreasonable. Nor is a finding that the judge misapprehended the evidence a condition precedent to a finding that a verdict is unreasonable. In cases tried without juries, a finding that the trial judge did misapprehend the evidence can, however, figure prominently in an argument that the resulting verdict was unreasonable. An appellant will be in a much better position to demonstrate the unreasonableness of a verdict if the appellant can demonstrate that the trial judge misapprehended significant evidence: *R. v. Burns, supra,* at p. 665 S.C.R., p. 200 C.C.C..

[111] Doherty J.A. described how a misapprehension of evidence can be an error of law or amount to a miscarriage of justice. To be a miscarriage of justice, the misapprehension must play an essential part in the reasoning process. He explained:

> **93** When will a misapprehension of the evidence render a trial unfair and result in a miscarriage of justice? The nature and extent of the misapprehension and its significance to the trial judge's verdict must be considered in light of the fundamental requirement that a verdict must be based exclusively on the evidence adduced at trial. Where a trial judge is mistaken as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process resulting in a conviction, then, in my view, the accused's conviction is not based exclusively on the evidence and is not a "true" verdict. Convictions resting on a misapprehension of the substance of the evidence adduced at trial sit on no firmer foundation than those based on information derived from sources extraneous to the trial. If an appellant can demonstrate that the conviction depends on a misapprehension of the evidence then, in my view, it must follow that the appellant has not received a fair trial, and was the victim of a miscarriage of justice. This is so even if the evidence, as actually adduced at trial, was capable of supporting a conviction.

[112] The central issue in *Morrissey* was credibility. The trial judge found the complainants to be credible and accepted their evidence as establishing beyond a reasonable doubt the alleged offences. However, in the course of coming to that conclusion, he incorrectly found their evidence consistent and confirmatory. This misapprehension was considered to be significant by Doherty J.A., in that it

"infected the very core of the reasoning process" that culminated in the convictions.

[113] This approach has been accepted as correct by the Supreme Court of Canada (see *R. v. Lohrer*, 2004 SCC 80), and repeatedly confirmed by this Court before and after *Lohrer* (see *R. v. Schrader*, 2001 NSCA 20; *R. v. Deviller*, 2005 NSCA 71; *R. v. D.D.S.*, 2006 NSCA 34). Cromwell J.A., as he then was, in *R. v. Deviller*, explained what an appellant must demonstrate to succeed on appeal, as follows:

> [12] It follows, therefore, that to succeed on appeal, the appellant must show two things: first, that the trial judge, in fact, misapprehended the evidence in that she failed to consider evidence relevant to a material issue, was mistaken as to the substance of the evidence, or failed to give proper effect to evidence; and second, that the judge's misapprehension was substantial, material and played an essential part in her decision to convict.

[114] Some additional detail with respect to how the case was presented by the Crown and defence is necessary to put into perspective the reasons by the trial judge.

[115] The allegations by DRS were broken down into 16 counts in the Indictment, all to have occurred between September 1, 1970 and September 1, 1975, but at eight different locales. The Crown argued that the indecent assault counts related to the appellant's touching of DRS, including his penis, and the gross indecency counts to the appellant performing oral sex on DRS. DRS testified that there had been conservatively one hundred sexual encounters with the appellant, all before his fourteenth birthday, September 1, 1975 – the date he would be legally able to consent to such activity.

[116] For most of the locales specified in the Indictment, there was one count of indecent assault and one of gross indecency. However, in some instances DRS described multiple incidents of fondling and oral sex occurring in different locations, and at different times within the locale specified in the Indictment.

[117] The complaints by JAH were less complicated. The Indictment alleged indecent assaults and acts of gross indecency between January 1, 1971 and JAH's fourteenth birthday, March 23, 1977. The counts were broken down into two locales. A similar pattern was used for the allegations by BAS, but since the trial

judge acquitted the appellant on all of these allegations, detailed reference to those allegations is not necessary.

[118] The parties broke down for the trial judge the locales and specific incidents tied to the various counts as follows:

Indictment

DRS - Born September *, 1961

Date and place of offence	Count	
Sept 1 1970-Sept 1, 1975 – Port Hawkesbury	1 & 2	Farquhar House
Sept 1 1970-Sept 1, 1975 – *	3 & 4	Basement of his house
Sept 1 1970-Sept 1, 1975 – Goose Harbour Road	5 & 6	Incidents in car
Sept 1 1970-Sept 1, 1975 – *	7 & 8	Mobile home Mother's House
Sept 1 1970-Sept 1, 1975 – Guysborough	9 & 10	Giant's Lake Hunting trip – Rabbit hunting Hunting cabin * road Reagan's Dam
Sept 1 1970-Sept 1, 1975 – Port Hastings	11 & 12	Parked in car just before the locks
Sept 1 1970-Sept 1, 1975 – Halifax	13 & 14	Motel
Sept 1 1970-Sept 1, 1975 – Mulgrave	15 & 16	Laundromat

JAH - Born March *, 1963

January 1, 1971 - March 23, 1977 – Port Hawkesbury	17 & 18	Farquhar House
January 1, 1971 - March 23, 1977 – Halifax	19 & 20	Sea King Motel – Blue Jeep

BAS – Born July * 1963

Jan 1, 1972 – December 31, 1975 – Mulgrave	20 & 21	Laundromat
Jan 1, 1972 – December 31, 1975 – Port Hawkesbury	23 & 24	Farquhar House
Jan 1, 1972 – December 31, 1975 – *	25 & 26	Car ride near cottage

[119] Like most criminal trials, the credibility and reliability of the witnesses was central to the key question before the trial judge: in light of all of the evidence, had the Crown proven beyond a reasonable doubt the essential elements of the offences alleged against the accused?

[120] All trials are, to a certain extent, historical. They entail an exploration of the perception and recall of events that happened in the past. In cases of sexual assault, absent forensic or other evidence, it is a resolution of the "he said – she said" scenario, but through the prism of the requirement that to convict, the credibility and reliability of the complainant's evidence must be such that despite the denial by the accused, the guilt of the accused has been proven to the criminal standard of proof beyond a reasonable doubt.

[121] Inconsistencies, improbabilities, and contradictions with other evidence become the focus, as well as evidence that tends to confirm the evidence of an accused if he or she testifies. As the length of time increases from the date of the event to the trial, difficulties abound in prosecuting and defending such cases. Not only was the time from the allegations to trial in the range of 34 to 40 years, there was no contemporaneous investigation.

[122] At trial, the appellant testified and denied the allegations and called evidence which tended to show that many of the details the complainants testified to could not be correct. The trial judge rejected the evidence of the appellant with respect to his denial of sexual activities with DRS and JAH at a time when they could not legally consent to such activities. The judge also rejected the appellant's claim of consensual sexual incidents with the complainants outside the time frame of the Indictment.

[123] With respect to the six counts involving BAS as the complainant, the trial judge was aware of the potential for collusion. He recounted that DRS told BAS about his allegations of having been sexually assaulted by the appellant. BAS admitted he told his brother and others, nothing like that happened to him. The trial judge said the appellant testified "strongly" that these incidents did not happen.

[124] Despite BAS's description of numerous incidents of sexual activity between him and the appellant when BAS said he was 9 to 12 years of age, the trial judge concluded he had a reasonable doubt and acquitted the appellant. No appeal from the acquittals is taken by the Crown.

[125] With respect to the four counts involving JAH, as noted above, two of the counts were in relation to a visit to Halifax where JAH and the appellant stayed overnight at the Sea King Motel in Bedford. JAH testified that he met the appellant at his uncle's home or maybe through a * job his father did for the appellant. The odd time, the appellant would pick him up on his way home from school. He said he was somewhere between 11 and 13, when he was in grade 7 or 8. The appellant was driving his blue Cherokee Jeep. Once in the Jeep, the appellant drove him to Farquhar House in Port Hawkesbury. He described how the appellant rubbed his leg up into his groin, unzipped his pants and performed oral sex on him. JAH testified it happened between four and six times. He explained he got into the vehicle because the appellant was a friend of the family.

[126] JAH also related to the trial judge a trip he took to Halifax with the appellant. His parents gave him permission to go with the appellant. He thought they travelled there in the appellant's blue Jeep. They stayed at the Sea King motel in Bedford. JAH said the appellant did the same thing as before – once in the bedroom, his pants were taken down and the appellant performed oral sex on him. But after that, it never happened again. Asked by the Crown if there was a reason nothing happened thereafter, JAH explained:

> **A.** I think my parents or F. or P. got wind that he was doing this to kids, and they put the end to it.

[127] There were problems with the credibility of JAH. In his statement to the police he told the officer there was no oral sex at the Farquhar House. He said he lied to the officer. For this, and other reasons, the trial judge said he doubted that

any of the sexual events described occurred at Farquhar House. Nonetheless, the trial judge convicted the appellant of indecent assault as set out in Count # 17. The reasons he gave for doing so are:

> [90] I do accept, however, that he did describe a blue Jeep Cherokee being used by Mr. MacIntosh. As Ms. MacGrath pointed out, the motor vehicle records indicate that Mr. MacIntosh had the vehicle before 1976, so it is conceivable this vehicle was being used by Mr. MacIntosh at the time to which JAH refers.
>
> [91] Now JAH also described an incident that is alleged to have occurred in Mr. MacIntosh's car. He said that he was driving in the car with Mr. MacIntosh and he was talking about a girlfriend and that he had an erection and that Mr. MacIntosh was rubbing his penis. **On that particular incident, I was impressed with the way that JAH was trying to be credible, and I do accept that he was. I watched him tell his evidence of this incident.** I do not find it to be consensual, but rather an indecent assault by Mr. MacIntosh about JAH. I accept JAH's evidence over that of Mr. MacIntosh on that particular incident, and I do not find he has raised any reasonable doubt in applying the principles of **R. v. W.D.**, ***supra***. I thus find Mr. MacIntosh guilty of indecent assault as alleged in Count #17, being the incident above involving the car, and not guilty of gross indecency under Count #18. Once again I might have my suspicions but suspicions, as the law says, is not proof beyond a reasonable doubt.
> [Emphasis added]

[128] The appellant identifies a number of problems with the reasons of the trial judge that lead to this conviction. The time frame described by JAH was when he was 11 to 13 years of age, which would be between 1974 and 1976. The motor vehicle records did **not** indicate that the appellant had the blue Jeep Cherokee before 1976. The Crown made no such suggestion to the trial judge. The uncontested evidence of the appellant was that he only ever had one Jeep. It was blue. He said he bought it second hand, he thought in 1978. The records from the Registry demonstrated that the only Jeep registered to the appellant was a 1976 Jeep “prior to Feb. 1978”.

[129] More fundamentally, JAH never described being in the appellant’s Jeep, talking about his girlfriend, having an erection and the appellant rubbing his penis. His evidence about what happened in the Jeep was:

> **Q.** Do you have any recollection about the ride from the time that you would get in the Jeep until you arrived at the Farquar House?

A. Recollection as of...

Q. Any details of those drives.

A. Just on the way over, he would . . . he'd put his hand on my leg and he'd rub my leg and go up into my groin area.

Q. Would he say anything to you during this time?

A. I'm not sure, no.

Q. Did you say anything to him?

A. No. But I'm sure we must have talked about something, you know. I'm not sure what it was.

[130] The only evidence about JAH having an erection in the Jeep, and a conversation about a girlfriend, came from the appellant who described such an incident on his way to Halifax with JAH in 1979 or 1980. How could the trial judge be impressed by the way JAH was trying to be credible as he watched him tell of this incident, when JAH described no such incident?

[131] The Crown does not dispute that the trial judge confused the evidence given by the appellant with that of JAH. She argues that, nonetheless, the trial judge grasped the salient features of the defence: that there was consensual sexual contact between the two, and rejected it. With respect, this argument is circular. The misapprehension is claimed not to be material because the trial judge rejected the evidence of the appellant and accepted the evidence of the complainant JAH. This was a credibility finding. But the trial judge found JAH to be credible on the basis of watching him describe an incident in the car, talking about his girlfriend and having an erection, and the appellant rubbing his penis, when such was not the evidence of JAH at all. The trial judge misapprehended the very evidence that the judge relied on to make his credibility finding. The conviction cannot stand (*R. v. Morrissey, supra*).

[132] The Crown alleged that counts 19 and 20 related to the trip to Halifax. On this allegation, the trial judge said he had no doubt. He accepted the evidence of JAH and rejected the alternate explanation by the appellant that the trip was in

1979 or 1980 and involved him performing oral sex on JAH's erect penis, essentially at the request of JAH. For reasons that were not explicit, the trial judge acquitted the appellant of indecent assault, but convicted him of gross indecency. Perhaps it was because of how the Crown had differentiated the incidents into non-consensual touching in circumstances of indecency as being indecent assault, and where he was satisfied that oral sex had occurred, this amounted to gross indecency. Otherwise, it makes no sense to acquit the appellant of indecent assault since the act of oral sex involves bodily contact with the complainant in circumstances of indecency in a time frame where the complainant could not, as a matter of law, consent.

[133] Whatever may have been the rationale, in my opinion, the conviction from this incident also cannot stand. The reasons for the conviction were:

> [93] As I have indicated above, I can believe all, none, or some of what a witness says as I assess their credibility in light of the above principles earlier stated by me at the outset of this decision. In these particular counts, I do not have any reasonable doubt whatsoever. I have no difficulty in coming to the conclusion that this incident occurred as described by JAH. I listened and I observed JAH, and I listened, and I observed, and watched Mr. MacIntosh testify. The description of the time, and the event by JAH has been denied by Mr. MacIntosh. I listened to the evidence of JAH where he said Mr. MacIntosh and he were sitting on the bed and the accused told him to relax, took his penis, and performed oral sex on him. I accept that. I have come to the conclusion that incident happened and he was trying to recall it, and that was the way he recalled it happening as a young child. **He was credible. He described the motel in some detail and about them going there. Simply put, I believe him.** He was truly remembering the incident as he testified, and I am not satisfied that the accused has raised any reasonable doubt as under the provisions of **R. v. W.(D)**, ***supra***, either in his credibility or on the whole of the evidence. I simply reject Mr. MacIntosh's version as untruthful or either a version of convenience. [Emphasis added]

[134] With respect, JAH did not describe the motel in some detail at all nor about them going there. JAH could not recall the purpose of the trip or the time of the year. He did describe where they stayed and the fact there was a pool at the motel, but absolutely nothing about the room nor a description of the motel in some detail. His evidence was:

> **Q.** Can you describe this motel for us?

A. Just the only thing I can remember in it was the pool out front. The windows were kind of steamy. The pool was right out front of the motel.

Q. Was it an indoor pool or an outdoor pool?

A. Indoor.

Q. Do you recall anything about the room that you stayed in?

A. No.

[135] In my opinion, one of the reasons the judge gave for believing JAH is not borne out by the evidence. The fact of being at the motel was hardly telling. The appellant testified that he had taken JAH to the motel, but it was in 1979 or 1980.

[136] Furthermore, the uncontradicted evidence from the father of DRS was that just a few days before the 1974 election, a retired RCMP officer reported to the family of DRS that the appellant had a reputation for "liking little boys". Documentary evidence established that the day of the election was April 2, 1974. After that time, the friendship between the families of DRS, JAH and the appellant stopped. This was confirmed by DRS. More importantly, according to JAH the incident at the Sea King Motel in Bedford clearly happened before that event. JAH said his parents had cleared him to go on the trip with the appellant. Hence, somehow the appellant, before April 1974, drove a 1976 blue Jeep Cherokee to Halifax with JAH and there committed sexual acts at a time JAH could not legally consent.

[137] The trial judge made no mention of this evidence. No explanation is forthcoming from the Crown as to how the judge could have legitimately disregarded this evidence. It is, of course, possible that JAH was mistaken about the sequence of events and that they had travelled to Bedford in the appellant's blue Jeep. But the trial judge made no such findings. The evidence and its import was simply ignored. In my opinion, he failed to consider evidence relevant to a material issue, thereby misapprehending the evidence before him. In addition, there was a clear mistake as to the substance of the evidence given by JAH about the circumstances of being touched in the Jeep. This led to his positive finding as

to the credibility of JAH. That cannot be divorced from the allegation concerning the trip to Halifax.

[138] There are other equally sound bases upon which this conviction should not be allowed to stand. The failure to acknowledge, let alone deal with the clear evidence that the incident in Bedford could not have happened as described can amount to an error in law (see *Harper v. The Queen*, [1982] 1 S.C.R. 2), or as a failure to give reasons on troubling and conflicting evidence (*R. v. Sheppard*, 2002 SCC 26; 1 S.C.R. 869).

[139] Furthermore, the trial judge never addressed the issue of the potential for collusion on this incident as between JAH and DRS (*R. v. Burke*, [1996] 1 S.C.R. 474). That is not to say that a trial judge must specifically address every argument and issue. But here the trial judge refused to convict the appellant on the very same allegation by DRS that the appellant had taken him to the same motel in Bedford and carried out virtually identical acts as alleged by JAH. Notably, one of the reasons given by the trial judge for having a reasonable doubt about this allegation was that DRS had talked with JAH about the motel incident. The potential for collusion was evident, but not addressed by the trial judge with respect to the credibility or reliability of the very same claim by JAH. For any and all of these reasons, the conviction cannot stand. The Crown did not argue that the s. 686(3)(1)(b)(iii) proviso (if it were applicable), could be invoked to save the convictions. I would decline to do so.

Counts involving DRS

[140] As already mentioned, the outcome of this trial depended on the trial judge's assessment of the credibility and reliability of the complainants and that of the appellant. The bulk of the counts in the Indictment related to allegations made by DRS that on hundreds of occasions he had been touched in a sexual manner by the appellant which inevitably led to fellatio. It is certainly not our function to re-try this case, acquitting the appellant if we disagree with the trial judge's view of the credibility or reliability of the evidence, and upholding the convictions if we agree.

[141] Our function is limited. By virtue of s. 686(1) of the *Criminal Code* an appeal court can only intervene if it finds the trial judge did not apply the correct

legal principles or otherwise erred in law; reached verdicts that are unreasonable or not supported by the evidence; or on any ground that there was a miscarriage of justice. If a legal error occurred, a conviction might still be upheld if the Crown can satisfy the Court that despite the error, there was no substantial wrong or miscarriage of justice. However, if the Court is of the view that the verdicts under review are unreasonable or not supported by the evidence the convictions must be quashed.

[142] The appellant argues that the trial judge misapprehended the evidence, and that the verdict he reached is unreasonable or not supported by the evidence. I have already referred to the legal test engaged by the suggestion the trial judge misapprehended the evidence. With respect to a complaint a verdict is unreasonable or not supported by the evidence, an appeal court is required to re-examine, and to some extent re-weigh the evidence, and consider its effect. The traditional expression of the correct test was set out in *R. v. Yebes* and confirmed in *R. v. Biniaris*.

[143] In *R. v. Yebes*, [1987] 2 S.C.R. 168, McIntyre J., for a unanimous six member panel, clarified that the correct approach is (pp. 185-186):

> ...Therefore, curial review is invited whenever a jury goes beyond a reasonable standard. In my view, then, *Corbett* is the governing case and the test is "whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered".
>
> The appellant, while not quarrelling with the authority of the *Corbett* case, argues that it was misapplied here in a case depending entirely on circumstantial evidence. He argues that before a jury may convict on purely circumstantial evidence, it must be satisfied beyond a reasonable doubt that the circumstances proved in the evidence are such as to be inconsistent with any other rational conclusion than that the accused is the guilty person. The test is sometimes stated in a somewhat different form, but to the same effect: the circumstances must be consistent with guilt and inconsistent with innocence. The appellant submits that the majority of the Court of Appeal erred in failing to apply this test.
>
> In my view, the majority of the Court of Appeal did not fail to apply the correct principles relating to the treatment of circumstantial evidence. The function of the Court of Appeal, under s. 613(1)(*a*)(i) of the *Criminal Code*, goes beyond merely finding that there is evidence to support a conviction. The Court must determine on the whole of the evidence whether the verdict is one that a

> properly instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the Court must re-examine and to some extent reweigh and consider the effect of the evidence. This process will be the same whether the case is based on circumstantial or direct evidence. In the Court of Appeal, the majority clearly found that there was sufficient evidence to justify the verdict and both Macdonald and Craig JJ.A. rejected all rational inferences offering an alternative to the conclusion of guilt. It is therefore clear that the law was correctly understood and applied.

[144] In *R. v. Biniaris*, [2000] 1 S.C.R. 381, the Court was asked to reconsider the *Yebes* test. Arbour J., for the unanimous court, rejected any departure. She wrote:

> 36 The test for an appellate court determining whether the verdict of a jury or the judgment of a trial judge is unreasonable or cannot be supported by the evidence has been unequivocally expressed in *Yebes* as follows:
>
> > [C]urial review is invited whenever a jury goes beyond a reasonable standard ... [T]he test is whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered'.
>
> (*Yebes*, *supra*, at p. 185 (quoting *Corbett v. The Queen*, [1975] 2 S.C.R. 275, at p. 282, *per* Pigeon J.).)
>
> That formulation of the test imports both an objective assessment and, to some extent, a subjective one. It requires the appeal court to determine what verdict a reasonable jury, properly instructed, could judicially have arrived at, and, in doing so, to review, analyse and, within the limits of appellate disadvantage, weigh the evidence. This latter process is usually understood as referring to a subjective exercise, requiring the appeal court to examine the weight of the evidence, rather than its bare sufficiency. The test is therefore mixed, and it is more helpful to articulate what the application of that test entails, than to characterize it as either an objective or a subjective test.
>
> . . .
>
> 42 It follows from the above that the test in *Yebes* continues to be the binding test that appellate courts must apply in determining whether the verdict of the jury is unreasonable or cannot be supported by the evidence. To the extent that it has a subjective component, it is the subjective assessment of an assessor with judicial training and experience that must be brought to bear on the exercise of reviewing the evidence upon which an allegedly unreasonable conviction rests. That, in turn,

> requires the reviewing judge to import his or her knowledge of the law and the expertise of the courts, gained through the judicial process over the years, not simply his or her own personal experience and insight. It also requires that the reviewing court articulate as explicitly and as precisely as possible the grounds for its intervention. I wish to stress the importance of explicitness in the articulation of the reasons that support a finding that a verdict is unreasonable or cannot be supported by the evidence. Particularly since this amounts to a question of law that may give rise to an appeal, either as of right or by leave, the judicial process requires clarity and transparency as well as accessibility to the legal reasoning of the court of appeal. When there is a dissent in the court of appeal on the issue of the reasonableness of the verdict, both the spirit and the letter of s. 677 of the *Criminal Code* should be complied with. This Court should be supplied with the grounds upon which the verdict was found to be, or not to be, unreasonable.

[145] Verdicts that are based on assessments of credibility are not immune from appellate review for reasonableness whether the trial was by jury or judge alone (*R. v. W. (R.*),[1992] 2 S.C.R. 122; *R. v. François*, [1994] 2 S.C.R. 827; *R. v. Burke*, [1996] 1 S.C.R. 474). However, there is an additional basis upon which a verdict rendered by a *trial judge* is reviewable. The Supreme Court of Canada has recently confirmed that a judge's verdict may be unreasonable as not being supported by the evidence, or unreasonable by virtue of it having been reached illogically or irrationally.

[146] The development started in *R. v. Beaudry*, 2007 SCC 5. The conviction hinged on the trial judge's assessment of the appellant's credibility. The conviction was upheld by the Quebec Court of Appeal (Chamberland J.A., dissenting). Justice Charron, writing for herself and three other justices, reaffirmed the test for an unreasonable verdict from *Yebes* and *Biniaris*. She emphasized that the appeal court's task is to assess the verdict, not the process used to reach the verdict. Justice Fish dissented. He disagreed with Charron J.'s statement of the appropriate test to determine if a verdict rendered by a judge alone is unreasonable. With respect to the test, Fish J. reasoned that given the governing provision of the *Criminal Code*, and recent jurisprudence in non jury cases, appellate courts may find a verdict to be unreasonable even where the verdict was available on the record. He wrote:

> 97 In Justice Charron's view, a verdict based on unreasonable reasons is not unreasonable if there is evidence upon which another trier of fact could have reached the same conclusion by a different and proper route. With respect, I do

> not share that view. No one should stand convicted on the strength of manifestly bad reasons – reasons that are illogical on their face, or contrary to the evidence – on the ground that another judge (who never did and never will try the case) could *but might not necessarily* have reached the same conclusion for *other reasons*. A verdict that was reached illogically or irrationally is hardly made reasonable by the fact that another judge could reasonably have convicted *or acquitted* the accused. I think it preferable by far, where there is evidence capable of supporting a conviction, to order a new trial so that a fresh and proper determination can be made by a real and not hypothetical "other judge". [Emphasis in original]

[147] Three other justices agreed with Justice Fish. The swing vote was cast by Justice Binnie. Binnie J. agreed with Justice Charron that the appeal should be dismissed, but agreed with the suggestion by Justice Fish that the traditional view of focussing on the reasonableness of the verdict, without regard to the quality of the reasons, was problematic. In particular, he was of the view that findings of fact essential to the verdict that are demonstrably incompatible with evidence, neither contradicted by other evidence, nor rejected by the trial judge, would produce a verdict lacking in legitimacy and hence "unreasonable" (para. 79).

[148] The full Court sat on *R. v. Sinclair*, 2011 SCC 40. The Court again divided in result (5-4) to allow the appeal, but by unambiguous plurality (7-2) confirmed that the test to review a verdict as being unreasonable is not limited to a review of the record to determine if a reasonable trier, properly instructed, could convict. Fish J. explained the relationship between misapprehension of evidence, lack of sufficient reasons and reasons that are flawed. He wrote:

> [3] While a verdict that rests on a mistake as to the substance of the evidence may well be "unreasonable" in the broad sense of that term, *Beaudry* has no application to errors of this sort. Rather, they are governed by *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732. Nor does *Beaudry* govern trial court decisions that are rendered inscrutable by an absence of sufficient reasons, as in *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869.
>
> [4] Nothing in *Beaudry* should be taken as a departure from the well-established principles of appellate review set out in *R. v. Yebes*, [1987] 2 S.C.R. 168, and *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381. *Yebes* and *Biniaris* continue to apply where the issue is whether the verdict could have been reached reasonably by a properly instructed jury or a judge sitting alone. *Beaudry*, as we shall see, involves a narrower inquiry. Its concern is whether it can be seen from the reasons for judgment that the trial judge's conclusion – that is to say, the judge's *verdict* – was reached illogically or irrationally. As Justice Charron puts

> it, *Beaudry* is concerned with "fundamental flaws in the reasoning process that led to [the trial judge's verdict]" (para. 77).
>
> [5] In short, *Beaudry* serves an important function of limited scope on an appellate review for unreasonableness under s. 686(1)(*a*)(i) of the *Code*. ...

[149] As to the appropriate test on reviewing judge alone verdicts, LeBel, Deschamps and Rothstein JJ. agreed with the reasons of Fish J. (paras. 44-46). Charron J. (Abella J. concurring) also agreed that the reasonableness of a judge's verdict may also be assessed under s. 686(1)(a)(i) "by scrutinizing the logic of the judge's findings of fact or inferences drawn from the evidence admitted at trial" (para. 69). But Charron J. disagreed with how that assessment ought to be carried out.

[150] *Sinclair* had not been released at the time this appeal was argued. The appellant has not sought to provide post hearing submissions, based on the confirmation by the Supreme Court of the expanded test for assessing the reasonableness of judge's verdict. Nonetheless, after having reviewed the reasons of the judge, in light of the evidence and arguments of the parties at trial, I see nothing irrational or illogical about the factual findings of the trial judge.

[151] The appellant's argument is that the trial judge misapprehended the evidence in a number of respects, the misapprehension was material, and played an important role in the reasoning process. These misapprehensions, coupled with what he contends are the inherent improbabilities and inconsistencies in the evidence of the complainant DRS, resulted in verdicts that are unreasonable. The Crown argues that it is not the role of this Court to substitute our views over such things as the alleged improbabilities of the claims by the complainant or our assessment of the importance of the inconsistencies and the explanations, if any, offered at trial for them.

[152] With respect to the identified instances of misapprehension of evidence, the Crown says they are minor, and did not play an important role in the reasoning of the trial judge. In any event, she says any such misapprehensions do not render the verdicts unreasonable.

[153] I agree with the Crown that it is decidedly not our role to substitute our views, assuming they would differ, for those of the trial judge with respect to the

credibility or reliability of the evidence adduced at trial. I also agree that even taking into account all of the apparent misapprehensions of the evidence, the verdicts are not unreasonable. A properly instructed trier of fact, acting reasonably could convict. However, in my opinion the trial judge misapprehended the evidence, and cited that evidence in his reasoning as to why he resolved the issue of credibility in favour of the Crown and against the appellant. The judge was mistaken as to the substance and importance of critical evidence and those errors played an essential part in the reasoning process which led to conviction. In these circumstances, the convictions cannot stand.

[154] The most significant misapprehensions are as follows. In relation to counts 5 and 6, the trial judge reasoned:

> [58] Counts #5 and #6 of the Indictment deal with incidents that are to have allegedly happened in the accused's car at Goose Harbour Road in Guysborough County. In assessing the totality of the evidence and relating it to Counts #5 and #6, I accept DRS's evidence that a lot of these incidents occurred in Mr. MacIntosh's car. Besides denying this took place as explained by DRS, the defence, Mr. MacIntosh argues that it could not have happened in a vehicle as described by DRS because Mr. MacIntosh did not own a vehicle of that nature at that time, according to the exhibits tendered from the Motor Vehicle Department. However, in that regard, the vehicle information supplied does not cover all the time-frame in the Indictment. I find when I consider the totality of the evidence, especially that of DRS, and as **I noted his evidence about the Goose Harbour Road incidents, that he seemed to recall a change in the way his life was with these incidents. His life changed from not being able to ejaculate and then being able to ejaculate as one of the things that sticks out in his mind about the incidents that occurred in that particular location**. Once again, the activity was the same. He said Mr. MacIntosh would unzipper his pants, start feeling his leg, then eventually going up to his penis area. He would then put his mouth on DRS's penis and have oral sexual relations with him. He said it was very repetitive in that area, although he couldn't remember each specific time. He said this happened when he was between the ages of 10 and 13, which would place him within the time-frame in the Indictment. [Emphasis added]

[155] There are a couple of problems with the reasons that led the trial judge to convict on these counts. First, the evidence of the appellant was uncontradicted that the only vehicle he ever owned which corresponded to the one DRS said he was assaulted in was the 1975 Oldsmobile. The Crown did not cross-examine the appellant on this issue nor call any evidence to challenge it.

[156] The records from the Registry showed that the 1975 Olds, was registered to the appellant between 1976 and 1980. The appellant produced copies of the financing documents establishing that he purchased the vehicle in December 1974. The trial judge overlooked or misunderstood the significance of this evidence. There was not a scintilla of evidence that he owned or even had access to another vehicle where, according to DRS, approximately 100 instances of oral sex and fondling occurred. No other possible vehicle was mentioned by DRS. This evidence was significant. It was clear that as of April 2, 1974, the family of DRS and of JAH forbade contact with the appellant. JAH was explicit about this. DRS testified that, as of the 1974 election, "things tapered off". The trial judge failed to understand the significance of this evidence.

[157] Just as important, the trial judge found DRS to be credible about the Goose Harbour Road incidents because of his evidence that what stuck out in his mind was at that particular location his life changed, as he was able to ejaculate. That was not the evidence of DRS. He testified it was at the appellant's property in Mulgrave that this change in his life occurred. The appellant's Mulgrave property included a Laundromat and a small house. DRS described in some detail being in that house sitting in a chair. His evidence on this point was:

> And one day when I was in there, and I was sitting in the chair at the stage of pretending to be asleep. And this wasn't the first time I was in there. But the significance about this time as he's performing oral sex on me, and then all of a sudden this strange sensation came across my body.
>
> And for lack of words, it scared the hell out of me. I didn't know what happened. And I went home and I was scared to death there was something wrong with me. I later learned that was my first ejaculation.

[158] The trial judge plainly misapprehended the evidence. It was material, and he relied on it in the course of making his finding as to why he found DRS to be credible in his complaint about the Goose Harbour Road allegations.

[159] With respect to counts 9 and 10, the trial judge had a doubt about some of the allegations. But with respect to one such incident, he did not, and hence convicted. He reasoned:

> [70] DRS described another incident at *, which is before *, but near the * family cottage. **He described about how he remembered that particular incident because he knew Mr. MacIntosh was trying to teach his mother how to water ski.** He seemed to have a recollection of the property, and described an incident when he was on the way to the cottage. He said Mr. MacIntosh, who was driving a motor vehicle, pulled it over and did, as he said, the routine by massaging him and having oral sex. He said he was 12 or 13 years of age and it didn't occur during the wintertime. I find that that would bring it within the time frame of the Indictment. [Emphasis added]

[160] The difficulty is that DRS testified there was an incident near the family cottage, when no one else was there, perhaps in the winter time or when the cottage was closed up. Yet, the trial judge reasoned that because of the way DRS described the incident, and the nature of his recollections, he found him to be credible. It seems inescapable that the trial judge confused the evidence DRS gave about an event in the summer as supportive that he reliably and credibly testified about an incident where his mother was not present and the cottage was closed for the season. It may very well be that the trial judge misspoke, and perhaps he meant to say the complainant remembered that particular location. Further, I accept the Crown's position that, even if the trial judge misapprehended the evidence about this particular incident, it did not go the core of his reasoning.

[161] What is significant, in my opinion, is that there are a number of occasions where the trial judge misapprehended the evidence, and at least in some instances the misapprehension was not only significant, it played an important role in his reasoning process. These instances alone call into question the legitimacy of the convictions entered even on the counts where there is no issue of misapprehension. This may not always be the case. For example, if there is other evidence that could be relied upon to confirm or corroborate the complainant's evidence on those counts where there was no misapprehension. In this case, there was no such evidence.

[162] To the contrary, there were numerous instances where the appellant called evidence to contradict or make improbable the reliability or credibility of the claims by DRS. I will mention three.

[163] DRS described staying overnight six to eight times at the Farquhar House, a boarding house owned jointly by the appellant and Marcie MacQuarrie. There were individual bedrooms along the hallway, with a bathroom at each end. The

appellant occupied one of the bedrooms. Next door to him was Marcie MacQuarrie. The other rooms were occupied by young men who played for the Port Hawkesbury Pirates hockey team.

[164] DRS said he stayed in the appellant's room where the appellant performed oral sex on him. DRS testified that on one occasion Mr. MacQuarrie walked in on them. DRS said he could remember the smirk on MacQuarrie's face and DRS's embarrassment at being caught. Marcie MacQuarrie testified as a Crown witness. He recalled seeing the appellant driving DRS and his older brother to and from hockey. To his knowledge no children ever spent the night at Farquhar House. He testified that he never walked into the appellant's room to discover DRS with the appellant. If that had occurred, he would recall.

[165] It was open to the trial judge to disbelieve Mr. MacQuarrie or to find he had forgotten or was mistaken. The judge did none of these. He accepted MacQuarrie's evidence and found he had never walked into the appellant's room and found DRS there with the appellant. Nonetheless, the trial judge convicted the appellant. He reasoned:

> [49] I conclude, and must say that I was, from the overall evidence, impressed with the evidence of DRS and the manner in which he testified regarding the events he was trying to recall. I have concluded because of his age at the time, DRS could have been mistaken as to Mr. MacQuarrie finding him in bed with the accused. I also conclude over the time of these instances from all of the evidence that it is possible for DRS and the accused to have stayed there on occasion without Mr. MacQuarrie knowing. I have no hesitation in concluding these were events that occurred at the Farquhar House between the dates alleged in the Indictment.

[166] It is difficult to imagine how the complainant could simply have been mistaken about this event, when he recalled the smirk on Mr. MacQuarrie's face and his embarrassment at being "caught". DRS certainly did not testify or in any way permit that he may have been mistaken.

[167] The other two incidents relate to additional claims of sexual activity that DRS did not mention to the police at the time of his first statement in 1995, despite being asked to provide any further details about such incidents. In an April 2000 statement he indicated that on the hunting trip the appellant had anal intercourse with him. He described it in this way:

> I sort of felt his penis. I don't think I've ever seen a big person's penis or anything like that before. But it felt big and stuff, rubbing up against my bum and stuff like that.
>
> And it kind of felt like kind of him pushing against me, you know, and I felt kind of a sensation, a sharp sensation I guess is the best way, like. I guess the best way I would describe it is kind of like a paper rip, kind of like a stinging, a little bit of a stinging sensation.

[168] In direct examination at trial DRS simply referred to having spent the night in bed with the appellant at the hunting cabin – the appellant performing oral sex on him, and then waking up with the appellant pressed against him. No movement or other sensation was described. He said after the appellant turned away, he knew his underwear was down. He reached down and felt a sticky substance that felt like jam.

[169] When confronted with his statement in cross-examination, DRS agreed that what he had described to the police in his statement was an act of anal intercourse. He said at trial he did not "necessarily believe that". The trial judge made no mention of this apparently significant inconsistency. He acquitted the appellant on this allegation, but merely said:

> [69] He described an incident, as well, about staying at a hunting cabin where they stayed overnight. He alleges Mr. MacIntosh performed oral sex on him there. However, I have difficulty with the allegation involving this camping trip. I find that DRS was vague and unsure on that particular point. He didn't know who was around. He wasn't sure of the time of the year. I'm satisfied that the defence has raised a reasonable doubt on that particular occasion. I am not satisfied that particular incident was proven beyond a reasonable doubt.

[170] The last and most significant instance is where DRS testified in direct examination to the same pattern of indecent assaults leading to oral sex in his home in *. He said that these occurred in the TV room next to the kitchen. He described he could hear his mother's voice in the kitchen as she was making supper. He recalled thinking it was pretty brazen. The kitchen was separated from the living room by just a half wall. No mention was made in his detailed January 1995 statement of any inappropriate contact at his home, despite being asked to recall any other incidents.

[171] In cross-examination DRS acknowledged having told the police in April of 2000, in two separate videotaped sessions, that the claimed acts of fondling and oral sex occurred five or six times in the TV room in the basement. Many details were given. The livingroom nor any other location in the house was mentioned. The indecent assaults in the basement are what DRS testified to under oath at the preliminary inquiry. It was suggested to him at that inquiry his allegations could not be true since there was no TV room in the basement in the relevant time period. In fact, it was established through other evidence that there was no TV room in the basement until approximately 1981. This led to this exchange in cross-examination at trial:

> **Q.** What I'm saying is the basement TV room didn't exist for the entire time you lived at home from 1965 or '66 to '78.
>
> **A.** And I would wonder how you could find that out.
>
> **Q.** I asked your father at the Preliminary Hearing, sir.
>
> **A.** Yes. Well, there you go. Then I was molested up in the living room.

[172] The trial judge found, on either version, it did not happen. He said the following:

> [54] DRS testified to instances alleged to have occurred in the t.v. room in the basement of his home, and in a room adjoining the kitchen area of his home, which led to the charges in Counts #3 and #4. He told of Mr. MacIntosh feeling his legs, groin, and private parts, and of his performing oral sex by him in these locations.
>
> [55] I have difficulty with these two counts because the crown must prove its case beyond a reasonable doubt, to which I described earlier. In this case, when I apply **R. v. W.D.**, ***supra***, the accused has raised concern and a reasonable doubt in these particular counts. Firstly, in dealing with the instances in the basement, DRS stated that they occurred in the t.v. room and that it was in the basement. The evidence does confirm, he said, that it happened there, and I watched as he testified in the video-statement shown by Mr. Casey. These instances involved, once again, oral sex in the manner and routine as described by DRS, and to which I have referred above. DRS told Cst. Deveaux that it occurred in the basement in the t.v. room about a half a dozen times. It turns out that there was no t.v. room in

> the basement of the home until 1981. **I find his testimony about this was not just a mistake made in trying to recall past events, but they just didn't happen.** [Emphasis added]
>
> . . .
>
> [57] I do find difficulty from the cross-examination again of Mr. Casey, and of his own evidence, that the other occasion involving the incident on the chesterfield behind the wall – a 5 ½ foot wall – with his mother working and cooking in the very next room, **could not have happened as alleged by DRS**. I believe he has had many instances of sexual activity he described, but that he was mistaken on this one. The defence raises a reasonable doubt in my mind and I, therefore, am not satisfied, even though I listened to the description of the lay out of the rooms, I have concern that, on the whole of the evidence, the crown has not proved its case beyond a reasonable doubt on the two counts, Counts #3 and #4, and in applying the principles of **R. v. W.D.**, ***supra***, I find the accused not guilty on Counts #3 and #4.

[173] Although the trial judge referred to the general principle that a trier of fact can accept some, all, or none of a witness's testimony, he made no mention of the equally important principle that if a witness is found to have deliberately lied or has made assertions that are demonstrably not true, it can impact on a trier's assessment of the entirety of that witness's testimony. The Crown does not dispute this, but says that the trial judge did not find that DRS had lied about the incidents in his home. She refers to the trial judge's comments in his sentencing decision of September 28, 2010 where he said:

> [15] ...There were some incidents told by D.R.S. and J.A.H. which I did not accept because I gave Mr. MacIntosh the benefit of reasonable doubt. But I have to say to you Mr. MacIntosh that despite my rejecting certain parts of their evidence, **it doesn't mean that I think they were lying, for example when you referred to the basement TV room incident.** It's just that I wasn't satisfied and the law requires me to be satisfied and, of course, because of that you are entitled to the benefit of reasonable doubt and, of course, you're presumed to be innocent until the Crown proves the allegations beyond a reasonable doubt.
> [Emphasis added]

[174] The Crown knew of no authority for the proposition that a trial judge's sentencing comments could alter the substance of conviction reasons. I would not rule out the possibility that in certain circumstances concern over some aspect of a

trial judge's reasons might be clarified in a subsequent sentencing decision. But here, there was no ambiguity. There was no reason to clarify anything. The trial judge found in his trial reasons that the basement incidents, vividly described in two separate videotaped sessions with the police, did not happen. He found it was not a mistake in trying to recall past events. The same claim was made under oath at the preliminary inquiry.

[175] When DRS changed the location from the basement to the livingroom outside the kitchen, the judge still found as a fact the incidents could not have happened. Granted, he said later in those reasons that he had a reasonable doubt. The judge in his sentencing comments also referred to having a reasonable doubt. However, reasonable doubt was a foregone conclusion where he had already found as a fact that the alleged criminal acts did not occur. I also accept the appellant's caution about according weight to the sentencing comments where the appellant's Notice of Appeal from conviction, dated July 30, 2010, specifically complained that the trial judge had failed to direct himself a lie by a witness may taint that witness's entire evidence.

[176] With respect, if a witness asserts that certain detailed criminal acts happened, and the trial judge finds they did not happen, and the witness was not mistaken or confused, few alternatives are left. It seems to me that the witness has deliberately lied, demonstrated a marked disregard for the truth, or is patently unreliable. On any of these interpretations, a trier of fact must be alive to the impact such a finding can have on the assessment whether the Crown has proven beyond a reasonable doubt other allegations by that witness, particularly where the allegations are similar and are without support from any other evidence. In my opinion, in this case, the trial judge did not do so. I do not mean to suggest that it would not be open to a trier of fact to convict, but failure to address these kind of issues indicates a failure to apply the proper principles in assessing the credibility of a key Crown witness.

[177] It is important to observe that this failure does not occur in isolation, but in a case where, as already indicated, the trial judge misapprehended the evidence in the course of making other findings that the complainants DRS and JAH were credible. As in *R. v. P.E.C.*, 2005 SCC 19, where allegations by complainants are intertwined, and some convictions cannot stand, I see no alternative where there is no other basis to support the other charges but to order a new trial on all of the

counts on which he was convicted (see also *R. v. J.G.C.*, [1997] O.J. No. 1836 (Ont.C.A.); *R. v. Hache* (1999), 175 N.S.R. (2d) 297, 136 C.C.C. (3d) 285 (C.A.)).

SUMMARY AND CONCLUSION

[178] The appellant faced allegations from over 35 years ago. He did not flee the jurisdiction. The motions judge erred in finding the appellant had no standing to contend that the lengthy delay while he resided outside Canada should be considered in assessing if his right to a trial within a reasonable time was infringed. This, coupled with other errors flawed the analysis. Applying the proper principles, and balancing the length of the delay with the explanation for it and the prejudice to the appellant and society's interest in a trial on the merits, the delay was unreasonable. Accordingly, the appellant's right to be tried within a reasonable period of time was infringed. The remedy for infringement is a stay. I would quash the convictions and enter a stay on all of the charges.

[179] Even if a stay were not entered, the trial judge erred in law in failing to address the issues of collusion and properly deal with significant problems of credibility, and his reasons revealed serious misapprehensions of evidence that were material to the convictions. Were it necessary to do so, I would have quashed the convictions and ordered a new trial.

Beveridge, J.A.

Concurred in:

Hamilton, J.A

Bryson, J.A.