REASONS FOR DECISION OF THE
ADMINISTRATIVE PENALTY TRIBUNAL

Form 10

Date of Hearing: **Monday, December 03, 2018**

Hearing Officer: **Paul B. Sommerville**

Re: **NP755781 Gordon Food Services, NP713804 Longo Brothers, NP617142 Garda World, NP727368 Pepsi Bottling Group, NP358949 Muldoon's Own Authentic Coffee**

City's Representative: **Erin Baker, Gadi Katz**

Owner's Representative: **Willero Legal Services, Sheila Calero**

INTRODUCTION

The City and the respective owners subject to the parking violation notices have consented to having these matters heard together. None of the submissions or evidence provided by the owners' agent concern the specific fact situations giving rise to the parking violation notices. Instead, the Owners seek a common finding that they qualify for relief from the penalties affirmed by the respective screening officers. In effect this proceeding is intended, with the consent of the Parties to deal with the policy environment respecting Delivery Service operations as it concerns parking regulation.

At the commencement of the Hearing Garda World withdrew from the proceeding.

All notices of violation comprising this hearing are for commercial delivery companies. Through their agent, these companies seek a finding from this Tribunal that they qualify for relief on the basis of Undue Hardship, as that term is defined in the City of Toronto Municipal Code, Chapter 610.

SCREENING OFFICER'S DECISION

In each of these cases the Screening Officer affirmed the Administrative Penalty stipulated in the respective parking regulations.

CITY REPRESENTATIVE'S EVIDENCE

Please see Schedule "A" to this Decision

RECIPIENT'S EVIDENCE

Please see Schedule "B" to this Decision. In addition, Mr Muldoon of Muldoon's Own Authentic Coffee provided oral evidence.

CITY REPRESENTATIVE'S SUBMISSIONS

The City's submissions went directly to the absence of evidence respecting the parking violation notices. It is the City's position that the Cancellation Guidelines issued by the City, and revised from time to time by it, provide the requisite level of discretion in prosecution to identify the occurrence of a "special or specified circumstance" such as would exempt the owners from the full burden of the respective stipulated penalties. Noting that the burden of proof falls upon the Owner to demonstrate Undue Hardship on the balance of probabilities, it referenced those portions of the Cancellation Guidelines addressing delivery services.

The Cancellation Guidelines make provision for the cancellation of or leniency in the prosecution of parking violation notices where the delivery service in question is able to provide evidence that a delivery actually occurred at the location, date and time reflected on the parking violation notice. The City asserts that the absence of such evidence in each of these cases means that the owners have failed to meet the burden of proof required by Chapter 610, and that therefore the penalties affirmed by the respective Screening Officers should be affirmed by this Tribunal.

RECIPIENTS' SUBMISSIONS

The owners assert that delivery service companies are experiencing ever-increasing obstacles in their efforts to serve their customers. This, they assert, leads to hardship for themselves and their clients. Increased costs associated with higher stipulated penalties must either be borne by the delivery companies or passed on to their customers - both undesirable outcomes. The delivery companies regard the advent of the Administrative Penalty System as a backward step in the reasonable accommodation of their activities within the overall regime of parking enforcement.

DECISION

Key to the Tribunal's consideration of these matters is the role of the Cancellation Guidelines - specifically Paragraph 17.1.

The Cancellation Guidelines contain a broad range of accommodations for a wide variety of activities. While the parking regulations themselves are highly prescriptive in prohibiting parking, stopping, or standing in certain locations at certain times of day, the Guidelines can operate to mitigate or exempt certain behaviours, which on their face are violations. For example, Taxi cabs may be exempted from certain offences, if the cab is engaged in the loading or unloading of passengers. Similarly, Nursing Agencies may be exempted from certain offences, if they can provide adequate proof that the vehicle in question was engaged in the provision of services for the Agency. Persons holding Disability Permits may be exempted from a wide range of activities that would otherwise be violations.

The City has established the Guidelines to balance effective parking regulation and traffic congestion concerns with desirable commercial and social activities that may come into conflict with them.

The Guidelines are just that - Guidelines, and their application in any given circumstance is a matter of discretion for Hearing Officers as they consider any given parking violation notice.

The Guidelines are not mandatory, but form an important component of the Hearing Officers' consideration of the criteria set out in Chapter 610. This means that as a Hearing Officer considers whether or not to Vary or Cancel an Administrative Penalty, the Hearing Officer will weigh the evidence presented with a view as to whether a special or specified circumstance existed at the time of the offence which would result in an unreasonable or disproportionate burden for the subject owner, were the Penalty to be affirmed.

As noted above Paragraph 17.1 of the Guidelines provides for conditional exemption for delivery service vehicles where the owner can provide written confirmation that a delivery did in fact occur. That exemption is restricted however. There are 14 exceptions to the possible exemption. These include a rush hour exception (6 a.m. to 10:00 a.m. and 3 p.m. to 7:00 p.m. Monday through Friday), a metered Pay and Display offence exception, and a catch-all exception covering any offence not listed in the Guideline.

Some of the submissions made by the owners' agent focused on the independence of the Tribunal, and its ability to apply the provisions of Chapter 610 of the Municipal Code without influence from the City and its prosecution apparatus.

The Tribunal has been established by the City as an independent body, free from influence from the City's enforcement or prosecutorial efforts. This is a key value

for the Tribunal, and it is embedded in the enabling legislation, the Tribunal's Principles and the Code of Conduct.

Revision of the Cancellation Guidelines is a matter solely within the purview of the City, and the Tribunal has no role in that process. There has been evolution in the Guidelines over the years. That would seem to evidence an evolving perception by the City of just what the right degree of accommodation for Delivery Services ought to be contained within the Guidelines. The revision of the Guidelines to reflect increased congestion, and densification is a matter for the City to consider, presumably in consultation with the Delivery Service providers and other effected persons. As noted, the Tribunal will consider the Guidelines in its consideration of the application of Undue Hardship, Extenuating Circumstances and Financial Hardship in any given case.

This means that the Cancellation Guidelines are, as noted, influential, but not definitive, and each Hearing Officer is charged with the responsibility to independently make their decision within the confines of Chapter 610. Whether leniency will be afforded any owner in any given circumstance depends on the extent to which the Hearing Officer is convinced on the balance of probabilities that an exemption should be extended.

Owners would be well advised to provide authoritative written evidence of any delivery made at the date, time and place covered by the parking violation notice. Any additional evidence respecting extenuating circumstances will be considered by Hearing Officers in coming to their decisions in light of the definition of Undue Hardship. Had they done so in these cases, the Tribunal would have had the requisite evidence to evaluate whether or not there were grounds for variance or cancellation of the Parking Violation Notices. But none did.

A note on the Financial Hardship component of Undue Hardship: First, Chapter 610 explicitly restricts the application of this component of Undue Hardship to owners, and their financial circumstances. Financial effects on customers are not relevant to the Tribunal's consideration of these cases.

Second, a general statement to the effect that the delivery services companies which are parties to this proceeding experience a choice between absorbing Administrative Penalties or passing them along to customers does not meet the standard of proof required by Chapter 610. Such an analysis could be made, but it would require a significantly more granular and focused presentation. In effect, the Tribunal received no evidence on this aspect of the cases.

To conclude, the Tribunal finds that the owners have failed to meet the burden required by Chapter 610.

Having said that, the Tribunal has been greatly assisted by the very able and constructive submissions of both the City and the owners' agent, Ms. Calero. The role of the Cancellation Guidelines in the Tribunal's work has not been previously dealt with in a written decision, and this process has advanced our jurisprudence, and we hope the understanding of delivery services companies. Accordingly, the Tribunal will vary for educational purposes the Administrative Penalties associated with the parking violation as follows:

As to PVN NP727368 varied to $20.00
As to PVN NP358949 varied to $15.00
As to PVN NP755781 varied to $50.00
As to PVN NP713804 varied to $50.00

Paul B. Sommerville,

Chair and Hearing Officer

Date Signed: Friday, February 01, 2019

Schedule A

HEARING DECEMBER 3RD, 2018 OF WILLERO LEGAL SERVICES' CLIENTS

CLIENTS / OFFENCES

1. Gordon Food Services: NP755781 plate number AW47544, offence dated August 4, 2018 of stop vehicle other than a bicycle in a bicycle lane on OPP 5 Shutter St, code 384 in the amount of $150.00.

2. Longo Brothers: NP713804 plate number AN53123, offence date Aug 11, 2018 of stand vehicle signed highway transit stop zone on 585 King St E in the amount of $150.00.

3. Garda World: NP779817 plate number AF87921, offence date Aug 22, 2018 of stop signed highway during prohibited times / days on E/S of James St; S/O Albert St in the amount of $60.00.

4. The Pepsi Bottling Group: NP727368 plate number 6921ZK, offence date July 31, 2018 of park signed highway during prohibited times / days on OPP 18 Wellington St W in the amount of $50.00.

5. Muldoon's Own Authentic Coffee: NP358949 plate number AW50829, offence date Aug 24, 2018 of park in public lane on 60 Bloor St W in the amount of $40.00.

ISSUES / ARGUMENTS

Parking has been a serious problem in the City of Toronto for quite some time. The distinction between individual parking offences and delivery parking offences is an essential one to be recognized. However, it has not been observed by the City of Toronto nor by the newly formed AMPS program.

1. Less parking more demand: Toronto in the past few years has increased its residents with Condo High Rises, particularly in the downtown core of Toronto. Taking away above ground parking lots and parking spaces to accommodate for these condominium developments. More condos mean more services and products required downtown.

2. Products/Services are essential: Businesses and residence require these services and products every day for the operation of their business or the operation of their livelihood. Without the

deliveries of the products or services, Toronto would cease to operate. The deliveries cannot be made any other way than by inbound vehicles.

3. No City Initiative: City has not initiated any solution to this growing problem. Their focus has been to solve the problem of high costs of operating a court for parking tickets. The AMPS program has been the solution but has failed to provide ANY solution to the companies for the deliveries constant battle. The small relief once provided to the companies through a courtesy delivery cancellation has been taken away with the AMPS program.

4. Hardship is to the Consumer: It is the impression of the City of Toronto that the parking fines are a cost of business. In the past, parking fines for many of the companies has been an expense account, however, as the fines have increased numerous times within the last 3-4 years the companies can no longer incur the expense. Since the increase of most of the fines to $150 the companies have offset the cost to the client which in turn the businesses have offset it to the consumer (Torontonians). Many of these companies use our services, Willero Legal, in attempt to keep their services and products at a reasonable cost when downtown; however, if Willero Legal cannot provide them with any savings then they will have no choice but to once again offset this to the consumer. Products and services for downtown Toronto will become unaffordable; a hardship for those Toronto citizens who are already paying high costs living in downtown Toronto.

5. Intervention: The government has established tribunals such as the Appeals Tribunal to demonstrate independence and to ensure that its decisions and functions are free from political influence. Hence, there is a need to have an intervenor before this issue becomes a crisis.

This growing problem has seemed to have been overlooked by many and although this Tribunal cannot provide a solution, it can provide a relief for these companies until a solution is presented.

SUPPORTING DOCUMENTATION

1. Administrative Law – Principles and Advocacy 3rd Edition by John Swaigen – Emond
2. Toronto Star News published October 22, 2015
3. Government Management Committee Consideration on June 13, 2016
4. R. v. Wust (2000), 143 C.C.C. (3d) 129
5. Valente v. The Queen [1985] 2 S.C.R. 673
6. Megens v. The Ontario Racing Commission O.J. No. 1459 (Div Ct)
7. Cancellation guidelines 2009, 2014, 2015
8. The City of Toronto Budget 2012
9. The City of Toronto Budget 2014
10. Toronto Star Official newspaper article dated August 15, 2014
11. The Canadian Press official newspaper article dated August 11, 2014
12. The Global News official newspaper article dated August 20, 2014
13. The Law Commission of Canada Report.
14. R. v Jordon 2016 SCC 27 (Introduction and Analysis)

Meet the fire hydrant that makes Toronto the most money from parking tickets

Meet Toronto's most lucrative fire hydrant

DBC

Meet the fire hydrant that makes Toronto the most money from parking tickets

The fire hydrant located at 393 University Avenue in Toronto is pictured on Thursday, August 7, 2014. The hydrant, located approximately 20 feet from the street, is the cause of more parking infractions than any other hydrant in the entire city. THE CANADIAN PRESS/Darren Calabrese

Posted: Monday, August 11, 2014 5:25 am | Updated: 7:02 am, Mon Aug 11, 2014.

Steve Rennie The Canadian Press | **0 comments**

OTTAWA - It's the street equivalent of a desert mirage, an elusive piece of prime parking real estate that, for some strange reason, everyone else just happened to miss.

Eventually, however, a telltale slip of paper tucked beneath a windshield wiper offers an explanation: you parked in front of a fire hydrant.

Maybe it was an honest mistake. Or maybe you thought you could slip in and out before your illegal parking job caught the attention of a passing bylaw officer. Either way, now you've been hit with a hefty fine.

And as it turns out, some hydrants seem to be more tempting — and more costly — than others.

In Toronto, one hydrant stands above the rest. People are fined so often for parking in front of it that on Google's Street View, a white Toyota can be seen with a yellow slip under its wiper blade as a parking-enforcement officer walks away.

Since 2008, cars that parked too close to the hydrant at 393 University Ave. have been ticketed 2,962 times. Those fines add up to $289,620 — more than any other hydrant in the city.

So, why is this one particular hydrant such a cash cow for the city? There are a few possible explanations. It's right by the courthouse and near a major downtown intersection. The hydrant itself is in the middle of a busy sidewalk set back some distance from the street, and it would be easy enough for drivers to miss. No markings on the street make it obvious that the spot is off-limits.

Anthony Fabrizi, the city's manager of parking ticket operations, says the hydrant needs to be a certain distance from the street so pumper trucks can park there.

"There's lots of logic to the madness when you see behind the scenes," Fabrizi said.

In Toronto, the fine for parking within three metres of a fire hydrant is $100. It used to be $30 until the city hiked the fine in early 2008.

A Canadian Press analysis of Toronto's parking-ticket data found the city has collected more than $24 million since 2008 by fining people who parked too close to hydrants.

Fabrizi says all parking fines, including those from parking next to hydrants, add up to $80 million a year.

That may seem like a big number, but Fabrizi says it only represents about one per cent of the money needed to run all of the city's programs.

"The amount of revenue that parking generates is so minuscule compared to the overall revenue that it really doesn't serve a great purpose as a revenue generator."

About half the revenue from parking tickets pays for parking enforcement and operations, he added.

"Parking is a bit of a funny business in terms of budgeting," Fabrizi said.

"We have to budget in terms of firm numbers the costs associated with enforcing parking. So we know that there's about a $50-million cost ... so that is a $50-million budget that has to be paid even if no parking tickets were issued.

"Historically, we see that parking tickets and fines, once it goes through the courts, generate about $80 million a year. So the program pays for itself and then there's a little bit of a margin, about $30 million extra."

Most parking tickets in Toronto are handed out to people who let their parking meters expire or who park in no-parking areas. Tickets for parking too close to fire hydrants only accounted for 1.45 per cent of all parking infractions last year.

While the hydrant at 393 University Ave. is by far the city's golden goose, many others are also quite lucrative.

At 33 Elmhurst Ave., a hydrant lurks in the shadow of a large condo building in North York. Vehicles that parked there have been ticketed 2,253 times since 2008, with fines totalling $207,030.

A nearby federal government building may explain all the parking tickets. The Joseph Shepard building houses branches of Passport Canada, a Canadian Forces recruiting centre and several other federal departments.

If you're visiting Toronto's Mount Pleasant Cemetery, don't park in front of the fire hydrant at 113 Merton St. This unassuming hydrant, tucked between two trees, is the city's third most-ticketed spot, with 2,165 fines handed out amounting to $212,300.

The city also tracks the province or state on the licence plates of people who get fined for parking too close to hydrants. Not surprisingly, almost every ticketed vehicle had Ontario plates. Drivers with Quebec plates were a distant second, followed by visitors from New York and Alberta.

But pity the two poor drivers with Hawaiian plates, who came a long way only to get busted for parking in front of hydrants.

CONFIDENTIAL – made public by City Council on June 8, 2010

APPENDIX A TO CONFIDENTIAL ATTACHMENT 1
Current Parking Ticket Cancellation Guidelines

CITY OF TORONTO Revised MARCH 12, 2009

PARKING TAG OPERATIONS
FIRST APPEARANCE FACILITY GUIDELINES

Introduction

This document contains information to be used as a guideline by Customer Service staff when responding to enquiries from members of the public. It is important that staff refer to these guidelines to ensure consistency in service delivery.

Legislative changes made in 1993 and 1994, contained in Bills 25, 47, and 175, amended the Provincial Offences Act to allow the Municipality to determine which cases should be filed with the court. The Municipality has up to 75 days to make this decision. It is our responsibility to review all cases presented prior to obtaining a conviction or relying on a court to determine the appropriate outcome of a ticket dispute.

When using these guidelines, please consider the circumstances and/or explanation provided by the customer and any documentation presented. A review of the plate history should be conducted on the system.

It is important to provide accurate and relevant information, explain all parking regulations and to educate the public when they wish to dispute a parking infraction notice. This includes explaining signage, new or changes to by-laws, enforcement practices etc.

Working closely with the Parking Enforcement Unit, Quality Control Section, staff should bring to their supervisor's attention, tickets and/or circumstances that identify officer errors. Supervisors are then better able to discuss these issues with the Quality Control Section to resolve problems.

Where the PTMS system reflects a pattern of parking infractions of a similar or habitual nature, and where a reasonable explanation cannot be presented, it is necessary to refer cases to the court. Where sufficient explanation and/or documentation are presented and it is reasonable to assume the circumstances outlined are likely to have occurred, staff is expected to give the recipient the benefit of any doubt. Where no prior tag history is evident, staff is encouraged to withdraw the ticket.

Staff are expected to use these guidelines in conjunction with sound judgement and problem solving skills when reviewing parking tickets with the public.

Do not involve yourself in a situation where a conflict of interest would compromise your position of authority (please refer to the City of Toronto web-site for Conflict of Interest Policy). Staff is reminded that in order to maintain the highest possible integrity in the system, any possible conflict of interest situations should be brought to their Supervisor’s attention immediately.

TABLE OF CONTENTS

1.0 DISABLED PARKING PERMITS - VPD

WITHDRAW ***(Withdraw as 'VPD' not 'DOC')***

Offence		
	5	Park signed highway during prohibited times/days (excluding rush hours)
	1	Expired Meter
	210	Park fail to display receipt in windshield
	2	Three Hour Parking
	29	Park (prohibited area/location) without a permit
	6	Park signed highway in excess of permitted time
	8	No Standing **EDU/MD can be given if plate check shows**
	9	No Stopping **good plate history (check with Supervisor if unsure)**

APPROVAL FROM AN FAF SUPERVISOR OR THE MANAGER MUST BE OBTAINED WHEN REQUESTING CANCELLATION OF TICKETS ISSUED FOR OFFENCE # 10 PARK VEHICLE IN DESIGNATED DISABLED PARKING SPACE.

1. Check to make sure name and address on permit matches registration on plate. Check with supervisor if there are a large number of withdrawals, or concerns about the validity of the permit.
2. Check that the permit has a valid date.
3. Original permit must be displayed (check for No Visible Permit-NVP code on tag).
4. Ensure that officer has not marked the NO PERMIT DISPLAYED box on the ticket.

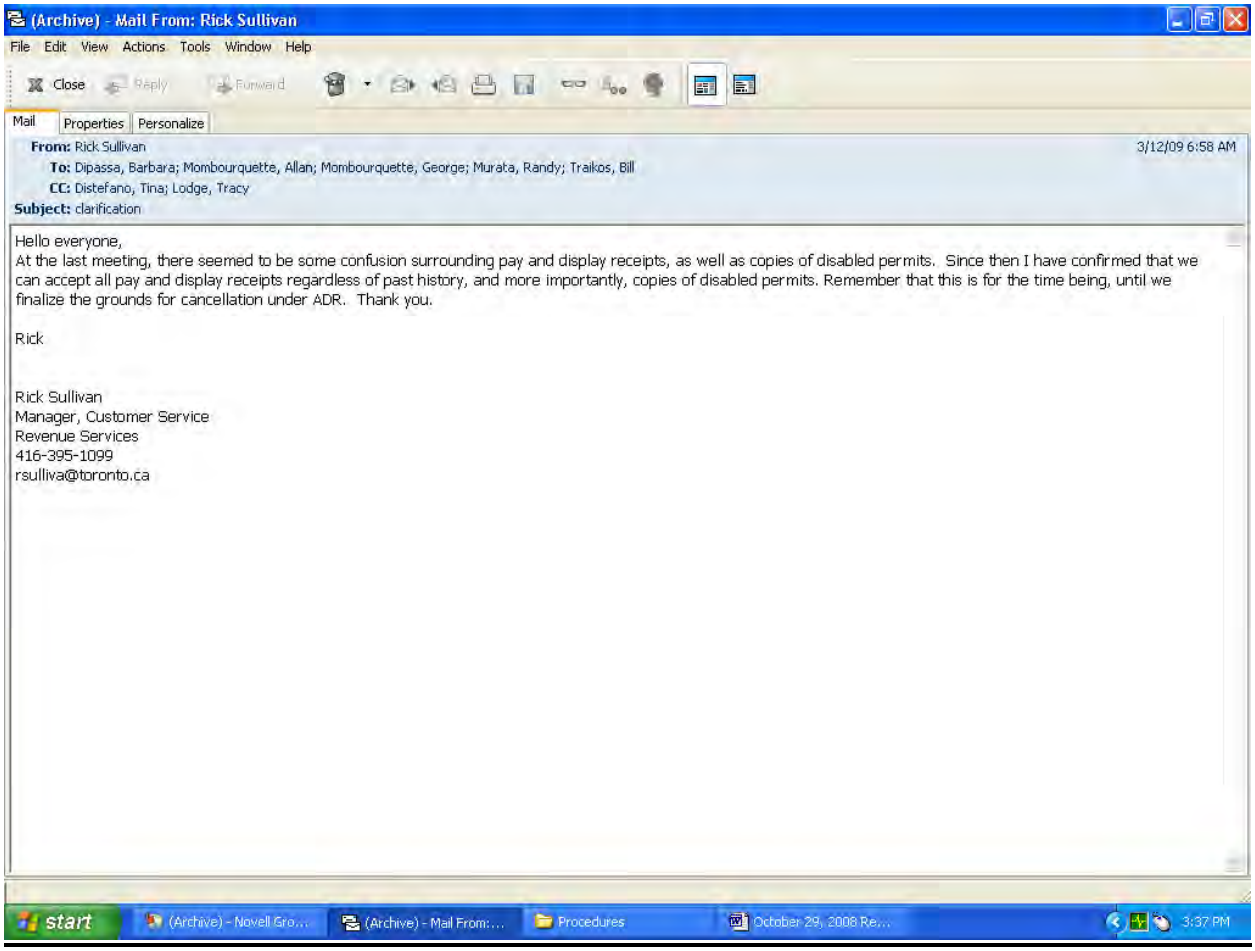
Mark permit number, expiry date, and name of permit holder on STOP PROCESS screen.

PLEASE REFER TO THE TORONTO POLICE – PARKING ENFORCEMENT INFORMATION SHEET ENTITLED "PARKING EXEMPTIONS AND PERMIT HOLDER RESPONSIBILITIES" FOR A DETAILED LIST OF NON - EXEMPTIONS.

Consideration may be given on a ticket issued for one of the above noted infractions if the recipient has not had a previous infraction or cancellation of this type and minimal tag activity exists on the vehicle plate. The counter clerk should use this opportunity to educate the customer on the proper use of the permit and distribute a copy of the permit guidelines.

Persons with disability permits are permitted to fax in copies of their tags provided PTO has a copy of the disability permit on file and the owner of the permit resides at the same address as the registered owner of the vehicle plate.

Forward a copy of all disability permits for central filing by last name; note all licence plates associated with disability permits.


(Archive) - Mail From: Rick Sullivan
File Edit View Actions Tools Window Help
Close Reply Forward
Mail Properties Personalize
From: Rick Sullivan
3/12/09 6:58 AM
To: Dipassa, Barbara; Mombourquette, Allan; Mombourquette, George; Murata, Randy; Traikos, Bill
CC: Distefano, Tina; Lodge, Tracy
Subject: clarification
Hello everyone,
At the last meeting, there seemed to be some confusion surrounding pay and display receipts, as well as copies of disabled permits. Since then I have confirmed that we can accept all pay and display receipts regardless of past history, and more importantly, copies of disabled permits. Remember that this is for the time being, until we finalize the grounds for cancellation under ADR. Thank you.
Rick
Rick Sullivan
Manager, Customer Service
Revenue Services
416-395-1099
rsulliva@toronto.ca
start
(Archive) - Novell Gro...
(Archive) - Mail From:...
Procedures
October 29, 2008 Re...
3:37 PM

2.0 ON-STREET PERMIT PARKING - VPP

1. Check to make sure the plate number on the Parking Infraction Notice (PIN) matches plate number on permit.
2. Check the City of Toronto permit system to ensure permit is valid.
3. Ensure area indicated on permit is for location indicated on ticket. I.e. 1B
4. Ensure the officer has not indicated the NO PERMIT DISPLAYED box on the ticket.

Permits are not transferable! However, there may be circumstances where this is acceptable, for example, permit car in for repairs and owner has a rental car occupying the paid space. Request a copy of rental agreement and the garage repair bill for documentation.

NOTE: Area 5E is transferable

WITHDRAW

Offence #

1 - Park at expired meter (check if location is licenced in permit book),
2 - Park longer than 3 hours,
6 - Park in excess of permitted time, or
29 - Park without a permit; and
9 - Stop vehicle during prohibited times **(Residents of street with VDP only)**
(Mutual, Maitland, Wood and Alexander streets only).

Mark Permit Number, area, expiry date, and plate number on the STOP PROCESS screen.

Streets must allow for offences 1 (Park at expired meter), 2 (Park longer than 3 hours) and 6 (Park in excess of permitted time) to be withdrawn.

Plate owners are allowed to fax in copies of their tags if they have a street permit or a disabled permit.

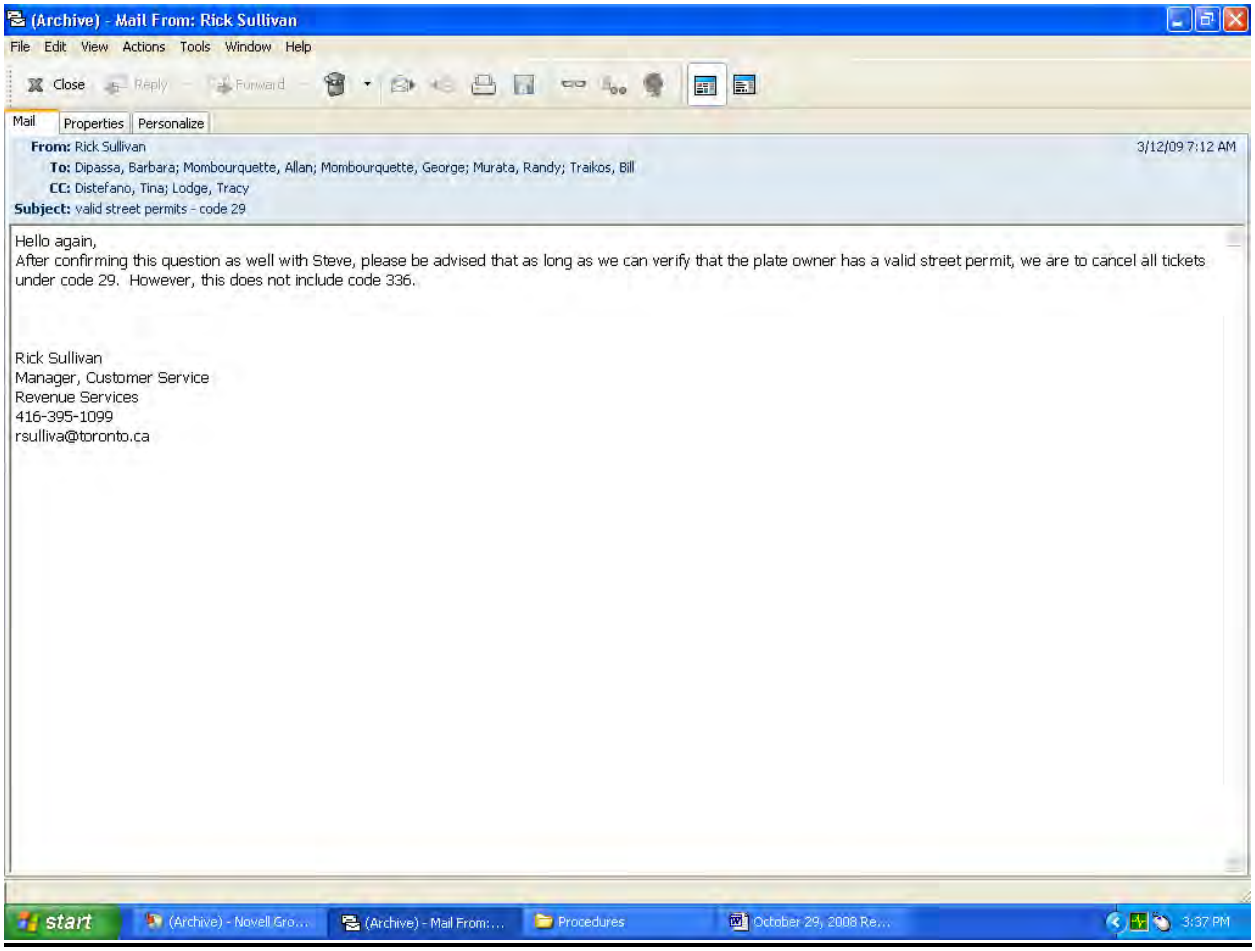
If the officer has written NVP (No Visible Permit) on the PIN, do not withdraw.

GPR cancellation

- late mailings (up to 2 weeks) – check plate history
- new resident (up to 5 business days)
- removal of 'old permit' too early (1 week)
- 1st/16th switchover times (9pm – 9am)
- letter – wrong permit issued

5 RSDs – any reasonable explanation

All cancellations MUST have a FULL explanation regarding reason ticket was withdrawn.


(Archive) - Mail From: Rick Sullivan
File Edit View Actions Tools Window Help
Close Reply Forward
Mail Properties Personalize
From: Rick Sullivan
3/12/09 7:12 AM
To: Dipassa, Barbara; Mombourquette, Allan; Mombourquette, George; Murata, Randy; Traikos, Bill
CC: Distefano, Tina; Lodge, Tracy
Subject: valid street permits - code 29
Hello again,
After confirming this question as well with Steve, please be advised that as long as we can verify that the plate owner has a valid street permit, we are to cancel all tickets under code 29. However, this does not include code 336.
Rick Sullivan
Manager, Customer Service
Revenue Services
416-395-1099
rsulliva@toronto.ca
start
(Archive) - Novell Gro...
(Archive) - Mail From:...
Procedures
October 29, 2008 Re...
3:37 PM

3.0 TEMPORARY PARKING PERMITS- VPT

These permits are transferable.
There is no plate number noted on the temporary permit.
Permit must be visibly displayed through the windshield to be valid. Ensure that the officer has not indicated the "no permit displayed box" on the ticket.
Check date of purchase and expiry date.
Original permit must be presented at counter as access to temporary permits on database unavailable.

Telephone numbers for permit parking information (former cities):

Toronto	392-7873
York	394-2646
Etobicoke	394-8410
East York	397-4480
Scarborough	396-7111

GPR – To get Temporary Permit – 2 business days

DOC – if vehicle in for repair/rental being used

5 RSDs – any reasonable explanation

ALL withdrawals MUST have a COMPLETE explanation in comment section

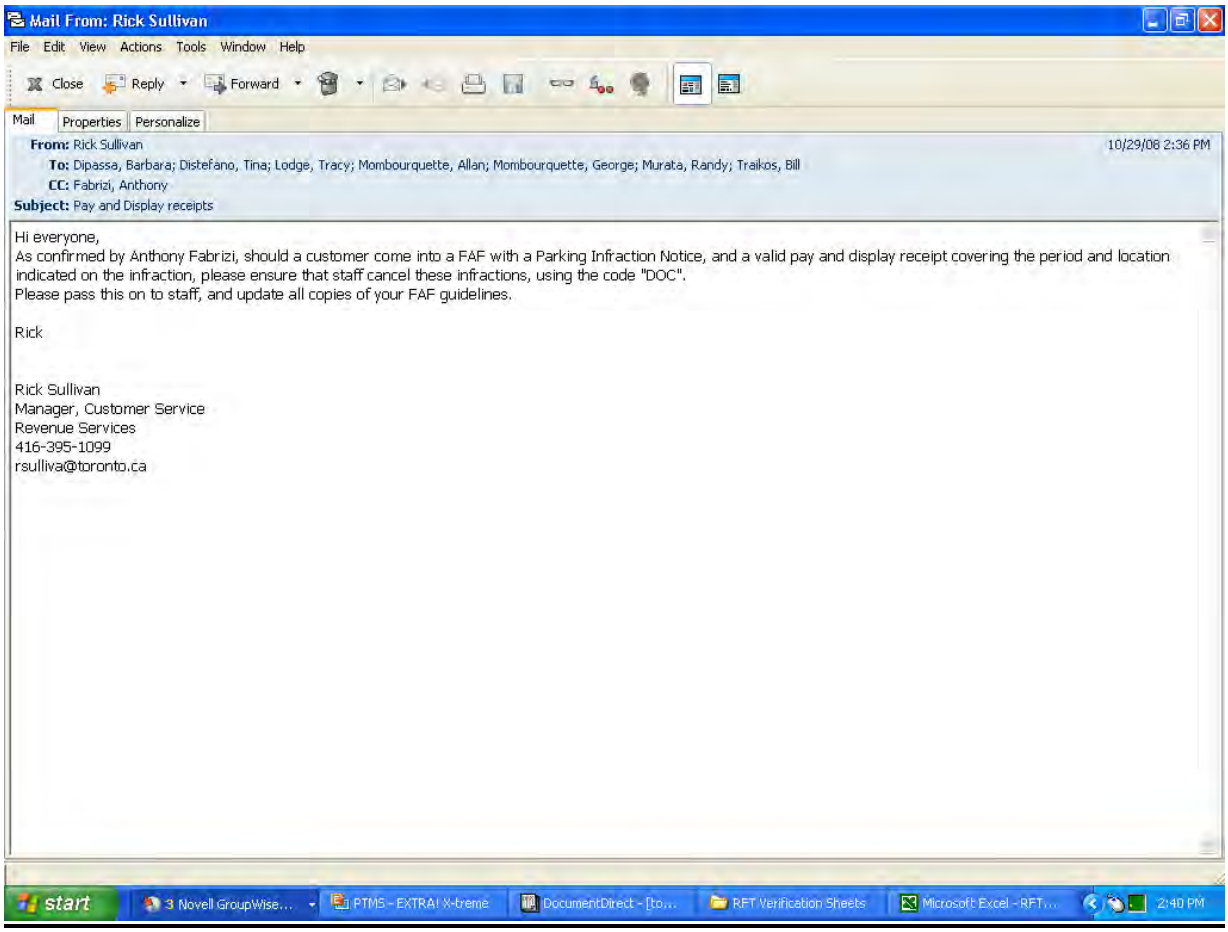
4.0 CHANGE-OVER DATES - GPR

(Applies to regular and temporary permits)

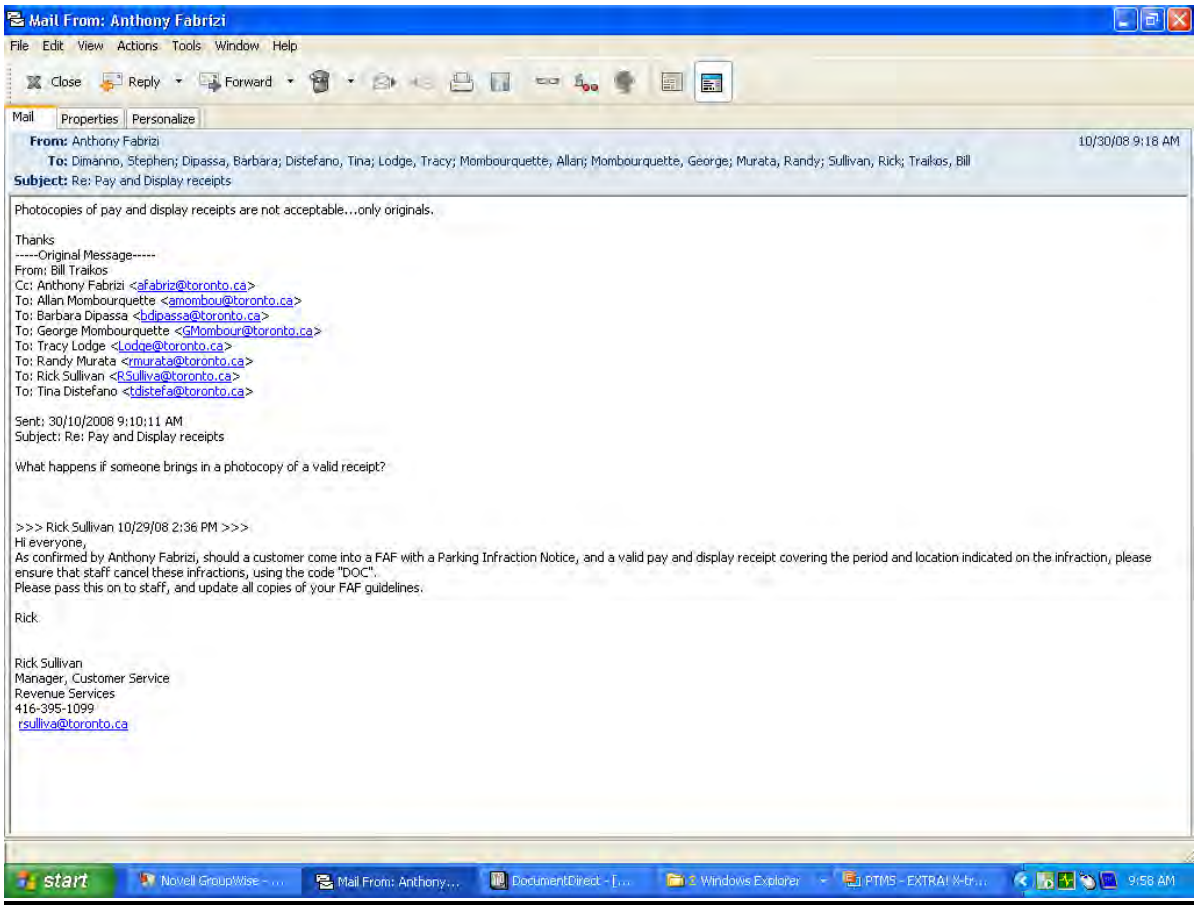
Normal grace period is from 9:00pm the previous evening and extends to 9:00am of next morning. Give consideration for either side of the street during this 12-hour period. However, use judgement in this regard.

For example, if tag issued is prior to noon and prior infraction history is minimal, then consideration to withdraw should be made after an explanation of the guidelines is given.

5.0 Pay & Display Receipt Policy



5.0 Pay & Display Receipt Policy (Continued)



6.0 OBVIOUS ERROR – OER, INC, ILT

WITHDRAW:

- Officer has failed to complete tag (no infraction, missing date, missing signature, service-affected box not marked, etc.)
- "Ontario Plate Renewal Month" must be completed unless officer states it was not visible (or unless not an Ontario vehicle).
- Make and model is **optional.**
- Infraction particulars are not clearly readable.

NOTE: Officer's name is not required at the top, however, the officer would be required to appear in court if the tag is disputed.

NOTE: Where the handwriting of the issuing officer's signature is such that the name cannot be interpreted, lack of clarity is not sufficient grounds to cancel if all other particulars of the infraction are clearly readable.

VAL – CANNOT be BLANK – MUST have a date OR 'N/A'
(Trailers DO NOT have VAL stickers)

VMM – check other tags/plate – 'ONE TIME ONLY'

- has more than 2 VMMs – Do Not Withdraw
- blank is OK

7.0 VEHICLES ON DELIVERY - DEL

Drivers on delivery are required to park legally at all times. It is recommended that an "On Delivery" sign be clearly displayed on the dashboard of the vehicle when parking in prohibited areas (officers are educated to use discretion when a sign is displayed). All deliveries should be made in the least amount of time possible.

WITHDRAW (Cancellation MUST have Company Name indicated in explanation)

For a tag to be eligible for withdrawal, the following must be produced with the tag:

1. Letter, preferably typed, on letterhead from the company's head office noting the PIN number and the fact the vehicle was engaged in making a delivery at the time infraction issued. A senior official (manager) of the firm must sign the correspondence. Photocopies of signatures are not acceptable; AND

2. Original waybill matching the location, date and time on the PIN; AND

3. The infraction is for prohibited parking area (excluding rush hour) and public laneway (not obstructed).

4. The signature on the letter matches the authorized signature we have on file.

DO NOT WITHDRAW

- Infractions for vehicles that are waiting for pick up outside the address of the company. Companies/drivers are responsible for their own parking requirements at/or within the vicinity of their place of employment.

- Any tags that impede vehicular/pedestrian or emergency vehicles. (This includes Stop/Stand, Fire Routes, etc.)

- Tags issued for parking longer than permitted time.

Effective July 1st, 2001, parking considerations will no longer be granted to vehicles on delivery that are parked on main arterial roads in the downtown core between the hours of 7:00am to 7:00pm.

The prohibited roads involved are:

North-South:

- Dufferin (including the jog via Peel & Gladstone)
- Bay (Bloor to Queens Quay)
- Ossington from Bloor to Queen
- Yonge (Eglinton to Queens Quay)
- Shaw from Queen to Douro
- Jarvis (Bloor to Front)
- Bathurst (Bloor to Front)
- Sherbourne (Bloor to Front)
- University (Bloor to Front)
- Parliament (Bloor to Front)

East-West:

- Harbord from Ossington to Queen's Park Circle
- Wellesley from Queen's Park Circle to Parliament
- Bloor (from Dufferin to Parliament)
- College (Bathurst to Yonge)
- Dundas (Bathurst to Parliament)
- Richmond and Adelaide from Spadina to Yonge Street
- Queen (Bathurst to Parliament)
- King (Bathurst to Parliament)

8.0 FAST FOOD DELIVERIES – DEL (Same as 'Delivery' above)

- Delivery Slip (stating address, time of delivery and date). Address, time and date must match ticket information.

- Letter on company (or franchise operator) letterhead signed by a manager/supervisor of that company that the vehicle in question was engaged in a delivery.

- If registered owner of the vehicle plate is also the owner of company, a signed letter must be provided from business receiving delivery confirming date and time of delivery

  If owner making delivery, same as above.

NOTE: There is no legal exemption for delivery vehicles under any by-law.

9.0 OFFICIAL VEHICLES- OVH, GVB

(Includes Ambulances, Police/Fire/City or Municipal vehicles)

Parking tags may be withdrawn by the First Appearance Facilities provided the Head or Deputy of the Department, Agency, Board or Commission, Managers or Supervisors certifies, in writing, that the vehicle was engaged in business as per the Uniform Traffic By-law, Section 50, subsection A and B, and Municipal Code #400-4.

- Copies of the tags withdrawn for all Police vehicles are to be sent to Superintendent Gary Ellis, Parking Enforcement Unit 1500 Don Mills Rd e.g. RCMP, OPP, Toronto Police, GO Police, CN Police, etc. – Cathy Garbutt

- **Councillors' vehicles** - requests for withdrawal for tags issued to Councillors on City business must be processed through the Council Support Office in City Clerk's. The nature of the City business must be stated.

- City of Toronto employees must park legally unless compliance to parking regulations would be impracticable. The vehicle must actually be engaged in works undertaken for or on behalf of the City. Tickets will NOT be withdrawn at employee's work locations, near Civic Centres, or when attending meetings.

NB. – MUST have Pay & Display receipts

Codes #8 – No Standing
#9 – No Stopping **CAN be withdrawn** (**NOT** near work)

10.0 NURSING AGENCIES/COMPASSIONATE SERVICE AGENCIES - DOC

There is no legal exemption for this, however:

Consider the withdrawal of parking tags for offence numbers

1 - Park at expired meter,
2 - Park longer than 3 hours,
5 - Park during prohibited times (excluding rush hour),
6 - Park in excess of permitted time; and
29 - Park no permit (if time/situation of infraction is reasonable) time, date, infraction and location of the duties should be specified.
207 – WITH receipt/recently expired
210 – WITH valid receipt

- The parking tag is to be accompanied by a letter from an official on letterhead explaining the vehicle was being operated by a staff member while performing duties for the organization.

- The letter must have an original signature and must include the title and telephone number of the authorized writer (Nurse Manager, etc.).

- Check owner's home and company's address against address of infraction.

- NOT for hospital visits.

11.0 UTILITY VEHICLES

(Includes Canada Post, Bell Canada, Cable Cos., Public Utilities, Communication Co.'s, Entourage)

Consider the **withdrawal** of parking tags for offence numbers

1 - Park at expired meter
2 - Park longer than 3 hours,
5 - Park during prohibited times (excluding rush hour), and
6 - Park in excess of permitted time (see Appendix "A" for infraction text).
207 – Park fail to deposit fee in machine – recently expired
210 – Park fail to display receipt in windshield – valid receipt

- The parking tag is to be accompanied by a typed letter on letterhead signed by an official of the company. The letter should confirm that at the time the ticket was issued, the vehicle was being operated by a staff member while performing duties for the company, legal parking was not available, and the situation was of an emergency nature. These vehicles are not exempt under the by-law.

- Presentation of a work order must accompany the request for withdrawal.

If a valid emergency existed at the time of the infraction, e.g. Consumer's Gas leak, supported by a copy of the work order, the ticket can be withdrawn for no stopping or not standing offences.

Official vehicles/Canada Post/Bell Canada, etc. are required to park legally whenever possible. Tags are withdrawn only when this is not possible and the above guidelines are met.

12.0 SECURITY COMPANIES – ALARM RESPONSE – ARMOURED CARS - DOC

Certain security companies respond to alarms at their client's sites. Due to the time requirements for response it is not always possible to park legally. While there is no legal exemption for this, consider the withdrawal of parking tags for the following offences:

1 - Park at expired meter,
2 - Park longer than 3 hours,
5 - Park during prohibited times (excluding rush hour)
6 - Park in excess of permitted times, and
29 - Park no permit.
207 - Park fail to deposit fee in machine
210 - Park fail to display receipt in windshield

The parking tag is to be accompanied by a letter from an official in the Security Company on official letterhead explaining that the vehicle was being operated by a security officer while in response to an alarm. The date, time and location of the alarm should be stated and be supported by the alarm response sheet.

13.0 TAXICABS/LIMOS FOR HIRE - TXI

- Metro Toronto By-law 32-92 and City of Toronto Municipal Code Chapter 400, paragraph 43(a)(i) prohibits parking a taxicab for hire in a location, which is not an authorized taxi stand.

- If a cab is parked with the lights off, driver is not with car, and is not available for hire, and then it is subject to the same regulations as all other motor vehicles.

- A taxicab may pick up and discharge passengers in "No Stopping" and "No Standing" zones.

WITHDRAW

- Prohibited parking offences (excluding rush hour) if tag accompanied by a letter, on letterhead from the Dispatcher, indicating pick up location (time & date) and drop off location (time & date) and a taxi licence is in the possession of the owner or driver. Also, check ownership to verify that plate is issued to a "taxi". If required information does not appear on the ownership, phone 392-4125 (Metro Licensing) in order to verify cab registration

- If the driver of the taxi is making a delivery, a letter from the taxi company and a waybill must accompany the request for withdrawal.

DO NOT WITHDRAW

- Stopping/Standing offences. Although a taxi-cab may pick up and discharge passengers in these zones, an officer would be aware of these regulations but did not observe the driver picking up or discharging.

- Any offence that impedes pedestrian or vehicular traffic.

- Any offence that impedes emergency vehicles.

NOTE: Taxis frequently park wherever it is convenient. On "Stop/Stand" offences, the good judgement of all factors should be considered.

14.0 TOUR BUSES - DOC

Tour buses may pick up and discharge passengers. However, they may not park in contravention of the by-laws.

Bus drivers should be aware of facilities available for their use.

Consider the withdrawal of parking tags for offence numbers

1 - Park at expired meter
2 - Park longer than 3 hours,
5 - Parking during prohibited times (excluding rush hour), and
6 - Park in excess of permitted time.

- The parking tag is to be accompanied by a typed letter from a management official on letterhead explaining that the vehicle was being operated by a staff member while performing duties for the company and that no other parking was available.

- Attempt to determine if legal parking is available in the vicinity.

15.0 REASONABLE DOUBT - COURTESY CONSIDERATION – EDU, RSD

When an explanation is received and the Municipality wishes to give consideration for medical reasons, age, unusual circumstances, ignorance of by-law etc. the plate owners record should be examined and the decision based on available information.

This should be used particularly when dealing with individuals residing more than 100 kilometres from Toronto.

Our responsibility is to provide information to the public and to ensure that matters going to trial are of a significant nature.

Comment field in 'Stop Process' MUST be completed properly – put in a completely explanation for cancellation of ticket. This allows more informed decisions on future tags submitted for investigation.

If there has already been a consideration given and staff feel the consideration is warranted/justified, the staff must consult with and obtain authorization from a supervisor prior to granting the courtesy.

See Supervisor if there are outstanding fines at MTO.

16.0 RELIGIOUS OBSERVANCE GRACE PERIODS - REX

Parking consideration is given to religious groups by Toronto Police to afford members of congregations to attend worship. This consideration is granted for worship services only.

Exemptions are granted for parking in prohibited areas or at meters

1 - Park at expired meter
5 - Park signed highway during prohibited (times/days) (excluding rush hour)
6 - Park signed highway in excess of permitted time

The religious group must provide a letter from the Minister/Pastor/Holy Man or a copy of the bulletin.

Let customer know their Minister/Pastor/Holy Man can obtain consideration to park during regular worship services by calling 416 808 6500 and obtaining a 'Consideration to Park'.

17.0 PARKING CONSIDERATIONS/GRACE PERIODS - GPR

Toronto Police give consideration under a variety of circumstances upon request of individuals and groups. Consideration numbers allow the withdrawal of infractions involving prohibited parking areas, expired meters, three-hour limit or parking in excess of permitted time. These requests can be handled by phone, fax or mail.

Verify consideration number/area/dates permitted to park.

Plates to be registered to company.

Sub-contractors/personal vehicles must obtain their own consideration number.

18.0 DIPLOMATIC IMMUNITY

DO NOT WITHDRAW - Refer the person to the Office of Protocol as outlined below. (Anne Marie Balzano)

WITHDRAW

- Tags sent directly to us by the Chief of Protocol office that are stamped as recommended for cancellation.

- Refer anyone submitting tags for cancellation to the Ministry of Economic Development/Trade and Tourism, 900 Bay Street, 10th Floor, Hearst Block, Toronto ON, M7A 2E1. This office will review tags and submit any to us that they recommend for cancellation.

19.0 PROCESSING ERRORS - PER

WITHDRAW

- Notices of Impending Conviction (NICs) if keying errors of plate are found.
- NICs if validation month does not match.
- NICs if ownership does not match make of car in any way, i.e. Chevrolet vs. Honda.
- NICs if issued more than 35 days from infraction date.

NOTE: ***Do not withdraw for those presenting the yellow tag without an investigation.***

20.0 CONTINUING INFRACTION - TPI

WITHDRAW

If more than one tag was issued within 3 hours and the following details exist.

- Same offence (do not withdraw if vehicle towed).
- Same location.
- Same plate number.

The first tag must be paid to allow for this type of cancellation.

21.0 OUT-OF-PROVINCE LICENCE PLATES/TRIP PERMITS

Until legislation is amended, we are unable to obtain a conviction against vehicle owner registered outside of Ontario.

Requests for Trial (RFTs) - ownership information cannot be obtained in time to process Request for Trial.

This condition may change in the future for certain provinces/states.

Accept payments if offered. The IVR system will accept payment on out-of-province tickets.

22.0 PHONE, FAX (392-4436), MAIL

PTO sites will be able to deal with several types of situations via phone, phone with mail follow-up or phone with investigative follow-up.

1. Obvious error (when the image on our system is available for viewing).

2. On-street parking permits (under certain circumstances).

3. Disabled person's parking permit. (under certain circumstances).

4. Stolen vehicle.

Obvious Error (Phone) – OER, INC, DTE, TME, VMM, VUM

Display Certificate of Parking Infraction (CPI) on screen.

If the CPI image is not available, phone customer back when it comes on the system or they may wish to attend a First Appearance Facility (FAF) with the ticket.

If an error is visible on the CPI, print the image, circle the error, and place in stop process tray.

Indicate on the print the cancellation code that describes the error.

If an error is not visible advise caller of their options.

On-Street Parking Permit or Disabled Permit – VPP, VPD, EDU

Check the City of Toronto, Permit system to determine if a permit has been issued. Ensure that the expiry date of the permit is valid and the vehicle was parked in the proper permit area.

Check the CPI to determine if the no permit displayed box was checked by the issuing officer. If the no permit displayed box was indicated, check the plate history and if clear, submit the request for a one-time cancellation.

If a courtesy has already been granted on the system, advise the customer they must attend one of our First Appearance Offices to dispute the ticket.

Defective Meter - DFM

Educate client that the Toronto Municipal Code states a meter must be set into operation in order to legally park at that location.

First time - RSD/EDU – CHECK PLATE - MAKE AWARE (MD IF RSD/EDU USED)

Second time - DFM - COMPLETE SUPERVISORY REVIEW & DO METER CHECK TO VERIFY

Third time - DFM - WITH PROOF (WRONG DATE/BLANK RECEIPT) – DO METER CHECK

Submit screen print for cancellation.

Issue IC (cancellation) letter if requested by the customer.

Stolen Vehicles/Plates - SVH

Ask for phone number of person (have customer complete ‘Supervisory Review Form’.

Ask in which municipality was the theft reported.

Stolen when? (If available)

Recovered when? (If available)

Print CPIs of all tags issued during that period.

Print screen prints of all tags issued during period of theft.

If stolen report is verified by police - cancel tags - send IC letter.
If stolen report is not verified send IR letter.

If withdrawing, enter occurrence number, date reported, date recovered on STOP PROCESS screen.

23.0 ADMINISTRATION FEES – SCREEN PRINTS, PHOTOCOPIES

Always keep payments for administrative fees separate from parking tag payments.

Staff are reminded that the following administrative fees are charged to customers:

Screen Prints	$1.00 per page
Photocopies	$1.00 per page
NSF Cheques	$35.00 per transaction
IVR Payments	$1.00 per transaction

Please be advised that at no time should staff provide screen prints or photocopies to members of the public free of charge.

Furthermore, screen prints and photocopies are to be provided to customer in person only. DO NOT mail, fax or email screen prints or photocopies, as the identity of the person requesting this confidential information cannot be determined.

City of Toronto

Parking Ticket Cancellation Guidelines

- Jun 2015 -

Introduction

Parking tickets help to regulate the movement of traffic on City roadways, and to ensure smooth traffic flows and safe streets. The City's various parking bylaws specify a set fine amount for each type of parking violation or infraction. The amount of the fine appears on the parking ticket.

To dispute a City of Toronto parking ticket, you or your representative must attend in person at one of the City's four parking ticket counters (First Appearance Facilities). To support your claim you must bring evidence (e.g. permits, written statements, supporting documents, photos, etc.) that establishes that the parking ticket meets the criteria for cancellation in these guidelines.

For a list of parking ticket counter locations (First Appearance Facilities), please visit toronto.ca/parkingtickets. Persons with a disability or persons who reside more than 100 km from the City of Toronto may call Parking Tag Operations at 416-397-TAGS (8247).

Staff review each disputed ticket individually and the evidence presented by the person who received the ticket or their representative, to understand the nature of the infraction, and the circumstances surrounding the ticket issued. The City of Toronto uses established guidelines to assist staff at parking ticket counters (First Appearance Facilities) in determining whether a parking ticket may be cancelled. In addition, City staff will take the necessary steps to determine whether a ticket warrants cancellation, which may include:

- examining the license plate history to identify past infractions, whether there are prior cancellations and the reasons for cancellations;
- requesting an investigation by Transportation Services, the Toronto Parking Authority or the Toronto Police Service Parking Enforcement Unit to verify whether signage may have been missing or covered, whether meters or pay and display machines were operational at the time of the infraction and/or that work was being carried out on the roadway, preventing legal parking;
- reviewing various bylaw exemptions and permit parking zones to confirm that the permit was used in the correct zone;
- confirming temporary police considerations which would permit parking due to police investigations, construction zones (i.e.: heavy crane lifts) or other street closures directed by police;

- accessing the Ministry of Transportation license plate/vehicle registration data to verify whether disabled parking permits are valid.

Any parking ticket arising from an offence where the vehicle was parked blocking vehicular or pedestrian traffic, loading areas for passengers or goods, or parked in an area where the offence poses a risk to life-safety (for example near schools, fire lanes, escape doors, hospitals or other facilities) will not be cancelled. This applies to any offence category.

The guidelines below are to be used for City of Toronto issued parking tickets only. They are meant to serve as a reference to provide an understanding of the circumstances in which a City of Toronto parking ticket may be cancelled and to outline the evidence required to support a parking ticket cancellation.

For more information on parking tickets, visit toronto.ca/parkingtickets or call Parking Tag Operations at (416)397-TAGS (8247).

City of Toronto
Parking Ticket Cancellation Guidelines
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1.0 Incorrect or Missing Data on the Parking Ticket

Parking tickets may be cancelled where there is sufficient evidence to indicate that any of the following apply:

- Incorrect or missing date
- Incorrect time of infraction
- Time of infraction missing
- Incorrect or missing plate number
- Plate's Province/State missing
- Address where offence occurred is missing or incorrect
- Infraction set fine amount missing, incorrect or changed
- Bylaw code or bylaw reference incorrect or missing
- Parking ticket not signed
- Changes made to infraction not initialled by the Issuing Officer

2.0 Person Claims Vehicle not at Location

Parking tickets may be cancelled where the following apply:

- Vehicle was not in the City or at that location on the date and time of the infraction.

Evidence such as written authorizations, permits, other documents, photos, etc. must be provided to establish that the above criteria for cancellation have been met.

3.0 Cancellations Relating to Parking Permits

Parking tickets may be cancelled for certain types of parking infractions where a valid permit exists and where the permit provides an exemption from the parking infraction noted on the ticket. Following is a list of the City's various parking permits:

1. On- Street and Area Parking Permits
2. Temporary On-Street Parking Permit
3. Boulevard Parking Permit
4. Front Yard Parking Permit
5. Film Permit
6. Street Occupation Permit
7. Temporary Street Occupation Permit - Utilities
8. Accessible Parking Permit or Disabled Persons Parking Permit
9. Valid Pay and Display Receipt Displayed

The cancellation guidelines for each type of permit are discussed below.

3.1 On-Street and Area Parking Permit

Parking tickets may be cancelled under this section for the following parking infractions:

- Expired Meter
- Three (3) Hour Parking
- Park Signed Highway in excess of permitted time
- Park (prohibited area/ location) without a permit
- Park - Fail to display receipt in windshield, or
- Park - Fail to deposit fee

A parking ticket may be cancelled under this section provided the following conditions are met:

1. The location of the infraction is on a street licensed for parking;
2. The vehicle plate number on the parking ticket matches the plate number on the permit ;
3. The permit is registered on the City of Toronto permit system;
4. Area indicated on the permit is for the location indicated on ticket, (e.g. 1B);
5. The permit must be valid for date and time of infraction.

A parking ticket related to alternate side parking may also be cancelled if the following conditions are met:

1. The location of the infraction is on a street where Alternate Side parking rules apply;
2. The parking ticket was issued to a vehicle with a residential parking permit;
3. The infraction was for Offence Code 29
4. The parking ticket was issued between the hours of 9:00pm and 12:01pm on the evening before and day of the switch-over period (typically the 16th of each month except when the 16th of the month occurs on a weekend or statutory holiday which then moves the switch-over date to the following business day.

Customers who meet these conditions and wish to have their ticket considered for cancellation can do so by faxing or email a copy of their ticket and valid residential parking permit to fax number: 416-696-4194 or by email to parkingdisputes@toronto.ca

A response will be provided within 5 business days.

3.1.1 Rental Vehicles

If you:

- have a valid on-street or area parking permit; and,
- you rented a vehicle because the vehicle to which the permit applies is being repaired; and
- the rental vehicle has been ticketed.

The car rental agreement and garage repair bill must be provided in order for a cancellation to be considered.

3.2 Temporary On-Street Parking Permit

Parking tickets may be cancelled under this section for the following infractions:

- Expired Meter
- Three (3) Hour Parking
- Park - Signed Highway in excess of permitted time
- Park - (prohibited area/ location) without a permit
- Park - Fail to display receipt in windshield; or
- Park - Fail to deposit fee

A parking ticket may be cancelled under this section provided the following conditions are met:

1. The location of the infraction is on a street that is licensed for parking;
2. The vehicle plate number on the parking ticket matches the plate number on the permit;
3. The permit is registered on the City of Toronto permit system;
4. The area indicated on permit is for the location indicated on ticket, e.g. 1B;
5. The permit must be valid for date and time of infraction.

3.3 Boulevard Parking Permit

An off-street parking permit is required to park on any part of the City boulevard. With proper approval, residents or commercial property owners may rent part of the City-owned boulevard to supplement space on private property. This program generally services commercial areas where on-street or off-street parking is limited or unavailable.

Parking tickets may be cancelled under this section for the following infraction:

- Park on/over boulevard

A parking ticket may be cancelled under this section provided the following conditions are met:

1. The permit is valid for the location, day and time of the infraction; and
2. Permission (a letter signed by the permit holder) was obtained to park at that location, date and time given by the permit holder, if the vehicle ticketed was not that of the permit holder. A copy of the permission letter must be provided to support the claim.

The ticket will not be cancelled if the parking infraction is for “too many vehicles parked” unless the letter of permission signed by the permit holder states that permission was granted to the vehicle specified on the ticket.

3.4 Front Yard Parking Permit

An off-street parking permit is required if you wish to park in your front yard or on part of the City boulevard. With proper approval, and in specific areas of the City, residents may rent part of the City owned boulevard to supplement space on private property. This program generally services those areas where driveways are not common or where driveway width is insufficient

Parking tickets may be cancelled under this section for the following infraction:

- Park in front yard

If the following conditions are met:

1. The permit is valid for the location, day and time of the infraction; and
2. Permission was obtained to park at that location, date and time given by the permit holder, if the vehicle ticketed was not that of the permit holder.

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. Copy of Permit, and
2. A letter of permission to park at that location, date and time given by the permit holder if the vehicle ticketed was not that of the permit holder signed by the permit holder.

3.5 Film Permit

The Toronto Film and Television Office (TFTO) issues parking permits for productions of feature films, movies for television, mini-series, television specials, television series, television productions, commercials, music videos and others.

The permit issued by the TFTO authorizes production companies to park production vehicles on City streets and in City parks. If any metered spaces or pay and display areas are covered by the permit, the production company must reimburse the Toronto Parking Authority for lost revenue.

The parking infractions to which the permit applies are listed on the actual permit.

Note that absolutely no crew or cast vehicles are exempted under the film permit.

The exemption applies only to the vehicles identified on the permit and at the location indicated on the permit during the time period that the permit is valid.

1. Production vehicles must not:
    - block fire hydrants; or

- be parked in fire routes; or
- be parked within 9 metres of an intersecting street; or
- impede any emergency response vehicles.

Production vehicles must also adhere to any other requirements specified on the permit.

2. In City parks, production vehicles and equipment must not block driveways or other access/egress ramps. Production vehicles must leave at least two feet clearance on either side of a driveway, ramp, or other accesses/egresses/ingresses.

3. Production vehicles parking on the street cannot block driveways or other access ramps without the approval of the owner of the property.

4. No production equipment/vehicles are to be within 30 metres of a subway entrance, a bus or streetcar stop, a pedestrian cross-over or a signalized intersection unless otherwise noted on the permit.

5. Production vehicles must not block parking lot access/egress ramps and accessible parking for persons with disabilities.

Both copies of film parking permit (red & white) must be provided to establish that the criteria for cancellation have been met. If the parking infraction is due to a blocked driveway, a letter of permission from the property owner allowing the encroachment or blockage must be provided for the cancellation of the ticket.

3.6 Street Occupation Permit

A street occupation permit issued by City of Toronto Transportation Services is required for any demolition, renovation and/or construction project if it is necessary to temporarily occupy any portion of the public right of way (the area beyond the property line, i.e. boulevard, sidewalk, roadway or public lane).

Parking tickets may be cancelled under this section for the following infractions:

- Expired Meter
- Three (3) Hour Parking
- Park - Signed Highway in excess of permitted time
- Park (prohibited area/location) without a permit
- Park - Fail to display receipt in windshield

A parking ticket may be cancelled under this section provided the following conditions are met:

1. The conditions stated on permit were complied with; and
2. The plated vehicles are listed on the permit.

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. Copy of the original permit; and
2. Work Order (if one exists); and
3. In case of an emergency (when allowed on the permit), the registered owner of the vehicle must provide a statement that the emergency situation existed at the time of the infraction and a description of the situation.

3.7 Temporary Street Occupation Permit - Utilities

Temporary Street Occupation Permits are issued to utility companies annually at no cost, pursuant to a decision of the Toronto Public Utility Co-ordinating Committee of which the City is a member. One permit is issued to each utility company which can make copies for its contractors and sub-contractors.

The permit is restricted to service vehicles only and a copy must be displayed on the windshield of the vehicle.

Parking tickets may be cancelled under this section for the following infractions:

- No parking
- No stopping (9:30 am to 11:30 am and 1:30 pm to 3:30 pm only and not during rush hour); and,
- No Standing (9:30 am to 11:30 am and 1:30 pm to 3:30 pm only and not during rush hour).

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. Copy of the Temporary Street Occupation – Site Service – Utilities permit; and
2. Copy of the Road Disruption Activity Reporting System (RoDARS) Restriction Notice for the location, date and time; and
3. Copy of work order/schedule pertaining to the date, time and location of the Infraction; and
4. Original letter on letterhead signed by the authorized manager or director (signature must be on file) indicating that parking was required for a legitimate business purpose and explaining why the driver needed to park in that location; and
5. Show that parking must have been required to perform the work at that location.

Cancellations will not be granted for the following infractions:

- Parking during rush hour
- Parking on private property
- Parking in disabled or fire routes
- No parking
- No stopping (9:30 am to 11:30 am and 1:30 pm to 3:30 pm only and not during rush hour)

- No Standing (9:30 am to 11:30 am and 1:30 pm to 3:30 pm only and not during rush hour)

3.8 Accessible Parking Permit or Disabled Persons Parking Permit

The Accessible Parking Permit (APP) is issued to individuals and entitles the vehicle in which it is displayed to be parked in a designated accessible parking space. The individual to whom the permit is issued must be in the vehicle and the permit must be visibly displayed on the dashboard or sun visor when it is parked in the designated accessible parking space. The permit holder may use the permit in any vehicle in which they are travelling. There is no fee for an APP. The Ministry of Transportation of Ontario issues four types of permits, which are colour coded; a Permanent Permit (blue), a Temporary Permit (red), a Traveller Permit (purple) and Company Permits (green).

The name "Accessible Parking Permit" was adopted to focus on the functionality and benefits of the permit to the holder, versus the holder's disability. Holders of a valid "Disabled Person Parking Permit" (DPPP) may continue to use their existing permit until it expires.

Parking tickets may be cancelled under this section for the following infractions:

- Signed on-street permit parking areas. (Vehicles displaying a valid disabled parking permit are permitted to park without a designated on-street parking permit)
- Signed parking limits such as one hour and two hour maximums; holders are allowed to exceed the signed maximum parking limit.
- Unsigned maximum three-hour parking limits in effect on all city streets.
- Holders may park at on-street Parking Meters or Pay and Display Machines without putting a coin in the meter / machine during the hours of legal operation. Note: exemption does not apply on private property.
- Signed No Stopping areas only while actually engaged in loading or unloading the named permit holder
- Signed/marked designated disabled parking space only for transporting, picking up, or dropping off a person who has been issued a current valid permit
- Signed/marked designated bicycle lane only while actually engaged in loading or unloading the named permit holder

Note: In all of the above situations parking is permitted for a period not to exceed 24 hours.

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. A valid copy of the APP or DPPP
2. If the vehicle is not registered to the APP or DPPP holder, an original letter signed by the APP or DPPP holder stating that they were with the registered owner on the date and at the time of infraction.

Vehicles displaying disabled permits are <u>not exempt</u> from the following:

- No Parking in areas where parking is prohibited during signed rush hour times
- No Parking/No Stopping/No Standing areas in designated emergency or snow routes
- Parking within 60 cm of a driveway
- Stopping/Parking on a bridge
- Parking within three metres of a fire hydrant
- Parking within seven and five-tenths (7.5) metres of any fire hall on the side of the highway on which the fire hall is located or within thirty and five-tenths (30.5) metres of the fire hall on the opposite side of the highway
- Parking within nine metres (signs not required) or 15 metres (signs required) of an intersection
- Parking in designated “No Standing and No Stopping areas”
- Parking in a designated fire route
- Parking in a public lane
- Parking within a stand designated for taxicabs
- Parking at a place marked by an authorized sign as a passenger or freight loading zone during the time shown on the sign

- Parking in a position as will prevent the removal of any other vehicle previously parked
- Parking on Private/Municipal Property if parked in a designated disabled spot must pay a fee if one is required on that property also must display a valid disabled permit. If vehicle is parked in a regular parking spot, (non-disabled) the permit holder must ensure that they follow the same rules as other users of the property.
- Overnight parking between the hours of 2 am - 6 am, from December 1-March 31 (in the former area of North York only)
- Parking within thirty and five-tenths (30.5) metres of an intersection controlled by a traffic control signal
- Parking in front of an entrance to or exit from any building or enclosed space in which persons may be expected to congregate in large numbers
- Parking within a turning basin
- Parking in a manner that would interfere with the formation of a funeral procession
- Parking within fifteen (15) metres of the termination of a dead-end street
- Parking within a T-type intersection
- Parking within the following distances of a crosswalk controlled by traffic control signals and located other than at an intersection:
    - Fifteen (15) metres of the crosswalk measured on each side of the highway in the direction of travel of vehicles on that side of the highway
    - [2] Thirty and five-tenths (30.5) metres of the crosswalk measured on each side of the highway in the direction opposite to the direction of travel of vehicles on that side of the highway

3.9 Valid Pay and Display Receipt Displayed

Parking tickets may be cancelled under this section for the following infractions:

- Park - fail to deposit fee in machine; and
- Park - fail to display receipt in windshield.

A parking ticket may be cancelled under this section provided the following conditions are met:

1. A valid Pay and Display parking receipt was displayed on the dashboard of the vehicle when the parking ticket was issued.
2. The parking receipt must show that the ticket was issued within the effective time, date and location of the receipt. Additionally, a 10 minute grace period at the end of the time is granted. Note: The minimum time purchased must be no less than ten minutes.

The original Pay and Display parking receipt must be provided as evidence.

4.0 Vehicle or Plate was Stolen or Lost at Time of Infraction

Parking tickets may be cancelled on the basis that the vehicle or plate was stolen or lost at the time of the infraction.

A parking ticket may be cancelled under this section provided that the following condition is met:

1. The infraction must have occurred after the date the theft was reported and prior to recovery (if applicable).

Evidence must be provided to establish that the criteria for cancellation has been met, including:

- Valid occurrence number from the Toronto Police Service; and
- Copy of the police report (if available).

5.0 Special Parking Considerations

The Toronto Police Service's Parking Enforcement Unit or the City of Toronto's Transportation Services Division may, in certain circumstances, provide short term parking considerations including:

1. Driveway paving;
2. Construction;
3. Religious observance; and
4. Underground parking cleaning.

Parking tickets may be cancelled under this section for the following infractions:

- Park Longer than 3 hours
- No parking

A parking ticket may be cancelled under this section provided that the following conditions are met:

1. The conditions stated on consideration were complied with; and
2. The plate numbers of the ticketed vehicles must be listed on the consideration letter.

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. A copy of the parking consideration letter; or
2. The consideration number assigned by the Toronto Police Service's Parking Enforcement Unit or the City of Toronto's Transportation Services Division so that the consideration can be confirmed.

Parking tickets will not be cancelled for the following infractions under this section:

- No Standing

- No Stopping
- Stop on sidewalk
- Park on boulevard
- Park in front of fire hydrant
- Park in fire route
- Park in rush hour route
- Park on a permit parking street

5.1 Religious Observances

For religious observances, parking tickets may be cancelled for the following infractions:

- Park at expired meter
- Park during prohibited times (excluding rush hour)
- Park signed highway in excess of permitted time

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. A letter or correspondence from the Minister or head of a religious group that identifies the time, date and location of the religious observance or service.

6.0 Extenuating Circumstances

Parking tickets may be cancelled in extenuating circumstances including:

- Medical emergency (e.g. a situation where a person required immediate hospitalization and the vehicle could not be moved to a legal parking area.)
- Vehicle breakdown;
- Other circumstances not identified in these guidelines where parking legally was not possible.

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. For medical emergencies, a copy of the hospital report, record of admission, and/or an ambulance report.
2. For vehicle breakdown, a copy of the tow receipt and/or the repair bill(s).
3. For other circumstances, evidence such as documents, permissions, photos, etc. must be provided to support the cancellation.

7.0 Sign Missing or Illegible

A parking ticket may be cancelled if a traffic sign was missing, damaged, obscured or illegible or that there were conflicting signs on the street where the infraction occurred. Staff will request that

the Toronto Police Services Parking Enforcement Office or the City of Toronto's Transportation Services Division conduct an investigation.

Parking tickets may be cancelled for signed offences.

The following condition must be met:

1. The investigating office (Parking Enforcement or Transportation Services) must recommend in writing that the parking ticket be cancelled.

8.0 Pay & Display Machine or Meter Missing, Removed or Inoperable

A parking ticket may be cancelled if a Pay and Display machine or parking meter was missing, removed or inoperable. Staff will request that the Toronto Parking Authority conduct an investigation.

Parking tickets may be cancelled under this section for the following infractions:

- Park - fail to deposit fee; and
- Park - fail to display receipt.

A parking ticket may be cancelled under this section provided the following condition is met:

1. The Toronto Parking Authority must recommend that the parking ticket be cancelled.

9.0 Emergency Vehicle

Parking tickets will be cancelled for emergency vehicles, such as ambulances, police or fire department that are exempt from parking tickets under the City of Toronto Municipal Code, where the particular emergency vehicle was attending to an emergency at the location indicated on the parking ticket. The exemption applies to all City of Toronto parking tickets.

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. An original letter on Divisional letterhead signed by the authorized manager or director of the City Division or public utility stating that the emergency existed when the parking ticket was issued.

10.0 Vehicles Engaged in Work for the City

Parking tickets will be cancelled for vehicles engaged in work for the City, and the Toronto Transit Commission (TTC) that are exempt from parking tickets under the Municipal Code, where parking,

standing or stopping of the vehicle doing the work was required to perform the work at the location, date and time of the ticket. The exemption applies to all City of Toronto parking tickets.

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. Copy of work order/schedule; and/or
2. Original letter on letterhead signed by the authorized manager or director of the City Division, TTC or Public Transit Agency indicating that parking, stopping or standing was required for a legitimate municipal purpose and an explanation of why the driver needed to illegally park, stand or stop in that location.

11.0 Public Utility Vehicles

Parking tickets will be cancelled for public utility vehicles responding to emergencies, (including utilities providing telecommunications, energy or water/ wastewater services) that are exempt under the Municipal Code, and when parking was necessary to perform the emergency work at that location. The exemption applies to all on-street infractions (only during the emergency)

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. Copy of the Temporary Street Occupation – Site Service – Utilities permit (if available);
2. Copy of work order/schedule pertaining to the date, time and location of the infraction, and
3. Original letter on letterhead signed by the authorized Manager or Director (signature must be on file) indicating that parking was required for a legitimate emergency purpose and explanation of why the driver needed to park in that location.

12.0 Valid Ontario Veteran Plate Displayed (on certain days only)

The City of Toronto's Municipal Code provides parking exemptions to persons who display a valid Ontario veteran's licence on their vehicle. The exemption only applies on the following dates:

- June 6
- September 17
- November 11
- August 18 (consideration)
- Other dates approved by council; and
- Any other date where consideration is granted.

Parking tickets may be cancelled under this section for the following infractions:

- Park - fail to deposit fee in meter
- Park - fail to deposit fee in machine

- Park vehicle in or on a parking space controlled by a parking machine without activating the machine
- Park - fail to properly display receipt in windshield

A parking ticket may be cancelled under this section provided the following condition is met:

1. The Ontario Veteran licence plate must be registered to the person requesting the cancellation and must have been affixed to the vehicle at the time of the infraction.

13.0 Continuing Infraction

A continuing infraction occurs when two or more parking tickets are issued to a vehicle within a specified time limit. The specified limit depends on the type of infraction (e.g. Park longer than 1, 2 or 3 hours).

Parking tickets may be cancelled under this section for No Parking infractions only, if the following conditions are met:

1. Must be the same offence;
2. Same plate; and
3. Same location.

Only tickets issued within 3 hours of each other will be considered for cancellation.

14.0 Issuing Enforcement Agency Request

Situations occur where the Toronto Police Service's Parking Enforcement Unit may request withdrawal of a parking ticket.

A parking ticket may be cancelled under this section for any parking related offences.

The Toronto Police Service's Parking Enforcement Unit must submit the request in writing using the approved Withdrawal Request Form - the form must be authorized by a management representative of the Parking Enforcement Unit.

15.0 Taxicabs/Limousine While Picking up or Dropping off Passengers

Parking tickets may be cancelled under this section for the following infractions:

- Prohibited parking offences (excluding rush hour)

A parking ticket may be cancelled under this section if the following conditions are met:

1. Vehicle was being operated for taxi or limousine services at the time of the infraction.
2. Vehicle license plate was issued to a taxi or limousine.

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. If the driver of the taxi/limousine is making a delivery, a letter from the taxi/limousine company and a waybill for the time/date and location of the infraction.
2. A letter, on letterhead from the Dispatcher, indicating pick up location, time, date and drop off location.
3. Owner or driver must possess a taxi licence.

16.0 Nursing Agencies/Compassionate Service Agencies

Parking tickets may be cancelled under this section for the following infractions:

- Metered offences;
- Park- longer than 3 hours;
- Park during prohibited times (excluding rush hour);
- Park in excess of permitted time; and
- Park no permit (if time/situation of infraction is reasonable) time, date, infraction and location of the duties should be specified.

The following evidence must be provided:

1. A letter from an official on letterhead explaining the vehicle was being operated by a staff member while performing duties for the organization.
2. The letter must have an original signature and must include the title and telephone number of the authorized writer (Nurse Manager, etc.).

17.0 Security Companies - Alarm Response

Parking tickets may be cancelled under this section for the following infractions:

- Metered offences
- Park longer than 3 hours
- Park during prohibited times (excluding rush hour)
- Park in excess of permitted time
- Park no permit (if time/situation of infraction is reasonable) time, date, infraction and location of the duties should be specified

The following evidence must be provided:

1. A letter from an official on letterhead explaining the vehicle was being operated by a staff member in response to an alarm.
2. The letter must have an original signature and must include the title and telephone number of the authorized writer as well as the time and location of the alarm supported by the response sheet.

17.1 Courier and Delivery Vehicles

Drivers of courier and delivery vehicles engaged in delivering goods or services are exempt from most parking offences only while in the act of loading or unloading merchandise or passengers and whilst actually in or around the vehicle.

The City of Toronto has created "Courier Delivery Zones" in strategic areas in the downtown core, based on heaviest courier usage and in consultation with the Canadian Courier and Logistics Association. Currently 13 of these Zones exist and future expansion is planned.

The Parking Enforcement Unit, where possible, is providing a 10-minute "delivery window" to allow deliveries to occur before ticketing.

Courier and Delivery vehicles, parked illegally are subject to ticketing and tickets may be considered for cancellation for the following offences only if the driver or representative provides a signed letter or delivery receipt which clearly displays the delivery time/location/date:

- No Parking (other than during rush-hour times)
- Park public lane

Courier and delivery vehicles ticketed or parked illegally are not exempt from the following:

- No Parking/No Stopping/No Standing where the offence occurred between the hours of 6 a.m. – 10 a.m. or 3 p.m. – 7 p.m., Monday through Friday
- In No Parking/No Stopping/No Standing areas in designated emergency or snow routes
- Any metered or Pay and Display Offence
- Parking within 60 cm of a driveway
- Stopping/Standing/Parking on a bridge
- Parking within 3 metres of a fire hydrant
- Parking within seven and five-tenths (7.5) metres of any fire hall on the side of the highway on which the fire hall is located or within thirty and five-tenths (30.5) metres of the fire hall on the opposite side of the highway
- Parking within nine metres (signs not required) or 15 metres (signs required) of an intersection
- Parking in any “No Standing and No Stopping areas”
- Parking in a designated fire route
- Parking within a stand designated for taxicabs
- Parking in a position as will prevent the removal of any other vehicle previously parked
- Designated Disabled Parking Offences (on-street or off-street)
- any other offence not listed above.

18.0 Tour Buses

Parking tickets may be cancelled under this section for the following infractions:

- Metered offences
- Park - longer than 3 hours
- Park during prohibited times (excluding rush hour),
- Park in excess of permitted time

The following evidence must be provided:

1. A letter from an official on letterhead explaining the vehicle was being operated by a staff member while performing duties of the company and that no other parking was available.

19.0 Time Allowance

The Time Allowance provision for parking offences refers to the period of time following the expiry of a pay and display receipt or paid parking time and the issuance of a parking ticket.

The Toronto Police Service Parking Enforcement Unit observes a 5-minute operational grace period before issuing a parking ticket for a time-limited offence, e.g. overstaying at a parking meter or a pay-and-display parking zone. The grace period is intended to ensure fairness and integrity in parking enforcement operations, and serves both as a courtesy to drivers, and avoids the issue of timing discrepancies between a driver's watch, a hand-held ticket-writing device, and a meter or pay-and-display machine.

> The Time Allowance provision does not provide for an automatic cancellation. Rather, each ticket is reviewed based on the location of the offence, circumstances surrounding the offence and the vehicle plate history (i.e.: prior cancellations, fraudulent use of permits or receipts and an offenders' outstanding fines may be considered as part of the overall review).

The City of Toronto operates with an administrative time allowance provision for time-limited offences including expired parking meters or expired pay-and-display receipts. This is a separate practice from the Toronto Parking Enforcement Unit, and may allow a parking ticket issued within 10 minutes of the expiry of the time-limited period to be cancelled, rather than requiring that drivers request a trial and appear in court in these circumstances.

This 10-minute Time Allowance provision applies to all time-limited offences where proof of a receipt

showing approved purchased time can be provided but excludes major arterial routes during rush hour periods or areas where parking is prohibited for construction, traffic or event closures.

- Customers who wish to submit their ticket for Time Allowance consideration can do so by emailing their request to parkingmeters@toronto.ca or by fax at 416-696-4194.

To support your claim you must bring evidence (i.e., valid pay-and-display parking receipt or other supporting documentation etc.) that establishes that the parking ticket meets the criteria for cancellation in the Parking Ticket Cancellation Guidelines.

Fax/E-mail Service for customers with valid Pay-and-Display receipts or Accessibility/Disabled Permits only:

Customers with valid pay-and-display receipts and/or accessibility/disabled permits can fax their written request for cancellation or consideration, along with copies of the receipts or permits, to the City's Parking Ticket Operations – Investigations Unit at: 416-696-4194, or scan and e-mail your request and documents to: parkingdisputes@toronto.ca.

Please ensure you provide a contact telephone number, email address or mailing address as staff will advise of the outcome of the investigation by telephone, email or in writing.

The most common example of a time-limited offence is when a driver parks beyond the time indicated on a pay-and-display parking receipt. The 10-minute time allowance period applies to the following offences and only tickets issued for these offences can be considered for cancellation:

Restricted time-limited offences to which a 10-minute time allowance may apply:

- Park Fail to Deposit Fee in Machine (Meter or Pay and Display Machines – Offence Code 207: $30.00)
- Park Fail to Display Receipt in Windshield (Offence Code 210: $30.00)

Note: The minimum time purchased must be no less than ten minutes.

When does the time allowance provision not apply?

Note that the 10-minute time allowance identified within the cancellation guidelines does NOT apply to tickets issued for:

- parking during prohibited times on major arterial routes or during rush hour periods (even where a pay-and-display ticket may have been purchased)
- 2am – 7am “snow clearing” bylaw offences (during weather events); and
- Any other offence not listed above where parking was temporarily restricted due to weather, traffic, construction or other events. The time allowance provision also does not apply in cases where the expiry time relates to a change in parking restrictions (e.g., where one can park between certain posted hours, but parking is prohibited beyond those specified hours due to permit requirements, changes in traffic flow etc).

How do I get my ticket reviewed and considered for cancellation?
The time allowance provision established in the Cancellation Guidelines apply only to time-limited parking offences. A number of factors are considered before a ticket may be cancelled. These include but are not limited to a vehicle or driver's previous offence history, abuse of time allowance cancellations, weather conditions and other factors that may have contributed to the excess time offence.

Offenders who are refused a cancellation under this provision and wish to further dispute their ticket, must attend in person at one of the City's four parking ticket counters (First Appearance Facilities) listed on the back of the parking ticket.

20.0 Rush Hour Routes/Bicycle Lanes/Time Restricted Parking Areas:

Cancellation of $150.00 parking tickets issued for the offences:

- No Parking
- No Stopping; or
- No Standing

issued Monday through Friday and during the hours of 6 a.m. and 10 a.m. or 3 p.m. and 7 p.m. do not qualify for cancellation unless the driver can provide evidence of:

1. Vehicle breakdown (mechanic or tow bill required)
2. Medical emergency (doctor or medical certificate required)
3. Weather events preventing legal parking on private areas (photos of the location must be provided or Supervisory authorization - weather event must have caused vehicle immobilization or inoperation/breakdown)

Cancellations for deliveries, pick-up or any other circumstances are not permitted for tickets with $150.00 fines.

21.0 Tickets issued for Expired Plates:

Cancellation of tickets issued for offences related to Expired Plates cannot be cancelled unless the driver/owner provides documentation which clearly identifies that the license plates of the offending vehicle were renewed prior to the offence date and time. Cancellation conditions require acceptable documentation which is restricted to:

1. a true copy of a Ministry of Transportation or Service Ontario Invoice showing date and time of purchase, which must be before the offence date and time; and
2. the invoice must include the plate number that was renewed - which must match the plate number on the parking ticket

Copies of ownership with renewal stickers are not acceptable since they do not clearly indicate a date and time of renewal purchase.

Schedule B

City of Toronto

and

Gordon Food Services, Longo Brothers, Garda World, The Pepsi Bottling Group, Muldoon's Own Authentic Coffee

Hearing Officer Review, December 3, 2018

City of Toronto Response

All notices of violation comprising this hearing are for commercial delivery companies. The companies in question have applied for a screening review by a screening officer in accordance with Chapter 610 of the City of Toronto Municipal Code. The screening officer affirmed the penalty; the companies now are seeking a hearing before this tribunal.

On review by a screening officer, the officer may affirm, cancel, or vary the administrative penalty when certain factors are established. For example, the screening officer may cancel the penalty if the recipient establishes on a balance of probabilities that the vehicle was not parked, standing or stopped contrary to a by-law. The screening officer may also cancel or vary a penalty if the recipient establishes on a balance of probabilities the existence of undue hardship. Hearing officers' powers of further review are similar.

None of the recipients subject to this application have presented any evidence that would satisfy on a balance of probabilities that their penalties should be varied or canceled.

The City of Toronto's Administrative Penalty System for parking violations ("APS") is governed by Chapter 610 of the City's Municipal code. Section 610(2.2)(N) and 610(2.3)(J) outline the duties of a screening officer and hearing officer respectively on a review of an administrative penalty or a review of a screening decision.

610-2.2. Review by a screening officer.

N. On a review of the administrative penalty, a screening officer may:

(1) affirm the administrative penalty, administrative fees, or both;

(2) cancel the administrative penalty, including administrative fees, if the recipient establishes on the balance of probabilities that the vehicle was not parked, standing or stopped contrary to the designated by-law provision as described in the penalty notice;

(3) cancel the administrative penalty, administrative fees, or both, if the recipient establishes on the balance of probabilities the existence of undue hardship;

(4) vary the administrative penalty, administrative fees, or both if the recipient establishes on the balance of probabilities the existence of undue hardship;

(5) extend the time for payment of the administrative penalty, administrative fees, or both if the recipient establishes on the balance of probabilities:

(a) the existence of undue hardship; and

(b) that the extension of time to pay is necessary to relieve the undue hardship established.

610-2.3. Review by a hearing officer

J. On a review of a screening decision, the hearing officer may:

(1) affirm the screening decision;

(2) cancel the screening decision, if the recipient establishes on the balance of probabilities that the vehicle was not parked, standing or stopped contrary to the designated by-law provision as described in the penalty notice:

(3) vary the screening decision by:

(a) cancelling the administrative penalty, administrative fees, or both if the recipient establishes on the balance of probabilities the existence of undue hardship;

(b) varying the administrative penalty, administrative fees, or both if the recipient establishes on the balance of probabilities the existence of undue hardship;

(c) extending the time for payment of the administrative penalty, administrative fees, or both if the recipient establishes on the balance of probabilities:

[1] the existence of undue hardship; and

[2] that the extension of time to pay is necessary to relieve the undue hardship established.

Undue hardship, extenuating circumstances, and financial hardship are defined terms in Chapter 610 and read:

Undue Hardship - circumstances in which payment of administrative penalties and/or administrative fees would cause undue hardship for purposes of O. Reg. 611/06 and contains the following two classes of circumstances:

(1) extenuating circumstances; and
(2) financial hardship.

Extenuating Circumstances - a special or specified circumstance, including such types of extenuating circumstances established by the City Solicitor, that partially or fully exempts a person from performance of a legal obligation so as to avoid an unreasonable or disproportionate burden or obstacle.

Financial Hardship - a significant difficulty or expense and focuses on the resources and circumstances of the person owing an administrative penalty, including administrative fees, in relationship to the cost or difficulty of paying the administrative penalty or any administrative fees.

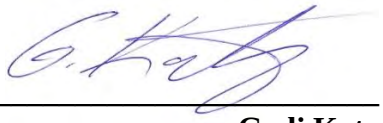
The recipients forming this application have provided no documentation or evidence that would support their position that undue hardship has been experienced. The materials filed by the applicants fail to show that a "special or specified circumstance" exists that would necessitate exemption from "performance of a legal obligation so as to avoid an unreasonable or disproportionate burden or obstacle".

The materials provided by the applicants includes cancellation guidelines from the City of Toronto which clearly allow for discretion in dealing with parking violations by vehicles on delivery. Each of the cancellation guidelines provided by the applicants, as well as the 2016 version provided by the City, show a variety of exemptions, grace periods, special delivery zones and the type of documentary evidence required by the City to establish a basis for leniency or cancellation. The cancellation guidelines filed by the applicants and the City show that a letter or

confirmation of delivery is required so that the City can verify that a delivery actually took place at or close to the location, date, and time on the violation notice.[1]

The applicants were invited to provide similar information in preparation for this hearing but did not avail themselves of that opportunity. (see email from Gadi Katz to Sheila Wilches-Calero, dated November 20, 2018 and response).

In conclusion, Chapter 610 of the City of Toronto Municipal Code clearly places the onus on the applicants to establish on a balance of probabilities that they may not have left their vehicles in contravention of the by-law or that undue hardship exists. The applicants have presented no evidence to support either of those grounds and therefore the administrative penalty must be affirmed.



Gadi Katz
LSO # 58309L
Tel: (416) 338-3169
Fax: (416) 338-6986
Email: gadi.katz@toronto.ca

November 26, 2018

[1] see enclosed: "City of Toronto Parking Ticket Cancellation Guidelines – April 2016", "Toronto Municipal Code Chapter 950 § 950-1308. Schedule IX: Delivery Vehicle Parking Zones", and Toronto Municipal Code Chapter 950 § 950-1305. Schedule Vi: Commercial Loading Zones"

TO: **Mr. Paul Sommerville,**
Chair, Administrative Penalty Tribunal
40 Orchard View Blvd, Suite 253,
Toronto, ON, M4R 1B9
Delivered by email to:
AdministrativePenaltyTribunal@toronto.ca and
Paul.Sommerville@toronto.ca

AND

TO: **Ms. Sheila Wilches-Calero**
Willero Legal Services
665 Millway Ave, Unit 12, 2nd Floor
Vaughan, Ontario L4K 3T8
Delivered by email to: scalero@rogers.com

City of Toronto

Parking Ticket Cancellation Guidelines

- Apr 2016 -

Introduction

Parking tickets help to regulate the movement of traffic on City roadways, and to ensure smooth traffic flows and safe streets. The City's various parking bylaws specify a set fine amount for each type of parking violation or infraction. The amount of the fine appears on the parking ticket.

To dispute a City of Toronto parking ticket, you or your representative must attend in person at one of the City's four parking ticket counters (First Appearance Facilities). To support your claim you must bring evidence (e.g. permits, written statements, supporting documents, photos, etc.) that establishes that the parking ticket meets the criteria for cancellation in these guidelines.

For a list of parking ticket counter locations (First Appearance Facilities), please visit toronto.ca/parkingtickets. Persons with a disability or persons who reside more than 100 km from the City of Toronto may call Parking Tag Operations at 416-397-TAGS (8247).

Staff review each disputed ticket individually and the evidence presented by the person who received the ticket or their representative, to understand the nature of the infraction, and the circumstances surrounding the ticket issued. The City of Toronto uses established guidelines to assist staff at parking ticket counters (First Appearance Facilities) in determining whether a parking ticket may be cancelled. In addition, City staff will take the necessary steps to determine whether a ticket warrants cancellation, which may include:

- examining the license plate history to identify past infractions, whether there are prior cancellations and the reasons for cancellations;
- requesting an investigation by Transportation Services, the Toronto Parking Authority or the Toronto Police Service Parking Enforcement Unit to verify whether signage may have been missing or covered, whether meters or pay and display machines were operational at the time of the infraction and/or that work was being carried out on the roadway, preventing legal parking;
- reviewing various bylaw exemptions and permit parking zones to confirm that the permit was used in the correct zone;
- confirming temporary police considerations which would permit parking due to police investigations, construction zones (i.e.: heavy crane lifts) or other street closures directed by police;

- accessing the Ministry of Transportation license plate/vehicle registration data to verify whether disabled parking permits are valid.

Any parking ticket arising from an offence where the vehicle was parked blocking vehicular or pedestrian traffic, loading areas for passengers or goods, or parked in an area where the offence poses a risk to life-safety (for example near schools, fire lanes, escape doors, hospitals or other facilities) will not be cancelled. This applies to any offence category.

Tickets issued for any No Stopping, No Standing, Fire Route, Fire Hydrant, Disabled Offences (including loading or unloading), Rush Hour Offences and ANY fine where the value is greater than $150.00 cannot be cancelled.

The guidelines below are to be used for City of Toronto issued parking tickets only. They are meant to serve as a reference to provide an understanding of the circumstances in which a City of Toronto parking ticket may be cancelled and to outline the evidence required to support a parking ticket cancellation.

For more information on parking tickets, visit toronto.ca/parkingtickets or call Parking Tag Operations at (416)397-TAGS (8247).

City of Toronto
Parking Ticket Cancellation Guidelines
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1.0 Incorrect or Missing Data on the Parking Ticket

Parking tickets may be cancelled where there is sufficient evidence to indicate that any of the following apply:

- Incorrect or missing date
- Incorrect time of infraction
- Time of infraction missing
- Incorrect or missing plate number
- Plate's Province/State missing
- Address where offence occurred is missing or incorrect
- Infraction set fine amount missing, incorrect or changed
- Bylaw code or bylaw reference incorrect or missing
- Parking ticket not signed
- Changes made to infraction not initialled by the Issuing Officer

2.0 Person Claims Vehicle not at Location

Parking tickets may be cancelled where the following apply:

- Vehicle was not in the City or at that location on the date and time of the infraction.

Evidence such as written authorizations, permits, other documents, photos, etc. must be provided to establish that the above criteria for cancellation have been met.

3.0 Cancellations Relating to Parking Permits

Parking tickets may be cancelled for certain types of parking infractions where a valid permit exists and where the permit provides an exemption from the parking infraction noted on the ticket. Following is a list of the City's various parking permits:

1. On- Street and Area Parking Permits
2. Temporary On-Street Parking Permit
3. Boulevard Parking Permit
4. Front Yard Parking Permit
5. Film Permit
6. Street Occupation Permit
7. Temporary Street Occupation Permit - Utilities
8. Accessible Parking Permit or Disabled Persons Parking Permit
9. Valid Pay and Display Receipt Displayed

The cancellation guidelines for each type of permit are discussed below.

3.1 On-Street and Area Parking Permit

Parking tickets may be cancelled under this section for the following parking infractions:

- Expired Meter
- Three (3) Hour Parking
- Park Signed Highway in excess of permitted time
- Park (prohibited area/ location) without a permit
- Park - Fail to display receipt in windshield, or
- Park - Fail to deposit fee

A parking ticket may be cancelled under this section provided the following conditions are met:

1. The location of the infraction is on a street licensed for parking;
2. The vehicle plate number on the parking ticket matches the plate number on the permit ;
3. The permit is registered on the City of Toronto permit system;
4. Area indicated on the permit is for the location indicated on ticket, (e.g. 1B);
5. The permit must be valid for date and time of infraction.

A parking ticket related to alternate side parking may also be cancelled if the following conditions are met:

1. The location of the infraction is on a street where Alternate Side parking rules apply;
2. The parking ticket was issued to a vehicle with a residential parking permit;
3. The infraction was for Offence Code 29
4. The parking ticket was issued between the hours of 9:00pm and 12:01pm on the evening before and day of the switch-over period (typically the 16th of each month except when the 16th of the month occurs on a weekend or statutory holiday which then moves the switch-over date to the following business day.

Customers who meet these conditions and wish to have their ticket considered for cancellation can do so by faxing or email a copy of their ticket and valid residential parking permit to fax number: 416-696-4194 or by email to parkingdisputes@toronto.ca

A response will be provided within 5 business days.

3.1.1 Rental Vehicles

If you:

- have a valid on-street or area parking permit; and,
- you rented a vehicle because the vehicle to which the permit applies is being repaired; and
- the rental vehicle has been ticketed.

The car rental agreement and garage repair bill must be provided in order for a cancellation to be considered.

3.2 Temporary On-Street Parking Permit

Parking tickets may be cancelled under this section for the following infractions:

- Expired Meter
- Three (3) Hour Parking
- Park - Signed Highway in excess of permitted time
- Park - (prohibited area/ location) without a permit
- Park - Fail to display receipt in windshield; or
- Park - Fail to deposit fee

A parking ticket may be cancelled under this section provided the following conditions are met:

1. The location of the infraction is on a street that is licensed for parking;
2. The vehicle plate number on the parking ticket matches the plate number on the permit;
3. The permit is registered on the City of Toronto permit system;
4. The area indicated on permit is for the location indicated on ticket, e.g. 1B;
5. The permit must be valid for date and time of infraction.

3.3 Boulevard Parking Permit

An off-street parking permit is required to park on any part of the City boulevard. With proper approval, residents or commercial property owners may rent part of the City-owned boulevard to supplement space on private property. This program generally services commercial areas where on-street or off-street parking is limited or unavailable.

Parking tickets may be cancelled under this section for the following infraction:

- Park on/over boulevard

A parking ticket may be cancelled under this section provided the following conditions are met:

1. The permit is valid for the location, day and time of the infraction; and
2. Permission (a letter signed by the permit holder) was obtained to park at that location, date and time given by the permit holder, if the vehicle ticketed was not that of the permit holder. A copy of the permission letter must be provided to support the claim.

The ticket will not be cancelled if the parking infraction is for “too many vehicles parked” unless the letter of permission signed by the permit holder states that permission was granted to the vehicle specified on the ticket.

3.4 Front Yard Parking Permit

An off-street parking permit is required if you wish to park in your front yard or on part of the City boulevard. With proper approval, and in specific areas of the City, residents may rent part of the City owned boulevard to supplement space on private property. This program generally services those areas where driveways are not common or where driveway width is insufficient

Parking tickets may be cancelled under this section for the following infraction:

- Park in front yard

If the following conditions are met:

1. The permit is valid for the location, day and time of the infraction; and
2. Permission was obtained to park at that location, date and time given by the permit holder, if the vehicle ticketed was not that of the permit holder.

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. Copy of Permit, and
2. A letter of permission to park at that location, date and time given by the permit holder if the vehicle ticketed was not that of the permit holder signed by the permit holder.

3.5 Film Permit

The Toronto Film and Television Office (TFTO) issues parking permits for productions of feature films, movies for television, mini-series, television specials, television series, television productions, commercials, music videos and others.

The permit issued by the TFTO authorizes production companies to park production vehicles on City streets and in City parks. If any metered spaces or pay and display areas are covered by the permit, the production company must reimburse the Toronto Parking Authority for lost revenue.

The parking infractions to which the permit applies are listed on the actual permit.

Note that absolutely no crew or cast vehicles are exempted under the film permit.

The exemption applies only to the vehicles identified on the permit and at the location indicated on the permit during the time period that the permit is valid.

1. Production vehicles must not:
    - block fire hydrants; or

- be parked in fire routes; or
- be parked within 9 metres of an intersecting street; or
- impede any emergency response vehicles.

Production vehicles must also adhere to any other requirements specified on the permit.

2. In City parks, production vehicles and equipment must not block driveways or other access/egress ramps. Production vehicles must leave at least two feet clearance on either side of a driveway, ramp, or other accesses/egresses/ingresses.

3. Production vehicles parking on the street cannot block driveways or other access ramps without the approval of the owner of the property.

4. No production equipment/vehicles are to be within 30 metres of a subway entrance, a bus or streetcar stop, a pedestrian cross-over or a signalized intersection unless otherwise noted on the permit.

5. Production vehicles must not block parking lot access/egress ramps and accessible parking for persons with disabilities.

Both copies of film parking permit (red & white) must be provided to establish that the criteria for cancellation have been met. If the parking infraction is due to a blocked driveway, a letter of permission from the property owner allowing the encroachment or blockage must be provided for the cancellation of the ticket.

3.6 Street Occupation Permit

A street occupation permit issued by City of Toronto Transportation Services is required for any demolition, renovation and/or construction project if it is necessary to temporarily occupy any portion of the public right of way (the area beyond the property line, i.e. boulevard, sidewalk, roadway or public lane).

Parking tickets may be cancelled under this section for the following infractions:

- Expired Meter
- Three (3) Hour Parking
- Park - Signed Highway in excess of permitted time
- Park (prohibited area/location) without a permit
- Park - Fail to display receipt in windshield

A parking ticket may be cancelled under this section provided the following conditions are met:

1. The conditions stated on permit were complied with; and
2. The plated vehicles are listed on the permit.

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. Copy of the original permit; and
2. Work Order (if one exists); and
3. In case of an emergency (when allowed on the permit), the registered owner of the vehicle must provide a statement that the emergency situation existed at the time of the infraction and a description of the situation.

3.7 Temporary Street Occupation Permit - Utilities

Temporary Street Occupation Permits are issued to utility companies annually at no cost, pursuant to a decision of the Toronto Public Utility Co-ordinating Committee of which the City is a member. One permit is issued to each utility company which can make copies for its contractors and sub-contractors.

The permit is restricted to service vehicles only and a copy must be displayed on the windshield of the vehicle.

Parking tickets may be cancelled under this section for the following infractions:

- No parking
- No stopping (9:30 am to 11:30 am and 1:30 pm to 3:30 pm only and not during rush hour); and,
- No Standing (9:30 am to 11:30 am and 1:30 pm to 3:30 pm only and not during rush hour).

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. Copy of the Temporary Street Occupation – Site Service – Utilities permit; and
2. Copy of the Road Disruption Activity Reporting System (RoDARS) Restriction Notice for the location, date and time; and
3. Copy of work order/schedule pertaining to the date, time and location of the Infraction; and
4. Original letter on letterhead signed by the authorized manager or director (signature must be on file) indicating that parking was required for a legitimate business purpose and explaining why the driver needed to park in that location; and
5. Show that parking must have been required to perform the work at that location.

Cancellations will not be granted for the following infractions:

- Parking during rush hour
- Parking on private property
- Parking in disabled or fire routes
- No parking
- No stopping (9:30 am to 11:30 am and 1:30 pm to 3:30 pm only and not during rush hour)

- No Standing (9:30 am to 11:30 am and 1:30 pm to 3:30 pm only and not during rush hour)

3.8 Accessible Parking Permit or Disabled Persons Parking Permit

The Accessible Parking Permit (APP) is issued to individuals and entitles the vehicle in which it is displayed to be parked in a designated accessible parking space. The individual to whom the permit is issued must be in the vehicle and the permit must be visibly displayed on the dashboard or sun visor when it is parked in the designated accessible parking space. The permit holder may use the permit in any vehicle in which they are travelling. There is no fee for an APP. The Ministry of Transportation of Ontario issues four types of permits, which are colour coded; a Permanent Permit (blue), a Temporary Permit (red), a Traveller Permit (purple) and Company Permits (green).

The name "Accessible Parking Permit" was adopted to focus on the functionality and benefits of the permit to the holder, versus the holder's disability. Holders of a valid "Disabled Person Parking Permit" (DPPP) may continue to use their existing permit until it expires.

Parking tickets may be cancelled under this section for the following infractions:

- Signed on-street permit parking areas. (Vehicles displaying a valid disabled parking permit are permitted to park without a designated on-street parking permit)
- Signed parking limits such as one hour and two hour maximums; holders are allowed to exceed the signed maximum parking limit.
- Unsigned maximum three-hour parking limits in effect on all city streets.
- Holders may park at on-street Parking Meters or Pay and Display Machines without putting a coin in the meter / machine during the hours of legal operation. Note: exemption does not apply on private property.
- Signed No Stopping areas only while actually engaged in loading or unloading the named permit holder
- Signed/marked designated disabled parking space only for transporting, picking up, or dropping off a person who has been issued a current valid permit
- Signed/marked designated bicycle lane only while actually engaged in loading or unloading the named permit holder

Note: In all of the above situations parking is permitted for a period not to exceed 24 hours.

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. A valid copy of the APP or DPPP
2. If the vehicle is not registered to the APP or DPPP holder, an original letter signed by the APP or DPPP holder stating that they were with the registered owner on the date and at the time of infraction.

Vehicles displaying disabled permits are <u>not exempt</u> from the following:

- No Parking in areas where parking is prohibited during signed rush hour times
- No Parking/No Stopping/No Standing areas in designated emergency or snow routes
- Parking within 60 cm of a driveway
- Stopping/Parking on a bridge
- Parking within three metres of a fire hydrant
- Parking within seven and five-tenths (7.5) metres of any fire hall on the side of the highway on which the fire hall is located or within thirty and five-tenths (30.5) metres of the fire hall on the opposite side of the highway
- Parking within nine metres (signs not required) or 15 metres (signs required) of an intersection
- Parking in designated “No Standing and No Stopping areas”
- Parking in a designated fire route
- Parking in a public lane
- Parking within a stand designated for taxicabs
- Parking at a place marked by an authorized sign as a passenger or freight loading zone during the time shown on the sign

- Parking in a position as will prevent the removal of any other vehicle previously parked
- Parking on Private/Municipal Property if parked in a designated disabled spot must pay a fee if one is required on that property also must display a valid disabled permit. If vehicle is parked in a regular parking spot, (non-disabled) the permit holder must ensure that they follow the same rules as other users of the property.
- Overnight parking between the hours of 2 am - 6 am, from December 1-March 31 (in the former area of North York only)
- Parking within thirty and five-tenths (30.5) metres of an intersection controlled by a traffic control signal
- Parking in front of an entrance to or exit from any building or enclosed space in which persons may be expected to congregate in large numbers
- Parking within a turning basin
- Parking in a manner that would interfere with the formation of a funeral procession
- Parking within fifteen (15) metres of the termination of a dead-end street
- Parking within a T-type intersection
- Parking within the following distances of a crosswalk controlled by traffic control signals and located other than at an intersection:
    - Fifteen (15) metres of the crosswalk measured on each side of the highway in the direction of travel of vehicles on that side of the highway
    - [2] Thirty and five-tenths (30.5) metres of the crosswalk measured on each side of the highway in the direction opposite to the direction of travel of vehicles on that side of the highway

3.9 Valid Pay and Display Receipt Displayed

Parking tickets may be cancelled under this section for the following infractions:

- Park - fail to deposit fee in machine; and
- Park - fail to display receipt in windshield.

A parking ticket may be cancelled under this section provided the following conditions are met:

1. A valid Pay and Display parking receipt was displayed on the dashboard of the vehicle when the parking ticket was issued.
2. The parking receipt must show that the ticket was issued within the effective time, date and location of the receipt. Additionally, a 10 minute grace period at the end of the time is granted. Note: The minimum time purchased must be no less than ten minutes.

The original Pay and Display parking receipt must be provided as evidence.

4.0 Vehicle or Plate was Stolen or Lost at Time of Infraction

Parking tickets may be cancelled on the basis that the vehicle or plate was stolen or lost at the time of the infraction.

A parking ticket may be cancelled under this section provided that the following condition is met:

1. The infraction must have occurred after the date the theft was reported and prior to recovery (if applicable).

Evidence must be provided to establish that the criteria for cancellation has been met, including:

- Valid occurrence number from the Toronto Police Service; and
- Copy of the police report (if available).

5.0 Special Parking Considerations

The Toronto Police Service's Parking Enforcement Unit or the City of Toronto's Transportation Services Division may, in certain circumstances, provide short term parking considerations including:

1. Driveway paving;
2. Construction;
3. Religious observance; and
4. Underground parking cleaning.

Parking tickets may be cancelled under this section for the following infractions:

- Park Longer than 3 hours
- No parking

A parking ticket may be cancelled under this section provided that the following conditions are met:

1. The conditions stated on consideration were complied with; and
2. The plate numbers of the ticketed vehicles must be listed on the consideration letter.

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. A copy of the parking consideration letter; or
2. The consideration number assigned by the Toronto Police Service's Parking Enforcement Unit or the City of Toronto's Transportation Services Division so that the consideration can be confirmed.

Parking tickets will not be cancelled for the following infractions under this section:

- No Standing

- No Stopping
- Stop on sidewalk
- Park on boulevard
- Park in front of fire hydrant
- Park in fire route
- Park in rush hour route
- Park on a permit parking street

5.1 Religious Observances

For religious observances, parking tickets may be cancelled for the following infractions:

- Park at expired meter
- Park during prohibited times (excluding rush hour)
- Park signed highway in excess of permitted time

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. A letter or correspondence from the Minister or head of a religious group that identifies the time, date and location of the religious observance or service.

6.0 Extenuating Circumstances

Parking tickets may be cancelled in extenuating circumstances including:

- Medical emergency (e.g. a situation where a person required immediate hospitalization and the vehicle could not be moved to a legal parking area.)
- Vehicle breakdown;
- Other circumstances not identified in these guidelines where parking legally was not possible.

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. For medical emergencies, a copy of the hospital report, record of admission, and/or an ambulance report.
2. For vehicle breakdown, a copy of the tow receipt and/or the repair bill(s).
3. For other circumstances, evidence such as documents, permissions, photos, etc. must be provided to support the cancellation.

7.0 Sign Missing or Illegible

A parking ticket may be cancelled if a traffic sign was missing, damaged, obscured or illegible or that there were conflicting signs on the street where the infraction occurred. Staff will request that

the Toronto Police Services Parking Enforcement Office or the City of Toronto's Transportation Services Division conduct an investigation.

Parking tickets may be cancelled for signed offences.

The following condition must be met:

1. The investigating office (Parking Enforcement or Transportation Services) must recommend in writing that the parking ticket be cancelled.

8.0 Pay & Display Machine or Meter Missing, Removed or Inoperable

A parking ticket may be cancelled if a Pay and Display machine or parking meter was missing, removed or inoperable. Staff will request that the Toronto Parking Authority conduct an investigation.

Parking tickets may be cancelled under this section for the following infractions:

- Park - fail to deposit fee; and
- Park - fail to display receipt.

A parking ticket may be cancelled under this section provided the following condition is met:

1. The Toronto Parking Authority must recommend that the parking ticket be cancelled.

9.0 Emergency Vehicle

Parking tickets will be cancelled for emergency vehicles, such as ambulances, police or fire department that are exempt from parking tickets under the City of Toronto Municipal Code, where the particular emergency vehicle was attending to an emergency at the location indicated on the parking ticket. The exemption applies to all City of Toronto parking tickets.

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. An original letter on Divisional letterhead signed by the authorized manager or director of the City Division or public utility stating that the emergency existed when the parking ticket was issued.

10.0 Vehicles Engaged in Work for the City

Parking tickets will be cancelled for vehicles engaged in work for the City, and the Toronto Transit Commission (TTC) that are exempt from parking tickets under the Municipal Code, where parking,

standing or stopping of the vehicle doing the work was required to perform the work at the location, date and time of the ticket. The exemption applies to all City of Toronto parking tickets.

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. Copy of work order/schedule; and/or
2. Original letter on letterhead signed by the authorized manager or director of the City Division, TTC or Public Transit Agency indicating that parking, stopping or standing was required for a legitimate municipal purpose and an explanation of why the driver needed to illegally park, stand or stop in that location.

11.0 Public Utility Vehicles

Parking tickets will be cancelled for public utility vehicles responding to emergencies, (including utilities providing telecommunications, energy or water/ wastewater services) that are exempt under the Municipal Code, and when parking was necessary to perform the emergency work at that location. The exemption applies to all on-street infractions (only during the emergency)

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. Copy of the Temporary Street Occupation – Site Service – Utilities permit (if available);
2. Copy of work order/schedule pertaining to the date, time and location of the infraction, and
3. Original letter on letterhead signed by the authorized Manager or Director (signature must be on file) indicating that parking was required for a legitimate emergency purpose and explanation of why the driver needed to park in that location.

12.0 Valid Ontario Veteran Plate Displayed (on certain days only)

The City of Toronto's Municipal Code provides parking exemptions to persons who display a valid Ontario veteran's licence on their vehicle. The exemption only applies on the following dates:

- June 6
- September 17
- November 11
- August 18 (consideration)
- Other dates approved by council; and
- Any other date where consideration is granted.

Parking tickets may be cancelled under this section for the following infractions:

- Park - fail to deposit fee in meter
- Park - fail to deposit fee in machine

- Park vehicle in or on a parking space controlled by a parking machine without activating the machine
- Park - fail to properly display receipt in windshield

A parking ticket may be cancelled under this section provided the following condition is met:

1. The Ontario Veteran licence plate must be registered to the person requesting the cancellation and must have been affixed to the vehicle at the time of the infraction.

13.0 Continuing Infraction

A continuing infraction occurs when two or more parking tickets are issued to a vehicle within a specified time limit. The specified limit depends on the type of infraction (e.g. Park longer than 1, 2 or 3 hours).

Parking tickets may be cancelled under this section for No Parking infractions only, if the following conditions are met:

1. Must be the same offence;
2. Same plate; and
3. Same location.

Only tickets issued within 3 hours of each other will be considered for cancellation.

14.0 Issuing Enforcement Agency Request

Situations occur where the Toronto Police Service's Parking Enforcement Unit may request withdrawal of a parking ticket.

A parking ticket may be cancelled under this section for any parking related offences.

The Toronto Police Service's Parking Enforcement Unit must submit the request in writing using the approved Withdrawal Request Form - the form must be authorized by a management representative of the Parking Enforcement Unit.

15.0 Taxicabs/Limousine While Picking up or Dropping off Passengers

Parking tickets may be cancelled under this section for the following infractions:

- Prohibited parking offences (excluding rush hour)

A parking ticket may be cancelled under this section if the following conditions are met:

1. Vehicle was being operated for taxi or limousine services at the time of the infraction.
2. Vehicle license plate was issued to a taxi or limousine.

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. If the driver of the taxi/limousine is making a delivery, a letter from the taxi/limousine company and a waybill for the time/date and location of the infraction.
2. A letter, on letterhead from the Dispatcher, indicating pick up location, time, date and drop off location.
3. Owner or driver must possess a taxi licence.

16.0 Nursing Agencies/Compassionate Service Agencies

Parking tickets may be cancelled under this section for the following infractions:

- Metered offences;
- Park- longer than 3 hours;
- Park during prohibited times (excluding rush hour);
- Park in excess of permitted time; and
- Park no permit (if time/situation of infraction is reasonable) time, date, infraction and location of the duties should be specified.

The following evidence must be provided:

1. A letter from an official on letterhead explaining the vehicle was being operated by a staff member while performing duties for the organization.
2. The letter must have an original signature and must include the title and telephone number of the authorized writer (Nurse Manager, etc.).

17.0 Security Companies - Alarm Response

Parking tickets may be cancelled under this section for the following infractions:

- Metered offences
- Park longer than 3 hours
- Park during prohibited times (excluding rush hour)
- Park in excess of permitted time
- Park no permit (if time/situation of infraction is reasonable) time, date, infraction and location of the duties should be specified

The following evidence must be provided:

1. A letter from an official on letterhead explaining the vehicle was being operated by a staff member in response to an alarm.
2. The letter must have an original signature and must include the title and telephone number of the authorized writer as well as the time and location of the alarm supported by the response sheet.

17.1 Courier and Delivery Vehicles

Drivers of courier and delivery vehicles engaged in delivering goods or services are exempt from most parking offences only while in the act of loading or unloading merchandise or passengers and whilst actually in or around the vehicle.

The City of Toronto has created "Courier Delivery Zones" in strategic areas in the downtown core, based on heaviest courier usage and in consultation with the Canadian Courier and Logistics Association. Currently 13 of these Zones exist and future expansion is planned.

The Parking Enforcement Unit, where possible, is providing a 10-minute "delivery window" to allow deliveries to occur before ticketing.

Courier and Delivery vehicles, parked illegally are subject to ticketing and tickets may be considered for cancellation for the following offences only if the driver or representative provides a signed letter or delivery receipt which clearly displays the delivery time/location/date:

- No Parking (other than during rush-hour times)
- Park public lane

Courier and delivery vehicles ticketed or parked illegally are not exempt from the following:

- No Parking/No Stopping/No Standing where the offence occurred between the hours of 6 a.m. – 10 a.m. or 3 p.m. – 7 p.m., Monday through Friday
- In No Parking/No Stopping/No Standing areas in designated emergency or snow routes
- Any metered or Pay and Display Offence
- Parking within 60 cm of a driveway
- Stopping/Standing/Parking on a bridge
- Parking within 3 metres of a fire hydrant
- Parking within seven and five-tenths (7.5) metres of any fire hall on the side of the highway on which the fire hall is located or within thirty and five-tenths (30.5) metres of the fire hall on the opposite side of the highway
- Parking within nine metres (signs not required) or 15 metres (signs required) of an intersection
- Parking in any “No Standing and No Stopping areas”
- Parking in a designated fire route
- Parking within a stand designated for taxicabs
- Parking in a position as will prevent the removal of any other vehicle previously parked
- Designated Disabled Parking Offences (on-street or off-street)
- any other offence not listed above.

18.0 Tour Buses

Parking tickets may be cancelled under this section for the following infractions:

- Metered offences
- Park - longer than 3 hours
- Park during prohibited times (excluding rush hour),
- Park in excess of permitted time

The following evidence must be provided:

1. A letter from an official on letterhead explaining the vehicle was being operated by a staff member while performing duties of the company and that no other parking was available.

19.0 Time Allowance

The Time Allowance provision for parking offences refers to the period of time following the expiry of a pay and display receipt or paid parking time and the issuance of a parking ticket.

The Toronto Police Service Parking Enforcement Unit observes a 5-minute operational grace period before issuing a parking ticket for a time-limited offence, e.g. overstaying at a parking meter or a pay-and-display parking zone. The grace period is intended to ensure fairness and integrity in parking enforcement operations, and serves both as a courtesy to drivers, and avoids the issue of timing discrepancies between a driver's watch, a hand-held ticket-writing device, and a meter or pay-and-display machine.

> The Time Allowance provision does not provide for an automatic cancellation. Rather, each ticket is reviewed based on the location of the offence, circumstances surrounding the offence and the vehicle plate history (i.e.: prior cancellations, fraudulent use of permits or receipts and an offenders' outstanding fines may be considered as part of the overall review).

The City of Toronto operates with an administrative time allowance provision for time-limited offences including expired parking meters or expired pay-and-display receipts. This is a separate practice from the Toronto Parking Enforcement Unit, and may allow a parking ticket issued within 10 minutes of the expiry of the time-limited period to be cancelled, rather than requiring that drivers request a trial and appear in court in these circumstances.

This 10-minute Time Allowance provision applies to all time-limited offences where proof of a receipt

showing approved purchased time can be provided but excludes major arterial routes during rush hour periods or areas where parking is prohibited for construction, traffic or event closures.

- Customers who wish to submit their ticket for Time Allowance consideration can do so by emailing their request to parkingmeters@toronto.ca or by fax at 416-696-4194.

To support your claim you must bring evidence (i.e., valid pay-and-display parking receipt or other supporting documentation etc.) that establishes that the parking ticket meets the criteria for cancellation in the Parking Ticket Cancellation Guidelines.

Fax/E-mail Service for customers with valid Pay-and-Display receipts or Accessibility/Disabled Permits only:

Customers with valid pay-and-display receipts and/or accessibility/disabled permits can fax their written request for cancellation or consideration, along with copies of the receipts or permits, to the City's Parking Ticket Operations – Investigations Unit at: 416-696-4194, or scan and e-mail your request and documents to: parkingdisputes@toronto.ca.

Please ensure you provide a contact telephone number, email address or mailing address as staff will advise of the outcome of the investigation by telephone, email or in writing.

The most common example of a time-limited offence is when a driver parks beyond the time indicated on a pay-and-display parking receipt. The 10-minute time allowance period applies to the following offences and only tickets issued for these offences can be considered for cancellation:

Restricted time-limited offences to which a 10-minute time allowance may apply:

- Park Fail to Deposit Fee in Machine (Meter or Pay and Display Machines – Offence Code 207: $30.00)
- Park Fail to Display Receipt in Windshield (Offence Code 210: $30.00)

Note: The minimum time purchased must be no less than ten minutes.

When does the time allowance provision not apply?

Note that the 10-minute time allowance identified within the cancellation guidelines does NOT apply to tickets issued for:

- parking during prohibited times on major arterial routes or during rush hour periods (even where a pay-and-display ticket may have been purchased)
- 2am – 7am “snow clearing” bylaw offences (during weather events); and
- Any other offence not listed above where parking was temporarily restricted due to weather, traffic, construction or other events. The time allowance provision also does not apply in cases where the expiry time relates to a change in parking restrictions (e.g., where one can park between certain posted hours, but parking is prohibited beyond those specified hours due to permit requirements, changes in traffic flow etc).

How do I get my ticket reviewed and considered for cancellation?
The time allowance provision established in the Cancellation Guidelines apply only to time-limited parking offences. A number of factors are considered before a ticket may be cancelled. These include but are not limited to a vehicle or driver's previous offence history, abuse of time allowance cancellations, weather conditions and other factors that may have contributed to the excess time offence.

Offenders who are refused a cancellation under this provision and wish to further dispute their ticket, must attend in person at one of the City's four parking ticket counters (First Appearance Facilities) listed on the back of the parking ticket.

20.0 Rush Hour Routes/Bicycle Lanes/Time Restricted Parking Areas /Transit or other Prohibited Parking Offences:

Effective 12:01am on March 31, 2016, cancellation of all $150.00 parking tickets issued for the offences:

- No Parking
- No Stopping;
- No Standing; or
- other offences where the fine is $150.00

issued Monday through Friday and during the hours of 6 a.m. and 10 a.m. or 3 p.m. and 7 p.m. do not qualify for cancellation unless the driver can provide evidence of:

1. Vehicle breakdown (mechanic or tow bill required)
2. Medical emergency (doctor or medical certificate required)
3. Weather events preventing legal parking on private areas (photos of the location must be provided or Supervisory authorization - weather event must have caused vehicle immobilization or inoperation/breakdown)

Cancellations for deliveries, pick-up or any other circumstances are not permitted for tickets with all $150.00 fines.

21.0 Tickets issued for Expired Plates:

Cancellation of tickets issued for offences related to Expired Plates cannot be cancelled unless the driver/owner provides documentation which clearly identifies that the license plates of the offending vehicle were renewed prior to the offence date and time. Cancellation conditions require acceptable documentation which is restricted to:

1. a true copy of a Ministry of Transportation or Service Ontario Invoice showing date and time of purchase, which must be before the offence date and time; and

2. the invoice must include the plate number that was renewed - which must match the plate number on the parking ticket

Copies of ownership with renewal stickers are not acceptable since they do not clearly indicate a date and time of renewal purchase.

City of Toronto
Parking Ticket Cancellation Guidelines

Glossary of Terms

A term not defined in this section shall have the same meaning as the term has in the Highway Traffic Act.

Accessible Parking Permit/Disabled Parking Permit
"accessible parking permit" or "disabled parking permit" means a current and valid disabled person parking permit issued by the Ministry of Transportation under the provisions of the Highway Traffic Act; or, a current and valid permit, number plate or other marker or device bearing the international symbol of access for the disabled which has been issued by a jurisdiction outside Ontario.

First Appearance Facility (FAF)
"First Appearance Facility or FAF" means a location where a person who received a City of Toronto parking ticket can attend to dispute the issuance of the parking ticket

Highway
"highway" includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof;

Infraction
"infraction" means a contravention of any provision of a City of Toronto parking bylaw

No Parking
"park" or "parking", when prohibited, means the standing of a vehicle, whether occupied or not, except when standing temporarily for the purpose of and while actually engaged in loading or unloading merchandise or passengers;

No Standing
"stand" or "standing", when prohibited, means the halting of a vehicle, whether occupied or not, except for the purpose of and while actually engaged in receiving or discharging passengers;

No Stopping
"stop" or "stopping", when prohibited, means the halting of a vehicle, even momentarily, whether occupied or not, except when necessary to avoid conflict with other traffic or in compliance with the directions of a police officer or of a traffic control sign or signal;

Offence
"offence" means any contravention of any provision under of a City of Toronto parking bylaw;

Parking
"parking" means the standing still of a vehicle, whether occupied or not;

Representative
"representative" means, in respect of a proceeding to which this Act applies, a person authorized under the Law Society Act to represent a person in that proceeding;

Signed Offence
"Signed offence" means, any sign that was erected by the City of Toronto depicting a parking bylaw or regulation;

Set Fine
"set fine" means the amount of fine set by the Chief Justice of the Ontario Court of Justice for an offence for the purpose of proceedings commenced under Part I or II. R.S.O. 1990, c. P.33, s. 1 (1); 2000, c. 26, Sched. A, s. 13 (6); 2002, c. 18, Sched. A, s. 15 (6); 2006, c. 21, Sched. C, s. 131 (1, 2); 2009, c. 33, Sched. 4, s. 1 (1);

Vehicle
"vehicle" includes a motor vehicle, trailer, traction engine, farm tractor, road-building machine, bicycle and any vehicle drawn, propelled or driven by any kind of power, including muscular power, but does not include a motorized snow vehicle or a street car..

From: SHEILA WILCHES CALERO <scalero@rogers.com>
Sent: November 20, 2018 1:12 PM
To: Gadi Katz
Cc: Erin Baker; Paul Sommerville
Subject: Re: Willero Legal Services Matter to heard December 3, 2018

Good afternoon,

I can advise that these cases were picked for the purposes of its infraction which is why the offence is detailed. I have requested from each company to provide to me any supporting documents for these infractions which I have yet to receive.

Also please note that as far as I am aware, there will be a representative for each company at the hearing. I only need to confirm with each company as to name and position of the individual. Furthermore, I can assure you, as an officer of the court, that all these companies were making deliveries at the time of the offence; if there are any other parking solutions for these offences, I have not found any during my research.

I trust that suffice for the purposes of providing the City's response.

Thank you kindly,

Sheila Wilches Calero
(Member of The Law Society of Upper Canada)
Willero Legal Services
665 Millway Ave, Unit 12, 2nd Floor
Vaughan, Ontario L4K 3T8
Tel. C. 416-268-7008– Office – 647-347-3400 - Toll free: 1-888-327-6492 Fax: 647-347-3401
www.willerolegal.com

From: Gadi Katz
To: 'SHEILA WILCHES CALERO'
Cc: Erin Baker
Sent: Tuesday, November 20, 2018 10:25 AM
Subject: RE: Willero Legal Services Matter to heard December 3, 2018

Dear Ms. Wilches Calero,
I have briefly reviews the materials you provided. Prior to formulating the City's response can we have some rationale as to why these five cases were selected as the representative group?
Also, would you be able to provide us with the delivery addresses for each of those infractions. One concern is that the tribunal and us have no idea if the driver was actually on a delivery at that time and if there were alternative parking solutions that were not utilized.
Thanks,
Gadi Katz | Solicitor, Prosecutions Section
City of Toronto | Legal Services Division
Room 12E | Old City Hall, 60 Queen Street West | Toronto ON | M5H 2M4

T: (416) 338-3169 | F: (416) 338-6986 | E: gadi.katz@toronto.ca

From: SHEILA WILCHES CALERO [mailto:scalero@rogers.com]
Sent: November 19, 2018 4:51 PM
To: Administrative Penalty Tribunal ; Paul.Sommervilee@toronto.ca; Erin Baker ; Gadi Katz
Cc: salero@willerolegal.com
Subject: Willero Legal Services Matter to heard December 3, 2018
Case Law attached.

Sheila Wilches Calero
(Member of The Law Society of Upper Canada)
Willero Legal Services
665 Millway Ave, Unit 12, 2nd Floor
Vaughan, Ontario L4K 3T8
Tel. C. 416-268-7008– Office – 647-347-3400 - Toll free: 1-888-327-6492 Fax: 647-347-3401
www.willerolegal.com

Highway	Side	Location	Times and/or Days
Adelaide Street West [Added 2015-07-09 by By-law No. 817-2015]	South	Between a point 73.5 metres east of Bay Street and a point 45 metres further east	Anytime, except 7:00 a.m. to 10:00 a.m. and 3:00 p.m. to 7:00 p.m., Mon. to Fri.
Augusta Avenue [Added 2018-01-16 by By-law 49-2018]	West	A point 29.4 metres north of Nassau Street and a point 25 metres further north	Anytime
Balmuto Street [Added 2012-02-14 by By-law No. 279-2012][Repealed 2017-05-02 by By-law 524-2017]			
Bay Street [Added 2015-04-02 by By-law No. 390-2015]	East	Between a point 15 metres north of Queens Quay West and a point 14 metres further north	4:30 p.m. of one day to 8:00 a.m. of the next following day Mon. to Fri. and anytime Sat., Sun., and public holidays from Jul. 1 to Aug. 31, inclusive; Anytime from Sept. 1 of one year to Jun. 30 of the next following year, inclusive
Bay Street [Added 2015-04-02 by By-law No. 390-2015][Repealed 2017-12-08 by By-law 1418-2017]			
Bay Street [Added 2015-04-02 by By-law No. 390-2015]	West	Between a point 15 metres north of Queens Quay West and a point 45 metres further north	4:30 p.m. of one day to 8:00 a.m. of the next following day Mon. to Fri. and anytime Sat., Sun., and public holidays from Jul. 1 to Aug. 31, inclusive; Anytime from Sept. 1 of one year to Jun. 30 of the next following year, inclusive
Bellair Street [Repealed 2016-06-14 by By-law No. 650-2016]			
Bellair Street [Added 2016-06-14 by By-law No. 650-2016]	East	Between a point 15 metres north of Bloor Street West and Mayfair Mews	6:00 a.m. to 6:00 p.m., Mon. to Fri.

Highway	Side	Location	Times and/or Days
Bellair Street [Added 2017-05-02 by By-law 534-2017]	West	Between a point 14.5 metres north of Cumberland Street and a point 27 metres south of Yorkville Avenue	6:00 a.m. to 4:00 p.m.. Mon. to Fri.
Bellair Street [Added 2015-09-08 by By-law No. 937-2015][Repealed 2017-05-02 by By-law 534-2017]			
Bloor Street West [Added 2013-12-18 by By-law No. 1713-2013]	North	A point 9 metres west of Balmuto Street and a point 20 metres further west	9:00 a.m. to 5:00 p.m. Mon. to Fri. except public holidays
Bloor Street West [Added 2016-07-15 by By-law No. 741-2016]	South	A point 55.5 metres east of Grace Street and a point 11 metres further east	Anytime
Bloor Street West [Added 2013-06-13 by By-law No. 797-2013]	South	Between a point 34.1 metres west of Concord Avenue and a point 6.5 metres further west	9:00 a.m. of one day to 7:00 a.m. of the next following day, Mon. to Fri. and anytime Sat. and Sun., for a maximum period of 30 minutes
Bond Street	West	Between Dundas Street East and a point 22 metres south	Anytime
Cameron Street	East	Between a point 85.3 metres south of Grange Avenue and a point 99.3 metres south of Grange Avenue	Anytime
Cariboo Avenue [Added 2013-05-14 by By-law No. 724-2013]	South	A point 69.5 metres west of Osler Street and a point 26.5 metres further west	7:00 a.m. to 9:00 p.m. Mon. to Sat. for a maximum period of 30 minutes
Carlton Street [Repealed 2017-10-04 by By-law 1073-2017]			

Highway	Side	Location	Times and/or Days
Carlton Street [Added 2017-10-04 by By-law 1073-2017]	North	Between a point 109.4 metres east of Yonge Street and a point 14.3 metres futher east	9:30 a.m. to 3:30 p.m., Mon. to Fri.; 8:00 a.m. to 6:00 p.m. Sat.
Centre Avenue	West	Between a point 32.7 metres north of Dundas Street West and a point 9.2 metres further north	Anytime
Church Street	East	Between a point 59.5 metres north of Front Street East and a point 15.5 metres further north	9:00 a.m. to 4:00 p.m., Mon. to Fri.; 8:00 a.m. to 6:00 p.m., Sat.
Colborne Street	South	Between a point 31.5 metres east of Yonge Street and a point 15 metres further east	Anytime
College Street	South	Between a point 60.9 metres west of Yonge Street and a point 14 metres further west	Anytime
Cumberland Street [Added 2015-09-08 by By-law No. 937-2015]	North	Between a point 159 metres east of Avenue Road and a point 10 metres further east	Anytime
Cumberland Street [Repealed 2015-09-08 by By-law No. 937-2015]			
Cumberland Street [Added 2016-06-14 by By-law No. 650-2016]	North	Between a point 169 metres east of Avenue Road and a point 20 metres west of Bellair Street	6:00 a.m. to 4:00 p.m., Mon. to Fri.
Cumberland Street [Added 2015-09-08 by By-law No. 937-2015][Repealed 2016-06-14 by By-law No. 650-2016]			

Highway	Side	Location	Times and/or Days
Cumberland Street [Repealed 2015-09-08 by By-law No. 937-2015]			
Cumberland Street [Added 2015-09-08 by By-law No. 937-2015]	South	Between a point 61 metres east of Bay Street and Yonge Street	6:00 a.m. to 4:00 p.m., Mon. to Fri.
Cumberland Street [Repealed 2015-09-08 by By-law No. 937-2015]			
Dalton Road	East	Between a point approximately 15 metres north of Bloor Street West and a point 12 metres further north	8:00 a.m. to 12:00 p.m.
Danforth Avenue [Repealed 2012-04-11 by By-law No. 528-2012]			
Danforth Avenue [Added 2012-07-13 by By-law No. 987-2012]	South	Between a point 300 metres east of Pape Avenue and a point 25 metres further east	10:00 a.m. to 2:00 p.m., Mon. to Fri.
Danforth Avenue	South	Between a point 40.5 metres east of Gough Avenue and a point 11 metres further east	Anytime
Edward Street [Added 2014-08-12 by By-law No. 847-2014]	North	Between a point 192.5 metres west of Yonge Street and a point 14.1 metres further west	Anytime
Edward Street [Added 2014-08-12 by By-law No. 847-2014]	North	Between a point 192.5 metres west of Yonge Street and a point 14.1 metres further west	Anytime

Highway	Side	Location	Times and/or Days
Edward Street	South	Between a point 35 metres east of University Avenue and a point 8.5 metres further east	8:00 a.m. to 6:00 p.m., Mon. to Sat.
Eglinton Avenue West	North	Between a point 7.5 metres west of Times Road and a point 7 metres further west	9:00 a.m. to 4:00 p.m., Mon. to Fri.
Front Street West	South	Between a point 30.5 metres east of Simcoe Street and a point 15 metres further east	Anytime
Gerrard Street East	South	Between a point 166 metres east of Broadview Avenue and a point 11 metres further east	Anytime
Harbord Street	South	Between a point 16.5 metres east of Montrose Avenue and a point 11 metres further east	8:00 a.m. to 6:00 p.m.
Hayden Street [Added 2018-04-04 by By-law 444-2018]	South	Between a point 20 metres east of Yonge Street and a point 24 metres further east	Anytime
Hayden Street [Added 2016-06-14 by By-law No. 659-2016][Repealed 2018-04-04 by By-law 435-2018]			
Hazelton Avenue	East	Between Scollard Street and a point 65.5 metres north	Anytime
Humbert Street	South	Between Ossington Avenue and a point 31 metres west	Anytime
Jamestown Crescent [Added 2017-02-22 by By-law 141-2017]	West	A point 58 metres north of John Garland Boulevard (west intersection) and a point 20 metres further north	9:00 a.m. to 2:00 p.m. on Wed. and Fri.

Highway	Side	Location	Times and/or Days
King Street East [Added 2017-11-09 by By-law 1259-2017]	North	Between a point 13.7 metres east of Toronto Street and a point 22 metres further east	Anytime (15 minutes maximum)
King Street East [Added 2018-02-01 by By-law 155-2018]	North	Between a point 15 metres west of Victoria Street and a point 22 metres further west	Anytime
King Street East [Added 2017-11-09 by By-law 1259-2017][Repealed 2018-04-27 by By-law 488-2018]			
King Street East [Added 2018-04-27 by By-law 488-2018]	South	Between a point 16.3 metres east of Leader Lane and a point 28 metres further east	Anytime
King Street East [Repealed 2013-12-17 by By-law No. 1729-2013]			
King Street East [Added 2013-12-17 by By-law No. 1729-2013][Repealed 2017-11-09 by By-law 1259-2017]			
King Street East [Added 2017-11-09 by By-law 1259-2017]	South	Between a point 20.5 metres east of Victoria Street and a point 46 metres further east	Anytime (15 minutes maximum)
King Street East [Added 2017-11-09 by By-law 1259-2017]	South	Between a point 35.8 metres west of Jarvis Street and a point 22 metres further west	Anytime (15 minutes maximum)

Highway	Side	Location	Times and/or Days
King Street East [Added 2018-02-01 by By-law 155-2018]	South	Between Victoria Street and a point 16 metres west	Anytime
King Street West [Added 2018-02-01 by By-law 155-2018]	North	Between a point 30.5 metres east of John Street and a point 84.5 metres further east	Anytime
King Street West [Added 2017-11-09 by By-law 1259-2017]	North	Between a point 43.5 metres east of Bay Street and a point 26.5 metres further east	Anytime (15 minutes maximum)
King Street West [Added 2017-11-09 by By-law 1259-2017]	North	Between a point 53.8 metres west of Spadina Avenue and a point 26.7 metres further west	Anytime (15 minutes maximum)
King Street West [Added 2017-11-09 by By-law 1259-2017]	North	Between a point 62.8 metres east of Portland Street and a point 22 metres further east	Anytime (15 minutes maximum)
King Street West [Added 2017-11-09 by By-law 1259-2017]	North	Between a point 77.5 metres east of York Street and a point 64.5 metres further east	Anytime (15 minutes maximum)
King Street West [Added 2017-11-09 by By-law 1259-2017]	North	Between a point 88.2 metres east of Bathurst Street and a point 27 metres further east	Anytime (15 minutes maximum)
King Street West [Added 2018-02-01 by By-law 155-2018]	North	Between a point 9 metres east of Ed Mirvish Way and a point 96 metres further east	Anytime
King Street West [Added 2013-11-15 by By-law No. 1516-2013][Repealed 2014-06-13 by By-law No. 533-2014]			

Highway	Side	Location	Times and/or Days
King Street West [Added 2018-04-27 by By-law 488-2018]	South	Between a point 108.4 metres east of Spadina Avenue and a point 44 metres further east	Anytime
King Street West [Added 2017-11-09 by By-law 1259-2017]	South	Between a point 121.8 metres east of Bathurst Street and a point 22 metres further east	Anytime (15 minutes maximum)
King Street West [Added 2017-11-09 by By-law 1259-2017]	South	Between a point 127.7 metres east of York Street and a point 83 metres further east	Anytime (15 minutes maximum)
King Street West [Added 2017-11-09 by By-law 1259-2017][Repealed 2018-04-27 by By-law 488-2018]			
King Street West [Added 2017-11-09 by By-law 1259-2017]	South	Between a point 168.8 metres west of Spadina Avenue and a point 11 metres further west	Anytime (15 minutes maximum)
King Street West [Added 2018-04-27 by By-law 488-2018]	South	Between a point 34.4 metres west of John Street and a point 22 metres further west	Anytime
King Street West [Added 2017-11-09 by By-law 1259-2017]	South	Between a point 41 metres east of Portland Street and a point 22 metres further east	Anytime (15 minutes maximum)
King Street West [Added 2017-11-09 by By-law 1259-2017]	South	Between a point 41.9 metres east of York Street and a point 16.5 metres further east	Anytime (15 minutes maximum)
King Street West [Added 2017-11-09 by By-law 1259-2017]	South	Between a point 69.2 metres east of Bay Street and a point 35 metres further east	Anytime (15 minutes maximum)

Highway	Side	Location	Times and/or Days
King Street West [Added 2017-11-09 by By-law 1259-2017]	South	Between a point 97.3 metres west of Spadina Avenue and a point 11 metres further west	Anytime (15 minutes maximum)
Leader Lane	West	Between a point 30.5 metres south of King Street East and Colborne Street	Anytime
Lombard Street [Repealed 2016-09-07 by By-law No. 856-2016]			
Lourdes Lane [Added 2013-10-17 by By-law No. 1408-2013]	South	Between a point 10.5 metres west of Sherbourne Street and a point 21.5 metres further west	Anytime
Market Street [Added 2015-09-08 by By-law No. 920-2015]	East	A point 53 metres north of The Esplanade and a point 25 metres further north	Anytime
Market Street [Added 2016-04-05 by By-law No. 343-2016]	East	A point 9 metres north of Wilton Street and a point 14 metres further north	12:00 a.m. to 8:00 a.m. and 2:00 p.m. to 6:00 p.m., Sat.; 2:00 a.m. to 8:00 a.m. and 4:00 p.m. to 8:00 p.m., Sun.
McGill Street [Added 2018-02-21 by By-law 239-2018]	South	A point 93.5 metres west of Church Street and a point 7.3 metres further west	Anytime
Mercer Street [Repealed 2016-10-13 by By-law 1043-2016]			
Mercer Street [Added 2016-10-13 by By-law 1043-2016]	North	Between a point 75.5 metres east of Blue Jays Way and a point 29.1 metres further east	Anytime
Morrison Street [Added 2015-07-09 by By-law No. 817-2015]	East	Between Adelaide Street West and a point 26 metres south	Anytime

Highway	Side	Location	Times and/or Days
Pape Avenue	West	Between a point 65.1 metres south of Danforth Avenue and a point 10 metres further south	Anytime
Phipps Street [Added 2015-02-18 by By-law No. 319-2015]	South	Between a point 68.4 metres east of Bay Street and a point 35 metres west of St. Nicholas Street	Anytime
Phipps Street [Repealed 2015-02-18 by By-law No. 319-2015]			
Piper Street	South	Between a point 25 metres east of York Street and a point 15 metres west of the east end of Piper Street	Anytime
Prince Arthur Avenue	South	Between a point 32 metres east of Bedford Road and a point 10 metres further east	8:00 a.m. to 6:00 p.m. Mon. to Sat. for a maximum period of 30 minutes
Queen Street East [Added 2013-10-11 by By-law No. 1307-2013]	North	Between a point 19 metres west of Lee Avenue and a point 11.5 metres further west	Anytime
Queens Quay West [Added 2015-04-02 by By-law No. 390-2015]	North	Between a point 154.7 metres east of Rees Street and a point 21.8 metres further east	Anytime
Queens Quay West [Added 2015-04-02 by By-law No. 390-2015]	North	Between a point 196.4 metres east of Rees Street and a point 14.6 metres further east	Anytime
Queens Quay West [Added 2015-04-02 by By-law No. 390-2015]	North	Between a point 294.1 metres east of Lower Spadina Avenue and a point 23.7 metres further east	Anytime
Queens Quay West [Added 2015-04-02 by By-law No. 390-2015]	North	Between a point 64.3 metres east of Rees Street and a point 16.2 metres further east	Anytime

Highway	Side	Location	Times and/or Days
Richmond Street East [Added 2016-06-14 by By-law No. 651-2016]	South	Between a point 48.5 metres east of Church Street and a point 12.5 metres further east	Anytime, except 7:00 a.m. to 9:00 a.m. and 3:30 p.m. to 6:30 p.m., Mon. to Fri.
Richmond Street East [Added 2016-06-14 by By-law No. 651-2016][Repealed 2016-12-15 by By-law 1269-2016]			
Richmond Street West [Added 2014-06-13 by By-law No. 562-2014]	South	A point 45 metres west of Spadina Avenue and a point 40 metres further west	7:30 a.m. to 9:30 a.m., Mon. to Fri., except public holidays
Richmond Street West [Repealed 2015-07-09 by By-law No. 817-2015]			
Roncesvalles Avenue	East	Between a point 15 metres south of Wright Avenue and a point 15 metres further south	6:00 a.m. to 6:00 p.m., Mon. to Sat. for a maximum period of 30 minutes
Sarah Street [Added 2016-01-19 by By-law No. 37-2016]	East	A point 9 metres south of Belmont Street and a point 14 metres further south	Anytime
Scadding Avenue	South	Between a point 50 metres east of Princess Street and a point 10 metres further east	Anytime
Shaftesbury Avenue	South	Between a point 77.4 metres east of Yonge Street and a point 15 metres further east	Anytime
Simcoe Street [Added 2015-07-09 by By-law No. 817-2015]	West	Between a point 38 metres south of Richmond Street West and a point 16 metres further south	Anytime

Highway	Side	Location	Times and/or Days
Simcoe Street [Added 2015-07-09 by By-law No. 817-2015]	West	Between a point 71.5 metres north of Wellington Street West and a point 33 metres further north	Anytime
Snooker Street	North	Between a point 15 metres east of Atlantic Avenue and a point 18 metres further east	8:00 a.m. to 6:00 p.m., Mon. to Sat. for a maximum period of 30 minutes
Spadina Avenue	West	Between a point 28.2 metres south of Baldwin Street and a point 7 metres further south	Anytime
St. Clair Avenue West [Added 2014-08-28 by By-law No. 935-2014]	North	A point 37 metres east of Oriole Road and a point 6.5 metres further east	Anytime
St. Helen's Avenue [Added 2012-03-20 by By-law No. 458-2012]	West	A point 35 metres south of Dublin Street and a point 69 metres further south	8:00 a.m. to 6:00 p.m., Mon. to Sat.
St. Patrick Street	West	Between a point 109 metres south of Dundas Street West and a point approximately 12 metres further south	Anytime
St. Patrick Street	West	Between a point 165 metres south of Dundas Street West and a point 36 metres further south	Anytime
St. Patrick Street	West	Between a point 216 metres south of Dundas Street West and a point 14 metres further south	Anytime
St. Patrick Street	West	Between a point 262 metres south of Dundas Street West and a point 22 metres further south	Anytime
St. Thomas Street [Added 2015-09-08 by By-law No. 937-2015]	West	Between a point 36 metres south of Bloor Street West and Sultan Street	Anytime

Highway	Side	Location	Times and/or Days
Stephanie Street [Added 2018-02-21 by By-law 251-2018]	North	A point 33.5 metres west of McCaul Street and a point 15 metres further west	Anytime
Sultan Street [Added 2015-09-08 by By-law No. 937-2015]	North	Between a point 9 metres west of St. Thoams Street and the west end of Sultan Street	6:00 a.m. to 4:00 p.m., Mon. to Fri.
The Esplanade	North	Between a point 52.8 metres west of Church Street and a point 23 metres further west	Anytime
The Esplanade [Added 2016-02-04 by By-law No. 126-2016]	South	A point 9 metres east of Market Street and a point 31 metres further east	12:00 a.m. to 8:00 a.m. and 2:00 p.m. to 6:00 p.m. Sat.; 2:00 a.m. to 8:00 a.m. and 4:00 p.m. to 8:00 p.m. Sun.
Victoria Street (TO) [Added 2013-10-17 by By-law No. 1412-2013]	West	A point 37.5 metres north of Shuter Street and a point 24 metres further north	Anytime
Victoria Street (TO)	West	Between a point 42 metres south of Shuter Street and a point 80 metres further south	Anytime
Walton Street [Added 2015-06-16 by By-law No. 709-2015]	North	A point 9 metres west of Bay Street and a point 17.5 metres further west	Anytime
Yonge Street [Added 2015-11-04 by By-law No. 1142-2015]	East	A point 6.5 metres south of Roehampton Avenue and a point 33.6 metres further south	9:00 a.m. to 4:00 p.m., Mon. to Fri.
Yonge Street	East	Between a point 30 metres south of Golfdale Road and a point 13 metres further south	Anytime
Yonge Street	West	Between a point 30 metres south of Chaplin Crescent and a point 24 metres further south	Anytime

Highway	Side	Location	Times and/or Days
York Street	West	Between Heenan Place and Wellington Street West	Anytime
Yorkville Avenue [Added 2015-09-08 by By-law No. 937-2015]	North	Between a point 15 metres east of Hazelton Avenue and a point 10 metres further east	Anytime
Yorkville Avenue [Added 2015-09-08 by By-law No. 937-2015]	North	Between a point 22 metres east of Bay Street and a point 26 metres further east	Anytime
Yorkville Avenue [Added 2015-09-08 by By-law No. 937-2015]	North	Between a point 25 metres east of Hazelton Avenue and a point 100 metres west of Bay Street	6:00 a.m. to 4:00 p.m., Mon. to Fri.
Yorkville Avenue [Repealed 2015-09-08 by By-law No. 937-2015]			
Yorkville Avenue [Added 2015-09-08 by By-law No. 937-2015][Repealed 2016-06-14 by By-law No. 648-2016]			
Yorkville Avenue [Added 2016-06-14 by By-law No. 648-2016]	North	Between a point 83.7 metres east of Avenue Road and a point 9 metres west of Hazelton Avenue	6:00 a.m. to 4:00 p.m., Mon. to Fri.

Highway	Side	Location	Time and/or Days	Maximum Period Permitted
Adelaide Street West [Added 2018-02-01 by By-law 151-2018]	North	Between a point 17.5 metres east of York Street and a point 27 metres further east	10:00 a.m. to 3:00 p.m., Mon. to Fri., except public holidays	20 mins.
Colborne Street [Added 2018-02-21 by By-law 252-2018]	North	Between a point 39 metres east of Victoria Street and a point 32 metres further east	Anytime	20 mins.
Court Street [Added 2018-02-21 by By-law 252-2018]	North	Between a point 9 metres east of Toronto Street and a point 23 metres further east	Anytime	20 mins.
Court Street [Added 2018-02-21 by By-law 252-2018]	South	Between a point 9 metres west of Church Street and a point 23 metres further west	Anytime	20 mins.
Duncan Street [Added 2018-02-21 by By-law 252-2018]	East	Between a point 11 metres north of Pearl Street and a point 12 metres further north	Anytime	20 mins.
Duncan Street [Added 2018-02-21 by By-law 252-2018]	East	Between a point 9 metres north of Adelaide Street West and a point 20.5 metres further north	Anytime	20 mins.
Duncan Street [Added 2018-02-21 by By-law 252-2018]	West	Between a point 10.5 metres south of Queen Street West and a point 24 metres further south	Anytime	20 mins.
Duncan Street [Added 2018-02-21 by By-law 252-2018]	West	Between a point 9 metres north of Adelaide Street West and a point 21 metres further north	Anytime	20 mins.
Duncan Street [Added 2018-02-21 by By-law 252-2018]	West	Between a point 9 metres north of Richmond Street West and a point 23 metres further north	Anytime	20 mins.
Ed Mirvish Way [Added 2018-02-21 by By-law 252-2018]	East	Between a point 15.5 metres north of King Street West and a point 9 metres further north	Anytime	20 mins.

Highway	Side	Location	Time and/or Days	Maximum Period Permitted
Emily Street [Added 2018-02-21 by By-law 252-2018]	East	Between a point 10 metres south of King Street West and a point 37.5 metres further south	Anytime	20 mins.
Lombard Street [Added 2018-02-21 by By-law 252-2018]	South	Between a point 9 metres west of Church Street and a point 12 metres further west	Anytime	20 mins.
Lombard Street [Added 2018-02-21 by By-law 252-2018]	South	Between a point 9 metres west of Jarvis Street and a point 19 metres further west	Anytime	20 mins.
Oxley Street [Added 2018-02-21 by By-law 252-2018]	North	Between a point 8 metres east of Spadina Avenue and a point 22.5 metres further east	Anytime	20 mins.
Oxley Street [Added 2018-02-21 by By-law 252-2018]	North	Between a point 8 metres west of Charlotte Street and a point 23 metres further west	Anytime	20 mins.
Pearl Street [Added 2018-02-21 by By-law 252-2018]	North	Between a point 9 metres east of Simcoe Street and a point 21 metres further east	Anytime	20 mins.
Pearl Street [Added 2018-02-21 by By-law 252-2018]	South	Between a point 9 metres east of John Street and a point 21 metres further east	Anytime	20 mins.
Pearl Street [Added 2018-02-21 by By-law 252-2018]	South	Between a point 9 metres west of Ed Mirvish Way and a point 16 metres further west	Anytime	20 mins.
Roncesvalles Avenue	East	Between a point 10 metres north of Galley Avenue and a point 13 metres further north	6:00 a.m. to 6:00 p.m., Mon. to Sat.	30 mins.
Roncesvalles Avenue	East	Between a point 9 metres north of Wright Avenue and a point 10 metres further north	6:00 a.m. to 6:00 p.m., Mon. to Sat.	30 mins.
Roncesvalles Avenue	East	Between a point 9 metres south of Galley Avenue and a point 20 metres further south	6:00 a.m. to 6:00 p.m., Mon. to Sat.	30 mins.

Highway	Side	Location	Time and/or Days	Maximum Period Permitted
Roncesvalles Avenue	East	Between a point 9 metres south of Wright Avenue and a point 23 metres further south	6:00 a.m. to 6:00 p.m., Mon. to Sat.	30 mins.
Roncesvalles Avenue	West	Between a point 10 metres south of Wright Avenue and a point 9 metres further south	Anytime	30 mins.
Scott Street [Added 2018-02-01 by By-law 151-2018]	East	Between a point 14 metres north of The Esplanade and a point 22 metres further north	Anytime	20 mins.
Sheppard Street [Added 2018-02-21 by By-law 252-2018]	East	Between a point 9 metres south of Richmond Street West and a point 27 metres further south	9:30 a.m. to 3:30 p.m., Mon. to Fri., except public holidays	20 mins.
Sheppard Street [Added 2018-02-21 by By-law 252-2018]	West	Between a point 9 metres south of Richmond Street West and a point 21 metres further south	9:30 a.m. to 3:30 p.m., Mon. to Fri., except public holidays	20 mins.
St. Helen's Avenue [Added 2015-09-08 by By-law No. 925-2015]	West	A point 35 metres south of Dublin Street and a point 69 metres further south	8:00 a.m. to 6:00 p.m., Mon. to Sat.	30 mins.
St. Helen's Avenue [Added 2012-03-20 by By-law No. 458-2012][Repealed 2015-02-18 by By-law No. 328-2015]				
St. Helen's Avenue [Repealed 2015-02-18 by By-law No. 328-2015]				
Victoria Street (TO) [Added 2018-02-21 by By-law 252-2018]	East	Between a point 12 metres north of Adelaide Street East and a point 19.5 metres further north	Anytime	20 mins.

Highway	Side	Location	Time and/or Days	Maximum Period Permitted
Victoria Street (TO) [Added 2018-02-21 by By-law 252-2018]	East	Between a point 60 metres north of King Street East and a point 12 metres further north	Anytime	20 mins.
Victoria Street (TO) [Added 2018-02-21 by By-law 252-2018]	East	Between a point 9 metres north of Colborne Street and a point 20 metres further north	Anytime	20 mins.
Victoria Street (TO) [Added 2018-02-21 by By-law 252-2018]	West	Between a point 42 metres north of Adelaide Street East and a point 43 metres further north	Anytime	20 mins.
Widmer Street [Added 2018-02-21 by By-law 252-2018]	East	Between a point 16.5 metres south of Richmond Street West and a point 23.5 metres further south	Anytime	20 mins.
Widmer Street [Added 2018-02-21 by By-law 252-2018]	East	Between a point 9 metres north of Adelaide Street West and a point 16 metres further north	Anytime	20 mins.
Windsor Street [Added 2018-02-21 by By-law 252-2018]	East	Between a point 15 metres north of Front Street West and a point 35 metres further north	Anytime	20 mins.
Windsor Street [Added 2018-02-21 by By-law 252-2018]	East	Between a point 15 metres south of Wellington Street West and a point 23 metres further south	Anytime	20 mins.
York Street [Added 2018-02-21 by By-law 252-2018]	East	Between a point 38 metres north of King Street West and a point 28 metres further north	9:30 a.m. to 3:30 p.m., Mon. to Fri., except public holidays	20 mins.

City of Toronto
Parking Ticket Cancellation Guidelines

Glossary of Terms

A term not defined in this section shall have the same meaning as the term has in the Highway Traffic Act.

Accessible Parking Permit/Disabled Parking Permit
"accessible parking permit" or "disabled parking permit" means a current and valid disabled person parking permit issued by the Ministry of Transportation under the provisions of the Highway Traffic Act; or, a current and valid permit, number plate or other marker or device bearing the international symbol of access for the disabled which has been issued by a jurisdiction outside Ontario.

First Appearance Facility (FAF)
"First Appearance Facility or FAF" means a location where a person who received a City of Toronto parking ticket can attend to dispute the issuance of the parking ticket

Highway
"highway" includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof;

Infraction
"infraction" means a contravention of any provision of a City of Toronto parking bylaw

No Parking
"park" or "parking", when prohibited, means the standing of a vehicle, whether occupied or not, except when standing temporarily for the purpose of and while actually engaged in loading or unloading merchandise or passengers;

No Standing
"stand" or "standing", when prohibited, means the halting of a vehicle, whether occupied or not, except for the purpose of and while actually engaged in receiving or discharging passengers;

No Stopping
"stop" or "stopping", when prohibited, means the halting of a vehicle, even momentarily, whether occupied or not, except when necessary to avoid conflict with other traffic or in compliance with the directions of a police officer or of a traffic control sign or signal;

Offence
"offence" means any contravention of any provision under of a City of Toronto parking bylaw;

Parking
"parking" means the standing still of a vehicle, whether occupied or not;

Representative
"representative" means, in respect of a proceeding to which this Act applies, a person authorized under the Law Society Act to represent a person in that proceeding;

Signed Offence
"Signed offence" means, any sign that was erected by the City of Toronto depicting a parking bylaw or regulation;

Set Fine
"set fine" means the amount of fine set by the Chief Justice of the Ontario Court of Justice for an offence for the purpose of proceedings commenced under Part I or II. R.S.O. 1990, c. P.33, s. 1 (1); 2000, c. 26, Sched. A, s. 13 (6); 2002, c. 18, Sched. A, s. 15 (6); 2006, c. 21, Sched. C, s. 131 (1, 2); 2009, c. 33, Sched. 4, s. 1 (1);

Vehicle
"vehicle" includes a motor vehicle, trailer, traction engine, farm tractor, road-building machine, bicycle and any vehicle drawn, propelled or driven by any kind of power, including muscular power, but does not include a motorized snow vehicle or a street car..

City of Toronto

Parking Ticket Cancellation Guidelines

- Feb 2014 -

Introduction

Parking tickets help to regulate the movement of traffic on City roadways, and to ensure smooth traffic flows and safe streets. The City's various parking bylaws specify a set fine amount for each type of parking violation or infraction. The amount of the fine appears on the parking ticket.

To dispute a City of Toronto parking ticket, you or your representative must attend in person at one of the City's four parking ticket counters (First Appearance Facilities). To support your claim you must bring evidence (e.g. permits, written statements, supporting documents, photos, etc.) that establishes that the parking ticket meets the criteria for cancellation in these guidelines.

For a list of parking ticket counter locations (First Appearance Facilities), please visit toronto.ca/parkingtickets. Persons with a disability or persons who reside more than 100 km from the City of Toronto may call Parking Tag Operations at 416-397-TAGS (8247).

Staff review each disputed ticket individually and the evidence presented by the person who received the ticket or their representative, to understand the nature of the infraction, and the circumstances surrounding the ticket issued. The City of Toronto uses established guidelines to assist staff at parking ticket counters (First Appearance Facilities) in determining whether a parking ticket may be cancelled. In addition, City staff will take the necessary steps to determine whether a ticket warrants cancellation, which may include:

- examining the license plate history to identify past infractions, whether there are prior cancellations and the reasons for cancellations;
- requesting an investigation by Transportation Services, the Toronto Parking Authority or the Toronto Police Service Parking Enforcement Unit to verify whether signage may have been missing or covered, whether meters or pay and display machines were operational at the time of the infraction and/or that work was being carried out on the roadway, preventing legal parking;
- reviewing various bylaw exemptions and permit parking zones to confirm that the permit was used in the correct zone;
- confirming temporary police considerations which would permit parking due to police investigations, construction zones (i.e.: heavy crane lifts) or other street closures directed by police;

- accessing the Ministry of Transportation license plate/vehicle registration data to verify whether disabled parking permits are valid.

Any parking ticket arising from an offence where the vehicle was parked blocking vehicular or pedestrian traffic, loading areas for passengers or goods, or parked in an area where the offence poses a risk to life-safety (for example near schools, fire lanes, escape doors, hospitals or other facilities) will not be cancelled. This applies to any offence category.

The guidelines below are to be used for City of Toronto issued parking tickets only. They are meant to serve as a reference to provide an understanding of the circumstances in which a City of Toronto parking ticket may be cancelled and to outline the evidence required to support a parking ticket cancellation.

For more information on parking tickets, visit toronto.ca/parkingtickets or call Parking Tag Operations at (416)397-TAGS (8247).

City of Toronto
Parking Ticket Cancellation Guidelines
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1.0 Incorrect or Missing Data on the Parking Ticket

Parking tickets may be cancelled where there is sufficient evidence to indicate that any of the following apply:

- Incorrect or missing date
- Incorrect time of infraction
- Time of infraction missing
- Incorrect or missing plate number
- Plate's Province/State missing
- Address where offence occurred is missing or incorrect
- Infraction set fine amount missing, incorrect or changed
- Bylaw code or bylaw reference incorrect or missing
- Parking ticket not signed
- Changes made to infraction not initialled by the Issuing Officer

2.0 Person Claims Vehicle not at Location

Parking tickets may be cancelled where the following apply:

- Vehicle was not in the City or at that location on the date and time of the infraction.

Evidence such as written authorizations, permits, other documents, photos, etc. must be provided to establish that the above criteria for cancellation have been met.

3.0 Cancellations Relating to Parking Permits

Parking tickets may be cancelled for certain types of parking infractions where a valid permit exists and where the permit provides an exemption from the parking infraction noted on the ticket. Following is a list of the City's various parking permits:

1. On- Street and Area Parking Permits
2. Temporary On-Street Parking Permit
3. Boulevard Parking Permit
4. Front Yard Parking Permit
5. Film Permit
6. Street Occupation Permit
7. Temporary Street Occupation Permit - Utilities
8. Accessible Parking Permit or Disabled Persons Parking Permit
9. Valid Pay and Display Receipt Displayed

The cancellation guidelines for each type of permit are discussed below.

3.1 On-Street and Area Parking Permit

Parking tickets may be cancelled under this section for the following parking infractions:

- Expired Meter
- Three (3) Hour Parking
- Park Signed Highway in excess of permitted time
- Park (prohibited area/ location) without a permit
- Park - Fail to display receipt in windshield, or
- Park - Fail to deposit fee

A parking ticket may be cancelled under this section provided the following conditions are met:

1. The location of the infraction is on a street licensed for parking;
2. The vehicle plate number on the parking ticket matches the plate number on the permit ;
3. The permit is registered on the City of Toronto permit system;
4. Area indicated on the permit is for the location indicated on ticket, (e.g. 1B);
5. The permit must be valid for date and time of infraction.

A parking ticket related to alternate side parking may also be cancelled if the following conditions are met:

1. The location of the infraction is on a street where Alternate Side parking rules apply;
2. The parking ticket was issued to a vehicle with a residential parking permit;
3. The infraction was for Offence Code 29
4. The parking ticket was issued between the hours of 9:00pm and 12:01pm on the evening before and day of the switch-over period (typically the 16th of each month except when the 16th of the month occurs on a weekend or statutory holiday which then moves the switch-over date to the following business day.

Customers who meet these conditions and wish to have their ticket considered for cancellation can do so by faxing or email a copy of their ticket and valid residential parking permit to fax number: 416-696-4194 or by email to parkingdisputes@toronto.ca

A response will be provided within 5 business days.

3.1.1 Rental Vehicles

If you:

- have a valid on-street or area parking permit; and,
- you rented a vehicle because the vehicle to which the permit applies is being repaired; and
- the rental vehicle has been ticketed.

The car rental agreement and garage repair bill must be provided in order for a cancellation to be considered.

3.2 Temporary On-Street Parking Permit

Parking tickets may be cancelled under this section for the following infractions:

- Expired Meter
- Three (3) Hour Parking
- Park - Signed Highway in excess of permitted time
- Park - (prohibited area/ location) without a permit
- Park - Fail to display receipt in windshield; or
- Park - Fail to deposit fee

A parking ticket may be cancelled under this section provided the following conditions are met:

1. The location of the infraction is on a street that is licensed for parking;
2. The vehicle plate number on the parking ticket matches the plate number on the permit;
3. The permit is registered on the City of Toronto permit system;
4. The area indicated on permit is for the location indicated on ticket, e.g. 1B;
5. The permit must be valid for date and time of infraction.

3.3 Boulevard Parking Permit

An off-street parking permit is required to park on any part of the City boulevard. With proper approval, residents or commercial property owners may rent part of the City-owned boulevard to supplement space on private property. This program generally services commercial areas where on-street or off-street parking is limited or unavailable.

Parking tickets may be cancelled under this section for the following infraction:

- Park on/over boulevard

A parking ticket may be cancelled under this section provided the following conditions are met:

1. The permit is valid for the location, day and time of the infraction; and
2. Permission (a letter signed by the permit holder) was obtained to park at that location, date and time given by the permit holder, if the vehicle ticketed was not that of the permit holder. A copy of the permission letter must be provided to support the claim.

The ticket will not be cancelled if the parking infraction is for “too many vehicles parked” unless the letter of permission signed by the permit holder states that permission was granted to the vehicle specified on the ticket.

3.4 Front Yard Parking Permit

An off-street parking permit is required if you wish to park in your front yard or on part of the City boulevard. With proper approval, and in specific areas of the City, residents may rent part of the City owned boulevard to supplement space on private property. This program generally services those areas where driveways are not common or where driveway width is insufficient

Parking tickets may be cancelled under this section for the following infraction:

- Park in front yard

If the following conditions are met:

1. The permit is valid for the location, day and time of the infraction; and
2. Permission was obtained to park at that location, date and time given by the permit holder, if the vehicle ticketed was not that of the permit holder.

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. Copy of Permit, and
2. A letter of permission to park at that location, date and time given by the permit holder if the vehicle ticketed was not that of the permit holder signed by the permit holder.

3.5 Film Permit

The Toronto Film and Television Office (TFTO) issues parking permits for productions of feature films, movies for television, mini-series, television specials, television series, television productions, commercials, music videos and others.

The permit issued by the TFTO authorizes production companies to park production vehicles on City streets and in City parks. If any metered spaces or pay and display areas are covered by the permit, the production company must reimburse the Toronto Parking Authority for lost revenue.

The parking infractions to which the permit applies are listed on the actual permit.

Note that absolutely no crew or cast vehicles are exempted under the film permit.

The exemption applies only to the vehicles identified on the permit and at the location indicated on the permit during the time period that the permit is valid.

1. Production vehicles must not:
    - block fire hydrants; or

- be parked in fire routes; or
- be parked within 9 metres of an intersecting street; or
- impede any emergency response vehicles.

Production vehicles must also adhere to any other requirements specified on the permit.

2. In City parks, production vehicles and equipment must not block driveways or other access/egress ramps. Production vehicles must leave at least two feet clearance on either side of a driveway, ramp, or other accesses/egresses/ingresses.

3. Production vehicles parking on the street cannot block driveways or other access ramps without the approval of the owner of the property.

4. No production equipment/vehicles are to be within 30 metres of a subway entrance, a bus or streetcar stop, a pedestrian cross-over or a signalized intersection unless otherwise noted on the permit.

5. Production vehicles must not block parking lot access/egress ramps and accessible parking for persons with disabilities.

Both copies of film parking permit (red & white) must be provided to establish that the criteria for cancellation have been met. If the parking infraction is due to a blocked driveway, a letter of permission from the property owner allowing the encroachment or blockage must be provided for the cancellation of the ticket.

3.6 Street Occupation Permit

A street occupation permit issued by City of Toronto Transportation Services is required for any demolition, renovation and/or construction project if it is necessary to temporarily occupy any portion of the public right of way (the area beyond the property line, i.e. boulevard, sidewalk, roadway or public lane).

Parking tickets may be cancelled under this section for the following infractions:

- Expired Meter
- Three (3) Hour Parking
- Park - Signed Highway in excess of permitted time
- Park (prohibited area/location) without a permit
- Park - Fail to display receipt in windshield

A parking ticket may be cancelled under this section provided the following conditions are met:

1. The conditions stated on permit were complied with; and
2. The plated vehicles are listed on the permit.

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. Copy of the original permit; and
2. Work Order (if one exists); and
3. In case of an emergency (when allowed on the permit), the registered owner of the vehicle must provide a statement that the emergency situation existed at the time of the infraction and a description of the situation.

3.7 Temporary Street Occupation Permit - Utilities

Temporary Street Occupation Permits are issued to utility companies annually at no cost, pursuant to a decision of the Toronto Public Utility Co-ordinating Committee of which the City is a member. One permit is issued to each utility company which can make copies for its contractors and sub-contractors.

The permit is restricted to service vehicles only and a copy must be displayed on the windshield of the vehicle.

Parking tickets may be cancelled under this section for the following infractions:

- No parking
- No stopping (9:30 am to 11:30 am and 1:30 pm to 3:30 pm only and not during rush hour); and,
- No Standing (9:30 am to 11:30 am and 1:30 pm to 3:30 pm only and not during rush hour).

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. Copy of the Temporary Street Occupation – Site Service – Utilities permit; and
2. Copy of the Road Disruption Activity Reporting System (RoDARS) Restriction Notice for the location, date and time; and
3. Copy of work order/schedule pertaining to the date, time and location of the Infraction; and
4. Original letter on letterhead signed by the authorized manager or director (signature must be on file) indicating that parking was required for a legitimate business purpose and explaining why the driver needed to park in that location; and
5. Show that parking must have been required to perform the work at that location.

Cancellations will not be granted for the following infractions:

- Parking during rush hour
- Parking on private property
- Parking in disabled or fire routes
- No parking
- No stopping (9:30 am to 11:30 am and 1:30 pm to 3:30 pm only and not during rush hour)

- No Standing (9:30 am to 11:30 am and 1:30 pm to 3:30 pm only and not during rush hour)

3.8 Accessible Parking Permit or Disabled Persons Parking Permit

The Accessible Parking Permit (APP) is issued to individuals and entitles the vehicle in which it is displayed to be parked in a designated accessible parking space. The individual to whom the permit is issued must be in the vehicle and the permit must be visibly displayed on the dashboard or sun visor when it is parked in the designated accessible parking space. The permit holder may use the permit in any vehicle in which they are travelling. There is no fee for an APP. The Ministry of Transportation of Ontario issues four types of permits, which are colour coded; a Permanent Permit (blue), a Temporary Permit (red), a Traveller Permit (purple) and Company Permits (green).

The name "Accessible Parking Permit" was adopted to focus on the functionality and benefits of the permit to the holder, versus the holder's disability. Holders of a valid "Disabled Person Parking Permit" (DPPP) may continue to use their existing permit until it expires.

Parking tickets may be cancelled under this section for the following infractions:

- Signed on-street permit parking areas. (Vehicles displaying a valid disabled parking permit are permitted to park without a designated on-street parking permit)
- Signed parking limits such as one hour and two hour maximums; holders are allowed to exceed the signed maximum parking limit.
- Unsigned maximum three-hour parking limits in effect on all city streets.
- Holders may park at on-street Parking Meters or Pay and Display Machines without putting a coin in the meter / machine during the hours of legal operation. Note: exemption does not apply on private property.
- Signed No Stopping areas only while actually engaged in loading or unloading the named permit holder
- Signed/marked designated disabled parking space only for transporting, picking up, or dropping off a person who has been issued a current valid permit
- Signed/marked designated bicycle lane only while actually engaged in loading or unloading the named permit holder

Note: In all of the above situations parking is permitted for a period not to exceed 24 hours.

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. A valid copy of the APP or DPPP
2. If the vehicle is not registered to the APP or DPPP holder, an original letter signed by the APP or DPPP holder stating that they were with the registered owner on the date and at the time of infraction.

Vehicles displaying disabled permits are <u>not exempt</u> from the following:

- No Parking/No Stopping/No Standing areas in designated emergency or snow routes
- Parking within 60 cm of a driveway
- Stopping/Parking on a bridge
- Parking within 3 metres of a fire hydrant
- Parking within seven and five-tenths (7.5) meters of any fire hall on the side of the highway on which the fire hall is located or within thirty and five-tenths (30.5) meters of the fire hall on the opposite side of the highway
- Parking within 9 meters (signs not required) or 15 meters (signs required) of an intersection
- Parking in designated “No Standing and No Stopping areas”
- Parking in a designated fire route
- Parking in a public lane
- Parking within a stand designated for taxicabs
- Parking at a place marked by an authorized sign as a passenger or freight loading zone during the time shown on the sign
- Parking in a position as will prevent the removal of any other vehicle previously parked

- Parking on Private/Municipal Property if parked in a designated disabled spot must pay a fee if one is required on that property also must display a valid disabled permit. If vehicle is parked in a regular parking spot, (non-disabled) the permit holder must ensure that they follow the same rules as other users of the property.
- Overnight parking between the hours of 2 am - 6 am, from December 1-March 31 (in the former area of North York only)
- Parking within thirty and five-tenths (30.5) metres of an intersection controlled by a traffic control signal
- Parking in front of an entrance to or exit from any building or enclosed space in which persons may be expected to congregate in large numbers
- Parking within a turning basin
- Parking in a manner that would interfere with the formation of a funeral procession
- Parking within fifteen (15) metres of the termination of a dead-end street
- Parking within a T-type intersection
- Parking within the following distances of a crosswalk controlled by traffic control signals and located other than at an intersection:
  - Fifteen (15) metres of the crosswalk measured on each side of the highway in the direction of travel of vehicles on that side of the highway
  - [2] Thirty and five-tenths (30.5) metres of the crosswalk measured on each side of the highway in the direction opposite to the direction of travel of vehicles on that side of the highway

3.9 Valid Pay and Display Receipt Displayed

Parking tickets may be cancelled under this section for the following infractions:

- Park - fail to deposit fee in machine; and
- Park - fail to display receipt in windshield.

A parking ticket may be cancelled under this section provided the following conditions are met:

1. A valid Pay and Display parking receipt was displayed on the dashboard of the vehicle when the parking ticket was issued.
2. The parking receipt must show that the ticket was issued within the effective time, date and location of the receipt. Additionally, a 10 minute grace period at the end of the time is granted.

The original Pay and Display parking receipt must be provided as evidence.

4.0 Vehicle or Plate was Stolen or Lost at Time of Infraction

Parking tickets may be cancelled on the basis that the vehicle or plate was stolen or lost at the time of the infraction.

A parking ticket may be cancelled under this section provided that the following condition is met:

1. The infraction must have occurred after the date the theft was reported and prior to recovery (if applicable).

Evidence must be provided to establish that the criteria for cancellation has been met, including:

- Valid occurrence number from the Toronto Police Service; and
- Copy of the police report (if available).

5.0 Special Parking Considerations

The Toronto Police Service's Parking Enforcement Unit or the City of Toronto's Transportation Services Division may, in certain circumstances, provide short term parking considerations including:

1. Driveway paving;
2. Construction;
3. Religious observance; and
4. Underground parking cleaning.

Parking tickets may be cancelled under this section for the following infractions:

- Park Longer than 3 hours
- No parking

A parking ticket may be cancelled under this section provided that the following conditions are met:

1. The conditions stated on consideration were complied with; and
2. The plate numbers of the ticketed vehicles must be listed on the consideration letter.

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. A copy of the parking consideration letter; or
2. The consideration number assigned by the Toronto Police Service's Parking Enforcement Unit or the City of Toronto's Transportation Services Division so that the consideration can be confirmed.

Parking tickets will not be cancelled for the following infractions under this section:

- No Standing
- No Stopping
- Stop on sidewalk

- Park on boulevard
- Park in front of fire hydrant
- Park in fire route
- Park in rush hour route
- Park on a permit parking street

5.1 Religious Observances

For religious observances, parking tickets may be cancelled for the following infractions:

- Park at expired meter
- Park during prohibited times (excluding rush hour)
- Park signed highway in excess of permitted time

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. A letter or correspondence from the Minister or head of a religious group that identifies the time, date and location of the religious observance or service.

6.0 Extenuating Circumstances

Parking tickets may be cancelled in extenuating circumstances including:

- Medical emergency (e.g. a situation where a person required immediate hospitalization and the vehicle could not be moved to a legal parking area.)
- Vehicle breakdown;
- Other circumstances not identified in these guidelines where parking legally was not possible.

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. For medical emergencies, a copy of the hospital report, record of admission, and/or an ambulance report.
2. For vehicle breakdown, a copy of the tow receipt and/or the repair bill(s).
3. For other circumstances, evidence such as documents, permissions, photos, etc. must be provided to support the cancellation.

7.0 Sign Missing or Illegible

A parking ticket may be cancelled if a traffic sign was missing, damaged, obscured or illegible or that there were conflicting signs on the street where the infraction occurred. Staff will request that the Toronto Police Services Parking Enforcement Office or the City of Toronto's Transportation Services Division conduct an investigation.

Parking tickets may be cancelled for signed offences.

The following condition must be met:

1. The investigating office (Parking Enforcement or Transportation Services) must recommend in writing that the parking ticket be cancelled.

8.0 Pay & Display Machine or Meter Missing, Removed or Inoperable

A parking ticket may be cancelled if a Pay and Display machine or parking meter was missing, removed or inoperable. Staff will request that the Toronto Parking Authority conduct an investigation.

Parking tickets may be cancelled under this section for the following infractions:

- Park - fail to deposit fee; and
- Park - fail to display receipt.

A parking ticket may be cancelled under this section provided the following condition is met:

1. The Toronto Parking Authority must recommend that the parking ticket be cancelled.

9.0 Emergency Vehicle

Parking tickets will be cancelled for emergency vehicles, such as ambulances, police or fire department that are exempt from parking tickets under the City of Toronto Municipal Code, where the particular emergency vehicle was attending to an emergency at the location indicated on the parking ticket. The exemption applies to all City of Toronto parking tickets.

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. An original letter on Divisional letterhead signed by the authorized manager or director of the City Division or public utility stating that the emergency existed when the parking ticket was issued.

10.0 Vehicles Engaged in Work for the City

Parking tickets will be cancelled for vehicles engaged in work for the City, and the Toronto Transit Commission (TTC) that are exempt from parking tickets under the Municipal Code, where parking, standing or stopping of the vehicle doing the work was required to perform the work at the location, date and time of the ticket. The exemption applies to all City of Toronto parking tickets.

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. Copy of work order/schedule; and/or
2. Original letter on letterhead signed by the authorized manager or director of the City Division, TTC or Public Transit Agency indicating that parking, stopping or standing was required for a legitimate municipal purpose and an explanation of why the driver needed to illegally park, stand or stop in that location.

11.0 Public Utility Vehicles

Parking tickets will be cancelled for public utility vehicles responding to emergencies, (including utilities providing telecommunications, energy or water/ wastewater services) that are exempt under the Municipal Code, and when parking was necessary to perform the emergency work at that location. The exemption applies to all on-street infractions (only during the emergency)

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. Copy of the Temporary Street Occupation – Site Service – Utilities permit (if available);
2. Copy of work order/schedule pertaining to the date, time and location of the infraction, and
3. Original letter on letterhead signed by the authorized Manager or Director (signature must be on file) indicating that parking was required for a legitimate emergency purpose and explanation of why the driver needed to park in that location.

12.0 Valid Ontario Veteran Plate Displayed (on certain days only)

The City of Toronto's Municipal Code provides parking exemptions to persons who display a valid Ontario veteran's licence on their vehicle. The exemption only applies on the following dates:

- June 6
- September 17
- November 11
- August 18 (consideration)
- Other dates approved by council; and
- Any other date where consideration is granted.

Parking tickets may be cancelled under this section for the following infractions:

- Park - fail to deposit fee in meter
- Park - fail to deposit fee in machine
- Park vehicle in or on a parking space controlled by a parking machine without activating the machine
- Park - fail to properly display receipt in windshield

A parking ticket may be cancelled under this section provided the following condition is met:

1. The Ontario Veteran licence plate must be registered to the person requesting the cancellation and must have been affixed to the vehicle at the time of the infraction.

13.0 Continuing Infraction

A continuing infraction occurs when two or more parking tickets are issued to a vehicle within a specified time limit. The specified limit depends on the type of infraction (e.g. Park longer than 1, 2 or 3 hours).

Parking tickets may be cancelled under this section for No Parking infractions only, if the following conditions are met:

1. Must be the same offence;
2. Same plate; and
3. Same location.

Only tickets issued within 3 hours of each other will be considered for cancellation.

14.0 Issuing Enforcement Agency Request

Situations occur where the Toronto Police Service's Parking Enforcement Unit may request withdrawal of a parking ticket.

A parking ticket may be cancelled under this section for any parking related offences.

The Toronto Police Service's Parking Enforcement Unit must submit the request in writing using the approved Withdrawal Request Form - the form must be authorized by a management representative of the Parking Enforcement Unit.

15.0 Taxicabs/Limousine While Picking up or Dropping off Passengers

Parking tickets may be cancelled under this section for the following infractions:

- Prohibited parking offences (excluding rush hour)

A parking ticket may be cancelled under this section if the following conditions are met:

1. Vehicle was being operated for taxi or limousine services at the time of the infraction.
2. Vehicle license plate was issued to a taxi or limousine.

Evidence must be provided to establish that the criteria for cancellation have been met, including:

1. If the driver of the taxi/limousine is making a delivery, a letter from the taxi/limousine company and a waybill for the time/date and location of the infraction.
2. A letter, on letterhead from the Dispatcher, indicating pick up location, time, date and drop off location.
3. Owner or driver must possess a taxi licence.

16.0 Nursing Agencies/Compassionate Service Agencies

Parking tickets may be cancelled under this section for the following infractions:

- Metered offences;
- Park- longer than 3 hours;
- Park during prohibited times (excluding rush hour);
- Park in excess of permitted time; and
- Park no permit (if time/situation of infraction is reasonable) time, date, infraction and location of the duties should be specified.

The following evidence must be provided:

1. A letter from an official on letterhead explaining the vehicle was being operated by a staff member while performing duties for the organization.
2. The letter must have an original signature and must include the title and telephone number of the authorized writer (Nurse Manager, etc.).

17.0 Security Companies - Alarm Response

Parking tickets may be cancelled under this section for the following infractions:

- Metered offences
- Park longer than 3 hours
- Park during prohibited times (excluding rush hour)
- Park in excess of permitted time
- Park no permit (if time/situation of infraction is reasonable) time, date, infraction and location of the duties should be specified

The following evidence must be provided:

1. A letter from an official on letterhead explaining the vehicle was being operated by a staff member in response to an alarm.

2. The letter must have an original signature and must include the title and telephone number of the authorized writer as well as the time and location of the alarm supported by the response sheet.

17.1 Courier and Delivery Vehicles

Drivers of courier and delivery vehicles engaged in delivering goods or services are exempt from most parking offences only while in the act of loading or unloading merchandise or passengers and whilst actually in or around the vehicle.

The City of Toronto has created "Courier Delivery Zones" in strategic areas in the downtown core, based on heaviest courier usage and in consultation with the Canadian Courier and Logistics Association. Currently 13 of these Zones exist and future expansion is planned.

The Parking Enforcement Unit, where possible, is providing a 10-minute "delivery window" to allow deliveries to occur before ticketing.

Courier and Delivery vehicles, parked illegally are subject to ticketing and tickets may be considered for cancellation for the following offences only if the driver or representative provides a signed letter or delivery receipt which clearly displays the delivery time/location/date:

- No Parking (other than during rush-hour times)
- Park public lane

Courier and delivery vehicles ticketed or parked illegally are not exempt from the following:

- No Parking/No Stopping/No Standing where the offence occurred between the hours of 6 a.m. – 10 a.m. or 3 p.m. – 7 p.m., Monday through Friday
- In No Parking/No Stopping/No Standing areas in designated emergency or snow routes
- Any metered or Pay and Display Offence
- Parking within 60 cm of a driveway
- Stopping/Standing/Parking on a bridge
- Parking within 3 metres of a fire hydrant
- Parking within seven and five-tenths (7.5) meters of any fire hall on the side of the highway on which the fire hall is located or within thirty and five-tenths (30.5) meters of the fire hall on the opposite side of the highway
- Parking within 9 meters (signs not required) or 15 meters (signs required) of an intersection
- Parking in any “No Standing and No Stopping areas”
- Parking in a designated fire route
- Parking within a stand designated for taxicabs
- Parking in a position as will prevent the removal of any other vehicle previously parked
- Designated Disabled Parking Offences (on-street or off-street)
- any other offence not listed above.

18.0 Tour Buses

Parking tickets may be cancelled under this section for the following infractions:

- Metered offences
- Park - longer than 3 hours
- Park during prohibited times (excluding rush hour),
- Park in excess of permitted time

The following evidence must be provided:

1. A letter from an official on letterhead explaining the vehicle was being operated by a staff member while performing duties of the company and that no other parking was available.

19.0 Time Allowance

The Time Allowance provision for parking offences refers to the period of time following the expiry of a pay and display receipt or paid parking time and the issuance of a parking ticket.

The Toronto Police Service Parking Enforcement Unit observes a 5-minute operational grace period before issuing a parking ticket for a time-limited offence, e.g. overstaying at a parking meter or a pay-and-display parking zone. The grace period is intended to ensure fairness and integrity in parking enforcement operations, and serves both as a courtesy to drivers, and avoids the issue of timing discrepancies between a driver's watch, a hand-held ticket-writing device, and a meter or pay-and-display machine.

> The Time Allowance provision does not provide for an automatic cancellation. Rather, each ticket is reviewed based on the location of the offence, circumstances surrounding the offence and the vehicle plate history (i.e.: prior cancellations, fraudulent use of permits or receipts and an offenders' outstanding fines may be considered as part of the overall review).

The City of Toronto operates with an administrative time allowance provision for time-limited offences including expired parking meters or expired pay-and-display receipts. This is a separate practice from the Toronto Parking Enforcement Unit, and may allow a parking ticket issued within 10 minutes of the expiry of the time-limited period to be cancelled, rather than requiring that drivers request a trial and appear in court in these circumstances.

This 10-minute Time Allowance provision applies to all time-limited offences where proof of a receipt

showing approved purchased time can be provided but excludes major arterial routes during rush hour periods or areas where parking is prohibited for construction, traffic or event closures.

- Customers who wish to submit their ticket for Time Allowance consideration can do so by emailing their request to parkingmeters@toronto.ca or by fax at 416-696-4194.

To support your claim you must bring evidence (i.e., valid pay-and-display parking receipt or other supporting documentation etc.) that establishes that the parking ticket meets the criteria for cancellation in the Parking Ticket Cancellation Guidelines.

Fax/E-mail Service for customers with valid Pay-and-Display receipts or Accessibility/Disabled Permits only:

Customers with valid pay-and-display receipts and/or accessibility/disabled permits can fax their written request for cancellation or consideration, along with copies of the receipts or permits, to the City's Parking Ticket Operations – Investigations Unit at: 416-696-4194, or scan and e-mail your request and documents to: parkingdisputes@toronto.ca.

Please ensure you provide a contact telephone number, email address or mailing address as staff will advise of the outcome of the investigation by telephone, email or in writing.

The most common example of a time-limited offence is when a driver parks beyond the time indicated on a pay-and-display parking receipt. The 10-minute time allowance period applies to the following offences and only tickets issued for these offences can be considered for cancellation:

Restricted time-limited offences to which a 10-minute time allowance may apply:

- Park Fail to Deposit Fee in Machine (Meter or Pay and Display Machines – Offence Code 207: $30.00)
- Park Fail to Display Receipt in Windshield (Offence Code 210: $30.00)

When does the time allowance provision not apply?

Note that the 10-minute time allowance identified within the cancellation guidelines does NOT apply to tickets issued for:

- parking during prohibited times on major arterial routes or during rush hour periods (even where a pay-and-display ticket may have been purchased)
- 2am – 7am “snow clearing” bylaw offences (during weather events); and
- Any other offence not listed above where parking was temporarily restricted due to weather, traffic, construction or other events. The time allowance provision also does not apply in cases where the expiry time relates to a change in parking restrictions (e.g., where one can park between certain posted hours, but parking is prohibited beyond those specified hours due to permit requirements, changes in traffic flow etc).

How do I get my ticket reviewed and considered for cancellation?

The time allowance provision established in the Cancellation Guidelines apply only to time-limited parking offences. A number of factors are considered before a ticket may be cancelled. These include but are not limited to a vehicle or driver's previous offence history, abuse of time allowance cancellations, weather conditions and other factors that may have contributed to the excess time offence.

Offenders who are refused a cancellation under this provision and wish to further dispute their ticket, must attend in person at one of the City's four parking ticket counters (First Appearance Facilities) listed on the back of the parking ticket.

20.0 Rush Hour Routes/Bicycle Lanes/Time Restricted Parking Areas:

Cancellation of $150.00 parking tickets issued for the offences:

- No Parking
- No Stopping; or
- No Standing

issued Monday through Friday and during the hours of 6 a.m. and 10 a.m. or 3 p.m. and 7 p.m. do not qualify for cancellation unless the driver can provide evidence of:

1. Vehicle breakdown (mechanic or tow bill required)
2. Medical emergency (doctor or medical certificate required)
3. Weather events preventing legal parking on private areas (photos of the location must be provided or Supervisory authorization - weather event must have caused vehicle immobilization or inoperation/breakdown)

Cancellations for deliveries, pick-up or any other circumstances are not permitted for tickets with $150.00 fines.

21.0 Tickets issued for Expired Plates:

Cancellation of tickets issued for offences related to Expired Plates cannot be cancelled unless the driver/owner provides documentation which clearly identifies that the license plates of the offending vehicle were renewed prior to the offence date and time. Cancellation conditions require acceptable documentation which is restricted to:

1. a true copy of a Ministry of Transportation or Service Ontario Invoice showing date and time of purchase, which must be before the offence date and time; and
2. the invoice must include the plate number that was renewed - which must match the plate number on the parking ticket

Copies of ownership with renewal stickers are not acceptable since they do not clearly indicate a date and time of renewal purchase.

City of Toronto
Parking Ticket Cancellation Guidelines

Glossary of Terms

A term not defined in this section shall have the same meaning as the term has in the Highway Traffic Act.

Accessible Parking Permit/Disabled Parking Permit
"accessible parking permit" or "disabled parking permit" means a current and valid disabled person parking permit issued by the Ministry of Transportation under the provisions of the Highway Traffic Act; or, a current and valid permit, number plate or other marker or device bearing the international symbol of access for the disabled which has been issued by a jurisdiction outside Ontario.

First Appearance Facility (FAF)
"First Appearance Facility or FAF" means a location where a person who received a City of Toronto parking ticket can attend to dispute the issuance of the parking ticket

Highway
"highway" includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof;

Infraction
"infraction" means a contravention of any provision of a City of Toronto parking bylaw

No Parking
"park" or "parking", when prohibited, means the standing of a vehicle, whether occupied or not, except when standing temporarily for the purpose of and while actually engaged in loading or unloading merchandise or passengers;

No Standing
"stand" or "standing", when prohibited, means the halting of a vehicle, whether occupied or not, except for the purpose of and while actually engaged in receiving or discharging passengers;

No Stopping
"stop" or "stopping", when prohibited, means the halting of a vehicle, even momentarily, whether occupied or not, except when necessary to avoid conflict with other traffic or in compliance with the directions of a police officer or of a traffic control sign or signal;

Offence
"offence" means any contravention of any provision under of a City of Toronto parking bylaw;

Parking
"parking" means the standing still of a vehicle, whether occupied or not;

Representative
"representative" means, in respect of a proceeding to which this Act applies, a person authorized under the Law Society Act to represent a person in that proceeding;

Signed Offence
"Signed offence" means, any sign that was erected by the City of Toronto depicting a parking bylaw or regulation;

Set Fine
"set fine" means the amount of fine set by the Chief Justice of the Ontario Court of Justice for an offence for the purpose of proceedings commenced under Part I or II. R.S.O. 1990, c. P.33, s. 1 (1); 2000, c. 26, Sched. A, s. 13 (6); 2002, c. 18, Sched. A, s. 15 (6); 2006, c. 21, Sched. C, s. 131 (1, 2); 2009, c. 33, Sched. 4, s. 1 (1);

Vehicle
"vehicle" includes a motor vehicle, trailer, traction engine, farm tractor, road-building machine, bicycle and any vehicle drawn, propelled or driven by any kind of power, including muscular power, but does not include a motorized snow vehicle or a street car..

Toronto 2014 BUDGET

OPERATING ANALYST NOTES

Parking Tags Enforcement and Operations

2014 OPERATING BUDGET OVERVIEW

What We Do

Parking Tags Enforcement and Operations provides safe and efficient free flow traffic by responding to local neighbourhood parking concerns, 7 days a week, 24 hours a day. Furthermore, the Program collects and processes fines for issued parking infraction tickets.

2014 Budget Highlights

(In $000s)	Approved 2013 Budget	Recommended 2014 Budget	Change $	Change %
Gross Expenditures	59,137.2	61,383.2	2,246.0	3.8%
Gross Revenue	82,134.1	84,380.2	2,246.1	2.7%
Net Expenditures	(22,996.9)	(22,997.0)	(0.1)	

The 2014 Recommended Operating Budget of $61.383 million is $2.246 million or 3.8% over the 2013 Approved Budget primarily due to increases in salaries and benefits and alignment of services and rents to reflect actual experience. Offsetting these pressures are new revenue streams as a result of changes to Provincial legislation and City by-laws.

Contents

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Parking Tags Enforcement and Operations

Our Service Deliverables for 2014

Parking Tags Enforcement and Operations is comprised of 4 inter-related services, each of which promotes the safe and efficient free flow of traffic. The 2014 Operating Budget will provide funding to the following services:

- The Parking Enforcement Unit ensures the safe and orderly flow of traffic and regulates parking by enforcing the Parking By-laws through the issuance of parking tickets to illegally parked vehicles and the training of Municipal Law Enforcement Officers (MLEO's) who are empowered to issue parking tickets on private and municipal properties.
- Revenue Services is responsible for the processing and collection of fines for all parking tickets issued in the City of Toronto. The service level provided meets the regulations established under the Provincial Offences Act.
- Court Services schedules and supports Part II (Parking Ticket) Trials of the Provincial Offences Act. This includes the receipt and file maintenance of all parking infraction trial requests that are delivered to court for adjudication purposes and managing default convictions.
- Parking Ticket Revenues are included in the Non-Program Revenue Budget to track revenues generated by parking tickets issued in order to support parking by-law initiatives and other related City programs.

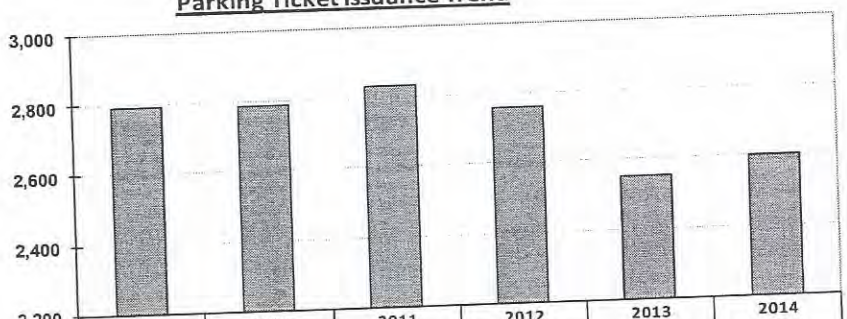
Fast Facts

- Parking Enforcement Officers are hired and trained as a class consisting of between 20 and 30 Officers.
- Approximately 2.800 million tickets are issued every year, of which 300,000 tickets are disputed in court.
- Approximately 25,000 vehicles are towed each year in relation to parking and enforcement violations.

Trends

- The number of parking tickets being issued is projected to decrease over the next three years due to new City by-laws.
- Approximately one out of every four tickets issued is cancelled under the new Parking Cancellation Guideline By-law.

Parking Ticket Issuance Trend



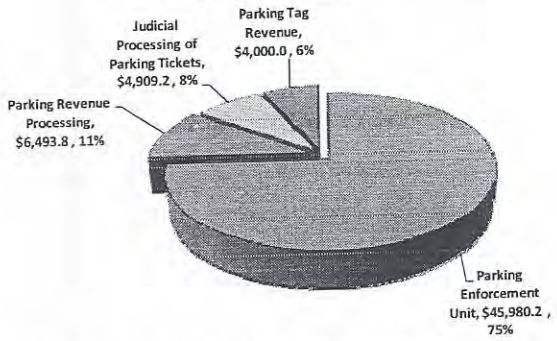
	2009 Actual	2010 Actual	2011 Actual	2012 Actual	2013 Projection	2014 Budget
Parking Ticket's Issued	2,794	2,787	2,834	2,762	2,550	2,600

2014 Operating Budget

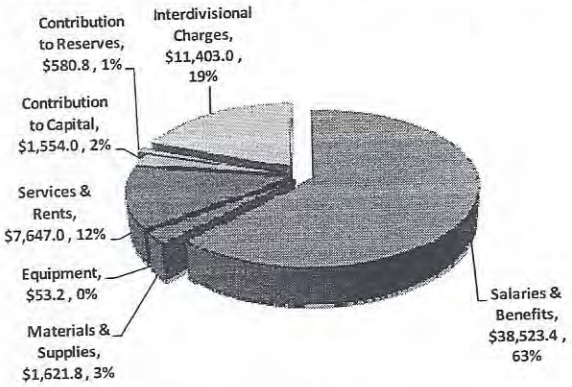
2014 Budget Expenditures & Funding

Where the money goes:

2014 Operating Budget by Service
$61.383 Million

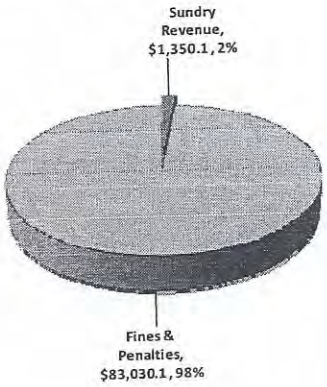


2014 Operating Budget by Expenditure Category



Where the money comes from:

2014 Operating Budget Funding Source
$84.380 Million



Parking Tags Enforcement and Operations

Our Key Challenges and Priority Actions

- Responding to changes in Provincial Legislation such as the Provincial Offences Act and City By-laws.
  - ➢ Continuous training for Parking Enforcement Officers to keep current on By-law amendments.
- Responding to Parking Ticket Cancellation Guideline originally approved in June 2010.
  - ➢ Responding to parking concerns of the community and working in co-operation with City Councillors and Transportation Services.
  - ➢ Language interpretation services to support police investigations.
- Maintain free flow of traffic through rush hour route enforcement.
  - ➢ Implementation of the Fixed Fine System for parking disputes and Rush Hour Route Fines during peak City travel times.
  - ➢ Responding to public emergencies/needs in addition to supporting stolen vehicle recovery, special events, and towing.

II: RECOMMENDATIONS

Recommendations

The City Manager and Chief Financial Officer recommend that:

1. City Council approve the 2014 Recommended Operating Budget for Parking Tags Enforcement and Operations of $61.383 million gross and ($22.997 million) net and comprised of the following services:

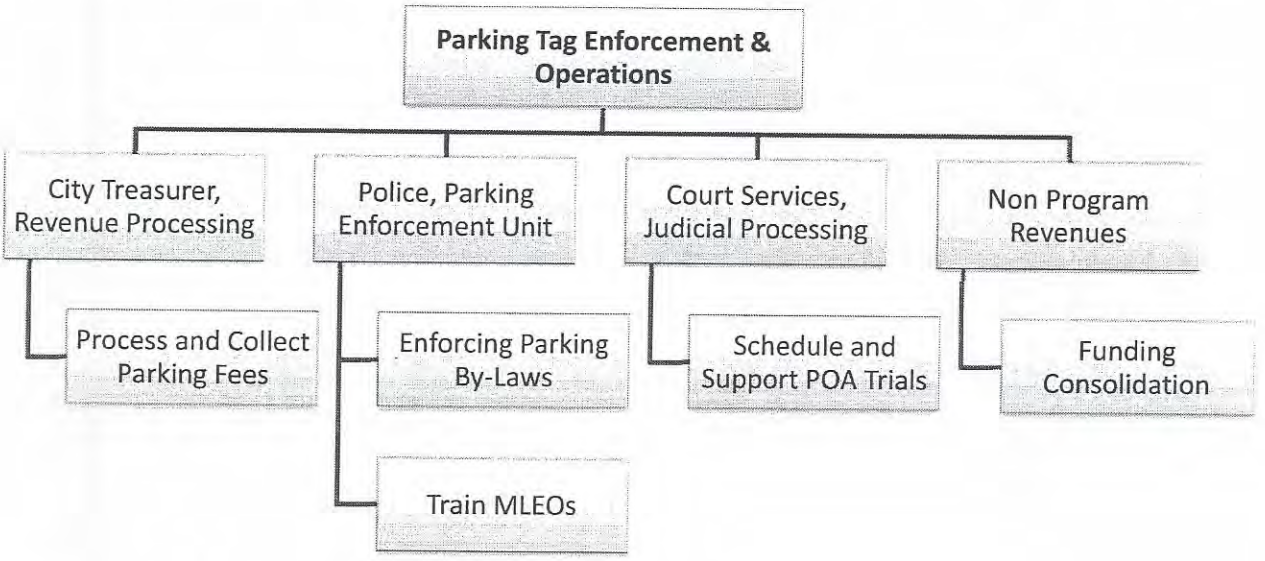
Service:	Gross ($000s)	Net ($000s)
Parking Enforcement Unit	45.980	44.630
Parking Revenue Processing	6.494	6.494
Judicial Processing of Parking Tickets	4.909	4.909
Parking Tag Revenue	4.000	(79.030)
Total Program Budget	61.383	(22.997)

2. City Council approve Parking Tags Enforcement and Operations services associated staff complement of 394.0.

III: 2014 SERVICE OVERVIEW AND PLAN

Program Map

Parking Tags Enforcement and Operations strives to provide safe and efficient free flow traffic by responding to local neighbourhood parking concerns, 7 days a week, 24 hours a day:



2014 Service Deliverables

Parking Tags Enforcement & Operations delivers services through four main service areas:

Toronto Police Service, Parking Enforcement Unit

- The Parking Enforcement Unit ensures the safe and orderly flow of traffic and regulates parking by enforcing the Parking By-laws through the issuance of parking tickets to illegally parked vehicles and the training of Municipal Law Enforcement Officers (MLEO's) who are empowered to write parking tickets on private and municipal properties. The Enforcement program carries out the following activities:
  - Enforce Parking By-laws: Issuance of parking infraction tickets - approximately 2.8 million tickets will be issued in 2013.
  - Parking tag inventory control.
  - Handle complaints against Municipal Law Enforcement Officers.
  - Train Municipal Law Enforcement Officers as required.

Office of the City Treasurer – Revenue Services Division

- Revenue Services is responsible for the processing and collection of fines for all parking tickets issued in the City of Toronto. The service level provided meets the regulations

established under the Provincial Offences Act. Revenue Services is responsible for the following activities:

- Parking Ticket Collection: Parking tickets are processed within the 75 day period required by the Provincial Offences Act. Processing of parking tickets includes a number of mandated and elaborate steps. This includes the collection of data from the Parking Enforcement Unit on tickets issued each day, retrieval of vehicle ownership information from the Ministry of Transportation for each ticket, timely mailing of required notices for non-payment and compilation of court documents to ensure convictions are registered for non-payment. This Unit also prepares pre-court trial documents for those offenders wishing to dispute their tickets in court. Tickets that cannot be processed within this time period must be dismissed as per legislative requirements.
- Payment Counter/First Appearance Facilities Operations operate daily from 8:30 am to 4:30 pm. These First Appearance Facilities are also legislated by the Provincial Offences Act and provide parking ticket appellants a forum for disputing parking tickets, filing trial requests, obtaining judicial documentation and paying parking tickets.

Court Services – Judicial Processing of Parking Tickets

- Court Services schedules and supports Part II (Parking Ticket) Trials of the Provincial Offences Act. This includes the receipt and file maintenance of all parking infraction trial requests that are delivered to court for adjudication purposes and managing default convictions, including cases that are appeals, re-openings or extensions of times to pay fines. Court Services provides the following activities:
  - Trials and other hearings are for parking tickets issued in the City of Toronto

Non-Program Revenues – Parking Ticket Revenues

- Parking Ticket Revenues are included in the Non-Program Revenue Budget to track revenues generated by parking tickets issued in order to support parking by-law initiatives and other related City programs.

2014 Recommended Base Budget
(In $000s)

(In $000s)	2013 Approved Budget	2014 Rec'd Base	Change 2014 Recommended Base vs. 2013 Approved Budget		Incremental Change 2015 Plan		2016 Plan	
By Service	$	$	$	%	$	%	$	%
Parking Enforcement Unit								
Gross Expenditures	44,098.9	45,980.2	1,881.3	4.3%	200.4	0.4%	202.0	0.4%
Revenue	695.0	1,350.1	655.1	94.3%				
Net Expenditures	43,403.9	44,630.1	1,226.2	2.8%	200.4	0.4%	202.0	0.5%
Parking Revenue Processing								
Gross Expenditures	6,243.7	6,370.8	127.1	2.0%	191.1	3.0%	196.9	3.0%
Revenue								
Net Expenditures	6,243.7	6,370.8	127.1	2.0%	191.1	3.0%	196.9	3.0%
Judicial Processing of Parking Tickets								
Gross Expenditures	4,794.5	4,909.2	114.7	2.4%				
Revenue								
Net Expenditures	4,794.5	4,909.2	114.7	2.4%				
Parking Tag Revenue								
Gross Expenditures	4,000.0	4,000.0						
Revenue	81,439.1	83,030.1	1,591.0	2.0%	360.6	0.4%	362.2	0.4%
Net Expenditures	(77,439.1)	(79,030.1)	(1,591.0)	2.1%	(360.6)	0.5%	(362.2)	0.5%
Total								
Gross Expenditures	**59,137.1**	**61,260.2**	**2,123.1**	**3.6%**	**391.5**	**0.6%**	**398.9**	**0.6%**
Revenue	**82,134.1**	**84,380.2**	**2,246.1**	**2.7%**	**360.6**	**0.4%**	**362.2**	**0.4%**
Net Expenditures	**(22,997.0)**	**(23,120.0)**	**(123.0)**	**0.5%**	**30.9**	**(0.1%)**	**36.7**	**(0.2%)**
Approved Positions	**394.0**	**394.0**						

The 2014 Recommended Base Budget of $61.260 million gross and ($23.120 million) net is $0.123 million or 0.5% under the 2013 Approved Budget of ($22.997) million net and provides $2.123 million in funding for base budget increases which have been offset by $2.246 million in recommended service revenue increases.

Key cost drivers resulting in base budget pressures of $1.468 million are detailed in the table below:

Key Cost Drivers
(In $000s)

(In $000s)	2014 Rec'd Base Budget
Gross Expenditure Changes	
Economic Factors	
Materials, Supplies and Equipment (i.e. handheld devices) inflationary costs	28.6
Services and Rents Inflationary Increases (rent, indirect costs, etc.)	221.2
Reduction in Revenue and reduced contribution to Reserves (Toronto Police Service)	95.9
COLA and Progression Pay	
Toronto Police Service Progression Pay, COLA and Fringe Benefit Increases	880.4
Court and Revenue Services' Progression Pay, COLA and Fringe Benefit Increases	241.8
Total Changes	**1,467.9**
Net Expenditures	**1,467.9**

Recommended service changes consisting of $1.591 million net are detailed in the table below:

2014 Recommended Service Change Summary by Program
(In $000s)

	2014 Recommended Service Changes				Net Incremental Impact			
					2015		2016	
Description ($000s)	Position Change	Gross Exp.	Net Expense	% Change over 2013 Budget	Net Expense	Pos.	Net Expense	Pos.
	#	$	$	%	$	#	$	#
Base Revenue Changes								
Parking Tag Issuance, By-Law Amedments and Provincial Legislation			(1,591.0)	1.9%				
Base Revenue Change			(1,591.0)	1.9%				
Total Changes			(1,591.0)	6.9%				

The 2014 recommended service changes consist of base expenditure and base revenue changes of ($1.591 million) net; bring the 2014 Recommended Base Budget to ($0.123 million) or 0.5% under the 2013 Approved Budget of ($22.997).

There is no net incremental impact on the 2015 and 2016 Operating Budgets. The 2014 recommended service changes are discussed below:

Base Revenue Changes: ($0 million gross, (1.591 million) net)

Projected Changes to Revenue Associated with Parking Ticket Issuance, By-Law Amendments and Provincial Legislation

- Following a review of parking ticket revenue projections, and following further consultation with the Toronto Police Service Parking Enforcement Unit, the 2014 budget estimate for parking ticket revenues has increased by $1.591 million. The increase primarily relates to an increase in fines for rush-hour periods and the implementation of the Habitual Offender Program.
- At its meeting on February 6 and 7, 2012, City Council approved an increase of $90.00 to No Standing, No Stopping and No Parking fines issued during rush-hour periods. The fines move from the current $60.00 to $150.00 and have recently obtained approval of the Set Fine Order by the Senior Regional Justice.
- The Habitual Offender Program, proposed to be implemented in 2014, is an initiative to assist with parking ticket collection. It is premised on a model whereby towing of vehicles occurs in cases where the owner has three (3) or more outstanding tickets, and those tickets remain unpaid for at least 120 days following the latest due date.
- The Fixed Fine System has established a set fine amount which applies when a parking ticket recipient requests a trial, and the trial results in a conviction. Individuals are now unable to receive any incentive to file a trial request on basis of seeking a reduced fine which is projected to reduce trial requests.

2014 Recommended New / Enhanced Service Priority Actions

(in $000s)

Description	2014 Recommended			Net Incremental Impact			
				2015 Plan		2016 Plan	
	Gross Expenditures	Net Expenditures	New Positions	Net Expenditures	# Positions	Net Expenditures	# Positions
Enhanced Services Priorities							
I&T Support for Parking	123.0	123.0					
Sub-Total	**123.0**	**123.0**					
Total	**123.0**	**123.0**					

Recommended Enhanced Service Priorities

I&T Support for Parking

- The Program requires the addition of one permanent full time position within Corporate I&T to provide ongoing IT support for Court Services and Revenue Services systems essential in tracking and managing parking tickets and court scheduling (PTMS, Parking Ticket Management System). This will result in an increase of $0.123 million gross and $0.123 million net to the Parking Tags Enforcement and Operations Operating Budget.

2015 and 2016 Plan
(In $000s)

Description ($000s)	2015 - Incremental Increase					2016 - Incremental Increase				
	Gross Expense	Revenue	Net Expense	% Change	# Positions	Gross Expense	Revenue	Net Expense	% Change	# Positions
Known Impacts:										
Progression Pay, Step Increases, COLA and Fringe Benefits	50.0		50.0	0.1%		50.0		50.0	0.1%	
Materials including fuel and handheld costs	33.0		33.0	0.1%		34.0		34.0	0.1%	
Facility Rent and Contracted Services	86.3		86.3	0.1%		86.3		86.3	0.1%	
Contributions to Capital and Reserve Funds	31.1		31.1	0.1%		31.7		31.7	0.1%	
Increases in Interdivisional Charges	191.1		191.1	0.3%		196.9		196.9	0.3%	
Sub-Total	391.5		391.5	0.6%		398.9		398.9	0.6%	
Anticipated Impacts:										
Parking Tag Revenue		360.6	(360.6)	0.4%			362.2	(362.2)	0.4%	
Sub-Total		360.6	(360.6)	0.4%			362.2	(362.2)	0.4%	
Total Incremental Impact	391.5	360.6	30.9	0.1%		398.9	362.2	36.7	0.2%	

Approval of the 2014 Recommended Budget for Parking Tags Enforcement and Operations will result incremental costs of $0.031 million in 2015 and $0.037 in 2016 to maintain the 2014 level of service.

Future year incremental costs are primarily attributable to the following:

Known Impacts

- For 2015, the incremental expenditures are project to be $1.473 million. This includes:
  - Step, progression pay and cost of living increases for Revenue Services ($0.191 million).
  - Salary increases for the Parking Enforcement Unit (0.050 million).
  - An inflationary increase for fuel, handheld device costs and computer hardware ($0.033 million).
  - An inflationary expenditure increase for Facility Rent and Contracted Services ($0.086 million).
  - Additional contributions to Capital and Reserve Funds ($0.031 million).
- For 2016, the incremental expenditures are projected to be $1.514 million. This includes:
  - Step and progression pay for Revenue Services ($0.197 million).
  - Salary increases for the Parking Enforcement Unit ($0.050 million).
  - An inflationary increase for fuel, handheld device costs and computer hardware ($0.034 million).
  - An inflationary expenditure increase for Facility Rent and Contracted Services ($0.086 million).
  - Additional contributions to Capital and Reserve Funds ($0.032 million).

Anticipated Impacts

- For 2015, the incremental revenue increases are projected to be $0.361 million based on the continuation of the Habitual Offender Program, Fixed Fine System and the increase to Rush Hour Route fines.
- For 2016, the incremental expenditures are projected to be $0.362 million.

V: ISSUES FOR DISCUSSION

2014 Issues

The Parking Tags Enforcement and Operations Program's strategic priorities include ensuring the free flow of traffic and creating more amiable conditions for business owners and their customers pertaining to parking on City streets and parking lots. Key issues facing the Parking Tags Enforcement and Operations Budget include:

Implementation of a Fixed Fine System for Parking Tickets

- On September 21 and 22, 2011, City Council adopted a report entitled: "Implementation of a Fixed Fine System for Parking Tickets." This established a fixed fine amount equal to the presently established set fine amount which applies when a parking ticket recipient requests a trial, and the trial results in a conviction. It is expected that this change will result in lower court requests and reduce the current backlog of trials. The Senior Regional Justice of the Ontario Court of Justice is expected to approve the established by-law by yearend. The fixed fine system will take effect during the first quarter of 2014.

Relieving Rush Hour Congestion Due to Unlawful Stopping, Standing and Parking

- On February 6 and 7, 2012 Council adopted a report entitled: "Relieving Rush Hour Congestion Due to Unlawful Stopping, Standing and Parking" that amended City by-laws to create new offences prohibiting stopping, standing, or parking a vehicle during all or any portion of the rush hour periods. A set fine amount of $150.00 for such offences has been established. It is currently unknown how parking ticket revenue will be affected, as it is difficult to predict the degree the increased fine amounts will act as a deterrent, and how the volume of tickets issued for such offences may change. The Senior Regional Justice of the Ontario Court of Justice is expected to approve the established by-law by yearend. The set fine amount will take effect in the first quarter of 2014.

Review of Parking Ticket Cancellation Guidelines

- A report entitled: "Review of Parking Ticket Cancellation Guidelines" recommending changes to the grace period for time-limited parking offences was adopted by City Council on July 11, 12 and 13th, 2012 and implemented in August 2012. This report recommended changes to the parking ticket cancellation guidelines used by Revenue Services staff in assessing whether a parking ticket may be cancelled. Council approved that the current 5-minute grace period for time-limited parking ticket offences (e.g., pay-and display tickets) be changed to 10 minutes, to take effect July 2010. It is projected that approximately 0.706 million parking tickets will be cancelled in 2013 with this trend continuing through 2014.

Future Year Issues

Courier/Delivery Vehicle Parking Permit – Approval and Program Implementation

- On January 4, 2012, the Public Works and Infrastructure Committee considered a report entitled: "Courier/Delivery Vehicle Parking Permit – Approval and Program Implementation" which addressed the significant number of parking tickets issued to courier and delivery vehicles, and proposed a strategy for a permitting system for such vehicles. The Committee referred the item to Transportation Services and will be considered in conjunction with three different studies: downtown traffic, rush hour route and curb space demand. The completion of the study is expected in the third quarter of 2014.

The Parking Tags Enforcement and Operations Program responds to local neighbourhood parking concerns, 7 days a week, 24 hours a day, and promotes the safe and efficient free flow of traffic. It will require a minimum of one year to determine the relative impacts of the Fixed Fine System, Rush Hour Route Set Fines, and Parking Ticket Cancellations as these are new initiatives. The Program will monitor the initiatives on an ongoing basis to determine their impacts.

Appendix 1

2013 Service Performance

2013 Key Accomplishments

In 2013, Parking Tags Enforcement and Operations achieved the following results:

- ✓ Implementation of all Ombudsman Recommendations from the Ombudsman's review of Parking Ticket Operations:
  - ➢ Completion of changes to the parking tickets, enhancements to web and fax service, changes to the Cancellation Guidelines including grace period changes and implementation of greater transparency for ticket disputes including installation of monitors in each of the First Appearance Facilities to scroll parking ticket dispute information and making available hard copies of the Cancellation Guidelines to customers.
- ✓ Development of a Habitual Offender Program, scheduled for implementation in early 2014 for parking ticket offenders who have 3 or more parking tickets outstanding. This program will authorize the Toronto Police - Parking Enforcement Unit to tow vehicles identified as a Habitual Offender.
- ✓ Participation in the launch of the "Pay by Cell" Project with the Toronto Parking Authority. This Project will allow drivers to pay parking meters with cell phones or smart phones and is expected to launch in early 2014.
- ✓ Requests for procurement and hiring of a new print vendor for all parking ticket notices and forms.
- ✓ Issuance of 2,550,000 parking tickets is expected by Parking Enforcement Officers (PEO), Municipal Law Enforcement Officers (MLEO) and Police Constables (PC) in 2013.
- ✓ Processing of 2,550,000 parking tickets, 350,000 trial requests, over 100,000 investigations completed related to parking ticket disputes.
- ✓ Handled 144,000 calls from citizens requesting parking enforcement services in the community.
- ✓ Located a total of 540 stolen vehicles from January 1 to October 31, 2013.
- ✓ Towed 19,558 vehicles from January 1 to October 31, 2013.

2013 Financial Performance

2013 Budget Variance Analysis
(In $000s)

	2011 Actuals	2012 Actuals	2013 Approved Budget	2013 Projected Actuals*	2013 Approved Budget vs. Projected Actual Variance	
($000s)	$	$	$	$	$	%
Gross Expenditures	55,990.1	53,800.9	59,137.2	58,731.0	(406.2)	(0.7)
Revenues	84,180.0	94,641.2	82,134.1	79,134.1	(3,000.0)	(3.7)
Net Expenditures	(28,189.9)	(40,840.3)	(22,996.9)	(20,403.1)	2,593.8	(11.3)
Approved Positions	395.0	394.0	394.0	411.0	17.0	4.3

* Based on the 3rd Quarter Operating Budget Variance Report

2013 Experience

- The projected year-end variance for Parking Tags Enforcement and Operations as of the third quarter is unfavourable by $2.594 million or 11.3% of the 2013 Approved Operating Budget of ($22.997) million.
- The variance is primarily due to 200,000 or 7.1% fewer parking tickets being issued than planned as a result of the implementation of City By-law parking ticket cancellation guidelines and additional Parking Enforcement Officer training held to maintain the staffing complement.

Impact of 2013 Operating Variance on the 2014 Recommended Budget

- Being on budget at year-end is dependent on maintaining parking ticket issuance and collection rates as projected for the year. Both of these revenue determinants in 2013 are dependent on the new Parking Ticket Cancellation Guidelines and the extension of the grace period to ten minutes. Cancellation numbers for 2013 are anticipated to be higher and it is projected that up to 706,000 tickets will be cancelled this year, with this trend continuing through 2014. The projected revenue was adjusted accordingly taking into account the cancellation guidelines in addition to the Habitual Offender Program, Rush-Hour-Route Fines and Fixed Fine System.

Appendix 2

2014 Recommended Total Operating Budget by Expenditure Category

Program Summary by Expenditure Category (In $000s)

Category of Expense	2011 Actual	2012 Actual	2013 Budget	2013 Projected Actual	2014 Rec'd Budget	2014 Change from 2013 Approved Budget		2015 Plan	2016 Plan
	$	$	$	$	$	$	%	$	$
Salaries and Benefits	34,997.4	36,101.6	37,643.0	37,343.0	38,523.4	880.4	2.3%	38,573.4	38,623.4
Materials and Supplies	1,259.7	1,256.8	1,586.2	1,586.2	1,621.8	35.6	2.2%	1,653.8	1,686.8
Equipment	79.5	11.1	60.2	60.2	53.2	(7.0)	(11.6%)	54.2	55.2
Services & Rents	7,165.6	3,326.9	6,505.8	6,399.5	7,647.0	1,141.2	17.5%	7,733.3	7,819.6
Contributions to Capital	1,554.0	1,554.0	1,554.0	1,554.0	1,554.0		0.0%	1,585.1	1,616.8
Contributions to Reserve/Res Funds	169.0	749.8	749.8	749.8	580.8	(169.0)	(22.5%)	580.8	580.8
Other Expenditures									
Interdivisional Charges	10,764.9	10,800.7	11,038.2	11,038.3	11,403.0	364.8	3.3%	11,594.1	11,791.0
Total Gross Expenditures	55,990.1	53,800.9	59,137.2	58,731.0	61,383.2	2,246.0	3.8%	61,774.7	62,173.6
Interdivisional Recoveries									
Provincial Subsidies									
Federal Subsidies									
Other Subsidies									
User Fees & Donations									
Transfers from Capital Fund									
Contribution from Reserve Funds									
Contribution from Reserve									
Sundry Revenues	84,180.0	94,641.2	82,134.1	79,134.1	84,380.2	2,246.1	2.7%	84,740.8	85,103.0
Required Adjustments									
Total Revenues	84,180.0	94,641.2	82,134.1	79,134.1	84,380.2	2,246.1	2.7%	84,740.8	85,103.0
Total Net Expenditures	(28,189.9)	(40,840.3)	(22,996.9)	(20,403.1)	(22,997.0)			(22,966.1)	(22,929.4)
Approved Positions	395.0	394.0	394.0	411.0	394.0			394.0	394.0

2014 Key Cost Drivers

- Salaries and Benefits is the largest expenditure category and accounts for 62.8% of the total expenditures, followed by Interdivisional Charges at 18.6% and Services and Rents at 12.5%.

Salaries and Benefits

- The 2014 Recommended Budget for Salaries and Benefits of $38.523 million is $0.880 million or 2.3% higher than the 2013 Approved Operating Budget.
  - ➢ This increase is attributable to progression pay, cost of living adjustments, step increases and maintaining fringe benefits rate.

Materials and Supplies

- The 2014 Recommended Budget for Materials and Supplies of $1.622 million is $0.036 million or 2.2% higher than the 2013 Approved Operating Budget.
  - ➢ This increase is attributable to the replacement of some handheld devices and economic factors.

Services and Rents

- The 2014 Recommended Budget for Services and Rents of $7.647 million is $1.141 million or 17.5% higher than the 2013 Approved Operating Budget.
  - ➢ This increase is attributable to the alignment of expenditures to past experience as detailed on page 10.

Interdivisional Charges

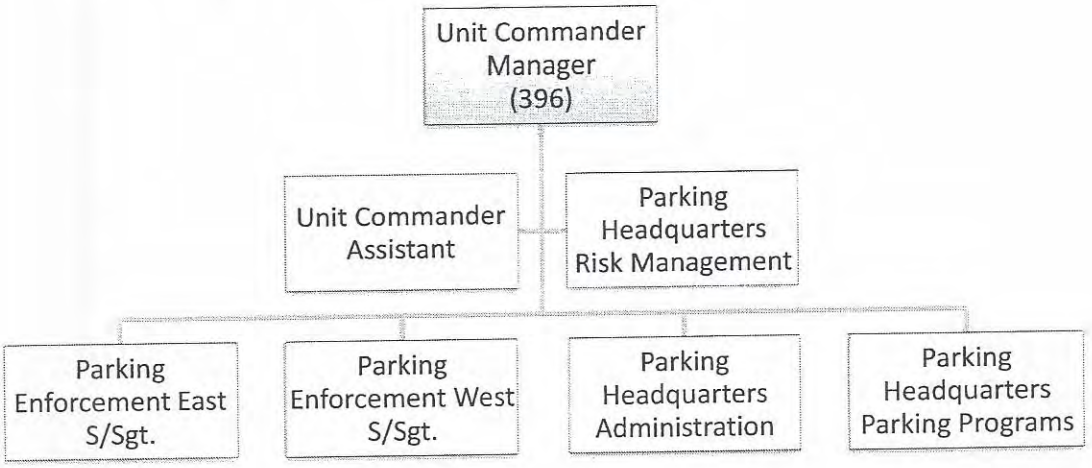
- The 2014 Recommended Budget for interdivisional charges of $11.403 million is $0.365 million or 3.3% higher than the 2013 Approved Operating Budget.
  - ➢ This is attributable to inflationary costs associated with the processing and collection of fines ($0.127 million), the judicial processing of parking tickets ($0.115 million) and the new I&T support for parking ticket and court systems ($0.123).

Sundry Revenue

- The 2014 Recommended Budget for sundry revenue of $84.380 million is $2.246 million or 2.7% higher than the 2013 Approved Operating Budget.
  - ➢ In 2014, the implementation of fines for rush-hour periods and the proposed implementation of the Habitual Offender Program have projected increases of fine revenue by $1.326 million.
  - ➢ An additional increase of $0.655 million is attributed to the alignment of revenues to past experience as detailed on page 14.

Appendix 2 - Continued

2014 Organization Chart



2013 Full and Part Time Staff

Category	Senior Management	Management	Exempt Professional & Clerical	Union	Total
Full-Time			1.0	393.0	394.0
Part-Time					
Total				393.0	394.0

Appendix 5

Inflows/Outflows to/from Reserves & Reserve Funds

Program Specific Reserve / Reserve Funds
(In $000s)

Reserve / Reserve Fund Name (In $000s)	Reserve / Reserve Fund Number	Projected Balance as of Dec. 31, 2013	Proposed Withdrawals (-) / Contributions (+)		
			2014	2015	2016
		$	$	$	$
Projected Beginning Balance			**43,451.0**	**44,085.0**	**44,762.8**
Vehicle and Equipment Reserve	XQ1701	6,049.0	1,554.0	1,597.8	1,642.8
Sick Pay Gratuity Reserve	XR1007	36,428.0	(486.1)	(486.1)	(186.1)
Police Central Sick Pay Reserve	XR1701	974.0	(433.9)	(433.9)	(433.9)
Total Reserve / Reserve Fund Draws / Contributions		**43,451.0**	**44,085.0**	**44,762.8**	**45,785.6**
Other program / Agency Net Withdrawals & Contributions					
Balance at Year-End		**43,451.0**	**44,085.0**	**44,762.8**	**45,785.6**

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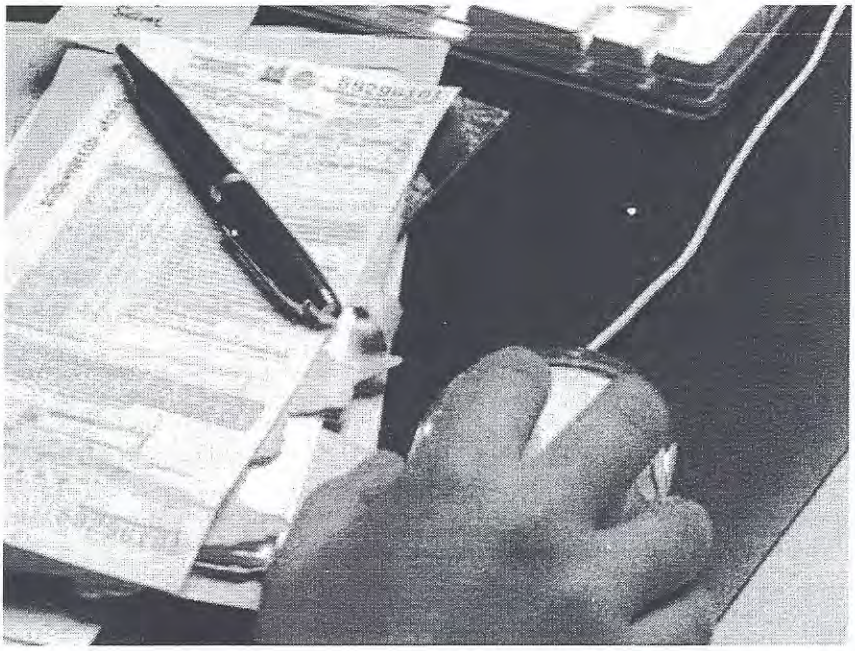

City Budget 2012

Parking Tag Enforcement & Operations Operating Budget Analyst Notes

The City of Toronto's budget is presented by program and service, in Analyst Note format. The City's Operating Budget pays the day-to-day operating costs for City services.

2012 Operating Budget

2012 OPERATING BUDGET ANALYST BRIEFING NOTES
BUDGET COMMITTEE NOVEMBER 28, 2011

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PART I: RECOMMENDATIONS

2012 Recommended Operating Budget
(In $000s)

(In $000s)	2011		2012 Recomm'd Operating Budget			Change - 2012 Recommended Operating Budget v. 2011 Appvd. Budget		FY Incremental Outlook	
	2011 Appvd. Budget	2011 Projected Actual	2012 Rec. Base	2012 Rec. New/Enhanced	2012 Rec. Budget			2013	2014
	$	$	$	$	$	$	%	$	$
GROSS EXP.	56,068.5	56,851.7	57,817.5	0	57,817.5	1,749.0	3.1	1,294.2	1,198.9
REVENUE	77,066.0	77,761.4	80,649.4	0	80,649.4	3,583.4	4.6	500.0	
NET EXP.	(20,997.5)	(20,909.7)	(22,831.9)	0.0	(22,831.9)	(1,834.4)	8.7	794.2	1,198.9
Approved Positions	395.0	395.0	394.0	0.0	394.0	(1.0)	(0.3)		

Recommendations

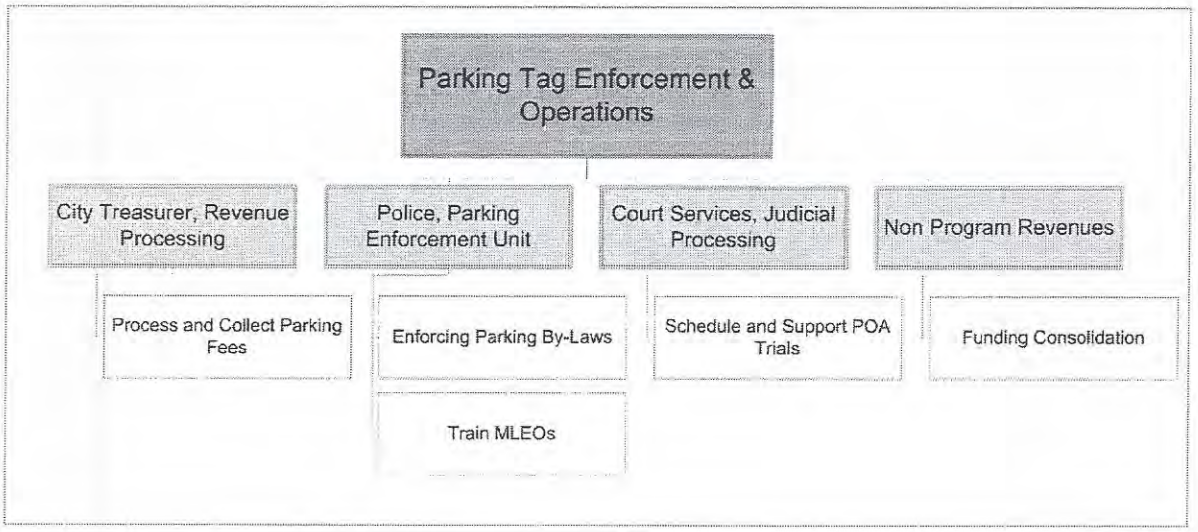
The City Manager and Chief Financial Officer recommend that:

1. City Council approve the 2012 Recommended Operating Budget for Parking Enforcement and Operations of $57.817 million gross and $(22.831.9) million net, comprised of the following services:

Service(s)	Gross ($000s)	Net ($000s)
Parking Enforcement Unit	42,758.4	42,063.4
Parking Revenue Processing	6,429.0	6,429.0
Judicial Processing of Parking Tickets	4,630.1	4,630.1
Parking Tag Revenue	4,000.0	(75,954.4)
Total Program Budget	57,817.5	(22,831.9)

PART II: 2012 SERVICE OVERVIEW AND PLAN

Program Map and Service Profiles



Parking Tag Enforcement & Operations delivers services through four main service areas: Police - Parking Enforcement Unit (issues parking infraction tickets); Office of the City Treasurer - Revenue Services Division (collects fines for the parking infractions issued by the Police Enforcement unit); Court Services - Judicial Processing of Parking Tickets (schedules trials for disputed parking tickets falling under the Provincial Offences Act (PCA)); and Non-Program Revenues - Parking Ticket Revenues (provides funding to support the parking by-law initiatives).

Police, Parking Enforcement Unit

- The Parking Enforcement unit ensures the safe and orderly flow of traffic and regulates parking by enforcing the Parking By-laws through the issuance of parking tickets to illegally parked vehicles and the training of Municipal Law Enforcement Officers (MLEO's) who are empowered to write parking tickets on private or municipal properties. The Enforcement program provides the following activities:
  - Enforce Parking By-laws: Issue parking infraction tickets - approximately 2.8 million tickets will be issued in 2012.
  - Train Municipal Law Enforcement Officers (MLEO's) as required.

Office of the Treasurer - Revenue Services Division

- Revenue Services is responsible for the processing and collection of fines for all parking infraction notices issued in the City of Toronto. The service level provided

meets the regulations established under the Provincial Offences Act. Revenue Services provides the following activities:

- Parking Ticket Collection: Process parking tickets within the 75 day period required by the Provincial Offences Act. Processing of parking tickets includes a number of crucial and complicated steps. This includes collecting all data from the Toronto Police, Parking Enforcement Unit on tickets written each day, retrieving vehicle ownership information from the Ministry of Transportation for each ticket, ensuring the timely mailing of required notices for non-payment and compiling court documents to ensure convictions are registered for non-payment. This unit also prepares pre-court trial documents for those offenders wishing to dispute their tickets in court. Tickets that cannot be processed within this time period must be cancelled and the Division's processes are established under this legislative framework.
- Payment Counter/First Appearance Facilities Operations operate daily from 8:30 am to 4:30 pm. These First Appearance Facilities are also legislated by the Provincial Offences Act and provide parking ticket customers a forum for disputing parking tickets, filing trial requests, obtaining judicial documentation or paying parking tickets.

Court Services - Judicial Processing of Parking Tickets

- Court Services is responsible for scheduling and supporting the Provincial Offences Act part II (parking tickets) trials. Responsibilities include receipt and file maintenance of all parking infraction trial requests delivered to court for adjudication purposes and managing default convictions, including cases that are appeals, re-openings or extensions of times to pay fines. Court Services provides the following activities:
  - Trials and other hearings for parking tickets issued in the City of Toronto

Non-Program Revenues - Parking Ticket Revenues

- Parking Ticket Revenues are included in the Non-Program Revenue Budget to track revenues generated by parking tickets issued in order to support parking by-law initiatives and other City programs.

2012 Service Deliverables

The 2012 Recommended Operating Budget of $57.817 million gross and $(22.832) million, net, revenue provides funding for Parking Tag Enforcement and Operations to:

- Continue to provide safe and efficient free flow of traffic by responding to local neighborhood parking concerns.
- Run five court rooms dedicated to reducing the backlog of parking ticket trials.
- Ensure Police Enforcement Officers will be able to attend court when scheduled and that enforcement activity service levels of issuing 2.8 million parking tickets are maintained.
- Processing and collecting fines for all parking infraction notices.

PART III: RECOMMENDED BASE BUDGET

2012 Recommended Base Budget
(In $000s)

(In $000s)	2011 Appvd. Budget	2012 Recommended Base	Change 2012 Recommended Base v. 2011 Appvd. Budget		FY Incremental Outlook	
					2013	2014
	$	$	$	%	$	$
GROSS EXP.	56,068.5	57,817.5	1,749.0	3.1	1,294.2	1,198.9
REVENUE	77,066.0	80,649.4	3,583.4	4.6	500.0	
NET EXP.	(20,997.5)	(22,831.9)	(1,834.4)	8.7	794.2	1,198.9
Approved Positions	395.0	394.0	(1.0)	(0.3)		

2012 Recommended Base Budget

- No reduction target was established for Parking Tag Enforcement and Operations as each individual Program delivering services to the Parking Tag Enforcement and Operations Unit has included the cost of their operations in their respective 2012 Operating Budgets which are subject to their respective 10% reduction targets.
- The 2012 Recommended Base Budget of $(22,831.9) million net revenue represents a $1.834 million or 8.7% increase in net revenue from the Parking Tag Enforcement and Operations' 2011 Approved Operating Budget of $(20,997.5) million.
- The 2012 Recommended Base Budget reflects the deletion of one base position, resulting in the staff complement decreasing from 395 to 394.

2012 Recommended Staff Complement – Base Budget Summary

Changes	Staff Complement
2011 Approved Positions	395.0
- 2011 In-year Adjustments	
2011 Approved Staff Complement	**395.0**
2012 Recommended Staff Complement Changes	
- 2012 Base Changes	(1.0)
Total Recommended Positions	**394.0**

2012 Recommended Service Changes

- The Program's 2012 Recommended Base Budget does not include any recommended service change reductions.

2013 and 2014 Outlook:

- Approval of the 2012 Base Budget for Parking Tag Enforcement and Operations will result in incremental increases of $0.794 million and $1.199 million in 2013 and 2014 respectively to maintain the 2012 level of service. Future year costs are primarily attributable to the following:
  - For 2013, the incremental expenditures are projected to be $0.794 million. This includes step and progression pay increases for Revenue Services in the amount of $0.002 million; and cost of living salary increase of $0.900 million for the Parking Tag Enforcement Unit, and an increase for the .9% OMERS premium rate increase. This is offset by a projected increase in parking ticket collections of approximately $0.500 million.
  - For 2014, the incremental expenditures are projected to be $1.199 million. This includes step and progression pay increases for Revenue Services in the amount of $0.002 million; and cost of living salary increases of $1.045 million for Parking Tag Enforcement staff only.
- No COLA has been included for City staff, since collective bargaining will begin in 2012.

PART V: ISSUES FOR DISCUSSION

2012 and Future Year Issues

Strategies and Initiatives to Mitigate Expenditure Increases, Maintain Revenues and Increase Collection Rates

- A number of strategies have been or are being developed to reduce reliance on the court system, thereby reducing the trial request rate, and/or mitigating expenditure increases and maintaining revenue and increasing collection rates. The initiatives are described below:

Implementation of a Fixed Fine System for Parking Tickets

- At its meeting of September 21 and 22, 2011, City Council adopted the report from the Treasurer and City Solicitor entitled 'Implementation of a Fixed Fine System for Parking Tickets'. The recommendations in the report stipulate that parking tickets, where a trial has been held and a guilty verdict results, will be paid at the fixed fine amount – that is, the amount that appears on the face of the ticket.
- In the past, parking ticket recipients often requested a trial in the hope that they would have their fine amount reduced at court. An increase in trial requests has contributed to a significant shortage in court capacity needed to hear parking ticket trials. It is anticipated that a system of fixed fines for parking tickets will result in fewer trial requests and a quicker time to trial for parking ticket requests, which will help to make more effective use of available court capacity..
- Although it is difficult to assess what the financial impact of this initiative will be, an estimated increase of $1 million has been included in the 2012 Recommended Operating Budget for Parking Tag Enforcement and Operations.

Couriers/Delivery Vehicles

- A significant number of parking tickets are issued to courier and delivery vehicles. Transportation Services has been developing a strategy to reduce the number of tickets and related requests for trials. The General Manager of Transportation Services will be reporting in January 2012 to request approval from City Council to initiate, further develop and implement a permit parking system for courier and delivery vehicles to address the issues around the ability to make deliveries, given the competing curb lane usages.

Reducing Officer Attendance at Court

- Currently, Police Officers must attend at court where a parking ticket recipient requests a trial. City Legal and Court staff are currently working with the province to

determine which offences could be handled without officers attending. This would reduce regular salary and/or overtime costs for Parking Enforcement Officers.

Appendix 1

2011 Performance

2011 Key Accomplishments:

In 2011, the Parking Tag Enforcement and Operations Unit accomplishments included the following:

- ✓ 2.8 million tickets are expected to be issued by Parking Enforcement Officers (PEO) and Municipal Law Enforcement Officers (MLEO) and processed in 2011 (*estimated based on year-to-date performance November 21, 2011).
- ✓ As of November 21st, 2011, approximately 1.5 million parking tickets issued in 2011 were paid in 2011.
- ✓ Approximately 120,000 calls from citizens requesting parking enforcement services in the community will be received.
- ✓ A total of 907 stolen vehicles were located from January 1 to November 21, 2011.
- ✓ 21,392 vehicles were towed from January 1 to November 21, 2011.
- ✓ In February 2011, Revenue Services launched an on-line dispute system that provides the public with a streamlined process to dispute a parking ticket under certain grounds without having to request a trial and appear in court. This initiative has been popular and has resulted in approximately 5,000 additional calls in 2011.
- ✓ In 2011 approximately 500,000 people will call or appear in-person to resolve their parking tag issues.
- ✓ In 2011 to the end of October, 168,561 parking ticket trial requests were made. Of those cases:
    - o 27,244 were prepaid, resolved before trial,
    - o 8,519 are incomplete or ongoing,
    - o 31,953 resulted in an acquittal or withdrawal in court,
    - o 58,943 resulted in a sentence in absentia because the accused failed to appear,
    - o 39,159 were fined in court, and
    - o 2,743 were suspended.

2011 Budget Variance Analysis

2011 Budget Variance Review
(In$000s)

(In $000s)	2009 Actuals	2010 Actuals	2011 Approved Budget	2011 Projected Actuals*	2011 Appvd. Budget vs Projected Actuals Variance	
	$	$	$	$	$	%
GROSS EXP.	48,547.3	54,619.6	56,068.5	56,851.7	783.2	1.4
REVENUES	93,423.4	80,898.6	77,066.0	77,761.4	695.4	0.9
NET EXP.	(44,876.1)	(26,279.0)	(20,997.5)	(20,909.7)	87.8	(0.4)
Approved Positions	395.0	395.0	395.0	395.0	-	-

* Based on the Third Quarter Operating Budget Variance Report.

2011 Experience

- The third quarter variance report for Parking Tag Enforcement and Operations projects that the program will be $0.088 million over the 2011 Approved Operating Budget of $(20.998) million net.
- The projected small unfavorable variance is due to increased costs for salaries and benefits for the Parking Tag Enforcement Unit in Toronto Police Services. More staff resources were temporarily hired than budgeted. This is mostly offset by an over-achievement in parking tag receipts in the amount of $0.695 million.

Impact of 2011 Operating Variance on the 2012 Recommended Budget

- The 2012 Recommended Operating Budget has been adjusted to reflect an increase to parking tag revenues, based on actual experience.

Appendix 2

2012 Recommended Operating Budget by Expenditure Category and Key Cost Drivers

Program Summary by Expenditure Category
(In $000s)

Category of Expense	2009 Actual	2010 Actual	2011 Budget	2011 Projected Actual	2012 Recommended Budget	2012 Change from 2011 Approved Budget		2013 Outlook	2014 Outlook
	$	$	$	$	$	$	%	$	$
Salaries and Benefits	31,467.1	34,533.3	35,316.2	36,099.4	36,334.4	1,018.2	2.9%	37,478.4	38,525.4
Materials and Supplies	1,217.2	1,479.5	1,354.9	1,354.9	1,594.0	239.1	17.6%	1,641.8	1,691.1
Equipment	63.4	64.0	96.2	96.2	94.2	(2.0)	(2.1%)	97.0	99.9
Services & Rents	7,651.2	7,183.5	7,396.6	7,396.6	7,375.6	(21.0)	(0.3%)	7,474.9	7,574.8
Contributions to Capital	434.0	434.0	534.0	534.0	534.0	-	0.0%	534.0	534.0
Contributions to Reserve/Res Funds	169.0	169.0	169.0	169.0	169.0	-	0.0%	169.0	169.0
Other Expenditures	265.0	265.0	265.0	265.0	265.0	-	0.0%	265.0	265.0
Interdivisional Charges	7,280.4	10,491.3	10,936.6	10,936.6	11,451.3	514.7	4.7%	11,451.3	11,451.3
TOTAL GROSS EXPENDITURES	48,547.3	54,619.6	56,068.5	56,851.7	57,817.5	1,749.0	3.2%	59,111.5	60,310.5
Interdivisional Recoveries						-	n/a		
Provincial Subsidies						-	n/a		
Federal Subsidies						-	n/a		
Other Subsidies						-	n/a		
User Fees & Donations						-	n/a		
Transfers from Capital Fund						-	n/a		
Contribution from Reserve Funds						-	n/a		
Contribution from Reserve						-	n/a		
Sundry Revenues	93,423.4	80,898.6	77,066.4	77,761.4	80,649.4	3,583.0	4.6%	81,149.4	81,149.4
TOTAL REVENUE	93,423.4	80,898.6	77,066.4	77,761.4	80,649.4	3,583.0	4.4%	81,149.4	81,149.4
TOTAL NET EXPENDITURES	(44,876.1)	(26,279.0)	(20,997.9)	(20,909.7)	(22,831.9)	(1,834.0)	(1.2%)	(22,037.9)	(20,838.9)
APPROVED POSITIONS	395.0	395.0	395.0	395.0	394.0	(1.0)	(0.3%)	-	-

2012 Key Cost Drivers

- Salaries and benefits are the largest expenditure category and account for 62.8% of the total expenditures, following by Interdivisional charges at 19.8% and Services and Rents at 12.8%.
- The 2012 budget for salaries and benefits of $36.334 million is $1.938 million or 5.6% higher than the 2011 Operating Budget.
  - ➢ This reflects the cost of living increase to Parking Enforcement Unit Officers in the amount of $0.900 million; increases as a result of a 1% increase in OMERS premium rate in the amount of $0.300 million.

- The 2012 budget for interdivisional recoveries is $11.451 million. This is an increase of $0.515 million over the 2011 Approved Budget.
- The expenditure increases have been more than offset by increases in revenues. Parking Tag revenues of $80.649 million are $3.583 million greater than the 2011 Approved Budget. This is the result of a 1% projected increase in collection rates, for $0.993 million; an increase based on 2011 results; for an increase of $0.700 million and an increase of $1.000 million, resulting from approval of a fixed fine policy.

parking tickets
August 20, 2014 6:20 pm

City to debate issuing parking tickets by mail

By David Shum and James Armstrong
Global News

***WATCH:* Why the city might ask the province to change the rules governing how they can issue parking tickets. Mark Carcasole reports.**

TORONTO – Should the city be able to mail people parking tickets? One councillor says yes, but the mayor says absolutely not.

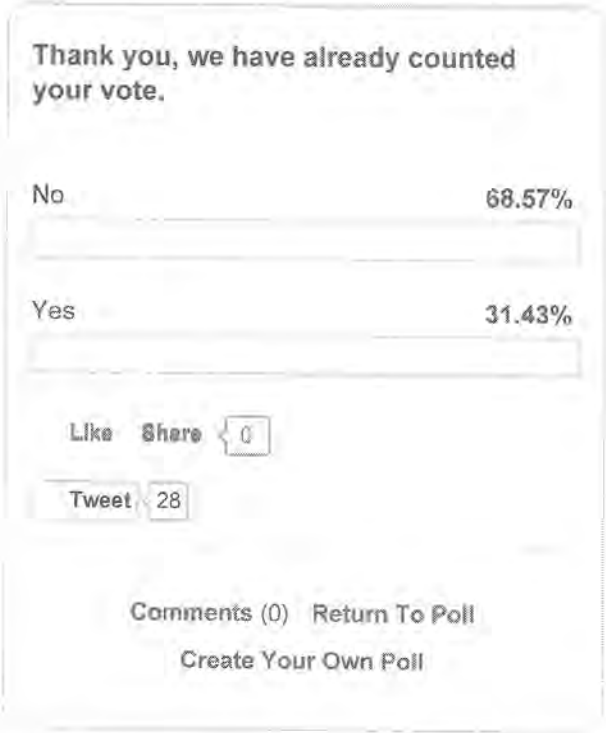
Toronto's executive committee will discuss a request today to amend the Provincial Offences Act and allow the city's parking enforcement officers to issue infractions by mail.

"Often, parking enforcement officers are not able to issue tickets for such offences before the offender drives away unpunished," Councillor Mike Layton wrote in a letter to committee.

"While City Council has increased fines for this conduct, drivers still think they can get away with this behaviour and the practice persists unabated."

The Provincial Offences Act states that the officer must affix the parking infraction notice to the vehicle or deliver it personally to the driver. However, once the offender drives away, they are free of any responsibility.

"A traffic cop can be working on a ticket for someone parked in a rush hour route and the person can come out of the coffee shop with their double double, hop in their car and drive away and there's nothing we can do," Layton said. "The problem is for the last ten minutes that person might have been holding up traffic in the downtown core."



Layton wants to give the authority to officers to issue infraction notices by regular mail to ensure that the city can enforce parking restrictions in order to keep traffic moving and fight gridlock.

He admits the policy wouldn't generate significant revenue but he hopes it would go a long way to deterring people from blocking traffic.

But Mayor Rob Ford called the motion nothing more than a "cash grab."

"No I do not support mailing parking tickets. That is a cash grab. You just write a parking ticket and mail it to somebody? No I don't support that. That's absolutely nonsense," he said. "How are you going to prove that you're there?"

Councillor Denzil Minnan-Wong though wants more information. He admits he hasn't heard many complaints about people driving away before they get ticketed but admitted blocking lanes of traffic with illegal parking is a problem the city needs to deal with.

But he's not willing to support the motion yet.

"I'm asking for a report to get all the facts," he said. "I don't want to take any knee-jerk type of reaction and ask for a change from the provincial government without getting all the facts on the table."

The issue will also be reviewed and voted on by city council next week.

The executive committee is meeting for the final time this term prior to the municipal election on Oct. 27.

⚠ Report an error

David Shum

Web Producer

David Shum is a web producer for Global Toronto and GlobalNews.ca's national breaking news desk.

James Armstrong

Web Producer

James is a Web Coordinator with Global News, covering Toronto for GlobalNews.ca.

TORONTO Item

Tracking Status

- This item will be considered by Government Management Committee on June 13, 2016. It will be considered by City Council on July 12, 2016, subject to the actions of the Government Management Committee.

Government Management Committee consideration on June 13, 2016

GM13.12	ACTION			Ward:All

Administrative Penalty System for Parking Violations

Origin

(May 24, 2016) Report from the City Solicitor, the City Treasurer and the Director, Court Services

Recommendations

The City Solicitor, the Treasurer, and the Director, Court Services recommend that:

1. City Council establish a system of administrative penalties for parking violations under, and in accordance with, the requirements of Ontario Regulation 611/06 of the City of Toronto Act, 2006 and generally as set out in Attachments 1, and 2 of this report to be effective May 15, 2017.

2. City Council establish an Administrative Penalty Tribunal composed of 25 public members ("Hearing Officers"), inclusive of a Chair, and approve the Tribunal governance structure outlined in Attachment 4 of this report, such Tribunal to be operational effective May 15, 2017.

3. City Council authorize the City Solicitor to introduce the necessary bills to amend the existing by-laws to which the City's system of administrative penalties applies, as outlined in Attachment 2 to this report, for the purpose of establishing these by-laws as designated by-laws under O. Reg. 611/06 and to indicate that the penalty amount set out in Column 3 of Attachment 2 will become the amount of the corresponding administrative penalty.

4. City Council delegate to the City Solicitor the authority to appoint Screening Officers, who will be City employees, required by O. Reg. 611/06 to respond to requests for review of penalty notices issued under the City's administrative penalty system established under that regulation.

5. City Council authorize the City Solicitor, the Treasurer and the Director, Court Services, to prepare the necessary policies, practices, and procedures required by O. Reg. 611/06 and make them publicly available on the City's website.

6. City Council direct staff to submit the administrative fees listed in Attachment 3 and the recommendation to eliminate online and telephone payment fees outlined in this report for consideration as part of the 2017 budget process and authorize the City Solicitor to amend the new Municipal Code Chapter 610, Penalties, Administration Of, to incorporate the administrative fees in support of the proposed Administrative Penalty System Program as adopted through the annual budget process.

7. City Council direct the Director, Court Services in consultation with the City Solicitor and the City Clerk to prepare a draft Procedure By-law, to enable the governance and administration of the Administrative Penalty Tribunal for consideration of the Tribunal prior to commencement of its first hearing.

8. City Council authorize the City Solicitor to introduce the necessary bills to enact new Municipal Code Chapter 610, Penalties, Administration of, to give effect to the system of administrative penalties, procedures and the Administrative Penalty Tribunal as generally outlined in this report and generally outlined in Attachments 1, 2, 4 and 5, inclusive, and to include any necessary clarifications, refinements, minor modifications or technical amendments as may be identified by the City Solicitor, such chapter to come into force on May 15, 2017.

9. City Council authorize the City Solicitor to introduce any necessary bills to amend the proposed Municipal Code Chapter 610 and its schedules, and the designated by-laws outlined in Attachment 2 to this report, to reflect any changes to the text and/or Schedules of the various designated by-laws between the date City Council adopts this Item and May 15, 2017, the date the proposed Code Chapter 610 comes into force.

10. City Council authorize the City Solicitor, in consultation with the City Clerk, to introduce any necessary bills to amend Municipal Code Chapter 217, Records, Corporate (City), and Chapter 219, Records, Corporate (Local Boards) and to adopt new record retention schedules, subject to the approval of the City's external auditor as required by s. 201, to give effect to the system of administrative penalties, procedures and the Administrative Penalty Tribunal as generally outlined in this report and generally outlined in Attachments 1, 2, 4 and 5, inclusive, such amendments to come into force on May 15, 2017.

11. City Council authorize a two office in person screening location model supported by increased use of online services as outlined in this report.

12. City Council direct staff to submit the estimated start-up costs to cover necessary construction costs and enforcement system upgrades as well as the incremental operating requirements including proposed staffing changes in support of the implementation of the proposed APS program for consideration as part of the 2017 budget process.

13. City Council forward this report to the Toronto Police Services Board, with a request that it direct the Transformation Task Force to consider and review opportunities for efficiencies and associated savings in parking enforcement from the implementation of the proposed

Administrative Penalty System, and include any necessary recommendations in its Final Report in advance of the 2017 budget cycle.

Summary

This report proposes that City Council approve the governance and administrative requirements to establish an Administrative Penalty System (APS) for parking violations (i.e. parking tickets) that will include an Administrative Penalty Tribunal. Under the City of Toronto Act, 2006, and a July 2015 amendment to Ontario Regulation 611/06, Administrative Penalties, the City can establish an administrative penalty and dispute resolution process for all parking violations. Adopting an administrative structure for parking disputes will divert non-complex matters from the provincial courts freeing up limited court time for more serious matters. Several municipalities in Ontario have already implemented APS programs for parking violations. Administrative penalties are well established at the provincial and municipal levels and have become an effective instrument of modern governance.

The new administrative process proposed in this report, with its associated policies and procedures will:

Provide a fair and equitable dispute resolution process for parking disputes ensuring that individuals who contest an administrative penalty (i.e. parking fines) for a parking violation receive an impartial review in a timely manner, ideally under 60 days.

Provide customers with greater access to dispute resolution services through the implementation of processes and technologies, including on-line options for disputing or paying a penalty, that are more accessible and efficient than those currently allowed under the Provincial Offences Act (POA).

Allow the City sufficient flexibility to respond to fluctuating parking dispute levels, while building capacity within the court system for the processing of more serious offences.

Help the City regulate the flow of traffic by promoting compliance with its by-laws respecting the parking, standing, or stopping of motor vehicles.

Financial Impact

Table 1 – Revenues and Expenditures

GROSS EXPENDITURES	2016 Budget		2017 Request (Transition)		2018 Estimate		Change 2017 to 2016		Change 2018 to 2016	
	($ million)	# POS*	($ million)	# POS*	($ million)	# POS*	($ million)	# POS*	($ million)	# POS*
Toronto Police – Parking Enforcement Unit	47.44	394.0	47.44	394.0	47.44	394.0	0	0	0	0
Court Services	5.37	31.0	7.72	38.0	1.36	7.0	2.35	7.0	(4.01)	(24)
Legal Services	1.5	14.0	2.77	50.0	4.39	36.0	1.27	36.0	2.89	22
Revenue Services	11.36**	42.0	10.57	48.0	9.70	37.0	(0.79)	6.0	(1.66)	(5)

Total Operating Costs	65.67	481	68.50	530	62.89	474	2.83	49.0	(2.78)	(7.0)

Gross Revenues	2016 Budget	2017 Request (Transition)	2018 Estimate	Change 2017 to 2016	Change 2018 to 2016
	($ million)	($ million)	($ million)	($ million)	($ million)
Toronto Police, Sundry Revenues	1.52	1.52	1.52	0	0
Parking Penalties (current fine level)	95.85	95.85	95.85	0	0
Transaction fees	1.56	0.59	0	(0.97)	(1.56)
Court costs/ fees related to *POA*	3.48	8.50	0	5.02	(3.48)
Fees Authorized Under APS regulation	0	6.13	11.33	6.13	11.33
Total Gross Revenues	102.41	112.59	108.70	10.18	6.29
Net Revenues	(36.74)	(44.09)	(45.81)	(7.35)	(9.07)

*: Number of positions / **This figure includes $4.7M in legislated payments to the Province.

Expenditures and Revenues

Expenditures:

As shown in Table 1, the City currently spends approximately $65.67 million on parking enforcement and the processing of parking tickets. Moving to an APS program for parking violations as proposed in this report, once fully implemented in 2018, is expected to reduce the gross operating budget for Parking Tags Enforcement and Operations from $65.67 million to $62.89 million reflecting a savings of $2.78 million and a reduction in staff complement of 7.0 positions from 481 to 474 positions.

Launching an APS program for parking violations on May 15, 2017 requires the City to run both the current court-based program and the new APS program in 2017. The one-time operational costs for running both programs in the 2017 transition year is expected to increase the gross operating budget for Parking Tags Enforcement and Operations by $2.830 million to $68.49 million in 2017.

Moving to an APS program for parking violations will require one-time start-up costs. Estimated start-up costs in 2017 are $5.2 million. These include one-time construction costs ($3 million) and enforcement system upgrades that incorporate the use of digital photography ($2.2 million). Funding of $2.973 million is currently included in the 2016-2025 Council Approved Capital Budget and Plan for the Toronto Police Service to replace the current parking ticket enforcement and management applications. However, the approved capital project does not include the additional cost of $2.2 million needed to incorporate digital photography. This

feature is considered by the project team to be an important component of a successful APS program.

Incremental operating funding requirements of $2.830 million for 2017 and an estimated capital funding request of $5.2 million to cover construction costs and system upgrades will be submitted through the 2017 Budget process for Court Services, Legal Services, Revenue Services, and the Toronto Police Parking Enforcement Unit. The proposed APS program is to be funded by the Parking Tags Operation and Enforcement Operating Budget in Non-Program through Inter-Divisional Recoveries with the participating Divisions as shown above. Detailed information regarding current and new program costs is included in Tables 7, 8 and 9.

Revenues

As shown in Table 1, the Operating Budget Notes for Parking Tags Enforcement and Operations show a revenue stream of $102.41 million in 2016. This is comprised of sundry revenues collected by the Toronto Police Service, parking fines, transaction fees ($1.50 for on-line payments and $2.00 for IVR phone payments), and administrative fees related to the POA.

Upon full implementation in 2018, an APS program for parking violations as proposed in this report is expected to increase revenues from $102.41 million to $108.7 million reflecting an increase of $6.29 million. Revenues from police sundries and parking penalties (formerly fines) are not expected to change from 2016 levels. Administrative fees largely assessed when penalties are paid late are expected to equal $11.33 million. To encourage greater use of automated payment channels, this report will propose, during the 2017 budget process, to eliminate revenue derived from payment transaction fees upon APS implementation May 15, 2017 representing a reduction of $1.56 million annually. Revenue figures for 2018 assume that projected enforcement levels outlined in the 2016 budget submission are achieved and historical customer responses to parking tickets remain consistent.

The 2017 transition year is expected to increase revenues from $102.41 million to $112.59 million reflecting an increase of $10.18 million, largely relating to fines and penalties that are paid late along with fines paid in 2017 that would, under the court based program, be paid in 2018 due to court scheduling delays. Administrative fees related to the POA are budgeted at $8.50 million in 2017 due to the provincially regulated late payment fee increase effective January 1, 2016 where unpaid tickets filed with the Ministry of Transportation are registered on the vehicle licence plate record for collection. No revenue from Court based administrative fees is budgeted for 2018 as the APS program is expected to be fully functional and is expected to generate $6.13 million, and transaction fees for the payment of tickets distributed prior to the APS implementation date are expected to generate $0.59 million. Effectively, the increased costs of the 2017 transition year will be funded from the increase in revenue relating to 2017 activity.

Upon full program implementation, in addition to the savings described in the report, there are opportunities for savings that cannot be quantified at this time. For example, parking enforcement officer capacity may increase if officers are not required to be involved in the dispute process to the same extent as they are in the current court based model. The use of photographic evidence may also reduce the volume of disputes filed that, in turn, would lower the projected program operating costs. The introduction of technology may also reduce the

administrative costs of supporting in-person business processes. Staff will monitor the impact of changes once we move away from the court based system to the administrative penalty model and report on results as part of the budget process.

The Deputy City Manager and Chief Financial Officer has reviewed this report and agrees with the financial impact statement.

Background Information

(May 24, 2016) Report and Attachments 1 - 6 from the City Solicitor, the City Treasurer and the Director, Court Services on Administrative Penalty System for Parking Violations (http://www.toronto.ca/legdocs/mmis/2016/gm/bgrd/backgroundfile-93829.pdf)

Source: Toronto City Clerk at www.toronto.ca/council

Case Name:

Megens v. Ontario (Racing Commission)

Between
Paul Megens, applicant, and
The Ontario Racing Commission, respondent

[2003] O.J. No. 1459

64 O.R. (3d) 142

225 D.L.R. (4th) 757

170 O.A.C. 155

10 Admin. L.R. (4th) 83

122 A.C.W.S. (3d) 2

Court File No. Divisional Court 127/03

Ontario Superior Court of Justice
Divisional Court

Lane, Brockenshire and Cameron JJ.

Heard: March 31 and April 1, 2003.
Judgment: April 11, 2003.

(35 paras.)

Gaming and betting -- Horse racing -- Regulation -- Commissions -- Appeals.

This was an application by Megens for judicial review of a decision by the Ontario Racing Commission. The Commission issued a Notice of Proposed Order proposing to revoke Megens' licences. A hearing was held to review the proposed order and a ruling was issued revoking the licences. The Deputy Director of the Commission issued an order confirming the revocation. Megens sought an order quashing the order of revocation and the Notice of Proposed Order, as well as an order specifically declining to remit the matter for a rehearing. The Notice of Proposed Order

was issued on the basis that the Commission had reasonable grounds to believe that Megens had conspired with two others to fix a horse race by agreeing that their horses would not finish in the top three, and then placing bets in accordance with the conspiracy. The most important evidence against Megens came from Brown, who had both exonerated and implicated him on different occasions. In exchange for his evidence, Brown's licence was reinstated, he was assured he could race in British Columbia and four of the six charges against him were expunged. Four witnesses gave evidence that was exculpatory. The decision did not give reasons as to why this evidence was not believed. Hulan, who had placed the bets, could have cast light on Megens' involvement, but he was not called as a witness. The bets placed by Hulan were inconsistent with the scheme to which Brown testified. The Commission investigator gave no testimony that any aspect of the way the race was run implicated Megens. The majority of the commission relied on Megens' demeanour alone to disbelieve him.

HELD: Application allowed. The matter was remitted to the Commission. The reasons were deficient to the point of denying Megens natural justice and procedural fairness. He and the court did not know why witnesses favourable to him were disbelieved, and the uncorroborated word of an admitted liar with a huge motive to bear witness was preferred. The court was required to remit the case as there was evidence available that was not called. Demeanour alone was not enough to support an adverse credibility finding in an important case.

Statues, Regulations and Rules Cited:

Racing Commission Act, S.O. 2000, c. 20.

Counsel:

Peter A. Simm, for the applicant.
Donald Bourgeois, for the respondent.

The judgment of the Court was delivered by

1 LANE J.:-- This is an application for judicial review of a decision of the Ontario Racing Commission ("ORC") issued October 25, 2002. The Deputy Director of the ORC issued a Notice of Proposed Order on April 4, 2002, proposing to revoke the licences of the applicant, Paul Megens ("Megens"). The ORC held a hearing, with prior disclosure and cross-examination, to review the proposed order and, by a majority, issued a ruling that revoked Megens' licences. The Deputy Director issued an order confirming the revocation on October 28, 2002.

2 The applicant seeks an order quashing the order of revocation and the Notice of Proposed Order

as well as an order expressly declining to remit the matter for any rehearing.

Background

3 Megens, Timothy Brown, and Grant Hollingsworth all drove standardbred horses in the seventh race at the Fraser Downs Racetrack in Fraser, B.C. on April 22, 1999. None of the horses finished in the top three, although Brown's had been one of the favourites. There was an investigation in B.C. into the possibility that the race result had been fixed involving Brown and Hollingsworth and Brown's licence was suspended.

4 The Deputy Director of the ORC issued a Notice of Proposed Order to Revoke Licence pursuant to the Racing Commission Act, S.O. 2000, c. 20 on April 4, 2002. The reasons given were that:

> The Deputy Director has reasonable grounds to believe that ... Megens while carrying out activities for which a licence is required, will not act in accordance with the law, or with integrity, honesty, or in the public interest, having regard to his past conduct.

5 In the particulars, the Deputy Director alleged that Megens conspired with Hollingsworth and Brown to fix the seventh race at Fraser Downs three years earlier. Essentially, the three were alleged to have agreed that none of their horses would finish in the top three and bets were placed on the triactor for that race in accordance with this conspiracy.

6 In proceedings about this race before the British Columbia Racing Commission, Brown's licence was suspended for two years with a recommendation that he not be allowed to apply for reinstatement for a further five years. During the first suspension period, Brown approached the B.C. Commission and made a deal to give evidence implicating Megens in the fix in return for termination of his suspension, dropping the five year recommendation, assurance that he would be allowed to race in B.C. and the expunging of four of the six charges from his record. He then testified at the Ontario hearing that Megens was part of the conspiracy. Brown stated before the ORC that he had given false statements under oath to the B.C. Racing Commission.

7 The decision of the two members of the majority of the ORC noted that the "most important evidence against Megens comes from Brown." It also noted that Brown "both implicated and exculpated Megens in fixing the race in question on different occasions." The ORC majority concluded: "there are reasons to believe that Brown is now telling the truth about Megens," including the fact that Hollingsworth testified that Brown implicated Megens on the day of the race, long before Brown was under any pressure from the B.C. Racing Commission to implicate Megens. There are serious and unresolved inconsistencies between the actual evidence and the majority's limited review of it as will appear below.

8 The majority of the ORC was "not impressed with the demeanour of Megens" and found him to

be "vague and uncertain" as well as "somewhat hostile and belligerent." In a case turning largely on matters of credibility, the ORC was "satisfied that there is clear and cogent evidence of Megens' involvement in the 'fix'."

9 The third member of the ORC panel dissented from the majority. He found that there was insufficient clarity and cogency in the evidence such that revocation would be unwarranted. He declared the principal witness (Brown) to be "an admitted liar." He found that it was entirely plausible that Brown concocted the whole story in order to have his own racing privileges restored. The dissenting member also drew a negative inference from the fact that while the prosecution brought four witnesses from B.C. to Toronto, it did not call as a witness Mr. Hulan, apparently living in Mississauga, whom the prosecution alleged made the bets and unsuccessfully tried to cash in the winning betting slips. He was prevented from doing so by an order of the parimutuel authorities.

Standard of Review

10 The appropriate standard of review to be applied to a decision of the Ontario Racing Commission acting within its jurisdiction is patent unreasonableness: Hickey v. Ontario (Racing Commission), [1997] O.J. No. 1230 (Div. Ct.) and McNamara v. Ontario (Racing Commission), [1998] O.J. No. 3238 (C.A.). In McNamara, Abella J.A. found that:

> This is a specialized tribunal whose expertise is entitled to judicial deference. The applicable standard of review when the Commission is acting within its jurisdiction is, therefore, patent unreasonableness or clear irrationality. (at para 33)

Duty of Fairness

11 It is only in rare circumstances that this court will interfere in a tribunal's findings of credibility. An application for judicial review is not a re-trial: Erikson v. Ontario (Securities Commission), [2003] O.J. No. 593. In that case, A. Campbell J. observed that nothing in the evidence or the reasons suggested any factual error or failure to consider a vital matter that might affect the result. The applicant before us contends that this is that rare case where there has been a failure to consider vital matters to the extent that the applicant has been deprived of procedural fairness.

12 Where a tribunal is said to have failed to give a party natural justice, the court does not engage in an assessment of the appropriate standard of review, but evaluates whether the rules of procedural fairness or the duty of fairness have been adhered to. The court assesses the specific circumstances and determines what safeguards were required to comply with the duty to act fairly: London (City) v. Ayerswood Development Corporation, [2002] O.J. No. 4859 (C.A.) at paragraph 10.

13 One aspect of the duty of fairness is the duty to give reasons. This duty applies both to the decision as to the merits and to any decision as to penalty. While the reasons of an administrative tribunal should not be scrutinized with the same scrupulous attention to detail as the reasons of a court[1], there is nevertheless a minimum standard that must be met. In 1984, the Divisional Court in O.P.S.E.U., et al. v. The Queen (Ontario) (1984), 5 D.L.R. (4th) 651, dealt with an application for judicial review of the decision of the Grievance Settlement Board upholding the dismissal of certain employees in a correctional facility. The Board was required to determine if the force used by the grievors on an inmate was excessive and failed to decide how the fight started. The application was allowed and the award quashed. Commenting on the duty of the Board in a credibility case, O'Driscoll J. said at page 659:

> A trier of fact may believe all, part or nothing of the evidence of any witness or any exhibit. However, a trier of fact cannot ignore nor fail to evaluate, nor forget a relevant portion or portions of the evidence. The trier of fact must consider all the evidence before deciding what is believed and what is rejected. If the trier of fact fails to carry out that fundamental responsibility, it results in a denial of natural justice as defined for the Supreme Court of Canada in Nipawin, supra.[2]
>
> The [Board] was faced with a fundamental conflict between the evidence of Barnes and the evidence of the applicants-grievors; it was a classic credibility case. In order to do natural justice to all concerned, it was the duty of the [Board] to decide what was to be believed and what was to be rejected; in doing so, the trier of fact was required to consider, evaluate and weigh all[3] the evidence.
>
> ... [T]he majority award glossed over evidence, was selective in what evidence it considered, and failed to refer to, consider and evaluate a wealth of relevant, cogent evidence that should have weighed very heavily on the crucial question of credibility.

14 A more recent exposition of this duty is found in Gray v. Ontario (Director, Disability Support Program) (2002), 212 D.L.R. (4th) 353 (Ont. C.A.) where the claimant and her doctor testified that she was unable to work. Although it found her a credible witness, the tribunal disallowed her claim. The Court of Appeal set aside the order and remitted the matter for reconsideration. It observed that the tribunal's reasons did not suffice. At page 364:

> The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather the decision maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and

> must reflect consideration of the main relevant factors.

and also:

> It is simply unclear what relevant evidence the Tribunal accepted and what it rejected.

15 While Gray was a case of a statutory duty to give reasons, the same requirement now exists at common law. In Baker v. Canada (Minister of Citizenship and Immigration) (1999), 174 D.L.R. (4th) 193 (S.C.C.) the Supreme Court dealt with the judicial review of the decision of an Immigration officer to refuse the applicant permission to remain in Canada, where she had resided illegally for 11 years, upon humanitarian grounds. In discussing the content of the duty of fairness, the court observed that requirements could vary with the circumstances including how closely the nature of the tribunal process resembled the judicial process, the statute within which it was operating and, at page 212, the importance of the decision to the party:

> The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed for example by Dickson J. ... in Kane v. Board of Governors of the University of British Columbia, [1980] 1 S.C.R. 1105 at 1113, 110 D.L.R. (3d) 311:
>
> > A high standard of justice is required when the right to continue in one's profession or employment is at stake ... A disciplinary suspension can have grave and permanent consequences upon a professional career.

16 The court went on to consider the role of reasons in the fairness analysis, reviewing previous authorities[4] and concluding at page 219:

> [43] In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. ... It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.

17 This passage applies to the present case, which is just as crucial to the applicant's future as was her case to Ms. Baker. He has the right to be told why his case was decided as it was. The content of this right was discussed by Bastarache J., then of the New Brunswick Court of Appeal, in Boyle v. New Brunswick (Workplace Health, Safety & Compensation Commission) (1996), 39

Admin. L.R. (2d) 150, where, at 156 he said:

> I am of the view that, in the absence of a true analysis of the evidence, the appeal process is frustrated and that the duty to give reasons cannot be met simply by listing the evidence considered.

and at page 158:

> As mentioned in De Smith at p. 467[5], a consideration of the purpose of the duty is sufficient to establish the nature of the requirement. Reasons must explain to the parties why the Tribunal decided as it did; it must avoid the impression that its decision was based on extraneous considerations or that it did not consider part of the evidence. Reasons must also be sufficient to enable the Court of Appeal to discharge its appellate function; the Tribunal must therefore set out the evidence supporting its findings in enough detail to disclose that it has acted within jurisdiction and not contrary to law.

Analysis

18 Applying these principles to the reasons of the majority in the present case, I turn to the applicant's complaints. These focus on the failure of the reasons to refer at all to certain evidence that had a tendency to exculpate Megens. Given that the evidence against Megens was all either given by Brown, or originated with him, his credibility was the central point of the case. The witnesses who tended to exculpate Megens also tended, by the same token, to damage Brown's credibility.

19 The ORC majority reasons stated:

> It is clear that Brown exchanged information about Megens, in part, with the B.C.R.C. in return for an earlier reinstatement of his licences in B.C.

20 Four witnesses gave evidence exculpatory of Megens. The majority reasons referred to three of them as follows:

> MacKay, Leak and Crimeni testified that Brown told them that in order to get his licences back from the BCRC he would have to implicate Megens even though Megens was not involved in the fixed race.

21 That is an accurate summary of their evidence. MacKay and Crimeni heard Brown make those statements at the same party at Crimeni's house. Crimeni confronted Brown saying you are not really going to do that?' to which Brown responded: I have no choice. I have to save myself' and also they want me to blame Paul, so I am going to have to bring Paul Megens into it.' Brown also repeated to Crimeni that Megens had absolutely nothing to do with the fix. Some time later,

Crimeni encountered Brown and said: you went ahead and did it' to which Brown replied: Yes. I didn't have a choice. I just had to save my ass'.

22 Ms. Leak was an ex-girl friend of Megens and the mother of two children by him. She is also a good friend of Brown whom she described as like an uncle to her children. Brown stayed with her for a month while recuperating from surgery and he told her he was under pressure to implicate Megens even though Megens had nothing to do with it.

23 Despite the importance of this evidence in exposing Brown's motivation to falsely accuse Megens, the sentence quoted in paragraph 20 above is the sum total of the references to these witnesses in the majority reasons. The majority must have disbelieved them, but why? The dissenting member found their evidence credible - "no more or less believable than Brown's declarations" - yet the majority gives no reason for disbelieving them. A fourth exculpatory witness was William Megens, Paul Megens' father, who spoke with Brown on the telephone. He said that Brown told him: "You know, Paul is not involved". The majority does not mention this evidence, much less give its reason for not accepting it. This is particularly odd when they did accept his evidence on another point. When the majority, at paragraph 19, sums up on credibility, it refers only to the evidence of Brown, Hollingsworth and Megens.

24 The majority clearly considered the evidence of Hollingsworth to be of great importance. When it turned to the reasons for thinking that Brown was finally telling it the truth, the first reason given was Hollingsworth's testimony. The majority said that Hollingsworth testified that Brown had told him that Megens was in on the fix. The majority said it was important that Brown was under no pressure to implicate Megens at the time, but in the next sentence it observes that Brown may have been' lying to induce Hollingsworth to join the conspiracy. It makes no finding about this very plausible possibility, but leaves the matter dangling. It approaches this evidence as if it was somehow independent verification of Megens' involvement, whereas it is just Brown's version recycled through Hollingsworth. Hollingsworth acknowledged at the hearing that he had never discussed this race with Megens and that anything he learned about the race came from Brown.

25 One witness who could have cast light on Megens' involvement, if any, was Ken Hulan, the man who placed the bets. He was interviewed by the Commission investigator, but was not called, even though he had admitted to some recollection while claiming to have been drunk. The dissenting member recognized that an inference could be drawn against the Commission case, but the majority did not. In the absence of Hulan, the only evidence that Hulan met with Megens before the race came from Brown. Megens knew Hulan and said that he lunched with him the next day, but denied meeting before the race or discussing any problem with cashing winning tickets. Hulan was an important witness and failing to call him after interviewing him was a serious omission in the case against Megens.

26 Another aspect of the case involving Hulan is the fact that the bets he placed were inconsistent with the scheme to which Brown testified. That scheme required that the #7 horse driven by

Hollingsworth be omitted from the bets, but Hulan included that horse. There was also evidence that one Ken Skiba made the precise bets which Brown's scheme called for and there was no evidence linking him with Megens; rather he was a friend of Hollingsworth. None of this is mentioned in the majority reasons.

27 The videotapes of the race, taken from several angles, were screened at the hearing. The Commission investigator gave no testimony that any aspect of the way the race was run implicated Megens. There is no mention of this in the reasons.

28 Finally, the majority relied on Megens' demeanour alone to disbelieve him. While actually seeing the witnesses in the box is an undoubted advantage possessed by the trier of fact, demeanour alone is a weak reed upon which to base an adverse credibility finding in an important case.[6] Surely some analysis of Megens' evidence was necessary, giving some examples of the vagueness and uncertainty about straightforward matters on which the majority relied.

29 For the foregoing reasons, I am of the view that the reasons of the majority utterly fail to grapple with numerous issues of importance as to the credibility of the principal witnesses. They are deficient to the point of denying the applicant natural justice and procedural fairness. He, and this court, simply do not know why he and the witnesses favourable to him were disbelieved and the uncorroborated word of an admitted liar with a huge motive to bear false witness was preferred.

Penalty

30 It was submitted that the Commission erred in failing to consider, or at all events, to record in its reasons, the alternative sentences that might be imposed rather than simply adopting the Deputy Director's recommendation.

31 The need for reasoned sentencing is summarized by Cory J., then a judge of the Divisional Court, in Re Stevens and Law Society of Upper Canada (1979), 55 O.R. (2d) 405, where at p. 411, he said:

> Ever since the development of the concepts of crime and punishment, mankind has struggled with uncertain success to make the punishment fit the crime. That is one of the factors that should be considered by every court that has the awesome duty of imposing sentence and every tribunal confronted with the difficult task of meting out punishment.
>
> Any sentencing involves an onerous exercise of will that involves a conscious act of balancing and comparison. How bad is the wrongdoer presently before the tribunal compared, first to the non-wrongdoer and secondly to other wrongdoers. Sentencing requires a consideration of the accused and the facts of the case presently before the court. A conscious comparison should be made between the

> case under consideration and similar cases wherein sentences were imposed. If the comparison with other cases is not undertaken, there may well be such a wide variation in the result as to constitute not simply unfairness but injustice. Considerations of such a nature should have as great a significance for professional discipline bodies with the power to impose onerous penalties as they do for courts of appeal and of first instance dealing with sentences upon conviction of criminal offences.

32 While the decision of the Commission refers to the balance between the protection of the public interest and the desire of individuals to participate in racing, it is devoid of any reference to having considered any alternative penalty short of the confirmation of the Deputy Director's proposal for revocation of Mr. Megens' licence. The decision therefore falls short of the standard of fairness required of sentencing authorities as outlined by Cory J. in Stevens, supra.

To remit or not?

33 It was submitted by the applicant that we should dismiss the matter entirely because the evidence of Brown could never amount to a case of clear and cogent evidence against Megens. In my view, given that there was evidence available that was not called, that is not a decision that this court should make in this case.

Disposition

34 I would allow the application for judicial review, quash the order of the Commission dated October 25, 2002 and the Order of the Deputy Director dated October 28, 2002 and remit the matter to the Commission for such further action as it may deem advisable. If there are further proceedings, they will be before a panel differently constituted.

35 The parties will endeavour to resolve the issue of costs, failing which they may make written submissions as to costs, the applicant within twenty days and the respondent within ten days thereafter.

LANE J.
BROCKENSHIRE J. -- I agree.
CAMERON J. -- I agree.

1 See Herman Motor Sales Inc. v. Registrar of Motor Vehicle Dealers Divisional Court, (July 2, 1980), 29 O.R. (2d) 431, 1989 C.R.A.T. 128.

2 Service Employees International Union, Local 333 v. Nipawin District Staff Nurses Ass'n, [1975] 1 S.C.R. 382.

3 Emphasis in the original.

4 In particular Northwestern Utilities v. Edmonton, [1979] 1 S.C.R. 684; Reference re Remuneration of Judges of Provincial Court of P.E.I. [1997] 3 S.C.R. 3.

5 De Smith, Woolf and Jowell, Judicial Review of Administrative Action, 5th ed.; London: Sweet & Maxwell, 1995.

6 Faryna v. Chorny (1951), 4 W.W.R. 171 (B.C.C.A.); R. v. Norman (1993), 16 O.R. (3d) 295 (Ont. C..A.); Heath v. College of Physicians and Surgeons (Ontario) (1997), 6 Admin. L.R. (3d) 304 (Ont. Divisional Ct.).

Walter Valente *Appellant*;

and

Her Majesty The Queen *Respondent*;

and

Attorney General of Canada, Attorney General of Quebec, Attorney General for Saskatchewan, Provincial Court Judges Association (Criminal Division) and Ontario Family Court Judges Association *Interveners.*

File No.: 17583.

1984: October 9, 10; 1985: December 19.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard, Lamer and Le Dain JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Courts — Charter of Rights — Independent tribunal — Provincial Court judge declined jurisdiction on ground Provincial Court (Criminal Division) not an independent tribunal — Whether or not judge of Provincial Court (Criminal Division) an independent tribunal.

Constitutional law — Charter of Rights — Courts — Independent tribunal — Jurisdiction declined on ground Provincial Court (Criminal Division) not an independent tribunal — Whether or not judge of Provincial Court (Criminal Division) an independent tribunal — Canadian Charter of Rights and Freedoms, s. 11(d) — Constitution Act, 1982, s. 52(1) — Provincial Courts Act, R.S.O. 1980, c. 398 — Public Service Act, R.S.O. 1980, c. 418 — Public Service Superannuation Act, R.S.O. 1980, c. 419 — Provincial Courts Amendment Act, 1983, 1983 (Ont.), c. 18, s. 1 — Provincial Judges and Masters Statute Law Amendment Act, 1983, 1983 (Ont.), c. 78, s. 2(2) — Courts of Justice Act, 1984, 1984 (Ont.), c. 11.

A judge of the Provincial Court (Criminal Division), sitting on the Crown's appeal against the sentence imposed on the appellant following conviction for careless driving, declined to hear the appeal pending determination by a superior court as to whether the Provincial Court (Criminal Division) was an independent tribunal within the meaning of s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*. Among the several reasons advanced by counsel in support of the contention

Walter Valente *Appelant*;

et

Sa Majesté La Reine *Intimée*;

et

Procureur général du Canada, Procureur général du Québec, Procureur général de la Saskatchewan, Association des juges des Cours provinciales (Division criminelle) et Ontario Family Court Judges Association *Intervenants.*

N° du greffe: 17583.

1984: 9, 10 octobre; 1985: 19 décembre.

Présents: Le juge en chef Dickson et les juges Beetz, Estey, McIntyre, Chouinard, Lamer et Le Dain.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Tribunaux — Charte des droits — Tribunal indépendant — Juge de la Cour provinciale déclinant compétence parce que la Cour provinciale (Division criminelle) n'est pas un tribunal indépendant — Un juge de la Cour provinciale (Division criminelle) est-il un tribunal indépendant?

Droit constitutionnel — Charte des droits — Tribunaux — Tribunal indépendant — Compétence déclinée parce que la Cour provinciale (Division criminelle) n'est pas un tribunal indépendant — Un juge de la Cour provinciale (Division criminelle) est-il un tribunal indépendant? — Charte canadienne des droits et libertés, art. 11d) — Loi constitutionnelle de 1982, art. 52(1) — Loi sur les cours provinciales, L.R.O. 1980, chap. 398 — Loi sur la fonction publique, L.R.O. 1980, chap. 418 — Loi sur le régime de retraite des fonctionnaires, L.R.O. 1980, chap. 419 — Provincial Courts Amendment Act, 1983, 1983 (Ont.), chap. 18, art. 1 — Provincial Judges and Masters Statute Law Amendment Act, 1983, 1983 (Ont.), chap. 78, art. 2(2) — Loi de 1984 sur les tribunaux judiciaires, 1984 (Ont.), chap. 11.

Dans un appel formé par Sa Majesté contre une peine infligée à l'appelant, reconnu coupable de l'infraction de conduite imprudente, un juge de la Cour provinciale (Division criminelle) a décliné compétence pour entendre l'appel tant qu'une cour supérieure n'aurait pas déterminé si la Cour provinciale (Division criminelle) était un tribunal indépendant au sens de l'al. 11*d*) de la *Charte canadienne des droits et libertés*. Parmi les nombreuses raisons soumises par l'avocat à l'appui de la

that the Provincial Court (Criminal Division) was not an independent tribunal were the nature of the tenure of provincial court judges, particularly those holding office under a post-retirement reappointment, the manner in which their salaries and pensions were fixed and provided for, and the extent to which they were dependent for certain advantages and benefits on the discretion of the executive government. The Ontario Court of Appeal proceeded on the basis that the provincial court judge had in effect decided that as a matter of law the Provincial Court (Criminal Division) as an institution was not independent. It allowed the appeal, holding that both the Provincial Court Judge and the Provincial Court (Criminal Division) were independent, and remitted the matter to the Provincial Court Judge to determine whether the sentence imposed was a fit and proper sentence.

Held: The appeal should be dismissed and the constitutional question answered as follows: A judge of the Provincial Court (Criminal Division) of Ontario is an independent tribunal within the meaning of s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*.

The concepts of "independence" and "impartiality" found in s. 11(*d*) of the *Charter*, although obviously related, are separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. "Independence" reflects or embodies the traditional constitutional value of judicial independence and connotes not only a state of mind but also a status or relationship to others—particularly to the executive branch of government—that rests on objective conditions or guarantees. Judicial independence involves both individual and institutional relationships: the individual independence of a judge as reflected in such matters as security of tenure and the institutional independence of the court as reflected in its institutional or administrative relationships to the executive and legislative branches of government.

The test for independence for purposes of s. 11(*d*) of the *Charter* should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. This perception must be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence and not a perception of how it will in fact act regardless of whether it enjoys such conditions or guarantees.

It would not be feasible to apply the most rigorous and elaborate conditions of judicial independence to the

prétention que la Cour provinciale (Division criminelle) n'est pas un tribunal indépendant, on trouve la nature de la charge des juges de cour provinciale, en particulier ceux qui occupent leur charge en vertu d'une nouvelle nomination après l'âge de la retraite, la manière dont leur traitement et pension sont fixés et versés et la mesure dans laquelle certains de leurs avantages sociaux dépendent du pouvoir discrétionnaire de l'exécutif. La Cour d'appel de l'Ontario a procédé sur le fondement que le juge de la Cour provinciale avait en réalité décidé qu'aux yeux du droit la Cour provinciale (Division criminelle), en tant qu'institution, n'était pas indépendante. Elle a accueilli l'appel, décidant que le juge de la Cour provinciale de même que la Cour provinciale (Division criminelle) étaient indépendants et a renvoyé la question au juge de la Cour provinciale pour qu'il statue sur la régularité et l'à-propos de la peine infligée.

Arrêt: Le pourvoi est rejeté et la question constitutionnelle reçoit la réponse suivante: Un juge de la Cour provinciale (Division criminelle) de l'Ontario est un tribunal indépendant au sens de l'al. 11*d*) de la *Charte canadienne des droits et libertés*.

Même s'il existe de toute évidence un rapport étroit entre les notions d'«indépendance» et d'«impartialité» que l'on trouve à l'al. 11*d*) de la *Charte*, ce sont néanmoins des valeurs ou exigences séparées et distinctes. L'impartialité désigne un état d'esprit ou une attitude du tribunal vis-à-vis des points en litige et des parties dans une affaire donnée. Le terme «indépendance» reflète ou consacre la valeur constitutionnelle traditionnelle qu'est l'indépendance judiciaire et connote non seulement un état d'esprit, mais aussi un statut ou une relation avec autrui, particulièrement avec l'organe exécutif du gouvernement, qui repose sur des conditions ou garanties objectives. L'indépendance judiciaire fait intervenir des rapports tant individuels qu'institutionnels: l'indépendance individuelle d'un juge, qui se manifeste dans certains de ses attributs, telle l'inamovibilité, et l'indépendance institutionnelle du tribunal qui ressort de ses rapports institutionnels ou administratifs avec les organes exécutif et législatif du gouvernement.

Le critère de l'indépendance aux fins de l'al. 11*d*) de la *Charte* doit être, comme dans le cas de l'impartialité, de savoir si le tribunal peut raisonnablement être perçu comme indépendant. Cette perception doit être celle d'un tribunal jouissant des conditions ou garanties objectives essentielles d'indépendance judiciaire, et non pas une perception de la manière dont il agira en fait, indépendamment de la question de savoir s'il jouit de ces conditions ou garanties.

Il ne serait pas possible d'appliquer les conditions les plus rigoureuses et les plus élaborées de l'indépendance

constitutional requirement of independence in s. 11(*d*) of the *Charter*, which may have to be applied to a variety of tribunals. The essential conditions of judicial independence for purposes of s. 11(*d*) must bear some reasonable relationship to the variety of legislative and constitutional provisions in Canada governing matters which bear on the judicial independence of tribunals trying persons charged with an offence. It is the essence of the security afforded by the essential conditions of judicial independence that is appropriate for application under s. 11(*d*) of the *Charter* and not any particular legislative or constitutional formula by which it may be provided or guaranteed. Section 11(*d*) cannot be construed and applied so as to accord provincial court judges the same constitutional guarantees of security of tenure and security of salary and pension as superior court judges for that construction would, in effect, amend the judicature provisions of the Constitution. The standard of judicial independence cannot be a standard of uniform provisions but rather must reflect what is common to the various approaches to the essential conditions of judicial independence in Canada.

Security of tenure, because of the importance traditionally attached to it, is the first of the essential conditions of judicial independence for purposes of s. 11(*d*) of the *Charter*. The essentials of such security are that a judge be removable only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure for purposes of s. 11(*d*) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.

Notwithstanding the importance of tradition as an objective condition tending to ensure the independence in fact of a tribunal, a provincial court judge who held office during pleasure under a post-retirement reappointment prior to the amendment in 1983 to s. 5(4) of the *Provincial Courts Act* was not an independent tribunal. The reasonable perception was that by providing for two classes of tenure the Legislature had deliberately, in the case of one category of judges, reserved to the Executive the right to terminate the holding of office without the necessity of any particular jurisdiction and without any inhibition or restraint arising from perceived tradition.

judiciaire à l'exigence constitutionnelle d'indépendance qu'énonce l'al. 11*d*) de la *Charte*, qui peut devoir s'appliquer à différents tribunaux. Les conditions essentielles de l'indépendance judiciaire, pour les fins de l'al. 11*d*), doivent avoir un lien raisonnable avec cet éventail de dispositions législatives et constitutionnelles qui au Canada régissent les questions touchant à l'indépendance judiciaire des tribunaux qui jugent les personnes accusées d'une infraction. C'est l'essence de la garantie fournie par les conditions essentielles de l'indépendance judiciaire qu'il convient d'appliquer en vertu de l'al. 11*d*) de la *Charte*, et non pas quelque formule législative ou constitutionnelle particulière qui peut l'offrir ou l'assurer. L'alinéa 11*d*) ne peut pas être interprété et appliqué de manière à conférer aux juges de cour provinciale les mêmes garanties constitutionnelles d'inamovibilité et de sécurité de traitement et de pension que les juges des cours supérieures, parce qu'une telle interprétation aurait pour effet de modifier les dispositions de la Constitution relatives à la magistrature. La norme de l'indépendance judiciaire ne peut être l'uniformité des dispositions, mais doit plutôt refléter ce qui est commun aux diverses conceptions des conditions essentielles de l'indépendance judiciaire au Canada.

L'inamovibilité, de par son importance traditionnelle, est la première des conditions essentielles de l'indépendance judiciaire pour les fins de l'al. 11*d*) de la *Charte*. Les conditions essentielles de l'inamovibilité sont que le juge ne puisse être révoqué que pour un motif déterminé, et que ce motif fasse l'objet d'un examen indépendant et d'une décision selon une procédure qui offre au juge visé la possibilité pleine et entière de se faire entendre. L'essence de l'inamovibilité pour les fins de l'al. 11*d*), que ce soit jusqu'à l'âge de la retraite, pour une durée fixe, ou pour une charge *ad hoc*, est que la charge soit à l'abri de toute intervention discrétionnaire ou arbitraire de la part de l'exécutif ou de l'autorité responsable des nominations.

Nonobstant l'importance de la tradition comme condition objective tendant à assurer l'indépendance de fait d'un tribunal, un juge de cour provinciale qui a occupé sa charge à titre amovible en vertu d'une nouvelle nomination après l'âge de la retraite, avant la modification apportée en 1983 au par. 5(4) de la *Loi sur les cours provinciales*, ne constituait pas un tribunal indépendant. Il est raisonnable de croire qu'en prévoyant deux genres de charge le corps législatif a délibérément, dans le cas d'une catégorie de juges, réservé à l'exécutif le droit de mettre fin à une charge, sans qu'aucune justification particulière ne soit nécessaire et sans aucune inhibition ou restriction imposée par une certaine perception de la tradition.

The Provincial Court Judge who declined jurisdiction did not hold office under a post-retirement reappointment. The fact that certain judges may have held office during pleasure at that time could not impair or destroy the independence of the Provincial Court (Criminal Division) as a whole. The objection would have to be taken to the status of the particular judge constituting the tribunal.

The second essential condition of judicial independence for purposes of s. 11(*d*) of the *Charter* is financial security—security of salary or other remuneration, and, where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence. In the case of pension, the essential distinction is between a right to pension and a pension that depends on the grace or favour of the Executive. Although it may be theoretically preferable that judicial salaries should be fixed by the legislature rather than the executive government and should be made a charge on the consolidated revenue fund rather than requiring annual appropriation, neither of these features should be regarded as essential to the financial security that may be reasonably perceived as sufficient for independence under s. 11(*d*) of the *Charter*. The right to salary of a provincial court judge is established by law, and there is no way in which the Executive could interfere with that right in a manner to affect the independence of the individual judge. It is impossible that the legislature would refuse to vote the annual appropriation in order to attempt to exercise some control or influence over a class of judges as a whole. The fact that the provisions respecting the pensions and other benefits of civil servants were made applicable to provincial court judges did not impair the independence of the latter. The provisions established a right to pension and other benefits which could not be interfered with by the Executive on a discretionary or arbitrary basis.

The third essential condition of judicial independence is the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function. Judicial control over such matters as assignment of judges, sittings of the court and court lists has been considered the essential or minimum requirement for institutional independence. Although an increased measure of administrative autonomy or independence for the courts may be desir-

Le juge de la cour provinciale qui s'est récusé n'occupait pas sa charge en vertu d'une nouvelle nomination postérieure à sa retraite. Le fait qu'à l'époque certains juges aient pu occuper leur charge à titre amovible ne saurait altérer ni détruire l'indépendance de la Cour provinciale (Division criminelle) dans son ensemble. L'objection aurait dû viser le statut du juge particulier qui constituait le tribunal saisi.

La deuxième condition essentielle de l'indépendance judiciaire pour les fins de l'al. 11*d*) de la *Charte* est la sécurité financière, c'est-à-dire un traitement ou autre rémunération assurés et, le cas échéant, une pension assurée. Cette sécurité consiste essentiellement en ce que le droit au traitement et à la pension soit prévu par la loi et ne soit pas sujet aux ingérences arbitraires de l'exécutif, d'une manière qui pourrait affecter l'indépendance judiciaire. Dans le cas de la pension, la distinction essentielle est entre un droit à une pension et une pension qui dépend du bon vouloir ou des bonnes grâces de l'exécutif. Bien qu'il puisse être théoriquement préférable que les traitements des juges soient fixés par le corps législatif, plutôt que par le pouvoir exécutif, et qu'ils grèvent le fonds du revenu consolidé, plutôt que d'exiger une affectation de crédit annuelle, ni l'une ni l'autre de ces caractéristiques ne doit être considérée comme essentielle à la sécurité financière qui peut être raisonnablement perçue comme suffisante pour assurer l'indépendance aux termes de l'al. 11*d*) de la *Charte*. Le droit d'un juge de cour provinciale à un traitement est prévu par la loi et l'exécutif ne peut d'aucune manière empiéter sur ce droit de façon à affecter l'indépendance du juge pris individuellement. Il est impossible que le corps législatif refuse de voter l'affectation de crédit annuelle dans le but de tenter d'exercer un contrôle ou d'influer sur une catégorie de juges dans son ensemble. Le fait que les dispositions relatives aux pensions et aux autres avantages offerts aux fonctionnaires ont été rendues applicables aux juges de cour provinciale ne porte pas atteinte à l'indépendance de ces derniers. Ces dispositions créent un droit à une pension et à d'autres avantages qui ne peut faire l'objet d'une atteinte discrétionnaire ou arbitraire de l'exécutif.

La troisième condition essentielle de l'indépendance judiciaire est l'indépendance institutionnelle du tribunal relativement aux questions administratives qui ont directement un effet sur l'exercice de ses fonctions judiciaires. Le contrôle des juges sur des questions comme l'assignation des juges aux causes, les séances de la cour et le rôle de la cour est considéré comme essentiel ou comme une exigence minimale de l'indépendance institutionnelle. Même si une plus grande autonomie ou

able it cannot be regarded as essential for purposes of s. 11(*d*) of the *Charter*.

While it may be desirable that discretionary benefits or advantages such as leave of absence with pay and permission to engage in extra-judicial employment, to the extent they should exist at all, should be under the control of the judiciary rather than the Executive, their control by the Executive does not touch one of the essential conditions of judicial independence for purposes of s. 11(*d*) of the *Charter*. It would not, moreover, be reasonable to apprehend that a provincial court judge would be influenced by the possible desire for one of these benefits or advantages to be less than independent in his or her adjudication.

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indépendance administrative des tribunaux peut être souhaitable, elle ne saurait être considérée comme essentielle pour les fins de l'al. 11*d*) de la *Charte*.

Il est peut-être souhaitable que des bénéfices ou avantages discrétionnaires comme les congés payés et l'autorisation de s'adonner à des activités extrajudiciaires, dans la mesure où il devrait y en avoir, soient contrôlés par le pouvoir judiciaire plutôt que par l'exécutif. Toutefois, leur contrôle par l'exécutif ne touche pas à l'une des conditions essentielles de l'indépendance judiciaire pour les fins de l'al. 11*d*) de la *Charte*. De plus, il ne serait pas raisonnable de craindre qu'un juge de cour provinciale, influencé par l'éventuel désir d'obtenir l'un de ces bénéfices ou avantages soit loin d'être indépendant au moment de rendre jugement.

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POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1983), 2 C.C.C. (3d) 417, qui a accueilli un appel contre un jugement du juge Sharpe de la Cour provinciale qui avait décliné compétence pour entendre un appel de Sa Majesté relativement à la peine infligée à l'appelant suite à sa déclaration de culpabilité. Pourvoi rejeté.

B. A. Crane, Q.C., and *R. Noel Bates*, for the appellant.

W. G. Blacklock, for the respondent.

Derek Aylen, Q.C., and *Graham Garton*, for the intervener the Attorney General of Canada.

Réal A. Forest and *Angeline Thibault*, for the intervener the Attorney General of Quebec.

James C. MacPherson, for the intervener the Attorney General for Saskatchewan.

Morris Manning, Q.C., for the interveners the Provincial Court Judges Association (Criminal Division) and Ontario Family Court Judges Association.

The judgment of the Court was delivered by

LE DAIN J.—The general question raised by this appeal is what is meant by an independent tribunal in s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*, which provides:

11. Any person charged with an offence has the right

. . .

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

The specific issue in the appeal is whether a provincial judge sitting as the Provincial Court (Criminal Division) in Ontario in December 1982 was an independent tribunal within the meaning of s. 11(*d*).

I

The appeal is by leave of this Court from the judgment of the Ontario Court of Appeal on February 15, 1983, allowing an appeal from the judgment on December 16, 1982 of Sharpe J. of the Provincial Court (Criminal Division) for the Judicial District of Halton, who, sitting on the Crown's appeal, pursuant to s. 99 of the *Provincial Offences Act*, R.S.O. 1980, c. 400, against the sentence imposed on the appellant following his conviction of the offence of careless driving contrary to s. 83 of *The Highway Traffic Act*, R.S.O. 1970, c. 202, declined jurisdiction to hear the

B. A. Crane, c.r., et *R. Noel Bates*, pour l'appelant.

W. G. Blacklock, pour l'intimée.

Derek Aylen, c.r., et *Graham Garton*, pour l'intervenant le procureur général du Canada.

Réal A. Forest et *Angeline Thibault*, pour l'intervenant le procureur général du Québec.

James C. MacPherson, pour l'intervenant le procureur général de la Saskatchewan.

Morris Manning, c.r., pour les intervenants l'Association des juges des Cours provinciales (Division criminelle) et Ontario Family Court Judges Association.

Version française du jugement de la Cour rendu par

LE JUGE LE DAIN — La question générale que soulève ce pourvoi est de savoir ce qu'on entend par tribunal indépendant à l'al. 11*d*) de la *Charte canadienne des droits et libertés*, lequel porte:

11. Tout inculpé a le droit:

. . .

d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

Le point précis en litige dans ce pourvoi est de savoir si un juge siégeant en Cour provinciale (Division criminelle) de l'Ontario, en décembre 1982, constituait un tribunal indépendant au sens de l'al. 11*d*).

I

On se pourvoit, avec l'autorisation de cette Cour, contre l'arrêt rendu le 15 février 1983 par la Cour d'appel de l'Ontario, qui a accueilli l'appel du jugement rendu le 16 décembre 1982 par le juge Sharpe de la Cour provinciale (Division criminelle) du district judiciaire de Halton qui, dans l'appel formé par Sa Majesté conformément à l'art. 99 de la *Loi sur les infractions provinciales*, L.R.O. 1980, chap. 400, contre la peine infligée à l'appelant, reconnu coupable de l'infraction de conduite imprudente décrite à l'art. 83 du *Code de la route*, S.R.O. 1970, chap. 202, a décliné compé-

appeal pending determination by a superior court whether the Provincial Court (Criminal Division) was an independent tribunal.

On the challenge before Sharpe J. to the independence of the Provincial Court (Criminal Division) counsel for the appellant advanced a number of reasons why in his submission the Court, because of the status of its judges as reflected in the provisions of the *Provincial Courts Act*, R.S.O. 1980, c. 398, the *Public Service Act*, R.S.O. 1980, c. 418, and the *Public Service Superannuation Act*, R.S.O. 1980, c. 419, as well as regulations made thereunder, was not one which satisfied the requirement of s. 11(*d*) of the *Charter*. These reasons, as summarized by Sharpe J. under the heading "Perceptions of Dependence" and set out in the reasons for judgment of the Ontario Court of Appeal, are as follows:

1. In that the salaries of the provincial judges are determined by the executive branch of the government without the benefit of the scrutiny of the legislature.

2. The judicial salaries are *not a charge* on the consolidated revenue fund, but are subject to annual appropriation.

3. Neither is there a pension charged on the consolidated revenue fund.

4. Nor is there any judicial pension other than one provided for under the *Public Service Superannuation Act*, and this notwithstanding s. 34 of the *Provincial Courts Act*.

5. Both the Act and the regulations provide for control of the judge and could be used to influence a judge or to apply real or perceived pressure to judges generally. Some of the sections that are capable of destroying the appearance of independence are as follows:

6. A judge may be appointed to sit during pleasure — s. 5(4) of the *Provincial Courts Act*. Moreover, any provincial court judge appointed after attaining the age of fifty-five years cannot receive any pension under the *Public Service Superannuation Act* unless the Cabinet reappoints him during pleasure after he reaches retirement age for a sufficient duration that he attains his minimum years of service to qualify for pension. Under the *Judges Act*, it is the *Judge* who chooses whether to retire. Can a provincial court judge under such a disabil-

tence pour entendre l'appel, tant qu'une cour supérieure n'aurait pas déterminé si la Cour provinciale (Division criminelle) était un tribunal indépendant.

Contestant devant le juge Sharpe l'indépendance de la Cour provinciale (Division criminelle), l'avocat de l'appelant a soumis un certain nombre de raisons pour lesquelles, selon lui, la cour, de par le statut de ses juges qui ressort des dispositions de la *Loi sur les cours provinciales*, L.R.O. 1980, chap. 398, la *Loi sur la fonction publique*, L.R.O. 1980, chap. 418, et la *Loi sur le régime de retraite des fonctionnaires*, L.R.O. 1980, chap. 419, ainsi que de leurs règlements d'application, ne satisferait pas à l'exigence de l'al. 11*d*) de la *Charte*. Voici ces raisons, résumées par le juge Sharpe, sous le titre [TRADUCTION] «Perceptions de dépendance», et exposées dans les motifs de l'arrêt de la Cour d'appel de l'Ontario:

[TRADUCTION] 1. En ce que les traitements des juges de cour provinciale sont fixés par l'organe exécutif du gouvernement, sans droit de regard de l'assemblée législative.

2. Les traitements des juges *ne sont pas une charge* grevant le fonds du revenu consolidé, mais dépendent d'une affectation annuelle de crédit.

3. Aucune pension ne grève non plus le fonds du revenu consolidé.

4. Il n'existe d'ailleurs aucune autre pension pour les juges que celle que prévoit la *Loi sur le régime de retraite des fonctionnaires*, et ce, malgré l'art. 34 de la *Loi sur les cours provinciales*.

5. Tant la Loi que la réglementation prévoient le contrôle du juge et pourraient être utilisées pour influencer un juge ou pour faire pression sur les juges en général, ou être perçues comme telles. Voici certains articles susceptibles de détruire toute apparence d'indépendance:

6. Un juge peut être nommé à titre amovible — par. 5(4) de la *Loi sur les cours provinciales*. De plus, tout juge de cour provinciale nommé après qu'il a atteint l'âge de cinquante-cinq ans ne peut toucher une pension en vertu de la *Loi sur le régime de retraite des fonctionnaires*, à moins que le Cabinet ne le nomme à nouveau, à titre amovible, lorsqu'il atteint l'âge de la retraite, pour une période suffisamment longue pour lui permettre de cumuler le nombre minimum d'années de service requis pour avoir droit à une pension. Aux termes de la *Loi sur*

ity be seen to be independent in a cause involving the Attorney General?

7. The Attorney General can appoint senior judges at greater pay than ordinary judges.

8. The executive branch can authorize judges to engage in any business, trade or occupation.

9. The Attorney General may authorize certain judges to do arbitrations, be conciliators, be a member of a police commission for which additional remuneration is received.

10. The executive branch purports to be able to appoint a rules committee composed of persons not necessarily judges for rules under the *Criminal Code*.

11. The executive branch has the power to make regulations for the inspection and destruction of judges' books, documents and papers (s. 34(1)(b) of the *Provincial Courts Act*).

12. In the regulations, the Attorney General can grant leave of absence for up to three years and the executive branch can grant it with pay.

13. This last mentioned regulation incorporates regulation 881 wherein judges are referred to as civil servants.

14. The judge has the same sick leave as a civil servant and his salary is reduced in the same manner as a civil servant when sick.

15. The Deputy Attorney General can require the judge to attend for medical examinations and to supply doctors' certificates.

16. A Deputy Attorney General can grant a judge a leave of absence for up to a year for employment with the Government of Canada or other public agency. A provincial judge in Ontario has been made a Deputy Minister while retaining his position as a judge, a matter deplored by Chief Justice Bora Laskin of the Supreme Court of Canada.

17. The judge receives the same financial benefits as the other civil servants as set out in s. 77, namely: (a) a basic life insurance plan, (b) a dependent's life insurance plan, (c) a long-term income protection plan, (d) a supplementary insurance plan, (e) a dental insurance plan. Some of these plans are paid for by the Government and all affect the financial status of the judge.

les juges, c'est *le juge* qui choisit ou non de prendre sa retraite. Un juge de cour provinciale assujetti à une telle incapacité peut-il être perçu comme indépendant dans une affaire impliquant le procureur général?

7. Le procureur général peut nommer des juges principaux dont le traitement est supérieur à celui des juges ordinaires.

8. Le pouvoir exécutif peut autoriser les juges à exercer tout commerce, métier ou occupation.

9. Le procureur général peut autoriser certains juges à agir à titre d'arbitres, de conciliateurs ou de membres d'une commission de police, auxquels cas ils reçoivent une rémunération supplémentaire.

10. Le pouvoir exécutif est apparemment en mesure de nommer un comité des règles de pratique, auquel ne siègent pas uniquement des juges, pour l'adoption de règles de pratique en vertu du *Code criminel*.

11. Le pouvoir exécutif peut établir des règlements portant sur l'inspection et la destruction des livres, documents et écrits des juges (al. 34(1)b) de la *Loi sur les cours provinciales*).

12. Suivant le règlement, le procureur général peut accorder un congé, pouvant aller jusqu'à trois ans, et le pouvoir exécutif peut l'accorder avec traitement.

13. Le dernier règlement mentionné incorpore le règlement 881 où l'on parle des juges comme étant des fonctionnaires.

14. Le juge a droit aux mêmes congés de maladie qu'un fonctionnaire et son traitement est réduit de la même manière qu'un fonctionnaire en cas de maladie.

15. Le sous-procureur général peut exiger d'un juge qu'il subisse des examens médicaux et fournisse des certificats médicaux.

16. Un sous-procureur général peut accorder à un juge un congé, pouvant aller jusqu'à un an, pour lui permettre de travailler pour le gouvernement du Canada ou un autre organisme public. Un juge de cour provinciale en Ontario a été nommé sous-ministre tout en conservant sa charge de juge, ce qu'a déploré le juge en chef Bora Laskin de la Cour suprême du Canada.

17. Le juge reçoit les mêmes bénéfices d'ordre financier que les autres fonctionnaires, comme l'indique l'art. 77, savoir: a) un plan d'assurance-vie de base, b) un plan d'assurance-vie pour les personnes à charge, c) un plan de protection de revenu garanti, d) un plan d'assurance supplémentaire, e) un plan d'assurance dentaire. Certains de ces plans sont payés par le gouvernement et tous influent sur la situation financière du juge.

18. The *Provincial Courts Act* provides for a procedure to remove a judge after an inquiry but it does not require a vote in the legislature as there is with a supreme court judge. The *Public Service Act* has a regulation under section [*sic*] 12 and 13 which includes a provincial court judge. The significance of this is that a provincial judge can be classified as a Crown employee and therefore under some direction by the executive branch of the government and there may be other Acts which have regulations that affect the provincial judges.

18. La *Loi sur les cours provinciales* établit une procédure de révocation d'un juge, après enquête, mais elle n'exige pas un vote de l'assemblée législative comme c'est le cas pour un juge de cour suprême. Un règlement d'application des art. 12 et 13 de la *Loi sur la fonction publique* inclut le juge de cour provinciale. Ce qui signifie qu'un juge de cour provinciale peut être classé comme employé de l'État et donc être assujetti jusqu'à un certain point aux directives de l'organe exécutif du gouvernement; il se peut qu'il y ait d'autres lois dont les règlements d'application touchent les juges de cour provinciale.

Counsel for the appellant submitted before Sharpe J. that since the Provincial Court (Criminal Division) was not an independent tribunal within the meaning of s. 11(*d*) of the *Charter*, s. 99 of the *Provincial Offences Act*, which conferred the right of appeal to the Court from the sentence imposed on the appellant, was of no force or effect by operation of s. 52(1) of the *Constitution Act, 1982*, which provides:

L'avocat de l'appelant a fait valoir devant le juge Sharpe que, puisque la Cour provinciale (Division criminelle) n'était pas un tribunal indépendant au sens de l'al. 11*d*) de la *Charte*, l'art. 99 de la *Loi sur les infractions provinciales*, qui confère le droit d'en appeler à la cour de la sentence imposée à l'appelant, était inopérant en vertu du par. 52(1) de la *Loi constitutionnelle de 1982* qui porte:

52. (1) The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

After consideration of the submissions in support of the contention that the Provincial Court (Criminal Division) was not an independent tribunal, Sharpe J. took the position that he was disqualified by interest from determining the question of independence, and he declined jurisdiction in order that the question be determined by a superior court.

Après examen des arguments soumis à l'appui de la prétention que la Cour provinciale (Division criminelle) n'était pas un tribunal indépendant, le juge Sharpe s'est récusé, s'estimant partie intéressée pour ce qui était de statuer sur la question d'indépendance, et il a décliné compétence afin de laisser une cour supérieure trancher cette question.

Leave to appeal to the Ontario Court of Appeal was granted on the basis that Sharpe J.'s decision that he was disqualified from determining the question of jurisdiction was a judgment from which an appeal lay under s. 114 of the *Provincial Offences Act*. At the hearing of the appeal the Court of Appeal ruled that the appeal should proceed on the basis that Sharpe J. had in effect decided that as a matter of law the Provincial Court (Criminal Division) as an institution was not independent.

L'autorisation d'interjeter appel à la Cour d'appel de l'Ontario a été accordée pour le motif que la décision du juge Sharpe, qu'il ne pouvait statuer sur la question de compétence, constituait un jugement dont appel pouvait être interjeté en vertu de l'art. 114 de la *Loi sur les infractions provinciales*. À l'audition de l'appel, la Cour d'appel a décidé que l'appel devait être fondé sur le fait que le juge Sharpe avait en réalité décidé qu'aux yeux du droit la Cour provinciale (Division criminelle), en tant qu'institution, n'était pas indépendante.

The unanimous judgment of the five-member Court of Appeal (Howland C.J.O., MacKinnon A.C.J.O., Dubin, Martin and Weatherston JJ.A.),

L'arrêt unanime de la formation de cinq membres de la Cour d'appel de l'Ontario (le juge en chef Howland, le juge en chef adjoint MacKinnon

reported at *R. v. Valente (No. 2)* (1983), 2 C.C.C. (3d) 417, was delivered by Howland C.J.O., who, after a comprehensive consideration of the issues, concluded at p. 444 as follows:

I have reached the conclusion that the concerns raised by the counsel for the respondent neither singly nor collectively would result in a reasonable apprehension that they would impair the ability of Judge Sharpe to make an independent and impartial adjudication. In my opinion, the provincial court in this province is as a matter of law an independent tribunal. Judge Sharpe sitting as a member of the court was independent, and as has been noted earlier, he was impartial. Therefore, the respondent appeared before an independent and impartial tribunal within the Charter.

Accordingly, the appeal is allowed. The purported judgment of Judge Sharpe that the provincial court (criminal division) as an institution is not an independent tribunal is set aside and the matter is remitted to Judge Sharpe to determine whether the sentence imposed was a fit and proper sentence.

On the appeal to this Court the constitutional question was framed as follows:

Is a judge of the Provincial Court (Criminal Division) of Ontario, appointed pursuant to the provisions of the *Provincial Courts Act*, R.S.O. 1980, c. 398, an independent and impartial tribunal within the meaning of the *Constitution Act, 1982*?

Although the decision of Sharpe J. was treated as a judgment that the Provincial Court (Criminal Division) as an institution was not an independent tribunal and it was that judgment that was found by the Court of Appeal to be in error and was set aside, the Court of Appeal, as the conclusions in its reasons for judgment indicate, necessarily had to consider the independence of Sharpe J. The tribunal, for purposes of s. 11(*d*) of the *Charter*, was Sharpe J. sitting as the Provincial Court (Criminal Division) for the Judicial District of Halton. The independence of Sharpe J. for purposes of the issue in the appeal is to be determined with reference to the relevant statutory provisions and regulations that were in force at the time he declined jurisdiction on December 16, 1982. Subsequent changes in the law governing the Provincial Court (Criminal Division) and its judges are relevant to the question of the continuing inde-

et les juges Dubin, Martin et Weatherston), publié à *R. v. Valente (No. 2)* (1983), 2 C.C.C. (3d) 417, a été rendu par le juge en chef Howland qui, après un examen approfondi des points litigieux, conclut ceci à la p. 444:

[TRADUCTION] Je suis arrivé à la conclusion que les préoccupations des avocats de l'intimé, ni individuellement ni collectivement, ne permettent pas raisonnablement de craindre qu'il y ait atteinte à la capacité du juge Sharpe de statuer en toute indépendance et impartialité. À mon avis, la Cour provinciale de notre province est, aux yeux du droit, un tribunal indépendant. Le juge Sharpe, siégeant comme membre de la cour, était indépendant et, comme on l'a déjà dit, impartial. Donc l'intimé a comparu devant un tribunal indépendant et impartial au sens de la Charte.

En conséquence, l'appel est accueilli. Le prétendu jugement du juge Sharpe, portant que la Cour provinciale (Division criminelle), en tant qu'institution, n'est pas un tribunal indépendant, est annulé et l'affaire lui est renvoyée pour qu'il statue sur la régularité et l'à-propos de la peine infligée.

Dans le pourvoi devant cette Cour, la question constitutionnelle a été formulée ainsi:

Un juge de la Cour provinciale (Division criminelle) de l'Ontario, nommé conformément aux dispositions de la *Loi sur les cours provinciales* L.R.O. 1980, chap. 398, constitue-t-il un tribunal indépendant et impartial au sens de la *Loi constitutionnelle de 1982*?

Bien que la décision du juge Sharpe ait été considérée comme un jugement portant que la Cour provinciale (Division criminelle), en tant qu'institution, n'était pas un tribunal indépendant et que ce soit ce jugement que la Cour d'appel a jugé erroné et a annulé, la Cour d'appel, comme l'indiquent les conclusions de ses motifs de jugement, devait nécessairement examiner si le juge Sharpe lui-même était indépendant. Le tribunal, pour les fins de l'al. 11*d*) de la *Charte*, était le juge Sharpe siégeant en Cour provinciale (Division criminelle) du district judiciaire de Halton. L'indépendance du juge Sharpe pour les fins du pourvoi doit être établie en fonction des dispositions législatives et réglementaires pertinentes en vigueur au moment où il a décliné compétence, le 16 décembre 1982. Les changements subséquents apportés au droit régissant la Cour provinciale (Division criminelle) et ses juges sont pertinents en ce qui

pendence of the tribunal to which the matter must be remitted for determination of this Court agrees with the Court of Appeal that Sharpe J. sitting as the Provincial Court (Criminal Division) was an independent tribunal when he declined jurisdiction.

II

The first question in the appeal is whether the Court of Appeal adopted the proper test for determining whether a tribunal is independent within the meaning of s. 11(*d*) of the *Charter*. The test applied was the one for reasonable apprehension of bias, adapted to the requirement of independence. Noting that in *Re Evans and Milton* (1979), 46 C.C.C. (2d) 129, a case involving a question of bias, the Ontario Court of Appeal has adopted the test for reasonable apprehension of bias expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, Howland C.J.O. held that this was the proper test to be applied in determining whether a tribunal is an independent tribunal.

The test for reasonable apprehension of bias was put by de Grandpré J. at p. 394 as follows:

> ... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — concluded . . . . "

As adapted to the requirement of an independent tribunal and to the issues in the appeal the test was stated by Howland C.J.O., at pp. 439-40 as follows:

> The question that now has to be determined is whether a reasonable person, who was informed of the relevant statutory provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically would conclude that a provincial court judge sitting as Judge Sharpe was to hear the appeal in this case was a tribunal which could make an independent and impartial adjudication. In answering

concerne la question de l'indépendance permanente du tribunal auquel l'affaire doit être renvoyée si cette Cour est d'accord avec la Cour d'appel pour dire que le juge Sharpe, siégeant en Cour provinciale (Division criminelle), constituait un tribunal indépendant lorsqu'il a décliné compétence.

II

La première question qui se pose dans ce pourvoi est de savoir si la Cour d'appel a adopté le bon critère pour déterminer si un tribunal est indépendant au sens de l'al. 11*d*) de la *Charte*. Le critère appliqué a été celui de la crainte raisonnable de partialité, adapté à l'exigence d'indépendance. Faisant remarquer que dans l'affaire *Re Evans and Milton* (1979), 46 C.C.C. (2d) 129, où il était question de partialité, la Cour d'appel d'Ontario a adopté le critère de la crainte raisonnable de partialité formulé par le juge de Grandpré dans l'arrêt *Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369, le juge en chef Howland de l'Ontario a jugé que c'était là le critère qu'il fallait appliquer pour décider si un tribunal est un tribunal indépendant.

Le critère de la crainte raisonnable de partialité est énoncé ainsi par le juge de Grandpré, à la p. 394:

> ... la crainte de partialité doit être raisonnable et le fait d'une personne sensée et raisonnable qui se poserait elle-même la question et prendrait les renseignements nécessaires à ce sujet. Selon les termes de la Cour d'appel, ce critère consiste à se demander «à quelle conclusion en arriverait une personne bien renseignée qui étudierait la question en profondeur, de façon réaliste et pratique. . .»

L'adaptant à l'exigence d'un tribunal indépendant et aux questions en litige dans cet appel, le juge en chef Howland énonce ainsi le critère aux pp. 439 et 440:

> [TRADUCTION] La question qui doit maintenant être tranchée est de savoir si une personne raisonnable, informée des dispositions législatives pertinentes, de leur historique et des traditions les entourant, après avoir envisagé la question de façon réaliste et pratique, conclurait qu'un juge de cour provinciale, chargé comme le juge Sharpe d'instruire l'appel en l'espèce, était un tribunal en mesure de statuer en toute indépendance et

this question it is necessary to review once again the specific concerns which were raised before Judge Sharpe and then conclude whether singly or collectively they would raise a reasonable apprehension that the tribunal was not independent and impartial so far as its adjudication was concerned.

In his reasons for judgment, Howland C.J.O. generally referred, as does the constitutional question, to the double requirement of an "independent and impartial tribunal". He made it clear, however, at one point in his reasons that there was no question of Sharpe J.'s impartiality, and that the sole issue was whether he, as a judge of the Provincial Court (Criminal Division), was an independent tribunal within the meaning of s. 11(*d*) of the *Charter*. On this point he said at p. 423:

> It will be noted that both the Charter and the *Bill of Rights* refer to an "independent and impartial tribunal". In this appeal the Court is only concerned with the independence of the tribunal and not with its impartiality or freedom from bias except in so far as it affects that independence. There was no suggestion that Judge Sharpe was in any way biased, and therefore not impartial. A judge may be impartial in the sense that he has no preconceived ideas or bias, actual or perceived, without necessarily being independent.

The issue is whether the test applied by the Court of Appeal, clearly appropriate, because of its derivation, to the requirement of impartiality, is an appropriate and sufficient test for the requirement of independence. Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" as Howland C.J.O. noted, connotes absence of bias, actual or perceived. The word "independent" in s. 11(*d*) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

impartialité. Pour répondre à cette question, il est nécessaire d'examiner une fois de plus les préoccupations spécifiques exprimées devant le juge Sharpe, puis de décider si, prises individuellement ou collectivement, elles soulèvent une crainte raisonnable que le tribunal n'ait pas été indépendant et impartial pour rendre jugement.

Dans ses motifs de jugement, le juge en chef Howland mentionne, comme le fait la question constitutionnelle, la double exigence d'un «tribunal indépendant et impartial». Cependant, il dit clairement, en un point de ses motifs, que l'impartialité du juge Sharpe n'est pas en cause et que la seule question qui se pose est de savoir si, en tant que juge de la Cour provinciale (Division criminelle), il constituait un tribunal indépendant au sens de l'al. 11*d*) de la *Charte*. Sur ce point, il affirme à la p. 423:

> [TRADUCTION] On notera que la *Charte*, tout comme la *Déclaration des droits*, parle d'un «tribunal indépendant et impartial». Dans le présent appel, la cour n'a à se préoccuper que de l'indépendance du tribunal et non de son impartialité, ou du fait qu'il soit exempt de toute partialité dans la mesure où cela influe sur cette indépendance. On n'a pas prétendu que le juge Sharpe avait un préjugé quelconque et qu'il n'était donc pas impartial. Un juge peut être impartial, en ce sens qu'il n'a aucun préjugé ou idée préconçue, réels ou apparents, sans nécessairement être indépendant.

Il s'agit de savoir si le critère appliqué par la Cour d'appel, qui de par son origine convenait à l'exigence d'impartialité, constitue un critère suffisant et approprié en ce qui concerne l'exigence d'indépendance. Même s'il existe de toute évidence un rapport étroit entre l'indépendance et l'impartialité, ce sont néanmoins des valeurs ou exigences séparées et distinctes. L'impartialité désigne un état d'esprit ou une attitude du tribunal vis-à-vis des points en litige et des parties dans une instance donnée. Le terme «impartial», comme l'a souligné le juge en chef Howland, connote une absence de préjugé, réel ou apparent. Le terme «indépendant», à l'al. 11*d*), reflète ou renferme la valeur constitutionnelle traditionnelle qu'est l'indépendance judiciaire. Comme tel, il connote non seulement un état d'esprit ou une attitude dans l'exercice concret des fonctions judiciaires, mais aussi un statut, une relation avec autrui, particulièrement avec l'organe exécutif du gouvernement, qui repose sur des conditions ou garanties objectives.

Fawcett, in *The Application of the European Convention on Human Rights* (1969), p. 156, commenting on the requirement of an "independent and impartial tribunal established by law" in article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, puts the distinction between independence and impartiality as follows:

> The often fine distinction between independence and impartiality turns mainly, it seems, on that between the status of the tribunal determinable largely by objective tests and the subjective attitudes of its members, lay or legal. Independence is primarily freedom from control by, or subordination to, the executive power in the State; impartiality is rather absence in the members of the tribunal of personal interest in the issues to be determined by it, or some form of prejudice.

The scope of the necessary status or relationship of independence has been variously defined. For example, Shetreet, in *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (1976), emphasizes in the following passage at pp. 17-18 the importance of freedom from the influence of certain powerful non-governmental interests:

> Independence of the judiciary has normally been thought of as freedom from interference by the Executive or Legislature in the exercise of the judicial function. This, for example, was the conception expressed by the International Congress of Jurists at New Delhi in 1959 (*The Rule of Law in a Free Society*, 11 (Report of the International Congress of Jurists, New Delhi, 1959, prepared by N. S. Marsh)) and arises from the fact that historically the independence of the judiciary was endangered by parliaments and monarchs. In modern times, with the steady growth of the corporate giants, it is of utmost importance that the independence of the judiciary from business or corporate interests should also be secured (*Accord* G. Borrie, *Judicial Conflicts of Interest in Britain*, 18 Am. J. Comp. L. 697 (1970)). In short, independence of the judiciary implies not only that a judge should be free from governmental and political pressure and political entanglements but also that he should be removed from financial or business entanglements likely to affect, or rather to seem to affect, him in the exercise of his judicial functions.

À la page 156 de son ouvrage intitulé *The Application of the European Convention on Human Rights* (1969), Fawcett parle de l'exigence d'un «tribunal indépendant et impartial, établi par la loi» que l'on trouve à l'article 6 de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, et fait la distinction suivante entre l'indépendance et l'impartialité:

> [TRADUCTION] La distinction souvent ténue entre l'indépendance et l'impartialité tient principalement, semble-t-il, à celle entre le statut du tribunal, qui peut être déterminé en grande partie en fonction de critères objectifs, et les attitudes subjectives de ses membres, juristes ou non. L'indépendance consiste avant tout à échapper au contrôle du pouvoir exécutif de l'État, ou à une subordination à celui-ci; l'impartialité, c'est plutôt l'absence chez les membres du tribunal d'intérêts personnels dans les questions sur lesquelles il doit statuer ou d'une forme quelconque de préjugé.

L'étendue du statut ou de la relation d'indépendance nécessaires a été définie de diverses manières. Par exemple, dans *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (1976), Shetreet souligne dans le passage suivant, aux pp. 17 et 18, l'importance d'être à l'abri de l'influence de certains intérêts puissants non gouvernementaux:

> [TRADUCTION] L'indépendance du pouvoir judiciaire est normalement conçue comme le fait d'être à l'abri de toute intervention du pouvoir exécutif ou du corps législatif dans l'exercice des fonctions judiciaires. C'était là par exemple la conception du Congrès international de juristes qui s'est tenu à New Delhi, en 1959 (*Le principe de la légalité dans une société libre*, 11 (Rapport des travaux du Congrès international de juristes tenu à New Delhi, 1959, rédigé par N. S. Marsh)); elle découle du fait qu'historiquement l'indépendance du pouvoir judiciaire était menacée par les parlements et les monarques. De nos jours, avec la croissance incessante de sociétés géantes, il est de la plus grande importance d'assurer aussi l'indépendance du pouvoir judiciaire vis-à-vis des intérêts d'entreprises ou de sociétés (*Accord* G. Borrie, *Judicial Conflicts of Interest in Britain*, 18 Am. J. Comp. L. 697 (1970)). En bref, l'indépendance du pouvoir judiciaire implique non seulement qu'un juge doit être à l'abri des pressions gouvernementales et politiques et des démêlés politiques, mais qu'il doit aussi être tenu à l'écart des démêlés financiers ou d'affaires susceptibles d'influer, ou plutôt de sembler influer, sur lui dans l'exercice de ses fonctions judiciaires.

The scope of the status or relationship of judicial independence was defined in a very comprehensive manner by Sir Guy Green, Chief Justice of the State of Tasmania, in "The Rationale and Some Aspects of Judicial Independence," (1985), 59 *A.L.J.* 135, at p. 135 as follows:

> I thus define judicial independence as the capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the extend that it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control.

The focus in the appeal, as indicated by the nature of the various objections to the status of provincial court judges, is on the relationship of the judges and the Provincial Court (Criminal Division) to the executive government of Ontario, and in particular to the Ministry of the Attorney General.

It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government. See Lederman, "The Independence of the Judiciary" in *The Canadian Judiciary* (1976, ed. A. M. Linden), p. 7; and Deschênes, *Masters in their own house* (1981), *passim*, where the notion of institutional independence is referred to as "collective" independence. The objections in the present case to the status of provincial court judges under the legislation and regulations that prevailed at the time Sharpe J. declined jurisdiction raise issues of both individual and institutional independence. The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.

L'étendue du statut ou de la relation d'indépendance judiciaire a été définie de façon très exhaustive par sir Guy Green, juge en chef de l'État de Tasmanie, dans son article intitulé «The Rationale and Some Aspects of Judicial Independence» (1985), 59 *A.L.J.* 135, à la p. 135:

> [TRADUCTION] Je définis donc l'indépendance judiciaire comme la capacité des tribunaux d'exercer leurs fonctions constitutionnelles à l'abri de toute intervention réelle ou apparente de la part de toutes personnes ou institutions sur lesquelles ils n'exercent pas un contrôle direct, y compris, notamment, l'organe exécutif du gouvernement, et dans la mesure où cela est constitutionnellement possible en étant exempts de toute dépendance réelle ou apparente vis-à-vis de celles-ci.

On s'est concentré dans ce pourvoi, comme l'indique la nature des diverses objections portant sur le statut des juges de cour provinciale, sur le rapport qu'il y a entre, d'une part, les juges et la Cour provinciale (Division criminelle) et, d'autre part, le pouvoir exécutif ontarien, et en particulier le ministère du Procureur général.

On admet généralement que l'indépendance judiciaire fait intervenir des rapports tant individuels qu'institutionnels: l'indépendance individuelle d'un juge, qui se manifeste dans certains de ses attributs, telle l'inamovibilité, et l'indépendance institutionnelle de la cour ou du tribunal qu'il préside, qui ressort de ses rapports institutionnels ou administratifs avec les organes exécutif et législatif du gouvernement. Voir Lederman, «The Independence of the Judiciary» dans *The Canadian Judiciary* (1976, ed. A. M. Linden), p. 7, et Deschênes, *Maîtres chez eux* (1981), *passim*, où la notion d'indépendance institutionnelle est appelée indépendance «collective». Les objections en l'espèce concernant le statut que possédaient les juges de cour provinciale, en vertu de la législation et de la réglementation qui prévalaient à l'époque où le juge Sharpe a décliné compétence, soulèvent des questions d'indépendance tant individuelle qu'institutionnelle. Le rapport entre ces deux aspects de l'indépendance judiciaire est qu'un juge, pris individuellement, peut jouir des conditions essentielles à l'indépendance judiciaire, mais si la cour ou le tribunal qu'il préside n'est pas indépendant des autres organes du gouvernement dans ce qui est essentiel à sa fonction, on ne peut pas dire qu'il constitue un tribunal indépendant.

In his reasons for judgment Howland C.J.O. referred in various ways to the independence required by s. 11(*d*) of the *Charter*. In some expressions of the issue he suggested that the question was whether the objections to the status of a provincial court judge gave rise to a reasonable apprehension that the tribunal would not act in an independent manner in the particular adjudication. This is suggested by the words "it could not be reasonably apprehended that the tribunal would not be independent and impartial in its adjudication". This view of the issue would give the word "independent" essentially the same kind of meaning and effect as the word "impartial", as referring to the state of mind or attitude of the tribunal in the actual exercise of its judicial function. In other expressions of the issue, however, Howland C.J.O. referred to the question as being whether the various objections to the status of a provincial court judge gave rise to a reasonable apprehension that the tribunal lacked the capacity to adjudicate in an independent manner. This is suggested by the words "a tribunal which could make an independent and impartial adjudication" in the statement of the test for independence which has been quoted above and by the words "a reasonable apprehension that they would impair the ability of Judge Sharpe to make an independent and impartial adjudication". This I take to be more clearly a reference to the objective status or relationship of judicial independence, which in my opinion is the primary meaning to be given to the word "independent" in s. 11(*d*). Of course, the concern is ultimately with how a tribunal will actually act in a particular adjudication, and a tribunal that does not act in an independent manner cannot be held to be independent within the meaning of s. 11(*d*) of the *Charter*, regardless of its objective status. But a tribunal which lacks the objective status or relationship of independence cannot be held to be independent within the meaning of s. 11(*d*), regardless of how it may appear to have acted in the particular adjudication. It is the objective status or relationship of judicial independence that is to provide the assurance that the tribunal has the capacity to act in an independent manner and will in fact act in such a manner. It is, therefore, necessary to consider what should be

Dans ses motifs de jugement, le juge en chef Howland s'est référé de diverses manières à l'indépendance requise par l'al. 11*d*) de la *Charte*. Dans certaines formulations de la question en litige, il laisse entendre qu'il s'agit de déterminer si les objections au statut d'un juge de cour provinciale laissent raisonnablement craindre que le tribunal n'agira pas d'une manière indépendante dans une espèce particulière. C'est ce que donne à entendre la phrase [TRADUCTION] «on ne pouvait raisonnablement craindre que le tribunal ne serait pas indépendant et impartial pour rendre jugement». Cette conception de la question litigieuse a pour effet de donner au terme «indépendant» essentiellement les mêmes sens et effet que ceux du terme «impartial», comme désignant l'état d'esprit ou l'attitude du tribunal lorsqu'il exerce concrètement ses fonctions judiciaires. Dans d'autres formulations de la question litigieuse cependant, le juge en chef Howland parle de la question comme étant de savoir si les diverses objections au statut de juge de cour provinciale faisaient naître une crainte raisonnable que le tribunal n'ait pas la capacité de statuer d'une manière indépendante. C'est ce que laisse entendre l'expression «un tribunal en mesure de statuer en toute indépendance et impartialité» dans son exposé du critère d'indépendance que j'ai déjà cité, ainsi que la phrase «ne permettent pas raisonnablement de craindre qu'il y ait atteinte à la capacité du juge Sharpe de statuer en toute indépendance et impartialité». Je pense que c'est là plus précisément une référence au statut objectif ou à la relation d'indépendance judiciaire, qui, à mon avis, est le premier sens qu'il faut donner au terme «indépendant» de l'al. 11*d*). Naturellement, on se préoccupe finalement de la manière dont un tribunal agira concrètement dans une espèce particulière, et un tribunal qui n'agit pas en toute indépendance ne saurait être considéré comme indépendant au sens de l'al. 11*d*) de la *Charte*, quel que soit son statut objectif. Mais un tribunal dépourvu du statut objectif ou de la relation d'indépendance ne peut être considéré comme indépendant aux termes de l'al. 11*d*), quelle que soit la manière dont il paraît avoir agi dans une espèce particulière. C'est le statut objectif ou la relation d'indépendance judiciaire qui doit fournir l'assurance que le tribunal peut agir d'une manière

regarded, with reference to the various objections to the status of provincial court judges, as the essential conditions of judicial independence for purposes of s. 11(*d*). Before doing that, however, it is necessary to consider the requirement in the test applied by the Court of Appeal that the status or relationship of judicial independence for purposes of s. 11(*d*) be one which a reasonable, well informed person would perceive as sufficient.

Although judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions, it is sound, I think, that the test for independence for purposes of s. 11(*d*) of the *Charter* should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception. The perception must, however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees.

This view of the test for independence is somewhat different from, but not in my opinion necessarily in conflict with, that suggested by the majority of this Court in *MacKay v. The Queen*, [1980] 2 S.C.R. 370, which was relied on to some extent by Howland C.J.O. in his reasons for judgment. In that case the relevant issue, for purposes of this appeal, was whether a Standing Court Martial trying a member of the armed forces for an offence under the criminal law and composed of

indépendante et qu'il agira effectivement de cette manière. Il est donc nécessaire de rechercher ce qui doit être considéré, en rapport avec les diverses objections au statut des juges de cour provinciale, comme les conditions essentielles de l'indépendance judiciaire aux fins de l'al. 11*d*). Avant de ce faire cependant, il est nécessaire d'examiner l'exigence du critère appliqué par la Cour d'appel, portant que le statut ou le rapport d'indépendance judiciaire aux fins de l'al. 11*d*) doit en être un qu'une personne raisonnable et bien informée percevrait comme suffisant.

Même si l'indépendance judiciaire est un statut ou une relation reposant sur des conditions ou des garanties objectives, autant qu'un état d'esprit ou une attitude dans l'exercice concret des fonctions judiciaires, il est logique, à mon avis, que le critère de l'indépendance aux fins de l'al. 11*d*) de la *Charte* soit, comme dans le cas de l'impartialité, de savoir si le tribunal peut raisonnablement être perçu comme indépendant. Tant l'indépendance que l'impartialité sont fondamentales non seulement pour pouvoir rendre justice dans un cas donné, mais aussi pour assurer la confiance de l'individu comme du public dans l'administration de la justice. Sans cette confiance, le système ne peut commander le respect et l'acceptation qui sont essentiels à son fonctionnement efficace. Il importe donc qu'un tribunal soit perçu comme indépendant autant qu'impartial et que le critère de l'indépendance comporte cette perception qui doit toutefois, comme je l'ai proposé, être celle d'un tribunal jouissant des conditions ou garanties objectives essentielles d'indépendance judiciaire, et non pas une perception de la manière dont il agira en fait, indépendamment de la question de savoir s'il jouit de ces conditions ou garanties.

Cette conception du critère de l'indépendance diffère quelque peu, quoique à mon avis elle ne soit pas nécessairement incompatible avec elle, de celle proposée par cette Cour à la majorité, dans l'arrêt *MacKay c. La Reine*, [1980] 2 R.C.S. 370, sur laquelle s'est appuyé, dans une certaine mesure, le juge en chef Howland dans ses motifs de jugement. Dans cette affaire, la question qui nous intéresse aux fins du présent pourvoi était de savoir si une cour martiale permanente, jugeant un membre des

an officer of the armed forces in the Judge Advocate General's branch was an independent tribunal within the meaning of s. 2(*f*) of the *Canadian Bill of Rights*, which provides:

> **2.** Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
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> . . .
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> (*f*) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; . . .

The majority held that the fact the president of the Standing Court Martial was an officer of the armed forces did not prevent the tribunal from being an independent tribunal within the meaning of s. 2(*f*). In the reasons for judgment of Ritchie J., with whom Martland, Pigeon, Beetz and Chouinard JJ. concurred, there is a suggestion that the issue of independence was viewed as being whether the tribunal had in fact acted in an idependent manner. Ritchie J. referred to the evidence and said at p. 395:

> There is no evidence whatever in the record of the trial to suggest that the president acted in anything but an independent and impartial manner or that he was otherwise unfitted for the task to which he was appointed.
>
> . . .
>
> I can find no support in the evidence for the contention that the appointment of the president of the Court resulted or was calculated to result in the appellant being deprived of a trial before an independent and impartial tribunal.

While the emphasis in these observations would appear to be on how the tribunal acted, it is my impression that both Ritchie J. and McIntyre J., who wrote separate reasons concurring in the result, and with whom Dickson J. (as he then was) concurred, both looked at the status or relationship

forces armées pour une infraction de droit criminel et composée d'un officier des forces armées relevant de la Direction du juge-avocat général, constituait un tribunal indépendant au sens de l'al. 2*f*) de la *Déclaration canadienne des droits*, qui porte:

> **2.** Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la *Déclaration canadienne des droits*, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme
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> . . .
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> *f*) privant une personne accusée d'un acte criminel du droit à la présomption d'innocence jusqu'à ce que la preuve de sa culpabilité ait été établie en conformité de la loi, après une audition impartiale et publique de sa cause par un tribunal indépendant et non préjugé, ou la privant sans juste cause du droit à un cautionnement raisonnable . . .

La Cour à la majorité a jugé que même si le président de la Cour martiale permanente était un officier des forces armées, cela n'empêchait pas ce tribunal d'être un tribunal indépendant au sens de l'al. 2*f*). Dans les motifs de jugement du juge Ritchie, auxquels ont souscrit les juges Martland, Pigeon, Beetz et Chouinard, on laisse entendre que la question de l'indépendance a été considérée comme s'il s'était agi de savoir si le tribunal avait en fait agi d'une manière indépendante. Le juge Ritchie se référant à la preuve affirme, à la p. 395:

> Absolument rien au dossier du procès ne laisse entendre que le président ait agi autrement que d'une façon indépendante et non préjugée ou qu'il ait par ailleurs été inapte à s'acquitter de la tâche qu'on lui avait confiée.
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> . . .
>
> Je ne trouve rien dans la preuve qui fonde la prétention que la nomination du président de la cour pour le procès a eu pour résultat de priver l'appelant d'un procès devant un tribunal indépendant et non préjugé ou qu'elle visait ce résultat.

Si l'on paraît insister dans ces observations sur la manière dont le tribunal a agi, j'ai l'impression que le juge Ritchie et le juge McIntyre, qui a écrit des motifs distincts concordants quant au résultat, auxquels le juge Dickson (maintenant juge en chef) a souscrit, ont tous deux examiné le statut ou

to the armed forces of the president of the Standing Court Martial Appeal as an objective matter to be considered in determining whether the tribunal could be regarded as independent. Both emphasized the long-established tradition of a separate system of military law applied by tribunals presided over by military officers. Both also emphasized the status of the Court Martial Appeal Court and its independence of the armed forces as ensuring that the person charged would be presumed innocent until proved guilty by an independent tribunal. I am, therefore, of the respectful opinion that the reasoning of this Court in *MacKay* does not preclude the view that the word "independent" in s. 11(*d*) of the *Charter* is to be understood as referring to the status or relationship of judicial independence as well as to the state of mind or attitude of the tribunal in the actual exercise of its judicial function.

III

What should be considered as the essential conditions of judicial independence for purposes of s. 11(*d*) of the *Charter*—that is, those which may be reasonably perceived as such—is a difficult question. The concept of judicial independence has been an evolving one. See Shetreet, *op. cit.*, pp. 383-84. The history of judicial independence in Great Britain and Canada is analyzed by Professor Lederman in his classic and frequently cited essay on the subject, "The Independence of the Judiciary" (1956), 34 *Can. Bar Rev.* 769, 769-809 and 1139-1179. The reasons of Howland C.J.O. in the case at bar contain a succinct and helpful review of the main features of the development of judicial independence in England and Canada, with particular reference to the status of provincial magistrates and courts. Modern views on the subject of judicial independence are reflected in the Deschênes report to which reference has been made, and in the recent report of the Canadian Bar Association's Committee on *The Independence of the Judiciary in Canada*. There have also been a number of international declarations of principle on judicial independence, of which the Universal Declaration on the Independence of Justice produced by the First World Conference on the Independence of Justice held in Montreal in June,

la relation entre les forces armées et le président de la Cour martiale permanente, à titre de question objective dont il fallait tenir compte pour décider si le tribunal pouvait être considéré comme indépendant. Tous deux ont insisté sur la tradition fort ancienne d'un système distinct de justice militaire administré par des tribunaux présidés par des militaires. Tous deux ont aussi souligné que le statut du Tribunal d'appel des cours martiales et son indépendance des forces armées assuraient que l'inculpé serait présumé innocent, jusqu'à preuve du contraire, par un tribunal indépendant. Avec égards, je suis donc d'avis que le raisonnement de cette Cour dans l'arrêt *MacKay* n'exclut pas l'opinion que le terme «indépendant» de l'al. 11*d*) de la *Charte* doit être interprété comme visant le statut ou la relation d'indépendance judiciaire, autant que l'état d'esprit ou l'attitude du tribunal dans l'exercice concret de ses fonctions judiciaires.

III

Que doit-on considérer comme conditions essentielles de l'indépendance judiciaire aux fins de l'al. 11*d*) de la *Charte*, c.-à-d. celles qu'on peut raisonnablement percevoir comme telles? C'est là une question difficile. La notion d'indépendance judiciaire a évolué. Voir Shetreet, précité, aux pp. 383 et 384. L'histoire de l'indépendance judiciaire en Grande-Bretagne et au Canada est analysée par le professeur Lederman dans un essai classique fréquemment cité sur le sujet: «The Independence of the Judiciary» (1956), 34 *R. du B. can.* 769, 769 à 809 et 1139 à 1179. Les motifs du juge en chef Howland en l'espèce comportent une étude succincte et utile des principales caractéristiques de l'évolution de l'indépendance judiciaire en Angleterre et au Canada, où l'on mentionne de façon particulière le statut des magistrats et tribunaux provinciaux. Les points de vue contemporains sur l'indépendance judiciaire se reflètent dans le rapport Deschênes, déjà mentionné, et dans le rapport récent du Comité de l'Association du Barreau canadien sur *L'Indépendance de la magistrature au Canada*. Il y a aussi eu un bon nombre de déclarations internationales de principe sur l'indépendance judiciaire, dont la plus importante est peut-être la Déclaration universelle sur l'indépendance de la Justice de la Première conférence

1983 is perhaps the most important. The recently published collection of papers and addresses, *Judicial Independence: The Contemporary Debate* (1985), edited by Shetreet and Deschênes, reflects the most up-to-date thinking on the subject. The concluding paper by Shetreet, entitled "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges", provides a valuable overview of the conceptual development in this area.

Conceptions have changed over the years as to what ideally may be required in the way of substance and procedure for securing judicial independence in as ample a measure as possible. Opinions differ on what is necessary or desirable, or feasible. This is particularly true, for example, of the degree of administrative independence or autonomy it is thought the courts should have. It is also true of the extent to which certain extra-judicial activity of judges may be perceived as impairing the reality or perception of judicial independence. There is renewed concern about the procedure and criteria for the appointment of judges as that may bear on the perception of judicial independence. Professional and lay concern about judicial independence has increased with the new power and responsibility given to the courts by the *Charter*. Reports and speeches on the subject of judicial independence in recent years have urged the general adoption of the highest standards or safeguards, not only with respect to the traditional elements of judicial independence, but also with respect to other aspects now seen as having an important bearing on the reality and perception of judicial independence. These efforts, particularly by the legal profession and the judiciary, to strengthen the conditions of judicial independence in Canada may be expected to continue as a movement towards the ideal. It would not be feasible, however, to apply the most rigorous and elaborate conditions of judicial independence to the constitutional requirement of independence in s. 11(*d*) of the *Charter*, which may have to be applied to a variety of tribunals. The legislative and constitutional provisions in Canada governing matters which bear on the judicial independence of tribunals trying persons charged with an offence exhibit a great range and variety. The essential conditions of judicial independence mondiale sur l'indépendance de la justice tenue à Montréal en 1983. Le recueil d'articles et d'allocutions récemment publié, *Judicial Independence: The Contemporary Debate* (1985), sous la direction de Shetreet et Deschênes, traduit la pensée la plus récente sur ce sujet. Servant de conclusion, l'article de Shetreet, intitulé «Judicial Independence: New Conceptual Dimensions and Contemporary Challenges», présente une vue d'ensemble précieuse de l'évolution des idées dans ce domaine.

Les idées ont évolué au cours des années sur ce qui idéalement peut être requis, sur le plan du fond comme sur celui de la procédure, pour assurer une indépendance judiciaire aussi grande que possible. Les opinions diffèrent sur ce qui est nécessaire ou souhaitable, ou encore réalisable. Cela est particulièrement vrai, par exemple, en ce qui concerne le degré d'indépendance ou d'autonomie que les tribunaux, pense-t-on devraient avoir sur le plan administratif. Cela est vrai aussi de la mesure dans laquelle certaines activités extrajudiciaires des juges peuvent être perçues comme portant atteinte à la réalité ou à la perception de l'indépendance judiciaire. Il y a un regain d'intérêt pour la procédure et les critères de nomination des juges, car ils peuvent avoir un effet sur la perception de l'indépendance judiciaire. Les préoccupations des juristes et des profanes concernant l'indépendance judiciaire se sont accrues avec les nouvelles attributions et responsabilités que la *Charte* a conférées aux tribunaux. Dans des rapports et des discours sur l'indépendance judiciaire, on a réclamé, ces dernières années, l'adoption généralisée des plus hautes normes ou garanties, non seulement à l'égard des éléments traditionnels de l'indépendance judiciaire, mais aussi à l'égard des autres aspects considérés aujourd'hui comme ayant un effet important sur la réalité et la perception de l'indépendance judiciaire. On peut s'attendre que ces efforts, déployés particulièrement par les milieux juridique et judiciaire en vue d'affermir les conditions de l'indépendance judiciaire au Canada, vont continuer à viser l'idéal. Il ne serait cependant pas possible d'appliquer les conditions les plus rigoureuses et les plus élaborées de l'indépendance judiciaire à l'exigence constitutionnelle d'indépendance qu'énonce l'al. 11*d*) de la *Charte*, qui peut devoir s'appliquer à différents tribunaux. Les dis-

dependence for purposes of s. 11(*d*) must bear some reasonable relationship to that variety. Moreover, it is the essence of the security afforded by the essential conditions of judicial independence that is appropriate for application under s. 11(*d*) and not any particular legislative or constitutional formula by which it may be provided or guaranteed.

Counsel for the Provincial Court Judges Association submitted that there should be a uniform standard of judicial independence under s. 11(*d*) and that it should be essentially the one embodied by ss. 99 and 100 of the *Constitution Act, 1867*, which provide:

99. (1) Subject to subsection two of this section, the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.

(2) A Judge of a Superior Court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

These provisions are generally regarded as representing the highest degree of constitutional guarantee of security of tenure and security of salary and pension. They find their historical inspiration in the provisions of the *Act of Settlement* of 1701 [12 & 13 Will. 3, c. 2], which provided that judges should hold office during good behaviour, subject to removal on an address of both Houses of Parliament, and that their salaries should be "ascertained and established". Provincial court judges contend that they should have the same constitutional guarantees of security of tenure and security

positions législatives et constitutionnelles qui, au Canada, régissent les questions ayant une portée sur l'indépendance judiciaire des tribunaux qui jugent les personnes accusées d'une infraction sont fort diverses et variées. Les conditions essentielles de l'indépendance judiciaire, pour les fins de l'al. 11*d*), doivent avoir un lien raisonnable avec cette diversité. De plus, c'est l'essence de la garantie fournie par les conditions essentielles de l'indépendance judiciaire qu'il convient d'appliquer en vertu de l'al. 11*d*), et non pas quelque formule législative ou constitutionnelle particulière qui peut l'offrir ou l'assurer.

Les avocats de l'Association des juges des cours provinciales ont fait valoir qu'il devrait y avoir une norme uniforme d'indépendance judiciaire en vertu de l'al. 11*d*) et que ce devrait essentiellement être celle que l'on trouve aux art. 99 et 100 de la *Loi constitutionnelle de 1867*, qui portent:

99. (1) Sous réserve du paragraphe (2) du présent article, les juges des cours supérieures resteront en fonctions à titre inamovible, mais ils pourront être révoqués par le gouverneur général sur une adresse du Sénat et de la Chambre des communes.

(2) Un juge d'une cour supérieure, nommé avant ou après l'entrée en vigueur du présent article, cessera de détenir sa charge lorsqu'il aura atteint l'âge de soixante-quinze ans, ou à la date d'entrée en vigueur du présent article si, à cette date, il a déjà atteint cet âge.

100. Les traitements, allocations et pensions des juges des cours supérieures, de district et de comté (sauf les cours de vérification en Nouvelle-Écosse et au Nouveau-Brunswick) et des cours de l'Amirauté, lorsque ces juges reçoivent actuellement un traitement, seront fixés et assurés par le Parlement du Canada.

Ces dispositions sont généralement considérées comme représentant le plus haut degré de garantie constitutionnelle d'inamovibilité et de sécurité de traitement et de pension. Elles s'inspirent historiquement des dispositions de l'*Acte d'établissement* de 1701 [12 & 13 Will. 3, chap. 2], qui prévoyait que les juges occuperaient leur charge durant bonne conduite, sous réserve de révocation par une adresse des deux chambres du Parlement, et que leur salaire serait [TRADUCTION] «fixé et établi». Les juges de cour provinciale soutiennent qu'ils devraient jouir des mêmes garanties constitution-

of salary and pension as superior court judges. Whatever may be the merits of this contention from the point of view of legislative or constitutional policy, I do not think that it can be given effect to in the construction and application of s. 11(*d*). To do so would be, in effect, to amend the judicature provisions of the Constitution. The standard of judicial independence for purposes of s. 11(*d*) cannot be a standard of uniform provisions. It must necessarily be a standard that reflects what is common to, or at the heart of, the various approaches to the essential conditions of judicial independence in Canada.

IV

It is necessary then to consider the essential conditions of judicial independence for purposes of s. 11(*d*) of the *Charter*, as they relate to the various objections to the status of provincial court judges raised before Sharpe J. Certain of these objections touch on the question of security of tenure. Security of tenure, because of the importance that has traditionally been attached to it, must be regarded as the first of the essential conditions of judicial independence for purposes of s. 11(*d*) of the *Charter*.

The provisions in Ontario governing the security of tenure of provincial court judges up to the age of retirement at the time Sharpe J. declined jurisdiction were contained in s. 4 of the *Provincial Courts Act*. Section 4 provided that a provincial court judge could be removed from office only "for misbehaviour or for inability to perform his duties properly" and only after an inquiry by a superior court judge at which the Provincial Court judge affected had been given a full opportunity to be heard. The report of the inquiry had to be laid before the Legislative Assembly, but the Lieutenant Governor in Council was not bound to act in accordance with its findings or recommendations. Under the provision for removal before retirement which now applies to provincial court judges—s. 56(1) of the *Courts of Justice Act, 1984*, 1984 (Ont.), c. 11, which came into force on January 1, 1985—a judge may be removed from office before

nelles d'inamovibilité et de sécurité de traitement et de pension que les juges des cours supérieures. Quel que soit le bien-fondé de cet argument du point de vue de la politique législative ou constitutionnelle, je ne pense pas qu'il puisse s'appliquer quand il s'agit d'interpréter et d'appliquer l'al. 11*d*). Ce faire reviendrait en fait à modifier les dispositions de la Constitution relatives à la magistrature. La norme de l'indépendance judiciaire, pour les fins de l'al. 11*d*), ne peut être l'uniformité des dispositions. Ce doit nécessairement être une norme qui reflète ce qui est commun aux diverses conceptions des conditions essentielles de l'indépendance judiciaire au Canada ou ce qui est au centre de ces conceptions.

IV

Il est donc nécessaire d'examiner les conditions essentielles de l'indépendance judiciaire pour les fins de l'al. 11*d*) de la *Charte*, étant donné le rapport qu'elles ont avec les diverses objections au statut des juges de cour provinciale soulevées devant le juge Sharpe. Certaines de ces objections touchent à la question de l'inamovibilité. L'inamovibilité, de par l'importance qui y a été attachée traditionnellement, doit être considérée comme la première des conditions essentielles de l'indépendance judiciaire pour les fins de l'al. 11*d*) de la *Charte*.

Les dispositions ontariennes régissant l'inamovibilité des juges de cour provinciale jusqu'à l'âge de la retraite, à l'époque où le juge Sharpe a décliné compétence, se trouvaient à l'art. 4 de la *Loi sur les cours provinciales*. L'article 4 portait qu'un juge de cour provinciale ne pouvait être démis de ses fonctions que [TRADUCTION] «pour mauvaise conduite ou pour incapacité d'exercer convenablement ses fonctions», et ce, uniquement après la tenue d'une enquête par un juge de cour supérieure, au cours de laquelle le juge de cour provinciale en cause avait eu pleinement l'occasion de se faire entendre. Le rapport de l'enquête devait être déposé à l'Assemblée législative, mais le lieutenant-gouverneur en conseil n'était pas obligé de se conformer à ses conclusions ou recommandations. En vertu de la disposition de révocation avant retraite qui s'applique aujourd'hui aux juges de cour provinciale—le par. 56(1) de la *Loi de 1984*

the age of retirement only if a complaint has been made to the Judicial Council for Provincial Judges and if the removal is recommended by a judicial inquiry on the ground that the judge has become incapacitated or disabled from the due execution of the office by reason of infirmity, by conduct that is incompatible with the execution of the office, or by having failed to perform the duties of the office. The judge may be removed by the Lieutenant Governor in Council only on an address of the Legislative Assembly.

There are, of course, a variety of ways in which the essentials of security of tenure may be provided by constitutional or legislative provision. As I have indicated, superior court judges in Canada enjoy what is generally regarded as the highest degree of security of tenure in the constitutional guarantee of s. 99 of the *Constitution Act, 1867* that they shall hold office during good behaviour until the age of seventy-five, subject to removal by the Governor General on address of the Senate and House of Commons. The judges of this Court, the Federal Court of Canada and the Tax Court of Canada also enjoy, under their respective governing statutes, a tenure during good behaviour until a specified age of retirement, subject to removal only on address of the Senate and House of Commons. The judges of the county courts hold office during good behaviour but are removable by the Governor in Council, on the recommendation of the Minister of Justice, following an inquiry or investigation and report by the Canadian Judicial Council, pursuant to ss. 40 and 41 of the *Judges Act*, R.S.C. 1970, c. J-1. Under these sections, which provide for an inquiry or investigation by the Council into the conduct or capacity of a judge of a superior, district or county court or of the Tax Court of Canada, the Council is empowered to recommend the removal of a judge. The grounds on which it may do so, as set out in s. 41, are that the judge has become incapacitated or disabled from the due execution of office by age or infirmity, by having been guilty of misconduct, by having failed in the due execution of office, or by having been placed by misconduct or otherwise in a position incompatible with the due execution of office.

sur les tribunaux judiciaires, 1984 (Ont.), chap. 11, entré en vigueur le 1er janvier 1985—un juge ne peut se voir démis de ses fonctions avant l'âge de la retraite que par suite d'une plainte portée au Conseil de la magistrature des juges provinciaux et que si la révocation est recommandée, après enquête judiciaire, pour le motif que le juge est devenu incapable de remplir dûment ses fonctions pour cause d'infirmité ou de conduite incompatible avec sa charge, ou parce qu'il n'a pas rempli les devoirs de sa charge. Le lieutenant-gouverneur en conseil ne peut démettre le juge de ses fonctions que sur adresse de l'Assemblée législative.

Il existe bien entendu diverses façons de prévoir les conditions essentielles de l'inamovibilité par une disposition constitutionnelle ou législative. Comme je l'ai indiqué, les juges de cour supérieure au Canada jouissent de ce qui est généralement considéré comme le plus haut degré d'inamovibilité qu'offre la garantie constitutionnelle de l'art. 99 de la *Loi constitutionnelle de 1867*: ils occupent leur charge à titre inamovible jusqu'à l'âge de soixante-quinze ans à moins d'être révoqués par le gouverneur général sur adresse du Sénat et de la Chambre des communes. En vertu des lois qui les régissent respectivement, les juges de cette Cour, ceux de la Cour fédérale du Canada et ceux de la Cour canadienne de l'impôt occupent également leur charge à titre inamovible jusqu'à un âge précis de mise à la retraite, à moins seulement d'être révoqués sur adresse du Sénat et de la Chambre des communes. Les juges des cours de comté occupent leur charge à titre inamovible, mais peuvent être démis de leurs fonctions par le gouverneur en conseil, sur la recommandation du ministre de la Justice, après enquête et rapport du Conseil canadien de la magistrature, conformément aux art. 40 et 41 de la *Loi sur les juges*, S.R.C. 1970, chap. J-1. En vertu de ces articles qui prévoient la tenue d'une enquête sur la conduite ou la capacité d'un juge d'une cour supérieure, d'une cour de district, d'une cour de comté ou de la Cour canadienne de l'impôt, le Conseil peut recommander la révocation d'un juge. Les motifs pour lesquels il peut le faire, énoncés à l'art. 41, sont que le juge est frappé d'une incapacité ou d'une invalidité qui l'empêche de remplir utilement ses fonctions et est due à l'âge ou à une infirmité, au fait qu'il s'est

office. The judge must be given an opportunity to be heard, in person or by counsel, and to cross-examine witnesses and adduce evidence. Where a judge may be removed by the Governor in Council following a report of the Council, as in the case of a county court judge, the Governor in Council is not bound by the report. The security of tenure provided for provincial court judges in Canada is, generally speaking, that they may be removed by the executive government before the age of retirement only for misbehaviour or disability following a judicial inquiry. There is considerable variation in the relevant provisions of the provincial legislation. In some cases it is expressly provided that they shall hold office during good behaviour; in others, the specific grounds for removal are spelled out and may, as I have indicated, be generally summarized as misbehaviour or misconduct rendering the judge unfit for office or incapacity by reason of infirmity. The essence of these provisions is that a provincial judge may be removed before the age of retirement only for cause. There is also provision for a judicial inquiry into whether there is cause at which the judge affected is afforded a full opportunity to be heard. In some cases the executive government is bound by the report of the inquiry; in most cases the government is not bound by it.

The Deschênes report recommended that all judges should enjoy a tenure expressly defined as being "during good behaviour" and that they should be removable only upon an address of the legislature. Alternatively, the report recommended that if the power of removal by the executive without an address of the legislature were retained, the executive should be bound by the report of the judicial inquiry. The report of the Canadian Bar Association Committee on judicial independence recommended that "All judges of Canadian Courts be guaranteed tenure during good behaviour". There is also an implication at p. 16 of the report that the committee was of the view that a

rendu coupable de mauvaise conduite, au fait qu'il n'a pas rempli utilement ses fonctions ou à celui que, par sa conduite ou pour toute autre raison, il s'est mis dans une situation telle qu'il ne peut remplir utilement ses fonctions. Le juge doit avoir la possibilité de se faire entendre, personnellement ou par avocat, et de contre-interroger des témoins et de produire une preuve. Lorsqu'un juge ne peut être révoqué que par le gouverneur en conseil après rapport du Conseil canadien de la magistrature, le gouverneur en conseil n'est pas lié par le rapport. L'inamovibilité prévue pour les juges de cour provinciale au Canada consiste, en général, dans le fait qu'ils ne peuvent être révoqués par le pouvoir exécutif avant l'âge de la retraite que pour mauvaise conduite ou invalidité, après enquête judiciaire. Les dispositions pertinentes des lois provinciales présentent une grande diversité. Dans certains cas, il est expressément prévu qu'ils occupent leur charge à titre inamovible. Dans d'autres cas, les motifs spécifiques de révocation sont énoncés bien clairement et, comme je l'ai déjà indiqué, se ramènent à la mauvaise conduite ou à un mauvais comportement qui rend le juge indigne de sa charge, ou à l'incapacité pour cause d'infirmité. Essentiellement, ces dispositions prévoient qu'un juge de cour provinciale ne peut être révoqué avant l'âge de la retraite que pour un motif déterminé. Une enquête judiciaire est aussi prévue pour établir si ce motif existe, le juge visé devant avoir pleinement l'occasion de s'y faire entendre. Dans certains cas, le pouvoir exécutif est lié par le rapport d'enquête; dans la plupart des cas, le gouvernement ne l'est pas.

Le rapport Deschênes recommande que tous les juges occupent leur charge à titre expressément défini comme «inamovible» et qu'ils ne puissent être révoqués que sur adresse du corps législatif. Subsidiairement, le rapport recommande que si le pouvoir de l'exécutif de révoquer sans adresse du corps législatif devait être maintenu, l'exécutif devrait être lié par le rapport d'enquête judiciaire. Le rapport d'un comité de l'Association du Barreau canadien sur l'indépendance de la magistrature recommande que «tous les juges des cours canadiennes soient nommés à titre inamovible». Il découle aussi du rapport, à la p. 17, que le comité était d'avis qu'un juge ne devrait être révoqué que

judge should be removable only on an address of the legislature. After referring to s. 99 of the *Constitution Act, 1867* respecting the tenure of superior court judges, the committee said: "Since the independence of the judiciary depends to a significant extent on the judges' security of tenure it is appropriate that their removal be a major undertaking, bringing the politicians who must accomplish it under close scrutiny. The removal of a judge is not to be undertaken lightly." It may be desirable that the tenure of judges should be expressed as being during good behaviour, which leaves cause for removal to be determined according to the common law meaning of those words (see Shetreet, *op. cit.*, pp. 89*ff* for the meaning of "during good behaviour" at common law) rather than have the grounds for removal specified in legislation, but I do not think it is reasonable to require that as an essential condition of judicial independence for purposes of s. 11(*d*) of the *Charter*. It is sufficient if a judge may be removed only for cause related to the capacity to perform judicial functions. It may be, as suggested by the Deschênes report, that the specified grounds for removal to be found in some of the provincial legislation are too broad, but this would not appear to be true of the grounds for removal specified in s. 4 of the *Provincial Courts Act* and s. 56(1) of the *Courts of Justice Act, 1984*. Similarly, it may be desirable, as now provided for in s. 56(1), that a judge should be removable from office only on an address of the legislature, but again I do not think it is reasonable to require this as essential for security of tenure for purposes of s. 11(*d*) of the *Charter*. It may be that the requirement of an address of the legislature makes removal of a judge more difficult in practice because of the solemn, cumbersome and publicly visible nature of the process, but the requirement of cause, as defined by statute, together with a provision for judicial inquiry at which the judge affected is given a full opportunity to be heard, is in my opinion a sufficient restraint upon the power of removal for purposes of s. 11(*d*). Whether or not the Executive should be bound by the report of the judicial inquiry—that is, whether the power to remove should be conditional upon a finding of cause by the judicial inquiry, as is now provided by

sur adresse du corps législatif. Après avoir mentionné l'art. 99 de la *Loi constitutionnelle de 1867*, concernant l'inamovibilité des juges de cour supérieure, le comité affirme: «Puisque l'indépendance du pouvoir judiciaire dépend dans une très large mesure de l'inamovibilité des juges, il est normal que leur destitution soit une décision majeure impliquant les politiciens, qui doivent accomplir leur travail sous l'œil vigilant du public. La destitution d'un juge ne peut pas être prise à la légère.» Il est peut-être souhaitable que la charge des juges soit déclarée inamovible, les motifs de révocation devant alors être déterminés en fonction du sens qu'ont ces termes en *common law* (voir Shetreet, précité, aux pp. 89 et suiv. pour la signification du terme «inamovibilité» en *common law*) plutôt que de les voir spécifiés dans les lois; cependant, je ne pense pas qu'il soit raisonnable d'exiger cela comme condition essentielle d'indépendance judiciaire pour les fins de l'al. 11*d*) de la *Charte*. Il suffit qu'un juge ne puisse être révoqué que pour un motif lié à sa capacité d'exercer les fonctions judiciaires. Il se peut, comme le laisse entendre le rapport Deschênes, que les motifs exprès de révocation que l'on trouve dans certaines lois provinciales soient trop larges, mais il ne semble pas que ce soit le cas des motifs de révocation prévus par l'art. 4 de la *Loi sur les cours provinciales* et par le par. 56(1) de la *Loi de 1984 sur les tribunaux judiciaires*. De même, il est peut-être souhaitable, comme le prévoit maintenant le par. 56(1), qu'un juge ne puisse être révoqué que sur adresse du corps législatif mais, ici encore, je ne pense pas qu'il soit raisonnable d'exiger cela comme étant essentiel à l'inamovibilité pour les fins de l'al. 11*d*) de la *Charte*. Il se peut que la nécessité d'une adresse du corps législatif rende la révocation d'un juge plus difficile en pratique à cause de la solennité, de la lourdeur et de la visibilité de la procédure, mais qu'un motif soit nécessaire, comme le définit la loi, et qu'une enquête judiciaire soit prévue au cours de laquelle le juge visé a pleinement l'occasion de se faire entendre, constituent à mon avis, une restriction suffisante du pouvoir de révocation pour les fins de l'al. 11*d*). J'estime qu'il est plus difficile de déterminer si l'exécutif doit ou non être lié par le rapport de l'enquête judiciaire, c.-à-d. si le pouvoir de révocation doit être assujetti

s. 56(1) of the *Courts of Justice Act, 1984*—I find more difficult. Certainly, it is preferable, but I do not think it can be required as essential to security of tenure for purposes of s. 11(*d*). The existence of the report of the judicial inquiry is a sufficient restraint upon the power of removal, particularly where, as provided by s. 4 of the *Provincial Courts Act*, the report is required to be laid before the legislature.

In sum, I am of the opinion that while the provision concerning security of tenure up to the age of retirement which applied to provincial court judges when Sharpe J. declined jurisdiction falls short of the ideal or highest degree of security, it reflects what may be reasonably perceived as the essentials of security of tenure for purposes of s. 11(*d*) of the *Charter*: that the judge be removable only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure for purposes of s. 11(*d*) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.

The most serious issue with respect to the security of tenure of provincial court judges under the statutory provisions that applied when Sharpe J. declined jurisdiction is the provision in s. 5(4) of the *Provincial Courts Act* for the reappointment of a judge, upon attaining the age of retirement, to hold office during pleasure. Such reappointment, to be made by the Lieutenant Governor in Council upon the recommendation of the Attorney General, was the subject of two objections: first, that an appointment to hold office during the pleasure of the Executive was incompatible with the requirement of judicial independence; and second, that the need in some cases of such a reappointment to complete entitlement to pension could give rise to a reasonable perception of dependence upon the

à la condition que l'enquête judiciaire ait constaté l'existence d'un motif, comme le prévoit maintenant le par. 56(1) de la *Loi de 1984 sur les tribunaux judiciaires*. Cela est certainement préférable, mais je ne pense pas que cela puisse être posé comme essentiel à l'inamovibilité pour les fins de l'al. 11*d*). L'existence du rapport d'enquête judiciaire constitue une restriction suffisante du pouvoir de révocation, particulièrement lorsque, comme le prévoit l'art. 4 de la *Loi sur les cours provinciales*, le rapport doit être déposé devant le corps législatif.

En somme, je suis d'avis que si la disposition concernant l'inamovibilité jusqu'à l'âge de la retraite, qui s'appliquait aux juges de cour provinciale lorsque le juge Sharpe a décliné compétence, ne fournit une inamovibilité ni idéale ni parfaite, elle fait néanmoins ressortir ce qu'on peut raisonnablement percevoir comme les conditions essentielles de l'inamovibilité pour les fins de l'al. 11*d*) de la *Charte*: que le juge ne puisse être révoqué que pour un motif déterminé, et que ce motif fasse l'objet d'un examen indépendant et d'une décision selon une procédure qui offre au juge visé toute possibilité de se faire entendre. L'essence de l'inamovibilité pour les fins de l'al. 11*d*), que ce soit jusqu'à l'âge de la retraite, pour une durée fixe, ou pour une charge *ad hoc*, est que la charge soit à l'abri de toute intervention discrétionnaire ou arbitraire de la part de l'exécutif ou de l'autorité responsable des nominations.

Le point le plus sérieux, en ce qui concerne l'inamovibilité des juges de cour provinciale conférée par les dispositions légales qui s'appliquaient lorsque le juge Sharpe a décliné compétence, c'est ce que prévoit le par. 5(4) de la *Loi sur les cours provinciales* au sujet de la nouvelle nomination à titre amovible d'un juge, lorsqu'il atteint l'âge de la retraite. Cette nouvelle nomination, qui doit être faite par le lieutenant-gouverneur en conseil sur la recommandation du procureur général, a fait l'objet de deux objections: premièrement, une nomination à titre amovible par l'exécutif est incompatible avec l'exigence d'indépendance judiciaire et, deuxièmement, la nécessité dans certains cas de procéder à cette nouvelle nomination afin de rendre admissible à la pension, peut susciter une

Executive. Under the pension provisions which applied when Sharpe J. declined jurisdiction, a provincial court judge was entitled to a pension upon attaining the age of sixty-five if he or she had served ten or more years. A judge who had been appointed after the age of fifty-five might be perceived as dependent upon the favour of the Executive for a post-retirement reappointment to complete pension entitlement. The first objection to the provision for post-retirement reappointment in s. 5(4) of the *Provincial Courts Act* relates to the question of security of tenure, which is the issue presently being considered. The second objection falls into the general category of objections to the status of provincial court judges based upon alleged dependence on the Executive for discretionary benefits or advantages. I propose to address that issue later.

Howland C.J.O. disposed of the objections to the provision for post-retirement reappointment which applied when Sharpe J. declined jurisdiction mainly on the ground that the incumbent Attorney General had, during his seven years in office, always acted with respect to such reappointments on the recommendation of the chief judge of the provincial court in question. That practice or "tradition", as it was referred to, was perhaps more relevant to the second objection to the provision for post-retirement appointment at pleasure—the dependence of provincial court judges on such reappointment to complete pension entitlement—than to the first objection—the lack of security of tenure under such a reappointment—but it may have been assumed that if the Attorney General made a post-retirement reappointment only on the recommendation of a chief judge he could be expected to act only on such recommendation with respect to the termination of such a reappointment. In any event, Howland C.J.O. placed considerable emphasis on the role of tradition as an objective condition or safeguard of judicial independence. Since tradition has most often been invoked in connection with the issue of security of

perception raisonnable de dépendance envers l'exécutif. En vertu des dispositions portant sur la pension, qui s'appliquaient lorsque le juge Sharpe a décliné compétence, un juge de cour provinciale avait droit à une pension quand il atteignait l'âge de soixante-cinq ans, s'il avait occupé sa charge pendant dix ans ou plus. Le juge nommé après l'âge de cinquante-cinq ans pouvait être perçu comme dépendant du bon vouloir de l'exécutif s'il voulait obtenir une nouvelle nomination après avoir atteint l'âge de retraite, en vue de devenir admissible à la pension. La première objection à la nouvelle nomination après avoir atteint l'âge de la retraite, prévue au par. 5(4) de la *Loi sur les cours provinciales*, touche à la question de l'inamovibilité, le point présentement examiné. La seconde objection se situe dans la catégorie générale des objections au statut des juges de cour provinciale, fondées sur une prétendue dépendance envers l'exécutif pour ce qui est d'obtenir des bénéfices ou avantages discrétionnaires. Je propose de traiter cette question plus loin.

Le juge en chef Howland a repoussé les objections à la disposition relative à la nouvelle nomination après l'âge de la retraite, qui s'appliquait lorsque le juge Sharpe a décliné compétence, principalement pour le motif que le procureur général en poste avait, durant les sept ans d'exercice de son mandat, toujours agi, en ce qui concerne ces nouvelles nominations, sur la recommandation du juge en chef de la cour provinciale en question. Cette pratique ou «tradition», comme on l'a appelée, est peut-être plus pertinente dans le cas de la seconde objection à la disposition sur les nominations à titre amovible après l'âge de la retraite—le fait que des juges de cour provinciale dépendent de cette nouvelle nomination pour avoir droit à leur pension—que dans le cas de la première objection—l'amovibilité dans le cas d'une nouvelle nomination—mais on peut avoir présumé que si le procureur général ne procédait à une nouvelle nomination après l'âge de la retraite que sur la recommandation d'un juge en chef, on pouvait s'attendre à ce qu'il n'agisse que sur une telle recommandation pour mettre fin à cette nouvelle nomination. De toute façon, le juge en chef Howland a accordé une importance considérable au

tenure it is convenient to consider its general role here.

I quote a passage on this subject from the reasons of Howland C.J.O., which refers to the opinions of several learned commentators on the importance of tradition. He said at pp. 431-32:

> Having considered the historical development of judicial independence in England and in Canada, it is necessary to refer to the importance of traditions. Quite apart from the Constitution or any statutory provisions, tradition has been an important factor in preserving judicial independence both in England and in Canada. In England a majority of the judges can be removed by the Lord Chancellor, who is an active member of the Government. However, the high tradition of the office of Lord Chancellor has resulted in very few abuses of this power. As Hogg states in his text *Constitutional Law of Canada* (1977), p. 120:
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> > The independence of the judiciary has since become such a powerful tradition in the United Kingdom and Canada that there may be little point in a fine analysis of the language of the provisions by which it is formally guaranteed.
>
> Shetreet's text *Judges on Trial, a Study of the Appointment and Accountability of the English Judiciary* (1976), emphasized the importance of tradition so far as judicial independence is concerned. At pp. 392-3 he stated:
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> > ... no executive or legislature can interfere with judicial independence contrary to popular opinion, and survive. "In Britain" wrote Professor de Smith, "the independence of the Judiciary rests not on formal constitutional guarantees and prohibitions but on an admixture of statutory and common-law rules, constitutional conventions and parliamentary practice, fortified by professional tradition and public opinion." (S.A. de Smith *Constitutional and Administrative Law* (1st ed. 1971), pp. 365-366 n. 35) Lord Sankey, L.C., said in Parliament:
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> > > "The independence and prestige which our judges have enjoyed in their position have rested far more upon the great tradition and long usage with which

rôle de la tradition en tant que condition ou garantie objectives de l'indépendance judiciaire. Étant donné que la tradition est, la plupart du temps, invoquée relativement à la question de l'inamovibilité, il convient d'examiner ici son rôle général.

À ce propos, je cite un passage des motifs de jugement du juge en chef Howland qui se réfère aux opinions de plusieurs savants glossateurs sur l'importance de la tradition. Il dit aux pp. 431 et 432:

> [TRADUCTION] Après l'examen de l'évolution historique de l'indépendance judiciaire en Angleterre et au Canada, il est nécessaire de mentionner l'importance des traditions. Tout à fait indépendamment de la Constitution ou des dispositions législatives, la tradition a été un facteur important pour la préservation de l'indépendance judiciaire tant en Angleterre qu'au Canada. En Angleterre, la majorité des juges peuvent être révoqués par le lord Chancelier, un membre actif du gouvernement. Toutefois, la haute tradition entourant l'office de lord Chancelier a fait qu'il n'y a eu qu'un fort petit nombre d'abus de ce pouvoir. Comme Hogg le dit dans son traité *Constitutional Law of Canada* (1977), à la p. 120:
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> > L'indépendance du pouvoir judiciaire est devenue depuis une tradition tellement puissante au Royaume-Uni et au Canada que procéder à une analyse subtile des textes qui la garantissent formellement n'aurait guère d'utilité.
>
> La monographie de Shetreet, *Judges on Trial, a Study of the Appointment and Accountability of the English Judiciary* (1976), souligne l'importance de la tradition en ce qui concerne l'indépendance judiciaire. Aux pages 392 et 393, il dit:
>
> > ... aucun exécutif ou corps législatif ne peut porter atteinte à l'indépendance judiciaire contrairement à l'opinion publique, et survivre. «En Grande-Bretagne, écrit le professeur de Smith, l'indépendance du pouvoir judiciaire repose non sur des garanties et prohibitions constitutionnelles formelles, mais sur un mélange de règles de droit écrit et de *common law*, de conventions constitutionnelles et de pratiques parlementaires, fortifiées par la tradition du monde juridique et l'opinion publique.» (S. A. de Smith, *Constitutional and Administrative Law* (1st ed. 1971), aux pp. 365 et 366, note 35). Le lord chancelier Sankey a dit au Parlement:
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> > > «L'indépendance et le prestige dont nos juges jouissent en occupant leur charge reposent beaucoup plus sur la grande tradition et le long usage qui les

they have always been surrounded, than upon any Statute. The greatest safeguard of all may be found along these lines for traditions cannot be repealed, but an Act of Parliament can be."

The strength of tradition is measured not only by its observance but also by the intensity of the reaction to its violation .... Strong public reaction to a breach of tradition demonstrates that the violation will not pass unnoticed.

To these opinions on the importance of tradition as a safeguard of judicial independence may be added the following statement by Lord Denning in *The Road to Justice* (1955), at pp. 16-17:

The County Court judges have some measure of protection but the stipendiary magistrates and the justices of the peace have no security of tenure at all. They hold office during pleasure ....

Nevertheless, although these lesser judges can theoretically be dismissed at pleasure, the great principle that judges should be independent has become so ingrained in us that it extends in practice to them also. They do in fact hold office during good behaviour and they are in fact only dismissed for misconduct. If any Minister or Government Department should attempt to influence the decision of any one of them, there would be such an outcry that no Government could stand against it.

Tradition, reinforced by public opinion, operating as an effective restraint upon executive or legislative action, is undoubtedly a very important objective condition tending to ensure the independence in fact of a tribunal. That it is not, however, regarded by itself as a sufficient safeguard of judicial independence is indicated by the many calls for specific legislative provisions or constitutional guarantees to ensure that independence in a more ample and secure measure. Shetreet himself makes this point later on in the discussion of the role of tradition from which Howland C.J.O. quoted, where he says at pp. 392-93:

Others, however, do not entertain this unreserved trust in tradition and popular opinion. A growing number of legal scholars, lawyers and even judges are advocating a written and entrenched constitution to protect civil liberties and other important parts of constitutional law against alteration by a small temporary majority in Parliament. Significant support for this view came from Lord Justice Scarman, who in his Hamlyn

ont toujours entourés que sur quelque loi. La meilleure garantie peut s'y trouver, car les traditions ne peuvent être abrogées, alors qu'une loi du Parlement peut l'être.»

La force de la tradition se mesure non seulement par son observance, mais aussi par l'intensité de la réaction que soulève sa violation ... Une forte réaction de l'opinion publique à une atteinte à la tradition démontre qu'une violation ne saurait passer inaperçue.

À ces opinions sur l'importance de la tradition comme garantie de l'indépendance judiciaire, on peut ajouter ce que dit lord Denning dans *The Road to Justice* (1955), aux pp. 16 et 17:

[TRADUCTION] Les juges de cour de comté sont protégés dans une certaine mesure, mais les magistrats stipendiaires et les juges de paix sont tout à fait amovibles. Ils occupent leur charge durant bon plaisir ...

Néanmoins, si ces juges d'instance inférieure sont théoriquement amovibles, le grand principe que les juges doivent être indépendants est tellement ancré en nous qu'il s'applique en pratique à eux aussi. Ils sont en fait inamovibles et ne peuvent être révoqués que pour mauvaise conduite. Si un ministre ou un ministère tentait d'influencer la décision de l'un deux, cela soulèverait un tel tollé qu'aucun gouvernement ne pourrait y résister.

La tradition, renforcée par l'opinion publique, joue le rôle d'un frein efficace à l'action de l'exécutif ou du législatif et constitue sans nul doute une condition objective fort importante qui tend à assurer l'indépendance effective d'un tribunal. Que cela n'est pas cependant considéré en soi comme une garantie suffisante de l'indépendance judiciaire ressort des nombreux appels réclamant des dispositions législatives ou des garanties constitutionnelles spécifiques assurant cette indépendance d'une manière plus large et plus certaine. Shetreet lui-même le dit plus loin dans son analyse du rôle de la tradition, que cite le juge en chef Howland, aux pp. 392 et 393:

[TRADUCTION] D'autres toutefois ne partagent pas cette confiance absolue dans la tradition et l'opinion populaire. Un nombre croissant d'auteurs, de juristes et même de juges réclament une constitution écrite et enchâssée qui protégerait les libertés publiques et d'autres portions importantes du droit constitutionnel contre toute modification par une petite majorité provisoire au Parlement. Cette opinion a reçu un appui de taille, celui

Lectures 1974 proposed a written Bill of Rights and judicial review of statutes. Individual rights, judicial independence and other parts of a democratic system of government can be better safeguarded by a written constitution supported by tradition and public opinion than by the latter alone.

Reports and addresses on judicial independence in recent years have indicated that the nature and importance of this constitutional value are not so well and widely understood as to give grounds for confidence that its protection can be safely left to the operation of tradition alone. This is clear, for example, from the observations and recommendations of the Deschênes report and from the recent report of the Canadian Bar Association committee on judicial independence. Indeed, a constitutional requirement of judicial independence such as that in s. 11(*d*) of the *Charter* presupposes that it does not automatically exist by reason of tradition alone. Important as tradition is as a support of judicial independence, I do not think that reliance on it should go so far as to treat other conditions or guarantees of independence as unnecessary or of no practical importance. I do not read the reasons of the Court of Appeal as suggesting that. It is a question of the relative importance that one is going to attach to tradition in a particular context as ensuring respect for judicial independence despite an apparent or potential power to interfere with it. Moreover, while tradition reinforced by public opinion may operate as a restraint upon the exercise of power in a manner that interferes with judicial independence, it cannot supply essential conditions of independence for which specific provision of law is necessary.

With the greatest respect for the contrary view, where, as in the case of provincial court judges at the time Sharpe J. declined jurisdiction, the legislature has expressly provided for two kinds of tenure—one under which a judge may be removed from office only for cause and the other under which a judge of the same court holds office during pleasure—I am of the opinion that the

du lord juge Scarman qui, dans ses Hamlyn Lectures de 1974, a proposé une déclaration des droits écrite et le contrôle judiciaire des lois. Les droits de l'individu, l'indépendance judiciaire et d'autres aspects d'un système démocratique de gouvernement pourraient être mieux protégés par une constitution écrite, appuyée par la tradition et l'opinion publique, que par cette dernière seulement.

Ces dernières années, des rapports et des allocutions sur l'indépendance judiciaire ont montré que la nature et l'importance de cette valeur constitutionnelle ne sont pas si bien et si largement comprises au point de justifier de croire que cette protection peut, en toute sécurité, être laissée à la tradition seule. Cela ressort clairement, par exemple, des observations et des recommandations du rapport Deschênes et du récent rapport du Comité de l'Association du Barreau canadien sur l'indépendance de la magistrature. D'ailleurs, une exigence constitutionnelle d'indépendance judiciaire, comme celle de l'al. 11*d*) de la *Charte*, présuppose qu'elle n'existe pas automatiquement en raison de la tradition seule. Si importante que soit la tradition en tant que support de l'indépendance judiciaire, je ne pense pas qu'on devrait s'y fier au point de considérer que les autres conditions ou garanties d'indépendance sont inutiles ou sans importance pratique. Suivant mon interprétation, les motifs de la Cour d'appel ne laissent pas entendre cela. Il s'agit plutôt de l'importance relative à donner à la tradition, dans un contexte particulier, en tant que moyen d'assurer le respect de l'indépendance judiciaire malgré l'existence d'un pouvoir apparent ou virtuel d'y porter atteinte. En outre, si la tradition, renforcée par l'opinion publique, peut permettre de freiner l'exercice d'un pouvoir qui porte atteinte à l'indépendance judiciaire, elle ne peut fournir les conditions essentielles d'indépendance qui doivent être prévues expressément par la loi.

Avec le plus grand respect pour les tenants de l'opinion contraire, lorsque, comme dans le cas des juges de cour provinciale à l'époque où le juge Sharpe a décliné compétence, le corps législatif a prévu expressément deux genres de charge, l'une où un juge peut être révoqué uniquement pour un motif déterminé, et l'autre où un juge du même tribunal est nommé à titre amovible, j'estime que

second class of tenure cannot reasonably be perceived as meeting the essential requirement of security of tenure for purposes of s. 11(*d*) of the *Charter*. The reasonable perception is that the legislature has deliberately, in the case of one category of judges, reserved to the Executive the right to terminate the holding of office without the necessity of any particular justification and without any inhibition or restraint arising from perceived tradition. I am thus of the view that a judge of the Provincial Court (Criminal Division) who held office during pleasure at the time Sharpe J. declined jurisdiction could not be an independent tribunal within the meaning of s. 11(*d*) of the *Charter*.

This conclusion could not, however, affect the independence of Sharpe J. personally because, as noted by the Court of Appeal, he did not hold office under a post-retirement reappointment. It was, nevertheless, contended that the provision for post-retirement reappointment at pleasure prevented the Provincial Court (Criminal Division) as a whole from being an independent tribunal within the meaning of s. 11(*d*) of the *Charter*. In my opinion, the fact that certain judges of the Court may have held office during pleasure at the time Sharpe J. declined jurisdiction could not impair or destroy the independence of the Court as a whole. The objection would have to be taken to the status of the particular judge constituting the tribunal.

As a further reason for rejecting the objections to the provision for post-retirement reappointment Howland C.J.O. referred to the declared intention of the Attorney General to introduce legislation at the next session of the legislature to make post-retirement reappointment subject to the approval of the Chief Judge of the Provincial Court. Such legislation was in fact introduced by s. 1 of the *Provincial Courts Amendment Act, 1983*, 1983 (Ont.) c. 18, which came into force on May 26, 1983 and amended s. 5(4) of the *Provincial Courts Act* to permit a provincial court judge who has attained the age of retirement to continue in office, with the annual approval of the chief judge of the court, until the age of seventy, and to continue in

la charge du second genre ne peut être raisonnablement perçue comme satisfaisant à l'exigence essentielle d'inamovibilité pour les fins de l'al. 11*d*) de la *Charte*. Il est raisonnable de croire que le corps législatif a délibérément, dans le cas d'une catégorie de juges, réservé à l'exécutif le droit de mettre fin à une charge, sans qu'aucune justification particulière ne soit nécessaire et sans aucune inhibition ou restriction imposée par une certaine perception de la tradition. Je suis donc d'avis qu'un juge de la Cour provinciale (Division criminelle), qui occupait sa charge à titre amovible à l'époque où le juge Sharpe a décliné compétence, ne pouvait pas être un tribunal indépendant au sens de l'al. 11*d*) de la *Charte*.

Cette conclusion ne peut toutefois influer sur l'indépendance du juge Sharpe personnellement parce que, comme l'a noté la Cour d'appel, il n'occupait pas sa charge en vertu d'une nouvelle nomination faite après qu'il eut atteint l'âge de la retraite. On a néanmoins soutenu que la disposition sur la nouvelle nomination à titre amovible, après l'âge de la retraite, empêchait la Cour provinciale (Division criminelle), dans son ensemble, d'être un tribunal indépendant au sens de l'al. 11*d*) de la *Charte*. À mon avis, le fait que certains juges de la cour aient pu occuper leur charge à titre amovible, au moment où le juge Sharpe a décliné compétence, ne saurait altérer ni détruire l'indépendance de la cour dans son ensemble. L'objection aurait dû viser le statut du juge particulier qui constituait le tribunal saisi.

Comme motif supplémentaire de rejet des objections apportées à la disposition relative aux nouvelles nominations après l'âge de la retraite, le juge en chef Howland a mentionné l'intention déclarée du procureur général de présenter, à la session suivante de l'Assemblée législative, un projet de loi qui assujettirait ces nouvelles nominations après l'âge de la retraite à l'approbation du juge en chef de la Cour provinciale. Cette mesure a en fait été déposée; c'est l'art. 1 de la *Loi de 1983 modifiant la Loi sur les cours provinciales*, 1983 (Ont.), chap. 18, qui est entré en vigueur le 26 mai 1983 et a modifié le par. 5(4) de la *Loi sur les cours provinciales* pour permettre à un juge de cour provinciale ayant atteint l'âge de la retraite de

office thereafter until the age of seventy-five, with the annual approval of the Judicial Council for Provincial Judges, a body composed of the Chief Justice of Ontario, the Chief Justice of the High Court, the Chief Justice of the District Court, the Chief Judges of the various divisions of the Provincial Court, the Treasurer of the Law Society of Upper Canada, and not more than two other persons appointed by the Lieutenant Governor in Council. The same provision is now found in s. 54(4) of the *Courts of Justice Act, 1984*, which came into force on January 1, 1985. This change in the law, while creating a post-retirement status that is by no means ideal from the point of view of security of tenure, may be said to have removed the principal objection to the provision which applied when Sharpe J. declined jurisdiction since it replaces the discretion of the Executive by the judgment and approval of senior judicial officers who may be reasonably perceived as likely to act exclusively out of consideration for the interests of the Court and the administration of justice generally.

continuer d'occuper sa charge, avec l'approbation annuelle du juge en chef de la cour, jusqu'à l'âge de soixante-dix ans, et de continuer à siéger par la suite jusqu'à l'âge de soixante-quinze ans, avec l'approbation annuelle du Conseil de la magistrature pour les juges de la Cour provinciale, composé du juge en chef de l'Ontario, du juge en chef de la Haute Cour, du juge en chef de la Cour de district, des juges en chef des diverses divisions de la Cour provinciale, du trésorier de la Law Society of Upper Canada et d'au plus deux autres personnes nommées par le lieutenant-gouverneur en conseil. La même disposition se retrouve maintenant au par. 54(4) de la *Loi de 1984 sur les tribunaux judiciaires*, qui est entrée en vigueur le 1er janvier 1985. Ce changement dans la loi, même s'il crée un statut d'après-retraite qui est loin d'être idéal du point de vue de l'inamovibilité, peut être considéré comme ayant supprimé l'objection principale apportée à la disposition qui s'appliquait lorsque le juge Sharpe a décliné compétence, puisqu'il remplace le pouvoir discrétionnaire de l'exécutif par le jugement et l'approbation d'officiers de justice supérieurs qu'on peut raisonnablement percevoir comme susceptibles d'agir exclusivement en fonction des intérêts de la cour et de l'administration de la justice en général.

V

The second essential condition of judicial independence for purposes of s. 11(*d*) of the *Charter* is, in my opinion, what may be referred to as financial security. That means security of salary or other remuneration, and, where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence. In the case of pension, the essential distinction is between a right to a pension and a pension that depends on the grace or favour of the Executive.

The salaries of provincial court judges were at the time Sharpe J. declined jurisdiction, and still are, fixed by regulation made by the Lieutenant Governor in Council pursuant to the authority formerly conferred by s. 34(1) of the *Provincial*

V

La deuxième condition essentielle de l'indépendance judiciaire pour les fins de l'al. 11*d*) de la *Charte* est, à mon avis, ce que l'on pourrait appeler la sécurité financière. Cela veut dire un traitement ou autre rémunération assurés et, le cas échéant, une pension assurée. Cette sécurité consiste essentiellement en ce que le droit au traitement et à la pension soit prévu par la loi et ne soit pas sujet aux ingérences arbitraires de l'exécutif, d'une manière qui pourrait affecter l'indépendance judiciaire. Dans le cas de la pension, la distinction essentielle est entre un droit à une pension et une pension qui dépend du bon vouloir ou des bonnes grâces de l'exécutif.

Les traitements des juges de cour provinciale étaient, à l'époque où le juge Sharpe a décliné compétence, et le sont toujours, fixés par règlement pris par le lieutenant-gouverneur en conseil, conformément à l'autorité que lui conférait aupa-

Courts Act and now conferred by s. 87(1) of the *Courts of Justice Act, 1984*, which came into force on January 1, 1985. The amount of the salary has been fixed by s. 2 of Regulation 811 of the Revised Regulations of Ontario, 1980, as amended from time to time. The government receives recommendations concerning the salaries of provincial court judges from the Ontario Provincial Courts Committee, which was first established by Order in Council 643/80 dated March 5, 1980 and was later given statutory recognition by s. 2(2) of the *Provincial Judges and Masters Statute Law Amendment Act, 1983*, 1983 (Ont.), c. 78, which added a new s. 35 to the *Provincial Courts Act*, establishing the Committee with three members: one appointed by provincial court and family court judges' associations; one appointed by the government; and the third, the chairman, appointed jointly by the associations and the government. Section 35 provided that the annual report and recommendations of the Committee be laid before the Legislative Assembly. The same provision is now made for the Committee and its role in relation to the remuneration, allowances and benefits of provincial court judges in s. 88 of the *Courts of Justice Act, 1984*, which came into force on January 1, 1985.

The principal objections to the manner in which the salaries of provincial court judges are provided for is that they are not fixed by the legislature and they are not made a charge on the Consolidated Revenue Fund. These two requirements have traditionally been regarded as affording the highest degree of security in respect of judicial salaries. Section 100 of the *Constitution Act, 1867* requires that the salaries of superior, district and county court judges be fixed by Parliament. The salaries of these and other federally-appointed judges are fixed by Parliament in the *Judges Act*, which provides in s. 33(1) that the salaries payable under the Act shall be paid out of the Consolidated Revenue Fund. In all of the other provinces the salaries of provincial judges are, as in Ontario, fixed by the executive government by regulation.

ravant le par. 34(1) de la *Loi sur les cours provinciales*, et que lui confère maintenant le par. 87(1) de la *Loi de 1984 sur les tribunaux judiciaires*, entrée en vigueur le 1er janvier 1985. Le montant du traitement est fixé par l'art. 2 du règlement 811 des Règlements refondus de l'Ontario de 1980 et ses modifications. Le gouvernement reçoit des recommandations concernant les traitements des juges de cour provinciale de l'Ontario Provincial Courts Committee qui a été établi initialement par le décret 643/80 en date du 5 mars 1980 et qui, par la suite a reçu reconnaissance légale par le par. 2(2) de la *Provincial Judges and Masters Statute Law Amendment Act, 1983*, 1983 (Ont.), chap. 78, qui a ajouté à la *Loi sur les cours provinciales* un nouvel art. 35 créant un comité formé de trois membres: un membre nommé par les associations des juges de cour provinciale et de cour de la famille, un membre nommé par le gouvernement et, troisièmement, le président, nommé conjointement par les associations et le gouvernement. L'article 35 prévoyait que le rapport annuel et les recommandations du comité, devaient être déposés à l'Assemblée législative. On trouve maintenant la même disposition, concernant le comité et son rôle en matière de rémunération, d'allocations et de bénéfices pour les juges de cour provinciale, à l'art. 88 de la *Loi de 1984 sur les tribunaux judiciaires*, entrée en vigueur le 1er janvier 1985.

La principale objection apportée à la façon dont les traitements des juges de cour provinciale sont fixés, est qu'ils ne sont pas fixés par le corps législatif et qu'ils ne grèvent pas le Fonds du revenu consolidé. Ces deux conditions ont traditionnellement été considérées comme offrant le plus haut degré de sécurité en matière de traitement des juges. L'article 100 de la *Loi constitutionnelle de 1867* requiert que les traitements des juges des cours supérieures, de district et de comté, soient fixés par le Parlement. Les traitements de ceux-ci et des autres juges de nomination fédérale sont fixés par le législateur fédéral dans la *Loi sur les juges* qui prévoit, au par. 33(1), que les traitements payables en vertu de cette loi seront prélevés sur le Fonds du revenu consolidé. Dans toutes les autres provinces, les traitements des juges de cour provinciale sont, comme en Ontario, fixés par règlement par le pouvoir exécutif. Dans certaines

In some, but not all provinces, they are paid out of the Consolidated Revenue Fund.

Although it may be theoretically preferable that judicial salaries should be fixed by the legislature rather than the executive government and should be made a charge on the Consolidated Revenue Fund rather than requiring annual appropriation, I do not think that either of these features should be regarded as essential to the financial security that may be reasonably perceived as sufficient for independence under s. 11(*d*) of the *Charter*. At the present time in Canada the amount of judges' salaries is a matter for the initiative of the Executive, whether they are fixed by act of the legislature or by regulation. Moreover, it is far from clear that having to bring proposed increases to judges' salaries before the legislature is more desirable from the point of view of judicial independence, and indeed adequate salaries, than having the question determined by the Executive alone, pursuant to a general legislative authority. In the case of the salaries of provincial court judges in Ontario, assurance that proper consideration will be given to the adequacy of judicial salaries is provided by the role assigned to the Ontario Provincial Courts Committee, although I do not consider the existence of such a committee to be essential to security of salary for purposes of s. 11(*d*). The essential point, in my opinion, is that the right to salary of a provincial court judge is established by law, and there is no way in which the Executive could interfere with that right in a manner to affect the independence of the individual judge. Making judicial salaries a charge on the Consolidated Revenue Fund instead of having to include them in annual appropriations is, I suppose, theoretically a measure of greater security, but practically it is impossible that the legislature would refuse to vote the annual appropriation in order to attempt to exercise some control or influence over a class of judges as a whole. For these reasons I am of the opinion that under the provisions of law which applied when Sharpe J. declined jurisdiction and which now apply, provincial court judges may be reasonably perceived to have the

provinces, mais non dans toutes, ils sont prélevés à même le Fonds du revenu consolidé.

Bien qu'il puisse être théoriquement préférable que les traitements des juges soient fixés par le corps législatif, plutôt que par le pouvoir exécutif, et qu'ils grèvent le Fonds du revenu consolidé, plutôt que d'exiger une affectation de crédit annuelle, je ne pense pas que l'une ou l'autre de ces caractéristiques doive être considérée comme essentielle à la sécurité financière qui peut être raisonnablement perçue comme suffisante pour assurer l'indépendance au sens de l'al. 11*d*) de la *Charte*. À l'heure actuelle au Canada, le montant du traitement des juges est laissé à l'initiative de l'exécutif peu importe qu'ils soient fixés par une loi ou par règlement. De plus, il est loin d'être clair que l'obligation de soumettre au corps législatif les projets de hausses de traitement des juges soit plus souhaitable du point de vue de l'indépendance judiciaire et, d'ailleurs, de celui d'un traitement adéquat, que de laisser à l'exécutif le soin de régler la question seul, conformément à une autorisation législative générale. Dans le cas des traitements des juges de cour provinciale en Ontario, le rôle assigné à l'Ontario Provincial Courts Committee donne l'assurance qu'on veillera dûment à ce que les traitements des juges soient suffisants, quoique je n'estime pas que l'existence de ce comité soit essentielle à la sécurité de traitement pour les fins de l'al. 11*d*). L'essentiel, à mon avis, est que le droit du juge de cour provinciale à un traitement soit prévu par la loi et qu'en aucune manière l'exécutif ne puisse empiéter sur ce droit de façon à affecter l'indépendance du juge pris individuellement. Faire en sorte que les traitements des juges grèvent le Fonds du revenu consolidé, plutôt que d'avoir à les inclure dans les affectations annuelles de crédit est, je suppose, une mesure de sûreté plus grande théoriquement mais, en pratique, il est impossible que le corps législatif refuse de voter l'affectation de crédit annuelle dans le but de tenter d'exercer un contrôle ou d'influer sur une catégorie de juges dans son ensemble. Pour ces motifs, je suis d'avis qu'en vertu des dispositions législatives qui s'appliquaient lorsque le juge Sharpe a décliné compétence et qui s'appliquent aujourd'hui, on peut raisonnablement considérer que les juges de cour provinciale jouissent de la

essential security of salary required for independence within the meaning of s. 11(*d*).

Although at the time Sharpe J. declined jurisdiction s. 34(1) of the *Provincial Courts Act* empowered the Lieutenant Governor in Council to make provision by regulation for the pensions of provincial court judges, no such regulation had been adopted. The right to pension enjoyed by provincial court judges was that provided for members of the public service by the *Public Service Superannuation Act*, R.S.O. 1980, c. 419, which was made applicable by s. 26 to every full time provincial judge. It was not until May 25, 1984 that Ontario Regulation 332/84 under the *Provincial Courts Act* was adopted making special provision for the pensions of provincial court judges.

The chief objection to the provision for pension which applied when Sharpe J. declined jurisdiction was, as I understood the argument, that it treated provincial court judges in the same way as civil servants. Indeed, the same objection was made to the provision for other benefits of a financial nature, such as sick leave with pay and group insurance benefits of various kinds. The provisions which governed these benefits in Ontario Regulation 881, under the *Public Service Act* were made applicable to provincial court judges by s. 7 of Ontario Regulation 811, under the *Provincial Courts Act*. It was not until May 25, 1984 that Ontario Regulation 332/84, to which reference has been made, made special provision for such benefits in the case of provincial court judges, although some of the provisions in Ontario Regulation 881, that had been made applicable to provincial court judges continued to apply to them.

In my opinion this objection to the provisions for pension and other financial benefits which were applicable to provincial court judges at the time Sharpe J. declined jurisdiction does not touch an essential condition of the independence required by s. 11(*d*). The provisions established a right to pension and other benefits which could not be

sécurité de traitement essentielle pour être indépendants au sens de l'al. 11*d*).

Bien que, à l'époque où le juge Sharpe a décliné compétence, le par. 34(1) de la *Loi sur les cours provinciales* habilitait le lieutenant-gouverneur en conseil à pourvoir par règlement aux pensions des juges de cour provinciale, aucun règlement de ce genre n'a été adopté. Le droit à une pension, dont jouissent les juges de cour provinciale, était celui prévu pour les fonctionnaires par la *Loi sur le régime de retraite des fonctionnaires*, L.R.O. 1980, chap. 419, rendue applicable, en vertu de son art. 26, à tout juge de cour provinciale à plein temps. Ce n'est que le 25 mai 1984 que le Règlement de l'Ontario 332/84, adopté en vertu de la *Loi sur les cours provinciales*, a prévu par une disposition spéciale des pensions pour les juges de cour provinciale.

La principale objection apportée à la disposition sur la pension qui s'appliquait lorsque le juge Sharpe a décliné compétence était, si j'ai bien compris l'argument, qu'elle traitait les juges de cour provinciale comme des fonctionnaires. D'ailleurs, la même objection a été apportée à la disposition régissant d'autres avantages de nature financière, comme les congés de maladie payés et les indemnités d'assurance-groupe de divers genres. Les dispositions qui régissent ces avantages dans le Règlement de l'Ontario 881, pris en application de la *Loi sur la fonction publique*, ont été rendues applicables aux juges de cour provinciale par l'art. 7 du Règlement de l'Ontario 811, pris en application de la *Loi sur les cours provinciales*. Ce n'est que le 25 mai 1984 que le Règlement de l'Ontario 332/84, déjà mentionné, a prévu spécialement ces avantages dans le cas des juges de cour provinciale, bien que certaines des dispositions du Règlement de l'Ontario 881, qui avaient été étendues aux juges de cour provinciale, aient continué de leur être applicables.

À mon avis, cette objection apportée aux dispositions relatives à la pension et aux autres avantages financiers, qui étaient applicables aux juges de cour provinciale à l'époque où le juge Sharpe a décliné compétence, ne touche pas une condition essentielle de l'indépendance requise par l'al. 11*d*). Ces dispositions créent un droit à une pension et à

interfered with by the Executive on a discretionary or arbitrary basis. That, as I have indicated, is the essential requirement for purposes of s. 11(*d*). Making the provisions governing civil servants applicable to the provincial court judges did not purport to characterize provincial judges as civil servants or increase the discretionary control of the Executive over the judges. It may well be preferable that the pensions and other financial benefits of judges should be given special and separate treatment in the law, as they now are, because of the special position and requirements of judges in this respect, but the application of the civil standards to provincial court judges at the time Sharpe J. declined jurisdiction did not, for the reasons I have indicated, affect their essential security in respect of pensions and benefits.

VI

The third essential condition of judicial independence for purposes of s. 11(*d*) is in my opinion the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function. The degree to which the judiciary should ideally have control over the administration of the courts is a major issue with respect to judicial independence today. Howland C.J.O. drew a distinction, for purposes of the issues in the appeal, between adjudicative independence and administrative independence, which is reflected in the following passages from his reasons for judgment at pp. 432-33:

When considering the independence of the judiciary, it is necessary to draw a careful distinction between independent adjudication and independent administration. It is independent adjudication about which the Court is concerned in this appeal. The position of the judiciary under the English and Canadian Constitutions is quite different from that under the American Constitution. In the United States the federal judiciary is a separate branch which includes judicial administration. While the report of Chief Justice Jules Deschênes, "Masters in their Own House", September, 1981, recommended the independent judicial administration of the courts, the Canadian Judicial Council, in Septem-

d'autres avantages qui ne peut pas faire l'objet d'une atteinte discrétionnaire ou arbitraire de l'exécutif. C'est là, comme je l'ai dit, l'exigence essentielle pour les fins de l'al. 11*d*). Rendre applicables aux juges de cour provinciale les dispositions régissant les fonctionnaires n'avait pas pour but de qualifier de fonctionnaires les juges de cour provinciale, ni d'accroître le contrôle discrétionnaire de l'exécutif sur les juges. Il est sans doute préférable que les pensions et autres avantages financiers des juges reçoivent un traitement spécial et distinct dans la loi, comme c'est maintenant le cas, vu la situation et les exigences spéciales des juges à cet égard, mais l'application de normes de la Fonction publique aux juges de cour provinciale à l'époque où le juge Sharpe a décliné compétence n'a pas, pour les raisons que j'ai données, affecté leur sécurité essentielle en matière de pensions et d'avantages.

VI

La troisième condition essentielle de l'indépendance judiciaire pour les fins de l'al. 11*d*) est, à mon avis, l'indépendance institutionnelle du tribunal relativement aux questions administratives qui ont directement un effet sur l'exercice de ses fonctions judiciaires. Le degré de contrôle que le pouvoir judiciaire devrait idéalement exercer sur l'administration des tribunaux est un point majeur de l'indépendance judiciaire aujourd'hui. Le juge en chef Howland a fait la distinction, pour les fins des questions visées par l'appel, entre l'indépendance en matière de décisions et l'indépendance en matière d'administration, qu'on trouve dans les passages suivants de ses motifs de jugement aux pp. 432 et 433:

[TRADUCTION] Lorsqu'on étudie l'indépendance du pouvoir judiciaire, il est nécessaire de distinguer soigneusement entre l'indépendance en matière de décisions et l'indépendance en matière d'administration. C'est l'indépendance en matière de décisions qui intéresse la cour dans le présent appel. La situation du pouvoir judiciaire sous le régime des constitutions anglaise et canadienne est fort différente de celle sous le régime de la constitution américaine. Aux États-Unis, la magistrature fédérale est un pouvoir distinct qui comprend l'administration judiciaire. Si le rapport du juge en chef Jules Deschênes, «Maîtres chez eux», en date de septembre 1981, a recommandé que l'administration

ber, 1982, only approved of the first two stages of consultation and decision sharing between the Executive and the Judiciary and was not prepared to approve at that time of the third stage of independent judicial administration.

In Ontario, the primary role of the judiciary is adjudication. The Executive on the other hand is responsible for providing the court rooms and the court staff. The assignment of judges, the sittings of the court, and the court lists are all matters for the judiciary. The Executive must not interfere with, or attempt to influence the adjudicative function of the judiciary. However, there must necessarily be reasonable management constraints. At times there may be a fine line between interference with adjudication and proper management controls. The heads of the judiciary have to work closely with the representatives of the Executive unless the judiciary is given full responsibility for judicial administration.

In his conclusions Howland C.J.O. observed at p. 443:

> On the hearing of this appeal, no submission was made that the Attorney General in his role as prosecutor interfered in any way with the sittings of the court, its lists, or the process of adjudication.

Judicial control over the matters referred to by Howland C.J.O.—assignment of judges, sittings of the court, and court lists—as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions, has generally been considered the essential or minimum requirement for institutional or "collective" independence. See Lederman, "The Independence of the Judiciary" in *The Canadian Judiciary* (1976, ed. A. M. Linden), pp. 9-10; Deschênes, *Masters in their own house*, pp. 81 and 124.

As the reasons of Howland C.J.O. indicate, however, the claim for greater administrative autonomy or independence for the courts goes considerably beyond these matters. The insistence is chiefly on a stronger or more independent role in the financial aspects of court administration—budgetary preparation and presentation and allo-

judiciaire des tribunaux soit indépendante, le Conseil canadien de la magistrature, en septembre 1982, n'a approuvé que les deux premiers stades, ceux de la consultation et du partage des décisions entre le pouvoir exécutif et le pouvoir judiciaire, n'étant pas prêt à approuver à cette époque le troisième stade, celui d'une administration judiciaire indépendante.

En Ontario, le rôle premier du pouvoir judiciaire est de rendre des décisions. L'exécutif, d'autre part, a la responsabilité de fournir les salles d'audience et le personnel judiciaire. L'assignation des juges à une cause, les séances de la cour et son rôle relèvent tous du pouvoir judiciaire. L'exécutif ne doit pas s'immiscer dans la fonction décisionnelle du pouvoir judiciaire ni tenter de l'influencer. Toutefois, il doit nécessairement y avoir des contraintes raisonnables de gestion. Parfois la démarcation entre l'immixtion dans la fonction décisionnelle et les contrôles adéquats de gestion est ténue. Les responsables du pouvoir judiciaire doivent collaborer étroitement avec les représentants de l'exécutif à moins que le pouvoir judiciaire ne se voie conférer l'entière responsabilité de l'administration judiciaire.

Dans ses conclusions, le juge en chef Howland souligne à la p. 443:

> [TRADUCTION] À l'audition de l'appel, on n'a pas prétendu que le procureur général, dans son rôle de poursuivant, s'est immiscé de quelque manière dans les séances de la cour, dans la confection du rôle ou dans le processus décisionnel.

Le contrôle judiciaire sur les questions mentionnées par le juge en chef Howland, savoir l'assignation des juges aux causes, les séances de la cour, le rôle de la cour, ainsi que les domaines connexes de l'allocation de salles d'audience et de la direction du personnel administratif qui exerce ces fonctions, a généralement été considéré comme essentiel ou comme une exigence minimale de l'indépendance institutionnelle ou «collective». Voir Lederman, «The Independence of the Judiciary», dans *The Canadian Judiciary* (1976, ed. A. M. Linden), aux pp. 9 et 10; Deschênes, *Maîtres chez eux*, aux pp. 83, 84 et 130.

Cependant, comme l'indiquent les motifs du juge en chef Howland, la demande d'une plus grande autonomie ou indépendance administrative pour les tribunaux va beaucoup plus loin que cela. On insiste surtout sur un rôle plus important et plus autonome dans les aspects financiers de l'administration d'un tribunal, dont la préparation du

cation of expenditure—and in the personnel aspects of administration—the recruitment, classification, promotion, remuneration, and supervision of the necessary support staff. Probably the fullest exposition of the recommended enlargement of administrative autonomy or independence for the courts is to be found in the Deschênes report, with its three stage proposal for realization referred to by Howland C.J.O. consisting of consultation, decision sharing and independence. Strong support for the Deschênes recommendations in this area was recently expressed in the report of the Canadian Bar Association's Committee on judicial independence, which, while noting the reservations referred to by Howland C.J.O. concerning the third stage of full administrative autonomy or independence, recommended that the first two stages of consultation and decision sharing be implemented as soon as possible. The desirability of greater administrative independence, particularly with respect to financial and personnel matters, has also been the subject of important public addresses by leaders of the judiciary. In an address entitled "Some Observations on Judicial Independence" in 1980 the late Chief Justice Laskin had this to say on the subject:

> Coming now to other elements which I regard as desirable supports for judicial independence, I count among them independence in budgeting and in expenditure of an approved budget, and independence in administration, covering not only the operation of the Courts but also the appointment and supervision of the supporting staff. Budget independence does not mean that Judges should be allowed to fix their own salaries; it means simply that the budget should not be part of any departmental budget but should be separately presented and dealt with. I do not, of course, preclude its presentation by a responsible Minister, but he should do this as a conduit, and yet as one able to support the budget after its preparation under the direction of the Chief Justice or Chief Judge and the chief administrative officer of the Court. So, too, should the Court, through its Chief Justice or Chief Judge and chief administrative officer, have supervision and direction of the staff of the Court

budget et la présentation et la répartition des dépenses, et dans les aspects de l'administration qui concernent le personnel, comme le recrutement, la classification, la promotion, la rémunération et la supervision du personnel de soutien nécessaire. Probablement l'exposé le plus complet de l'élargissement recommandé de l'autonomie ou de l'indépendance administrative des tribunaux se trouve dans le rapport Deschênes, et sa proposition en trois stades de réalisation, que mentionne le juge en chef Howland, comprenant la consultation, la participation et l'indépendance. Les recommandations Deschênes dans ce domaine ont récemment reçu l'appui, non négligeable, du rapport du Comité de l'Association du Barreau canadien sur l'indépendance de la magistrature qui, tout en prenant note des réserves que mentionne le juge en chef Howland concernant le troisième stade, celui de l'indépendance ou de l'autonomie administrative totale, a recommandé que les deux premiers stades de la consultation et de la participation soient mis en œuvre dès que possible. Le caractère souhaitable d'une plus grande indépendance administrative, particulièrement dans les domaines des finances et du personnel, a aussi fait l'objet d'allocutions publiques importantes de la part des leaders du pouvoir judiciaire. Dans un discours intitulé [TRADUCTION] «Quelques observations sur l'indépendance judiciaire», en 1980, feu le juge en chef Laskin avait eu ceci à dire à ce sujet:

> [TRADUCTION] Pour en venir maintenant aux autres éléments que je considère comme souhaitables pour consolider l'indépendance judiciaire, j'y inclus l'indépendance dans la confection et dans les dépenses d'un budget approuvé, et l'indépendance dans l'administration, s'étendant non seulement au fonctionnement des tribunaux, mais aussi à la nomination et à la supervision du personnel de soutien. L'indépendance budgétaire ne signifie pas que les juges devraient être autorisés à fixer leur propre traitement; cela signifie simplement que le budget ne devrait faire partie d'aucun budget ministériel, mais qu'il devrait être présenté et traité séparément. Je ne m'oppose pas, bien entendu, à sa présentation par un ministre responsable, mais il devrait le faire comme intermédiaire, tout en étant en position de l'appuyer, après qu'il a été préparé sous la direction du juge en chef, ou du premier juge, et de l'administrateur en chef du tribunal. De même aussi, la cour, par son juge en chef, ou premier juge, et par l'administrateur en chef, devrait être chargée de la supervision et de la direction

and of the various supporting services such as the library and the Court's law reports.

The present Chief Justice of Canada, in his recent address to the annual meeting of the Canadian Bar Association, referred with approval to this statement of Laskin C.J. and said that "Preparation of judicial budgets and distribution of allocated resources should be under the control of the Chief Justices of the various courts, not the Ministers of Justice" and "Control over finance and administration must be accompanied by control over the adequacy and direction of support staff".

It is not entirely clear as to the extent to which the issue of institutional independence is actually raised by the various objections to the status of provincial court judges at the time Sharpe J. declined jurisdiction. As I understood the argument, the chief objection which could be said to relate to institutional independence was the extent to which the judges were treated as civil servants for purposes of pension and other financial benefits, such as group insurance and sick leave, and the control exercised by the Executive over such discretionary benefits or advantages as post-retirement reappointment, leave of absence with or without pay and the right to engage in extra-judicial employment. The contention was that the treatment of these matters and the executive control over them were calculated to make the Court appear as a branch of the Executive and the judges as civil servants. This impression, it was said, was reinforced by the manner in which the Court and its judges were associated with the Ministry of the Attorney General in printed material intended for public information. Dependence on the Executive for discretionary benefits or advantages was also said to affect the reality and the perception of the individual independence of the judges, an issue which must be considered separately from the question of institutional independence.

Although the increased measure of administrative autonomy or independence that is being recommended for the courts, or some degree of it,

de son personnel et des divers services de soutien, tels la bibliothèque et les recueils de jurisprudence de la cour.

L'actuel Juge en chef du Canada, dans un récent discours à l'assemblée annuelle de l'Association du Barreau canadien, s'est référé à ce qu'avait dit le juge en chef Laskin, l'approuvant et disant que [TRADUCTION] «La préparation des budgets judiciaires et la répartition des ressources allouées devraient être sous le contrôle des juges en chef des divers tribunaux, et non des ministres de la justice» et [TRADUCTION] «Le contrôle sur les finances et l'administration doit être assorti du contrôle sur la compétence et la direction du personnel de soutien.»

On ne voit pas tout à fait clairement dans quelle mesure la question de l'indépendance constitutionnelle est vraiment posée par les diverses objections apportées au statut des juges de cour provinciale de l'époque où le juge Sharpe a décliné compétence. Si je comprends bien l'argument, l'objection principale qui serait apportée en matière d'indépendance institutionnelle aurait trait à la mesure dans laquelle les juges étaient considérés comme des fonctionnaires aux fins des pensions et d'autres avantages financiers, tels l'assurance-groupe, les congés de maladie et le contrôle qu'exerce l'exécutif sur des bénéfices ou avantages discrétionnaires comme les nouvelles nominations après l'âge de la retraite, les congés payés ou non payés et le droit de s'adonner à des activités extrajudiciaires. On a soutenu que la façon de traiter ces questions et le contrôle de l'exécutif sur celles-ci étaient conçus de manière à faire percevoir la cour comme un organe de l'exécutif et les juges, comme des fonctionnaires. Cette impression, a-t-on dit, était renforcée par la manière dont la cour et ses juges étaient associés au ministère du Procureur général dans les brochures destinées à informer le public. La dépendance envers l'exécutif dans le cas des bénéfices ou avantages discrétionnaires, a-t-on ajouté, influait sur l'indépendance véritable des juges, pris individuellement, et sur l'idée qu'on s'en faisait, un point qui doit être examiné indépendamment de la question de l'indépendance institutionnelle.

Si la plus grande autonomie ou indépendance administrative qu'il est recommandé d'accorder aux tribunaux, ou une partie de celle-ci, peut se

may well be highly desirable, it cannot in my opinion be regarded as essential for purposes of s. 11(*d*) of the *Charter*. The essentials of institutional independence which may be reasonably perceived as sufficient for purposes of s. 11(*d*) must, I think, be those referred to by Howland C.J.O. They may be summed up as judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function. To the extent that the distinction between administrative independence and adjudicative independence is intended to reflect that limitation, I can see no objection to it. It may be open to objection, however, in so far as the desirable or recommended degree of administrative autonomy or independence of the courts is concerned. In my opinion, the fact that certain financial benefits applicable to civil servants were also made applicable to provincial court judges, that the Provincial Court (Criminal Division) and its judges were shown in printed material as associated with the Ministry of the Attorney General and that the Executive exercised administrative control over certain discretionary benefits or advantages affecting the judges did not prevent the Provincial Court (Criminal Division) at the time Sharpe J. declined jurisdiction from being reasonably perceived as possessing the essential institutional independence required for purposes of s. 11(*d*).

VII

It is necessary now to consider the effect on the individual independence of provincial court judges of the control exercised by the Executive over certain discretionary benefits or advantages. I have referred to the provisions of the *Provincial Courts Act* and the *Courts of Justice Act, 1984* concerning post-retirement reappointment or continuation in office, which may be necessary to permit a judge to complete entitlement to pension. Objection was also taken to the provisions for leave of absence with or without pay and for permission to engage in extra-judicial employment. The provisions for leave of absence that were applicable to provincial court judges at the time Sharpe J. declined jurisdiction were found in ss. 4 and 5 of Regulation 811 of the Revised Regulations of

révéler hautement souhaitable, elle ne saurait, à mon avis, être considérée comme essentielle pour les fins de l'al. 11*d*) de la *Charte*. Les aspects essentiels de l'indépendance institutionnelle qui peuvent raisonnablement être perçus comme suffisants pour les fins de l'al. 11*d*) doivent, je pense, se limiter à ceux mentionnés par le juge en chef Howland. On peut les résumer comme étant le contrôle par le tribunal des décisions administratives qui portent directement et immédiatement sur l'exercice des fonctions judiciaires. Dans la mesure où la distinction entre l'indépendance dans l'administration et l'indépendance dans les décisions se veut le reflet de cette limitation, je n'y vois aucune objection. On peut s'y opposer toutefois dans la mesure où le degré souhaitable ou recommandé d'indépendance ou d'autonomie administrative des tribunaux est concerné. À mon avis, le fait que certains avantages financiers applicables aux fonctionnaires soient aussi applicables aux juges de cour provinciale, que la Cour provinciale (Division criminelle) et ses juges soient, dans des brochures, associés au ministère du Procureur général, et que l'exécutif exerce un contrôle administratif sur certains bénéfices ou avantages discrétionnaires touchant les juges, n'empêchait pas la Cour provinciale (Division criminelle), à l'époque où le juge Sharpe a décliné compétence, d'être raisonnablement perçue comme possédant l'indépendance institutionnelle essentielle pour les fins de l'al. 11*d*).

VII

Il est maintenant nécessaire d'examiner l'effet qu'a, sur l'indépendance individuelle des juges de cour provinciale, le contrôle exercé par l'exécutif sur certains bénéfices ou avantages discrétionnaires. J'ai mentionné les dispositions de la *Loi sur les cours provinciales* et de la *Loi de 1984 sur les tribunaux judiciaires*, concernant les nouvelles nominations ou le maintien des juges dans leur charge après l'âge de la retraite, qui peuvent se révéler nécessaires pour permettre à un juge d'être admissible à une pension. On s'est aussi opposé aux dispositions concernant les congés payés ou non payés et l'autorisation de s'adonner à des activités extrajudiciaires. Les dispositions portant sur les congés qui s'appliquaient aux juges de cour provinciale, à l'époque où le juge Sharpe a décliné

Ontario, 1980, made under the *Provincial Courts Act*, and in ss. 75 and 76 of Regulation 881 of the Revised Regulations of Ontario, 1980, made under the *Public Service Act*. Sections 4 and 5 of Regulation 811 provide that the Attorney General, upon the recommendation of the chief judge of the provincial courts, may grant to a judge leave of absence without pay and without the accumulation of sick leave credits for a period up to three years, and that the Lieutenant Governor in Council, upon the recommendation of the Attorney General, may grant special leave of absence with pay to a judge for special or compassionate purposes for a period not exceeding one year. Sections 75(1) and 76(1) of Regulation 881, which were made applicable to provincial court judges by s. 7 of Regulation 811, provided that a deputy minister could grant to an employee in his ministry leave of absence with pay for a period of not more than one year for the purpose of undertaking employment under the auspices of the Government of Canada or other public agency and leave of absence without pay and without accumulation of credits for a period of not more than one year for the purpose of undertaking employment under the auspices of the Government of Canada or other public agency, or by a public or private corporation. A leave of absence granted under s. 75 or s. 76 of Regulation 881 could be renewed from year to year. By s. 32(3) of Ontario Regulation 332/84, made on May 25, 1984, the Chief Judge of the Provincial Court (Criminal Division) was given the authority, in place of the deputy minister, to grant leave of absence to provincial court judges under ss. 75 and 76 of Regulation 881. The provision concerning permission to engage in extra-judicial employment at the time Sharpe J. declined jurisdiction was s. 12 of the *Provincial Courts Act*, which read as follows:

12.—(1) Subject to subsection (2), unless authorized by the Lieutenant Governor in Council, a judge shall not practise or actively engage in any business, trade or occupation but shall devote his whole time to the performance of his duties as a judge.

compétence, se retrouvent aux art. 4 et 5 du règlement 811 des Règlements refondus de l'Ontario de 1980, pris en application de la *Loi sur les cours provinciales*, et aux art. 75 et 76 du règlement 881 des Règlements refondus de l'Ontario de 1980, pris en application de la *Loi sur la fonction publique*. Les articles 4 et 5 du règlement 811 prévoient que le procureur général, sur la recommandation du juge en chef des cours provinciales, peut accorder à un juge un congé, non payé et sans crédit de congés de maladie, pour une période pouvant aller jusqu'à trois ans, et que le lieutenant-gouverneur en conseil, sur la recommandation du procureur général, peut accorder un congé payé spécial à un juge, pour des raisons humanitaires ou spéciales, pour une durée maximale d'un an. Les paragraphes 75(1) et 76(1) du règlement 881, rendus applicables aux juges de cour provinciale par l'art. 7 du règlement 811, prévoient qu'un sous-ministre peut accorder à un employé de son ministère un congé payé d'une durée maximale d'un an, pour lui permettre de travailler sous les auspices du gouvernement du Canada ou d'un autre organisme public, et un congé, non payé et sans crédit de congés de maladie, d'une durée maximale d'un an, pour lui permettre de travailler sous les auspices du gouvernement du Canada ou d'un autre organisme public ou d'une société publique ou privée. Un congé accordé en vertu des art. 75 ou 76 du règlement 881 peut être renouvelé d'année en année. Selon le par. 32(3) du Règlement de l'Ontario 332/84, pris le 25 mai 1984, le juge en chef de la Cour provinciale (Division criminelle) a reçu le pouvoir, en lieu et place du sous-ministre, d'accorder un congé aux juges de cour provinciale en vertu des art. 75 et 76 du règlement 881. La disposition concernant l'autorisation de s'adonner à une activité extrajudiciaire, à l'époque où le juge Sharpe a décliné compétence, était l'art. 12 de la *Loi sur les cours provinciales*, dont voici le texte:

[TRADUCTION] **12.**—(1) Sous réserve du paragraphe (2), à moins d'une autorisation du lieutenant-gouverneur en conseil, un juge ne doit s'adonner à aucun commerce, métier ou occupation, ni y participer activement, mais doit consacrer tout son temps à l'exercice de ses fonctions de juge.

(2) A judge, with the previous consent of the Minister, may act as arbitrator, conciliator or member of a police commission.

The provision with respect to extra-judicial employment of provincial judges in the *Courts of Justice Act, 1984* is s. 53, which came into force on January 1, 1985 and reads as follows:

53.—(1) A provincial judge shall devote his or her whole time to the performance of his or her duties as a judge, except as authorized by the Lieutenant Governor in Council.

(2) Notwithstanding subsection (1), a provincial judge who, before the coming into force of this Part, had the consent of the Attorney General to act as an arbitrator or conciliator may continue to so act.

There are similar provisions respecting extra-judicial employment in the provincial courts legislation of the other provinces. In some cases it is specified that a judge shall not receive any additional remuneration for such employment.

While it may well be desirable that such discretionary benefits of advantages, to the extent that they should exist at all, should be under the control of the judiciary rather than the Executive, as recommended by the Deschênes report and others, I do not think that their control by the Executive touches what must be considered to be one of the essential conditions of judicial independence for purposes of s. 11(*d*) of the *Charter*. In so far as the subjective aspect is concerned, I agree with the Court of Appeal that it would not be reasonable to apprehend that a provincial court judge would be influenced by the possible desire for one of these benefits or advantages to be less than independent in his or her adjudication.

For the foregoing reasons I am of the opinion that at the time he declined jurisdiction on December 16, 1982 Sharpe J. sitting as the Provincial Court (Criminal Division) was an independent tribunal within the meaning of s. 11(*d*) of the *Charter*. The same is true in my opinion of all the judges of the Court since the amendment in 1983 to s. 5(4) of the *Provincial Courts Act* removed the objection to the nature of the tenure under a post-retirement appointment or continuation in office. Accordingly I would dismiss the appeal and

(2) Un juge peut, après avoir reçu l'autorisation du Ministre, agir comme arbitre, conciliateur ou membre d'une commission de police.

La disposition concernant les emplois extrajudiciaires des juges provinciaux dans la *Loi de 1984 sur les tribunaux judiciaires* est l'art. 53, entré en vigueur le 1er janvier 1985, dont voici le texte:

53.—(1) Le juge d'une cour provinciale se consacre à ses fonctions à l'exclusion de toutes autres, sauf avec l'autorisation du lieutenant-gouverneur en conseil.

(2) Par dérogation au par. (1), le juge qui, avant l'entrée en vigueur de la présente partie, avait l'autorisation du procureur général pour agir à titre d'arbitre ou de conciliateur peut continuer d'occuper ces fonctions.

Il y a des dispositions semblables concernant les activités extrajudiciaires dans la législation des autres provinces sur les cours provinciales. Dans certains cas, il est spécifié qu'un juge ne touchera aucune rémunération additionnelle pour une telle activité.

S'il peut être souhaitable que ces bénéfices ou avantages discrétionnaires, dans la mesure où il devrait y en avoir, soient contrôlés par le pouvoir judiciaire plutôt que par l'exécutif, comme le rapport Deschênes et d'autres l'on recommandé, je ne pense pas que leur contrôle par l'exécutif touche à ce qui doit être considéré comme l'une des conditions essentielles de l'indépendance judiciaire pour les fins de l'al. 11*d*) de la *Charte*. Pour ce qui est de l'aspect subjectif, je conviens avec la Cour d'appel qu'il ne serait pas raisonnable de craindre qu'un juge de cour provinciale, influencé par l'éventuelle volonté d'obtenir l'un de ces bénéfices ou avantages, soit loin d'être indépendant au moment de rendre jugement.

Pour les motifs qui précèdent, je suis d'avis qu'à l'époque où il a décliné compétence, soit le 16 décembre 1982, le juge Sharpe siégeant en Cour provinciale (Division criminelle) constituait un tribunal indépendant au sens de l'al. 11*d*) de la *Charte*. On peut dire la même chose, selon moi, de tous les juges de la cour puisque la modification apportée en 1983 au par. 5(4) de la *Loi sur les cours provinciales* a fait disparaître l'objection à la nature de la charge par suite d'une nomination après l'âge de la retraite ou du maintien en poste.

answer the constitutional question as follows: A judge of the Provincial Court (Criminal Division) of Ontario is an independent tribunal within the meaning of s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*.

Appeal dismissed.

Solicitor for the appellant: Noel Bates, Burlington.

Solicitor for the respondent: Attorney General for Ontario, Toronto.

Solicitor for the intervener the Attorney General of Canada: R. Tassé, Ottawa.

Solicitors for the intervener the Attorney General of Quebec: Réal A. Forest and Angeline Thibault, Ste-Foy.

Solicitor for the intervener the Attorney General for Saskatchewan: Richard Gosse, Regina.

Solicitor for the interveners The Provincial Court Judges Association (Criminal Division) and Ontario Family Court Judges Association: Morris Manning, Toronto.

En conséquence, je suis d'avis de rejeter le pourvoi et de répondre ainsi à la question constitutionnelle: Un juge de la Cour provinciale (Division criminelle) de l'Ontario constitue un tribunal indépendant au sens de l'al. 11*d*) de la *Charte canadienne des droits et libertés*.

Pourvoi rejeté.

Procureur de l'appelant: Noel Bates, Burlington.

Procureur de l'intimée: Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général du Canada: R. Tassé, Ottawa.

Procureurs de l'intervenant le procureur général du Québec: Réal A. Forest et Angeline Thibault, Ste-Foy.

Procureur de l'intervenant le procureur général de la Saskatchewan: Richard Gosse, Regina.

Procureur des intervenants l'Association des juges des Cours provinciales (Division criminelle) et Ontario Family Court Judges Association: Morris Manning, Toronto.

Lance William Wust *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General for Ontario *Intervener*

INDEXED AS: R. *v.* WUST

Neutral citation: 2000 SCC 18.

File No.: 26732.

1999: November 9; 2000: April 13.

Present: Gonthier, McLachlin, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law — Sentencing — Mandatory minimum sentences — Robbery — Criminal Code providing for mandatory minimum sentence of four years where firearm used in commission of robbery — Whether sentencing judge may reduce minimum sentence to take into account pre-sentencing custody — Criminal Code, R.S.C., 1985, c. C-46, ss. 344(a), 719(3).

The accused pleaded guilty to charges of robbery with a firearm and possession of a restricted weapon. At the time of his sentencing, he had been in custody since his arrest approximately seven and a half months earlier. He was sentenced to four and a half years' imprisonment, with a concurrent one-year term for possession of a restricted weapon, and was credited one year for his pre-sentencing custody. The resulting sentence was three and a half years. The Crown appealed the sentence, seeking to have it increased to seven or eight years and to have the credit for pre-sentencing custody set aside. The Court of Appeal varied the sentence, reducing it to four years and refusing credit for time served prior to sentencing.

Lance William Wust *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Le procureur général de l'Ontario *Intervenant*

RÉPERTORIÉ: R. *c.* WUST

Référence neutre: 2000 CSC 18.

N° du greffe: 26732.

1999: 9 novembre; 2000: 13 avril.

Présents: Les juges Gonthier, McLachlin, Iacobucci, Major, Bastarache, Binnie et Arbour.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit criminel — Détermination de la peine — Peines minimales obligatoires — Vol qualifié — Peine minimale obligatoire de quatre ans d'emprisonnement prévue par le Code criminel en cas d'usage d'une arme à feu lors d'un vol qualifié — Le tribunal qui détermine la peine peut-il réduire la peine minimale pour tenir compte de la période passée sous garde avant le prononcé de la sentence? — Code criminel, L.R.C. (1985), ch. C-46, art. 344a), 719(3).

L'accusé a plaidé coupable à des accusations de vol qualifié et de possession d'une arme à autorisation restreinte. Au moment de la détermination de sa peine, il était détenu depuis son arrestation, environ sept mois et demi auparavant. Il a été condamné à une peine de quatre ans et demi d'emprisonnement, à purger concurremment avec un emprisonnement d'un an pour le chef de possession d'une arme à autorisation restreinte, et sa peine à été réduite d'un an pour tenir compte de la période qu'il avait passée sous garde avant qu'elle ne soit prononcée. Il en a résulté une peine de trois ans et demi. Le ministère public a interjeté appel contre cette peine, demandant qu'elle soit haussée à sept ou huit ans et que la réduction accordée pour tenir compte de la période de détention présentencielle soit annulée. La Cour d'appel a modifié la peine, la réduisant à quatre ans et refusant d'accorder une réduction pour la période de détention présentencielle.

Held: The appeal should be allowed.

Mandatory minimum sentences must be interpreted in a manner consistent with the full context of the sentencing scheme, including statutory remission. A rigid interpretation of the interaction between ss. 344(*a*) and 719(3) of the *Criminal Code* suggests that time served before sentence cannot be credited to reduce a minimum sentence because it would offend the requirement that nothing short of the minimum be served. Such an interpretation, however, does not accord with the general management of minimum sentences which are, in every other respect, "reduced" like all others, even to below the minimum. Pre-sentencing custody is time actually served in detention, and often in harsher circumstances than the punishment will ultimately call for. Credit for such custody is arguably less offensive to the concept of a minimum period of incarceration than the granting of statutory remission or parole. Section 719(3) ensures that the well-established practice of sentencing judges to give credit for time served when computing a sentence remains available, even if it appears to reduce a sentence below the minimum provided by law.

Parliament did not exempt the s. 344(*a*) minimum sentence from the application of s. 719(3). Indeed, unjust sentences would result if the s. 719(3) discretion were not applicable to the mandatory s. 344(*a*) sentence. Discrepancies in sentencing between least and worst offenders would increase, because the worst offender, whose sentence exceeded the minimum would benefit from pre-sentencing credit, while the first-time offender, whose sentence would be set at the minimum, would not receive credit for his or her pre-sentencing detention. These sections are to be interpreted harmoniously and consistently within the overall context of the criminal justice system's sentencing regime.

The well-entrenched judicial discretion provided in s. 719(3) should not be compromised by a mechanical formula for crediting pre-sentencing custody. The goal of sentencing is to impose a just and fit sentence,

Arrêt: Le pourvoi est accueilli.

Les peines minimales obligatoires doivent être interprétées d'une manière conforme au contexte global du régime de détermination de la peine, y compris la réduction légale. Si l'on donne une interprétation stricte de l'interaction de l'al. 344*a*) et du par. 719(3) du *Code criminel*, la période passée sous garde par le délinquant avant le prononcé de sa peine ne pourrait être comptée à son actif parce que cela irait à l'encontre de l'exigence selon laquelle la période d'emprisonnement purgée par ce dernier ne doit pas être inférieure à la peine minimale prévue. Toutefois, cette interprétation est incompatible avec le régime général d'exécution des peines minimales, peines qui, à tous autres égards, sont «réduites» comme toutes les autres peines, même en deçà de la durée minimale prescrite. La période passée sous garde avant le prononcé de la peine est véritablement passée en détention, souvent dans des circonstances plus pénibles que celles dans lesquelles sera purgée la peine infligée en bout de ligne. Le fait d'accorder une réduction pour cette période porte moins atteinte au concept de période minimale d'incarcération que la réduction légale de peine ou la libération conditionnelle. Le paragraphe 719(3) fait en sorte que la pratique bien établie qu'appliquent les juges déterminant les peines et qui consiste à prendre en compte la période passée sous garde par le délinquant dans le calcul de la durée de sa peine puisse être utilisée, même si elle semble avoir pour effet de réduire la peine en deçà du minimum fixé par la loi.

Le législateur n'a pas soustrait à l'application du par. 719(3) la peine minimale prévue à l'al. 344*a*). D'ailleurs, si le pouvoir discrétionnaire conféré par le par. 719(3) ne s'appliquait pas à la peine obligatoire prescrite par l'al. 344*a*), il en résulterait des peines injustes. L'écart entre les peines infligées aux délinquants les moins dangereux et les plus dangereux s'accentuerait, parce que ces derniers, du fait qu'ils reçoivent des peines supérieures au minimum prévu, profiteraient d'une réduction de peine fondée sur la période de détention présentencielle, alors que les délinquants qui n'en sont qu'à leur première infraction et qui se voient infliger la peine minimale ne bénéficieraient pas de cette réduction. Ces articles doivent être interprétés de façon harmonieuse et cohérente dans le contexte général du régime de détermination de la peine du système de justice criminelle.

Il ne faut pas porter atteinte au pouvoir discrétionnaire bien établi dont disposent les tribunaux en vertu du par. 719(3) en avalisant une formule mécanique de réduction de la peine pour tenir compte de la période de

responsive to the facts of the individual offender and the particular circumstances of the commission of the offence. In the past, many judges have given more or less two months' credit for each month spent in pre-sentencing detention. This ratio reflects not only the harshness of the detention owing to the absence of programs, but also the fact that none of the remission mechanisms apply to that period of detention. The credit cannot and need not be determined by a rigid formula and is thus best left to the sentencing judge.

détention présentencielle. L'objectif de la détermination de la peine est l'infliction d'une peine juste et appropriée, qui prend en compte la situation du délinquant et les circonstances particulières de la perpétration de l'infraction. Dans le passé, nombre de juges ont retranché environ deux mois à la peine du délinquant pour chaque mois passé en détention présentencielle. Ce rapport reflète non seulement la rigueur de la détention en raison de l'absence de programmes, mais également le fait qu'aucun mécanisme de réduction de la peine ne s'applique à cette période de détention. Comme la période à retrancher ne peut ni ne doit être établie au moyen d'une formule rigide, il est préférable de laisser au juge qui détermine la peine le soin de calculer cette période.

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Referred to: *R. v. Alain* (1997), 119 C.C.C. (3d) 177; *R. v. Lapierre* (1998), 123 C.C.C. (3d) 332; *R. v. Sanko*, [1998] O.J. No. 1026 (QL); *R. v. Morrisey* (1998), 124 C.C.C. (3d) 38; *R. v. McDonald* (1998), 127 C.C.C. (3d) 57; *R. v. Brown* (1976), 36 C.R.N.S. 246; *R. v. Mills* (1999), 133 C.C.C. (3d) 451; *R. v. Arthurs*, [2000] 1 S.C.R. 481, 2000 SCC 19; *R. v. Arrance*, [2000] 1 S.C.R. 488, 2000 SCC 20; *R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Goltz*, [1991] 3 S.C.R. 485; *R. v. Bill* (1998), 13 C.R. (5th) 125; *R. v. Leimanis*, [1992] B.C.J. No. 2280 (QL); *R. v. Pasacreta*, [1995] B.C.J. No. 2823 (QL); *R. v. Chief* (1989), 51 C.C.C. (3d) 265; *R. v. McGillivary* (1991), 62 C.C.C. (3d) 407; *R. v. Hainnu*, [1998] N.W.T.J. No. 101 (QL); *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *R. v. Gladue*, [1999] 1 S.C.R. 688; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Patterson* (1946), 87 C.C.C. 86; *R. v. Sloan* (1947), 87 C.C.C. 198; *R. v. Rezaie* (1996), 112 C.C.C. (3d) 97; *R. v. McIntosh*, [1995] 1 S.C.R. 686; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Pearson*, [1992] 3 S.C.R. 665.

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Criminal Code, R.S.C., 1985, c. C-46, ss. 85(2), 344 [repl. 1995, c. 39, s. 149], 718.1 [*idem*, c. 22, s. 6], 718.2(*b*) [*idem*], 718.3(1) [*idem*], 719(1) [en. *idem*], (3) [*idem*], (4) [*idem*], 721(3) [rep. *idem*], 743.6, 745.4.

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Loi sur le système correctionnel et la mise en liberté sous condition, L.C. 1992, ch. 20, art. 120(1) [rempl. 1998, ch. 35, art. 112], 128(1) [mod. 1995, ch. 42, art. 69], annexe I.

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APPEAL from a judgment of the British Columbia Court of Appeal (1998), 107 B.C.A.C. 130, 174 W.A.C. 130, 125 C.C.C. (3d) 43, 17 C.R. (5th) 45, 53 C.R.R. (2d) 306, [1998] B.C.J. No. 1076 (QL), allowing in part the Crown's appeal from the sentence imposed by Grist J. (1997), 43 C.R.R. (2d) 320, [1997] B.C.J. No. 573 (QL), and dismissing the accused's cross-appeal. Appeal allowed.

Harry G. Stevenson, for the appellant.

Peter W. Ewert, Q.C., and *Geoffrey R. Gaul*, for the respondent.

David Finley, for the intervener.

The judgment of the Court was delivered by

ARBOUR J. —

I. Introduction

1 This appeal raises a legal issue of deceptive simplicity, which has generated a number of contrary decisions in several courts of appeal. The issue is whether, when Parliament has imposed a mandatory minimum sentence, the courts may deduct from that sentence the time spent by the accused in custody while awaiting trial and sen-

Loi sur les armes à feu, L.C. 1995, ch. 39, art. 165.

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Friedland, Martin L. *Detention Before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts.* Toronto: University of Toronto Press, 1965.
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POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (1998), 107 B.C.A.C. 130, 174 W.A.C. 130, 125 C.C.C. (3d) 43, 17 C.R. (5th) 45, 53 C.R.R. (2d) 306, [1998] B.C.J. No. 1076 (QL), qui a accueilli en partie l'appel interjeté par le ministère public contre la peine infligée par le juge Grist (1997), 43 C.R.R. (2d) 320, [1997] B.C.J. No. 573 (QL), et qui a rejeté l'appel incident de l'accusé. Pourvoi accueilli.

Harry G. Stevenson, pour l'appelant.

Peter W. Ewert, c.r., et *Geoffrey R. Gaul*, pour l'intimée.

David Finley, pour l'intervenant.

Version française du jugement de la Cour rendu par

LE JUGE ARBOUR —

I. Introduction

Le présent pourvoi soulève une question juridique d'une simplicité trompeuse, qui a donné lieu à un certain nombre de décisions contradictoires par plusieurs cours d'appel. La question en litige est celle de savoir si, dans les cas où le législateur établit une peine minimale obligatoire, les tribunaux peuvent déduire de cette peine la période que

tence, if this has the effect of reducing the sentence pronounced by the court to less than the minimum provided by law.

le contrevenant a passée sous garde en attendant son procès et le prononcé de sa peine, lorsque, du fait de cette réduction, la peine infligée au délinquant serait inférieure à la peine minimale prévue par la loi.

More specifically, in this appeal from a judgment of the British Columbia Court of Appeal we must determine whether a judge may exercise the discretion provided for in s. 719(3) of the *Criminal Code*, R.S.C., 1985, c. C-46, to credit time spent in pre-sentencing custody when calculating the appropriate sentence for robbery while using a firearm under s. 344(*a*) of the *Code*. Section 344(*a*) prescribes a mandatory minimum punishment of four years' imprisonment.

2 Plus précisément, dans le présent pourvoi visant un arrêt de la Cour d'appel de la Colombie-Britannique, nous devons décider si le tribunal qui détermine la peine qu'il convient d'imposer au délinquant déclaré coupable de l'infraction de vol qualifié avec usage d'une arme à feu, prévue à l'al. 344*a*) du *Code criminel*, L.R.C. (1985), ch. C-46, peut exercer le pouvoir discrétionnaire que lui confère le par. 719(3) du *Code* pour prendre en compte la période passée sous garde par le délinquant avant le prononcé de sa peine (aussi appelée ci-après «période de détention présentencielle»). L'alinéa 344*a*) prescrit une peine minimale obligatoire de quatre ans d'emprisonnement.

Section 344(*a*) is one of several amendments to the *Code* prescribing mandatory minimum punishments for firearms-related offences, arising from the enactment of the *Firearms Act*, S.C. 1995, c. 39. The *Firearms Act* amendments to the *Code* did not provide for any changes to the sentencing provisions in s. 719 of the *Code*, which are of general application. In particular, s. 719(3) provides that in determining the sentence to be imposed, the court may take into account any time spent in custody in relation to the offence for which a person has been convicted. The question of whether this can be done in relation to mandatory minimum sentences has created a problem of statutory interpretation which the courts of British Columbia, Ontario, Quebec, and Nova Scotia have variously addressed during the four years since the amendments have been in force, reaching different conclusions regarding the interaction between the two sections.

3 L'alinéa 344*a*) est l'une des diverses modifications qui ont été apportées au *Code* afin d'établir les peines minimales obligatoires applicables à l'égard des infractions relatives aux armes à feu créées par la *Loi sur les armes à feu*, L.C. 1995, ch. 39. Les modifications du *Code* qui découlent de l'édiction de la *Loi sur les armes à feu* n'ont eu aucune incidence sur les dispositions de l'art. 719 du *Code*, qui sont d'application générale. En particulier, le par. 719(3) précise que, pour fixer la peine à infliger à une personne déclarée coupable d'une infraction, le tribunal peut prendre en compte toute période que cette personne a passée sous garde par suite de l'infraction. La question de savoir si cette disposition s'applique aux peines minimales obligatoires a soulevé un problème d'interprétation législative que les tribunaux de la Colombie-Britannique, de l'Ontario, du Québec et de la Nouvelle-Écosse ont tranché de diverses façons au cours des quatre années qui ont suivi l'entrée en vigueur des modifications, tirant des conclusions divergentes en ce qui concerne l'interaction de ces deux dispositions.

The Quebec Court of Appeal has held that it is not appropriate for the trial judge to consider pre-sentencing custody in cases where such a consideration would result in a sentence falling below the

4 La Cour d'appel du Québec a estimé qu'il ne convenait pas que le juge du procès prenne en compte la période de détention présentencielle dans les affaires où cette démarche entraînerait

mandatory minimum: *R. v. Alain* (1997), 119 C.C.C. (3d) 177, and *R. v. Lapierre* (1998), 123 C.C.C. (3d) 332. Proulx J.A. in *Lapierre* held (at p. 344) that the punishment in s. 344(*a*) required a sentence of four years' imprisonment, since a sentence commences from the day it is imposed, pursuant to s. 719(1) of the *Code*. However, Proulx J.A. also recognized (at pp. 345-46) that removing the discretion to take account of the time spent in custody created some difficulty, since the crediting of pre-trial custody is based on fairness and the need to avoid injustice in the individual case.

l'infliction d'une peine inférieure à la peine minimale obligatoire: *R. c. Alain* (1997), 119 C.C.C. (3d) 177, et *R. c. Lapierre*, [1998] R.J.Q. 677. Dans l'arrêt *Lapierre*, à la p. 685, le juge Proulx a estimé que l'application de l'al. 344*a*) exige l'infliction d'une peine de quatre ans d'emprisonnement car, aux termes du par. 719(1) du *Code*, la peine commence la journée où elle est infligée. Cependant, le juge Proulx a également reconnu, aux pp. 685 et 686, que l'élimination du pouvoir discrétionnaire de prendre en compte la période passée sous garde créait une certaine difficulté, puisque la prise en compte de cette période répond à un souci d'équité et au besoin d'éviter qu'une injustice soit commise dans l'affaire dont le tribunal est saisi.

5 Other courts have followed *Lapierre* and *Alain* in determining that pre-trial custody may not be applied to mandatory minimum punishments. For example, Langdon J., in *R. v. Sanko*, [1998] O.J. No. 1026 (QL) (Gen. Div.), and Bateman J.A. of the Nova Scotia Court of Appeal, in *R. v. Morrisey* (1998), 124 C.C.C. (3d) 38, have both held that it is not open to a trial judge to apply the discretion provided for in s. 719(3), where to do so would result in a sentence below the mandatory minimum.

D'autres cours ont suivi les arrêts *Lapierre* et *Alain*, et jugé que la période de détention avant le procès ne pouvait pas être soustraite d'une peine minimale obligatoire. Par exemple, le juge Langdon dans *R. c. Sanko*, [1998] O.J. No. 1026 (QL) (Div. gén.), et Madame le juge Bateman de la Cour d'appel de la Nouvelle-Écosse dans *R. c. Morrisey* (1998), 124 C.C.C. (3d) 38, ont tous deux estimé qu'il n'était pas loisible au juge du procès d'exercer le pouvoir discrétionnaire prévu au par. 719(3) dans les cas où la peine en résultant serait plus courte que la peine minimale prescrite.

6 The reasoning of the Quebec Court of Appeal was also followed by the British Columbia Court of Appeal in this case. The appellant was one of five persons who appealed their sentences, challenging the constitutionality of s. 344(*a*) under s. 12 of the *Canadian Charter of Rights and Freedoms* and requesting that s. 719(3) be interpreted to permit a reduction of the mandatory minimum punishment set out in s. 344(*a*) to take into account pre-sentencing custody. McEachern C.J.B.C., writing for a unanimous Court of Appeal, upheld the constitutionality of s. 344(*a*): *R. v. Wust* (1998), 125 C.C.C. (3d) 43, at p. 59. McEachern C.J.B.C. also reasoned that, since a sentence commences upon its imposition under s. 719(1), the mandatory language of s. 344(*a*) precludes the judicial discretion permitted by s. 719(3), where such discretion would result in a sentence of less than the required

Le raisonnement de la Cour d'appel du Québec a également été suivi par la Cour d'appel de la Colombie-Britannique dans la présente affaire. L'appelant était l'une des cinq personnes qui avaient formé appel contre les peines qui leur avaient été infligées, plaidant l'inconstitutionnalité de l'al. 344*a*) au regard de l'art. 12 de la *Charte canadienne des droits et libertés* et demandant que le par. 719(3) soit interprété de façon à permettre la réduction de la peine minimale obligatoire prévue à l'al. 344*a*) par la prise en compte de la période de détention présentencielle. Rédigeant la décision unanime de la Cour d'appel de la Colombie-Britannique, le juge en chef McEachern a confirmé la validité constitutionnelle de l'al. 344*a*): *R. c. Wust* (1998), 125 C.C.C. (3d) 43, à la p. 59. Le juge en chef McEachern a également raisonné que, comme le par. 719(1) précise qu'une

minimum of four years. Otherwise, the mandatory sentence prescribed by s. 344(*a*) would be reduced impermissibly: *Wust*, at p. 60.

peine commence la journée où elle est infligée, le caractère impératif du texte de l'al. 344*a*) a pour effet d'empêcher l'exercice du pouvoir discrétionnaire accordé au tribunal par le par. 719(3) lorsqu'il en résulterait une peine plus courte que la peine minimale de quatre ans prévue, sinon la peine obligatoire prescrite par l'al. 344*a*) serait réduite de façon inacceptable: *Wust*, à la p. 60.

At approximately the same time as the British Columbia Court of Appeal was deciding *Wust*, the Ontario Court of Appeal was considering the same issue in *R. v. McDonald* (1998), 127 C.C.C. (3d) 57. Rosenberg J.A., writing for a unanimous court, declined to follow the reasons of Proulx J.A. in *Lapierre*, *supra*, and held that s. 719(3) could be applied to s. 344(*a*). Following a thorough analysis of both s. 344(*a*) and s. 719(3), based on principles of statutory interpretation and with reference to *Charter* values, Rosenberg J.A. held that presentencing custody could be considered even if such credit resulted in reducing the sentence imposed on conviction below four years, since the total punishment would still equal the mandatory minimum of four years. Concurring with Rosenberg J.A. was Borins J.A., who took the unusual opportunity to overrule his own earlier decision in *R. v. Brown* (1976), 36 C.R.N.S. 246 (Ont. Co. Ct.), regarding the inapplicability of s. 649(2.1) (now s. 719(3)) to the mandatory minimum sentence set out in s. 5(2) of the *Narcotic Control Act*, R.S.C. 1970, c. N-1.

7 À peu près à la même époque où la Cour d'appel de la Colombie-Britannique était appelée à statuer sur l'affaire *Wust*, la Cour d'appel de l'Ontario était saisie de la même question dans l'affaire *R. c. McDonald* (1998), 127 C.C.C. (3d) 57. Le juge Rosenberg, qui a rédigé la décision unanime de la Cour d'appel, a refusé de suivre les motifs exposés par le juge Proulx de la Cour d'appel du Québec dans l'arrêt *Lapierre*, précité, estimant plutôt que le par. 719(3) pouvait être appliqué à l'al. 344*a*). Après avoir minutieusement analysé ces deux dispositions en se fondant sur les principes d'interprétation législative et en renvoyant aux valeurs consacrées par la *Charte*, le juge Rosenberg a conclu que la période de détention présentencielle pouvait être prise en compte, même si cela avait pour effet de réduire à moins de quatre ans la peine minimale applicable en cas de déclaration de culpabilité, puisque la durée totale de l'emprisonnement serait quand même égale à ce minimum. Souscrivant aux motifs du juge Rosenberg, le juge Borins a profité de l'occasion inhabituelle qui se présentait pour infirmer la décision qu'il avait lui-même rendue dans *R. c. Brown* (1976), 36 C.R.N.S. 246 (C. dist. Ont.), relativement à l'inapplicabilité du par. 649(2.1) (maintenant le par. 719(3)) à la peine minimale obligatoire qui était prévue au par. 5(2) de la *Loi sur les stupéfiants*, S.R.C. 1970, ch. N-1.

In another interesting turn of events, a five-judge panel of the British Columbia Court of Appeal, in *R. v. Mills* (1999), 133 C.C.C. (3d) 451, overturned its decision in the present case, adopting the reasons of Rosenberg J.A. in *McDonald*. The court in *Mills* held at pp. 458-59 that

8 Autre fait intéressant, dans *R. c. Mills* (1999), 133 C.C.C. (3d) 451, une formation de cinq juges de la Cour d'appel de la Colombie-Britannique a écarté l'arrêt qu'elle a rendu dans la présente affaire, adoptant les motifs exposés par le juge Rosenberg dans *McDonald*. Dans *Mills*, aux pp. 458 et 459, la Cour d'appel de la Colombie-Britannique a tiré la conclusion suivante:

[i]ncarceration, whether before or after disposition, is a serious deprivation of liberty, and being forced to ignore

[TRADUCTION] [L]'incarcération, avant ou après que l'affaire soit tranchée, constitue une privation de liberté

it as part of sentencing is inherently unjust. Moreover, not taking time in custody into account can lead to unjust discrepancies between similarly situated offenders. . . .

9 The task before this Court is to settle the controversy regarding whether or not s. 719(3) may be applied to sentences imposed under s. 344(*a*), and, by implication, to mandatory minimum sentences in general. For the reasons that follow, I find Rosenberg J.A.'s analysis in *McDonald* compelling. The *McDonald* decision makes it clear that this Court can uphold both Parliament's intention that offenders under s. 344(*a*) receive a minimum punishment of four years imprisonment and Parliament's equally important intention to preserve the judicial discretion to consider pre-sentencing custody under s. 719(3) and ensure that justice is done in the individual case.

II. Factual Background and Judicial History

A. *Factual Background*

10 On July 5, 1996, the appellant and two accomplices robbed a gas station, their faces covered with bandanas. Two of them, including the appellant, were armed. The appellant pointed a loaded nine millimetre, semi-automatic pistol into the cashier's face, showed him that the gun was loaded and demanded money. The cashier handed him $780 and the appellant struck him several times on the head with his fist, and threatened to kill him if he gave the police his description.

11 The appellant was arrested shortly thereafter and charged with both robbery and possession of a restricted weapon. He was 22 years old at the time of the offence and had an extensive criminal record in both youth and adult courts, with 30 convictions dating back to July 1990, including violent offences. A prohibition against possessing firearms was in force against him at the time of the robbery.

grave, et il est fondamentalement injuste d'être contraint de ne pas en tenir compte dans la détermination de la peine. En outre, le fait de ne pas prendre en compte le temps passé sous garde peut être source d'écarts injustes dans les peines infligées à des délinquants se trouvant dans des situations similaires . . .

Notre Cour est donc appelée à trancher la question controversée de savoir si le par. 719(3) peut ou non être appliqué aux peines infligées en vertu de l'al. 344*a*) et, par implication, aux peines minimales obligatoires en général. Pour les motifs qui suivent, j'estime que le juge Rosenberg de la Cour d'appel a fait une analyse convaincante dans l'arrêt *McDonald*. Il ressort clairement de cet arrêt que notre Cour est en mesure de donner effet à la volonté du législateur que les délinquants déclarés coupables en vertu de l'al. 344*a*) reçoivent une peine minimale de quatre ans d'emprisonnement et à son désir, tout aussi important, de laisser aux juges le pouvoir discrétionnaire que leur confère le par. 719(3) de prendre en compte la période de détention présentencielle et de faire en sorte que justice soit rendue dans chaque cas.

II. Les faits et l'historique des procédures judiciaires

A. *Les faits*

Le 5 juillet 1996, l'appelant et deux complices ont commis un vol qualifié dans une station-service, le visage couvert d'un foulard. Deux des voleurs, dont l'appelant, étaient armés. Ce dernier a braqué un pistolet semi-automatique de neuf millimètres chargé sur le visage du caissier, lui a montré que l'arme était chargée et lui a demandé de l'argent. Le caissier lui a remis 780 $, après quoi l'appelant l'a frappé à plusieurs reprises à la tête avec le poing et a menacé de le tuer s'il donnait sa description à la police.

L'appelant a été arrêté peu de temps après et accusé de vol qualifié et de possession d'une arme à autorisation restreinte. Âgé de 22 ans à l'époque de l'infraction, l'appelant possédait un long casier judiciaire tant devant les tribunaux pour adolescents que devant les tribunaux pour adultes, ayant déjà fait l'objet de 30 déclarations de culpabilité depuis juillet 1990, y compris pour des infractions

He was detained pending trial and sentencing for a period of seven and a half months.

accompagnées de violence. Au moment où il a commis le vol qualifié, il était sous le coup d'une ordonnance lui interdisant d'avoir des armes à feu en sa possession. Il a été détenu pendant sept mois et demi avant son procès et la détermination de sa peine.

B. *British Columbia Supreme Court* (1997), 43 C.R.R. (2d) 320

B. *Cour suprême de la Colombie-Britannique* (1997), 43 C.R.R. (2d) 320

At trial in the Supreme Court of British Columbia, Grist J. held that the discretion allowed by s. 721(3) (now s. 719(3)) of the *Code* is applicable to sentences imposed under s. 344(*a*), since to do otherwise, and fail to give credit for time served would risk violation of s. 12 of the *Charter*. Grist J. determined that the appropriate sentence in this case was four and a half years, with a concurrent sentence of one year for possession of a restricted weapon. The appellant was credited one year for his pre-sentencing custody of seven and a half months, reducing his sentence, under s. 344(*a*), to three and a half years.

12 Au procès, le juge Grist de la Cour suprême de la Colombie-Britannique a estimé que le pouvoir discrétionnaire prévu au par. 721(3) (maintenant le par. 719(3)) du *Code* était applicable à l'égard des peines infligées en vertu de l'al. 344*a*), car le fait de conclure autrement et de ne pas prendre en compte la période passée sous garde risquerait d'entraîner la violation de l'art. 12 de la *Charte*. Le juge Grist a déterminé que la peine qu'il convenait de prononcer en l'espèce était une peine d'emprisonnement de quatre ans et demi, à purger concurremment avec un emprisonnement d'un an pour le chef de possession d'une arme à autorisation restreinte. La peine ainsi infligée à l'appelant a été réduite d'un an pour prendre en compte la période de sept mois et demi qu'il avait passée sous garde en attendant le prononcé de sa peine, de sorte qu'il a été condamné à trois ans et demi de prison en vertu de l'al. 344*a*).

C. *British Columbia Court of Appeal* (1998), 125 C.C.C. (3d) 43

C. *Cour d'appel de la Colombie-Britannique* (1998), 125 C.C.C. (3d) 43

The Crown appealed that sentence to the British Columbia Court of Appeal, seeking to have it increased from three and a half years to seven or eight years on the basis of the accused's lengthy criminal record. The Crown also sought to have the credit for pre-sentencing custody set aside. The appellant cross-appealed, challenging the constitutionality of the mandatory minimum punishment of s. 344(*a*) as a violation of his s. 12 *Charter* right to be free of cruel and unusual punishment.

13 Le ministère public a interjeté appel à la Cour d'appel de la Colombie-Britannique de la peine de trois ans et demi infligée à l'appelant, demandant qu'il soit plutôt condamné à sept ou huit ans d'emprisonnement, en raison de son casier judiciaire chargé. Le ministère public a également sollicité l'annulation de la réduction accordée pour la période de détention présentencielle. L'appelant a pour sa part formé un appel incident, plaidant que la peine minimale obligatoire prévue à l'al. 344*a*) est inconstitutionnelle parce qu'elle porte atteinte au droit à la protection contre tous traitements ou peines cruels et inusités qui lui est garanti par l'art. 12 de la *Charte*.

14 McEachern C.J.B.C., writing for a unanimous court, upheld the constitutionality of s. 344(*a*) under s. 12 of the *Charter*, and also held that the correct interpretation of s. 344(*a*) mandated the imposition of a sentence of at least four years. Because s. 719(1) provides that a sentence begins when it is imposed, McEachern C.J.B.C. held that it was not possible to reduce a sentence to account for time served while awaiting trial, if such a discount results in a sentence of less than the required minimum. However, if the credit does not result in a sentence of less than four years, s. 719(3) may be applied: *Wust*, at p. 60.

Rédigeant la décision unanime de la Cour d'appel, le juge en chef McEachern a confirmé la validité constitutionnelle de l'al. 344*a*) au regard de l'art. 12 de la *Charte*, décidant également que, suivant l'interprétation qu'il convient de donner à l'al. 344*a*), une peine d'au moins quatre ans d'emprisonnement s'imposait en l'espèce. Comme le par. 719(1) précise que la peine commence au moment où elle est infligée, le juge en chef McEachern a estimé qu'il n'était pas possible de réduire une peine pour prendre en compte la période passée sous garde par le délinquant avant son procès, lorsque, du fait de cette réduction, la peine infligée à ce dernier serait inférieure à la peine minimale prescrite. Cependant, il a jugé que, dans les cas où une telle réduction ne se traduit pas par une peine de moins de quatre ans, le par. 719(3) peut être appliqué: *Wust*, à la p. 60.

15 McEachern C.J.B.C. also considered the Crown appeal against the sentence and concluded that, in the circumstances, the four and one-half years imposed by the trial judge was not unfit. He also found that the trial judge did not commit an error in giving credit for time served prior to sentencing; however, McEachern C.J.B.C. varied the sentence to allow a credit only to the extent of reaching the minimum sentence of four years: *Wust*, at p. 61.

Le juge en chef McEachern a également examiné l'appel formé par le ministère public contre la peine et il a décidé que, dans les circonstances, la peine de quatre ans et demi infligée à l'appelant par le juge du procès n'était pas inappropriée. De plus, il a estimé que le juge du procès n'avait pas commis d'erreur en prenant en compte la période de détention présentencielle. Cependant, le juge en chef McEachern a modifié la peine, mais l'a réduite uniquement dans la mesure nécessaire pour infliger à l'appelant la peine minimale de quatre ans d'emprisonnement: *Wust*, à la p. 61.

16 The appeal to the British Columbia Court of Appeal in this case was heard and decided at the same time as four other sentencing appeals, all under s. 344(*a*). Two of those appeals were also heard in this Court together with the present case: *R. v. Arthurs*, [2000] 1 S.C.R. 481, 2000 SCC 19, and *R. v. Arrance*, [2000] 1 S.C.R. 488, 2000 SCC 20, released concurrently and to which these reasons apply as well.

L'appel à la Cour d'appel de la Colombie-Britannique dans la présente affaire a été entendu et tranché en même temps que quatre autres appels interjetés contre des peines infligées en vertu de l'al. 344*a*). Deux de ces appels font également l'objet de pourvois qui ont été entendus par notre Cour avec le présent pourvoi: *R. c. Arthurs*, [2000] 1 R.C.S. 481, 2000 CSC 19, et *R. c. Arrance*, [2000] 1 R.C.S. 488, 2000 CSC 20, qui sont

tranchés en même temps que celui-ci et auxquels s'appliquent également les présents motifs.

III. Relevant Statutory Provisions

Criminal Code, R.S.C., 1985, c. C-46

344. Every person who commits robbery is guilty of an indictable offence and liable

(*a*) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(*b*) in any other case, to imprisonment for life.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

. . .

(*b*) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

. . .

718.3 (1) Where an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence.

(2) Where an enactment prescribes a punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence, but no punishment is a minimum punishment unless it is declared to be a minimum punishment.

. . .

719. (1) A sentence commences when it is imposed, except where a relevant enactment otherwise provides.

. . .

III. Les dispositions législatives pertinentes

Code criminel, L.R.C. (1985), ch. C-46 17

344. Quiconque commet un vol qualifié est coupable d'un acte criminel passible:

a) s'il y a usage d'une arme à feu lors de la perpétration de l'infraction, de l'emprisonnement à perpétuité, la peine minimale étant de quatre ans;

b) dans les autres cas, de l'emprisonnement à perpétuité.

718.1 (1) La peine est proportionnelle à la gravité de l'infraction et au degré de responsabilité du délinquant.

718.2 Le tribunal détermine la peine à infliger compte tenu également des principes suivants:

. . .

b) l'harmonisation des peines, c'est-à-dire l'infliction de peines semblables à celles infligées à des délinquants pour des infractions semblables commises dans des circonstances semblables;

. . .

718.3 (1) Lorsqu'une disposition prescrit différents degrés ou genres de peine à l'égard d'une infraction, la punition à infliger est, sous réserve des restrictions contenues dans la disposition, à la discrétion du tribunal qui condamne l'auteur de l'infraction.

(2) Lorsqu'une disposition prescrit une peine à l'égard d'une infraction, la peine à infliger est, sous réserve des restrictions contenues dans la disposition, laissée à l'appréciation du tribunal qui condamne l'auteur de l'infraction, mais nulle peine n'est une peine minimale à moins qu'elle ne soit déclarée telle.

. . .

719. (1) La peine commence au moment où elle est infligée, sauf lorsque le texte législatif applicable y pourvoit de façon différente.

. . .

(3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence.

(4) Notwithstanding subsection (1), a term of imprisonment, whether imposed by a trial court or the court appealed to, commences or shall be deemed to be resumed, as the case may be, on the day on which the convicted person is arrested and taken into custody under the sentence.

(3) Pour fixer la peine à infliger à une personne déclarée coupable d'une infraction, le tribunal peut prendre en compte toute période que la personne a passée sous garde par suite de l'infraction.

(4) Malgré le paragraphe (1), une période d'emprisonnement, infligée par un tribunal de première instance ou par le tribunal saisi d'un appel, commence à courir ou est censée reprise, selon le cas, à la date où la personne déclarée coupable est arrêtée et mise sous garde aux termes de la sentence.

IV. Analysis

A. *Mandatory Minimum Sentences and General Sentencing Principles*

18 Mandatory minimum sentences are not the norm in this country, and they depart from the general principles of sentencing expressed in the *Code*, in the case law, and in the literature on sentencing. In particular, they often detract from what Parliament has expressed as the fundamental principle of sentencing in s. 718.1 of the *Code*: the principle of proportionality. Several mandatory minimum sentences have been challenged under s. 12 of the *Charter*, as constituting cruel and unusual punishment: see, for example, *R. v. Smith*, [1987] 1 S.C.R. 1045, *R. v. Goltz*, [1991] 3 S.C.R. 485, and *Morrisey*, *supra*.

19 On some occasions, a mandatory minimum sentence has been struck down under s. 12, on the basis that the minimum prescribed by law was, or could be, on a reasonable hypothetical basis, grossly disproportionate to what the circumstances called for. See, for example, *Smith*, striking down s. 5(2) of the *Narcotic Control Act*; *R. v. Bill* (1998), 13 C.R. (5th) 125 (B.C.S.C.), striking down the four-year minimum sentence for manslaughter with a firearm under s. 236(*a*) of the *Code*; *R. v. Leimanis*, [1992] B.C.J. No. 2280 (QL) (Prov. Ct.), in which the s. 88(1)(c) minimum sentence of the B.C. *Motor Vehicle Act* for driving under a s. 85(a) prohibition was invalidated; and *R. v. Pasacreta*, [1995] B.C.J. No. 2823 (QL) (Prov. Ct.), where the same penalty as in *Leimanis* for

IV. L'analyse

A. *Peines minimales obligatoires et principes généraux de détermination de la peine*

Les peines minimales obligatoires ne constituent pas la norme au Canada, et elles dérogent aux principes généraux applicables en matière de détermination de la peine énoncés dans le *Code*, la jurisprudence et la littérature sur le sujet. En particulier, elles dérogent souvent au principe énoncé à l'art. 718.1 du *Code*, que le législateur a déclaré être le principe fondamental en matière de détermination de la peine: le principe de la proportionnalité. Plusieurs peines minimales obligatoires ont été contestées au regard de l'art. 12 de la *Charte* pour le motif qu'elles constituaient des peines cruelles et inusitées: voir, par exemple, *R. c. Smith*, [1987] 1 R.C.S. 1045, *R. c. Goltz*, [1991] 3 R.C.S. 485, et *Morrisey*, précité.

Dans certains cas, la peine minimale obligatoire contestée a été invalidée en application de l'art. 12 pour le motif que l'emprisonnement minimal prévu par la loi était ou pouvait être, sur une base hypothétique raisonnable, exagérément disproportionné eu égard à ce que commandaient les circonstances. Voir, par exemple, l'arrêt *Smith*, qui a invalidé le par. 5(2) de la *Loi sur les stupéfiants*; l'affaire *R. c. Bill* (1998), 13 C.R. (5th) 125 (C.S.C.-B.), qui a invalidé la peine minimale de quatre ans d'emprisonnement que prescrivait l'al. 236*a*) du *Code* à l'égard des homicides involontaires coupables commis en utilisant une arme à feu; l'affaire *R. c. Leimanis*, [1992] B.C.J. No. 2280 (QL) (C. prov.), dans laquelle le tribunal a invalidé la peine minimale que prévoyait l'al. 88(1)c) de la *Motor Vehicle Act* de la C.-B. et qui

driving under a s. 84 prohibition was also struck down.

était imposée aux personnes qui conduisaient, mêmes si elles faisaient l'objet d'une ordonnance d'interdiction fondée sur l'al. 85a); et l'affaire *R. c. Pasacreta*, [1995] B.C.J. No. 2823 (QL) (C. prov.), dans laquelle on a également invalidé la même peine que celle en litige dans l'affaire *Leimanis*, qui était imposée aux personnes conduisant sous le coup d'une ordonnance d'interdiction fondée sur l'art. 84.

In other cases, courts have fashioned the remedy of a constitutional exemption from a mandatory minimum sentence, thereby upholding the enactment as valid while exempting the accused from its application: see *R. v. Chief* (1989), 51 C.C.C. (3d) 265 (Y.T.C.A.), and *R. v. McGillivary* (1991), 62 C.C.C. (3d) 407 (Sask. C.A.). Finally, in some of the cases where the courts have upheld a minimum sentence as constitutionally valid, it has been noted that the mandatory minimum sentence was demonstrably unfit or harsh in the case before the court. See, for example, *McDonald*, *supra*, at p. 85, *per* Rosenberg J.A., and *R. v. Hainnu*, [1998] N.W.T.J. No. 101 (QL) (S.C.), at para. 71.

20 Dans d'autres affaires, des tribunaux ont, à titre de réparation, accordé l'exemption constitutionnelle de l'application de la peine minimale obligatoire prévue, confirmant ainsi la validité de la disposition législative en cause tout en exemptant le délinquant de son application: voir *R. c. Chief* (1989), 51 C.C.C. (3d) 265 (C.A.T.Y.); et *R. c. McGillivary* (1991), 62 C.C.C. (3d) 407 (C.A. Sask.). Enfin, dans certains cas où les tribunaux ont confirmé la validité constitutionnelle d'une peine minimale, ils ont souligné qu'on était parvenu à établir que, dans les circonstances de l'affaire dont ils étaient saisis, la peine minimale en cause était inappropriée ou sévère. Voir, par exemple, *McDonald*, précité, à la p. 85, le juge Rosenberg, et *R. c. Hainnu*, [1998] N.W.T.J. No. 101 (QL) (C.S.), au par. 71.

Even if it can be argued that harsh, unfit sentences may prove to be a powerful deterrent, and therefore still serve a valid purpose, it seems to me that sentences that are unjustly severe are more likely to inspire contempt and resentment than to foster compliance with the law. It is a well-established principle of the criminal justice system that judges must strive to impose a sentence tailored to the individual case: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 92, *per* Lamer C.J.; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 93, *per* Cory and Iacobucci JJ.

21 Même s'il est possible de soutenir que des peines sévères et inappropriées peuvent avoir un effet dissuasif considérable et que, en conséquence, de telles peines servent toujours un objectif valable, il me semble que l'infliction de peines injustement sévères risque davantage d'inspirer le mépris et le ressentiment que d'inciter au respect de la loi. Selon un principe bien établi du système de justice criminelle, le juge doit s'efforcer d'infliger une peine appropriée eu égard à l'affaire dont il est saisi: *R. c. M. (C.A.)*, [1996] 1 R.C.S. 500, au par. 92, le juge en chef Lamer; *R. c. Gladue*, [1999] 1 R.C.S. 688, au par. 93, les juges Cory et Iacobucci.

Consequently, it is important to interpret legislation which deals, directly and indirectly, with mandatory minimum sentences, in a manner that is consistent with general principles of sentencing, and that does not offend the integrity of the criminal justice system. This is entirely possible in this

22 En conséquence, il est important que les dispositions législatives qui portent — directement ou indirectement — sur des peines minimales obligatoires soient interprétées d'une manière qui soit compatible avec les principes généraux de la détermination de la peine et qui ne porte pas atteinte à

case, and, in my view, such an approach reflects the intention of Parliament that all sentences be administered consistently, except to the limited extent required to give effect to a mandatory minimum.

23 In accordance with the umbrella principle of statutory interpretation expressed by this Court in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 20-23, mandatory minimum sentences must be understood in the full context of the sentencing scheme, including the management of sentences provided for in the *Corrections and Conditional Release Act*, S.C. 1992, c. 20. Several provisions of the *Code*, and of other federal statutes, provide for various forms of punishment upon conviction for an offence. Most enactments providing for the possibility of imprisonment do so by establishing a maximum term of imprisonment. In deciding on the appropriate sentence, the court is directed by Part XXIII of the *Code* to consider various purposes and principles of sentencing, such as denunciation, general and specific deterrence, public safety, rehabilitation, restoration, proportionality, disparity, totality and restraint, and to take into account both aggravating and mitigating factors. The case law provides additional guidelines, often in illustrating what an appropriate range of sentence might be in the circumstances of a particular case. In arriving at a fit sentence, the court must also be alive to some computing rules, for example, the rule that sentences cannot normally be back- or post-dated: s. 719(1) of the *Code*; see also *R. v. Patterson* (1946), 87 C.C.C. 86 (Ont. C.A.), at p. 87, *per* Robertson C.J., and *R. v. Sloan* (1947), 87 C.C.C. 198 (Ont. C.A.), at pp. 198-99, *per* Roach J.A., cited with approval by Rosenberg J.A., in *McDonald*, *supra*, at p. 71.

l'intégrité du système de justice criminelle. Il est tout à fait possible, en l'espèce, de donner une telle interprétation et, à mon avis, cette interprétation tient compte du désir du législateur que toutes les peines soient administrées uniformément, sauf dans la mesure requise pour donner effet à une peine minimale obligatoire.

Conformément au principe général d'interprétation des lois énoncé par notre Cour dans *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, aux par. 20 à 23, les peines minimales obligatoires doivent être considérées dans le contexte global du système de détermination de la peine, y compris le régime d'administration des peines prévu par la *Loi sur le système correctionnel et la mise en liberté sous condition*, L.C. 1992, ch. 20. Plusieurs dispositions du *Code* et d'autres lois fédérales établissent les peines qui sont infligées aux personnes reconnues coupables d'infractions criminelles. La plupart des dispositions qui accordent la possibilité de recourir à l'emprisonnement le font en fixant une période d'emprisonnement maximale. Le tribunal appelé à décider de la peine qu'il convient d'imposer à un délinquant doit, conformément à la partie XXIII du *Code*, considérer divers objectifs et principes en matière de détermination de la peine tels que la dénonciation, la dissuasion générale ou spécifique, la sécurité publique, la réadaptation, la réparation, la proportionnalité, la disparité, ainsi que la totalité et la retenue, et il doit également tenir compte des circonstances aggravantes ou atténuantes. La jurisprudence fournit des précisions supplémentaires, souvent en indiquant quelle serait, dans les circonstances d'une affaire donnée, la fourchette des peines convenables. De plus, pour déterminer la peine appropriée, le tribunal doit tenir compte de certaines règles de calcul, par exemple la règle selon laquelle le début de la peine ne peut normalement être fixé à une date antérieure ou postérieure à celle de son prononcé: par. 719(1) du *Code*; voir également *R. c. Patterson* (1946), 87 C.C.C. 86 (C.A. Ont.), à la p. 87, le juge en chef Robertson, et *R. c. Sloan* (1947), 87 C.C.C. 198 (C.A. Ont.), aux pp. 198 et 199, le juge Roach, cité avec approbation par le juge Rosenberg de la Cour d'appel dans *McDonald*, précité, à la p. 71.

Rarely is the sentencing court concerned with what happens after the sentence is imposed, that is, in the administration of the sentence. Sometimes it is required to do so by addressing, by way of recommendation, or in mandatory terms, a particular form of treatment for the offender. For instance in murder cases, the sentencing court will determine a fixed term of parole ineligibility: s. 745.4 of the *Code*. However, for the most part, after a sentence of imprisonment is imposed, the *Corrections and Conditional Release Act* comes into play to administer that sentence, with the almost invariable effect of reducing the amount of time actually served in detention. Under this Act, the offender earns statutory remission, that is, time that will be automatically deducted from the sentence imposed. Furthermore, he or she will become eligible for escorted and unescorted temporary absences, work releases, day parole and full parole, and statutory release. In short, it is quite possible, indeed, it is most likely, that the person sentenced will not be incarcerated for the full period of time imposed in the sentence pronounced by the court.

Le tribunal qui détermine la peine est rarement concerné par ce qui se produit après le prononcé de la peine, c'est-à-dire par l'exécution de la peine. Par contre, il doit parfois s'attacher à cet aspect de la question lorsqu'il recommande ou impose une forme particulière de traitement au délinquant. Dans les affaires de meurtre, par exemple, le tribunal qui détermine la peine fixe le délai préalable à la libération conditionnelle du contrevenant: art. 745.4 du *Code*. Cependant, une fois la peine d'emprisonnement infligée, ce sont essentiellement les dispositions de la *Loi sur le système correctionnel et la mise en liberté sous condition* qui entrent en jeu en ce qui concerne l'exécution de cette peine, et celles-ci ont presque invariablement pour effet d'entraîner la réduction de la période que purge concrètement en détention le délinquant. En vertu de cette loi, le délinquant bénéficie d'une réduction légale de peine, c'est-à-dire que la peine qui lui a été infligée est automatiquement écourtée. De plus, il devient éventuellement admissible aux mesures suivantes: permission de sortir avec escorte ou sans escorte, placement à l'extérieur, semi-liberté et libération conditionnelle totale, et libération d'office. Bref, il est fort possible et même probable que, dans les faits, le délinquant ne sera pas incarcéré pendant toute la durée de la peine d'emprisonnement prononcée par le tribunal. 24

The *Corrections and Conditional Release Act*, in effect, "deems" the time spent lawfully at large by the offender who is released on parole, statutory release or unescorted temporary absence as a continuation of the sentence until its expiration: s. 128(1). This provision applies to all sentences, even where the term of imprisonment imposed is a statutory mandatory minimum.

Aux termes de la *Loi sur le système correctionnel et la mise en liberté sous condition*, le délinquant qui bénéficie d'une libération conditionnelle ou d'office ou d'une permission de sortir sans escorte est réputé continuer — tant qu'il a le droit d'être en liberté — de purger sa peine d'emprisonnement jusqu'à l'expiration légale de celle-ci: par. 128(1). Or, cette disposition s'applique dans tous les cas, même lorsque la peine d'emprisonnement qui a été infligée est une peine minimale obligatoire. 25

The *Firearms Act* addressed the issue of the administration of mandatory minimum sentences, but in a very minimal way by amending one section of Schedule I of the *Corrections and Conditional Release Act*. Schedule I sets out the offences for which the sentencing court has power to delay eligibility for full parole to the lesser of one-half of

La *Loi sur les armes à feu* a une incidence, très minime toutefois, sur l'exécution des peines minimales obligatoires en ce qu'elle a modifié un article de l'annexe I de la *Loi sur le système correctionnel et la mise en liberté sous condition*. On trouve, à cette annexe, la liste des infractions à l'égard desquelles le tribunal qui détermine la 26

the sentence or ten years, rather than the standard time for full parole eligibility of the lesser of one-third of the sentence or seven years: s. 120(1) of the *Corrections and Conditional Release Act*, referring to, among other sections, s. 743.6 of the *Code*. In s. 165, the *Firearms Act* amends Schedule I to include using an imitation firearm in the commission of an offence, as prohibited by s. 85(2) of the *Code*.

peine a le pouvoir d'allonger le temps d'épreuve, pour l'admissibilité à la libération conditionnelle totale, de la moitié de la peine à concurrence de dix ans, remplaçant ainsi le temps d'épreuve habituel pour l'admissibilité à la libération conditionnelle totale, soit un tiers de la peine à concurrence de sept ans: par. 120(1) de la *Loi sur le système correctionnel et la mise en liberté sous condition*, qui renvoie, entre autres, à l'art. 743.6 du *Code*. L'article 165 de la *Loi sur les armes à feu* modifie l'annexe I en ajoutant à la liste des infractions celle prévue au par. 85(2) du *Code*, soit l'usage d'une fausse arme à feu lors de la perpétration d'une infraction.

27 This slight amendment of the *Corrections and Conditional Release Act* by the *Firearms Act* suggests that while Parliament turned its mind to the administration of sentences when it was introducing the firearms-related minimum sentences, it did not see fit to alter the general administration of sentences in a way that would distinguish the new mandatory minimums from other sentences. It therefore follows that a rigid interpretation of s. 719(3), which suggests that time served before sentence cannot be credited to reduce a minimum sentence because it would offend the requirement that nothing short of the minimum be served, does not accord with the general management of minimum sentences, which are in every other respect "reduced" like all others, even to below the minimum.

Cette légère modification de la *Loi sur le système correctionnel et la mise en liberté sous condition* par la *Loi sur les armes à feu* tend à indiquer que, bien que le législateur se soit attardé à la question de l'exécution des peines lorsqu'il a introduit les peines minimales applicables en cas d'usage d'armes à feu, il n'a pas estimé qu'il convenait de modifier le régime général d'exécution des peines de façon à distinguer les nouvelles peines minimales obligatoires des autres peines. Il s'ensuit donc que l'interprétation stricte du par. 719(3), c'est-à-dire l'interprétation voulant que la période passée sous garde par le délinquant avant le prononcé de sa peine ne puisse être comptée à son actif parce que cela irait à l'encontre de l'exigence selon laquelle la période d'emprisonnement purgée par ce dernier ne doit pas être inférieure à la peine minimale prévue, est incompatible avec le régime général d'exécution des peines minimales, peines qui, à tous autres égards, sont «réduites» comme toutes les autres peines, même en deçà de la durée minimale prescrite.

28 In addition, and in contrast to statutory remission or parole, pre-sentence custody is time actually served in detention, and often in harsher circumstances than the punishment will ultimately call for. In *R. v. Rezaie* (1996), 112 C.C.C. (3d) 97 (Ont. C.A.), to which several lower courts have referred in their consideration of pre-sentencing custody, Laskin J.A. succinctly summarizes the particular features of pre-trial custody that result in

De plus, par opposition à la réduction légale de peine ou à la libération conditionnelle, la période passée sous garde avant le prononcé de la peine est véritablement passée en détention, souvent dans des circonstances plus pénibles que celles dans lesquelles sera purgée la peine infligée en bout de ligne. Dans *R. c. Rezaie* (1996), 112 C.C.C. (3d) 97 (C.A. Ont.), arrêt dont plusieurs tribunaux de juridiction inférieure ont fait état dans l'examen de

its frequent characterization as "dead time" at p. 104:

> . . . in two respects, pre-trial custody is even more onerous than post-sentencing custody. First, other than for a sentence of life imprisonment, legislative provisions for parole eligibility and statutory release do not take into account time spent in custody before trial (or before sentencing). Second, local detention centres ordinarily do not provide educational, retraining or rehabilitation programs to an accused in custody waiting trial.

As this quotation from *Rezaie* demonstrates, pre-sentencing custody, pre-trial custody, pre-disposition custody and "dead time" are all used to refer to the time spent by an accused person in detention prior to conviction and sentencing. For the purposes of this decision, I consider all these terms to refer to the same thing; however, I prefer "pre-sentencing custody" as it most accurately captures all the time an offender may have spent in custody prior to the imposition of sentence.

Several years ago, Professor Martin L. Friedland published an important study of pre-sentencing custody in which he referred to Professor Caleb Foote's Comment on the New York Bail Study project, noting that "accused persons . . . are confined pending trial under conditions which are more oppressive and restrictive than those applied to convicted and sentenced felons": *Detention Before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts* (1965), at p. 104. As Rosenberg J.A. noted in *McDonald*, *supra*, at p. 72: "There has been little change in the conditions under which remand prisoners are held in this province in the almost forty years since Professor Friedland did his study". Considering the severe nature of pre-sentencing custody, and that the accused person is in fact deprived of his or her liberty, credit for pre-sentencing custody is arguably

la question de la période de détention présentencielle, le juge Laskin a résumé succinctement les caractéristiques particulières de cette période de détention que l'on qualifie fréquemment de «temps mort», à la p. 104:

> [TRADUCTION] . . . à deux égards, la période passée sous garde avant le procès est encore plus pénible que celle qui suit le prononcé de la peine. Premièrement, sauf dans le cas de l'emprisonnement à perpétuité, les dispositions législatives touchant l'admissibilité à la libération conditionnelle et la libération d'office ne prennent pas en compte la période passée sous garde par le délinquant avant le procès (ou le prononcé de sa peine). Deuxièmement, les centres de détention locaux n'offrent habituellement pas de programmes d'enseignement, de recyclage ou de réadaptation aux accusés qui attendent leur procès.

29 Comme le démontre cet extrait de l'arrêt *Rezaie*, les expressions détention présentencielle, détention avant le procès, détention avant le verdict et «temps mort» sont toutes utilisées pour désigner la période passée sous garde avant la déclaration de culpabilité et la détermination de la peine. Pour les fins de la présente décision, je considère que toutes ces expressions signifient la même chose; cependant, je préfère utiliser l'expression «détention présentencielle», car il s'agit de celle qui désigne le plus fidèlement la période qu'un contrevenant a pu passer sous garde avant le prononcé de sa peine.

30 Il y a plusieurs années, le professeur Martin L. Friedland a publié une importante étude sur la détention présentencielle, dans laquelle il référait au *Comment on the New York Bail Study* du professeur Caleb Foote, soulignant que [TRADUCTION] «les accusés qui attendent leur procès [. . .] sont détenus dans des conditions plus sévères et restrictives que celles auxquelles sont assujettis les criminels qui ont été déclarés coupables et condamnés à leur peine»: *Detention Before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts* (1965), à la p. 104. Comme l'a souligné le juge Rosenberg dans l'arrêt *McDonald*, précité, à la p. 72 [TRADUCTION] «Très peu de changements ont été apportés aux conditions de détention provisoire dans la province au cours de la période de presque quarante ans qui s'est écoulée depuis l'étude du professeur Friedland». Compte tenu du

less offensive to the concept of a minimum period of incarceration than would be the granting of statutory remission or parole. It is therefore ironic that the applicability of s. 719(3) has encountered such difficulties in the case of minimum sentences, simply because the "interference" with the minimum is at the initial sentence determination stage and thus more readily apparent.

caractère rigoureux de la détention présentencielle et du fait que le délinquant est alors concrètement privé de sa liberté, il est possible d'affirmer que le fait d'accorder une réduction pour cette période porte moins atteinte au concept de période minimale d'incarcération que la réduction légale de peine ou la libération conditionnelle. Il est par conséquent ironique que l'applicabilité du par. 719(3) ait suscité tant de difficultés dans le cas des peines minimales, du seul fait que l'«atteinte» à leur intégralité survienne dès le moment où elles sont infligées et qu'elle soit, de ce fait, plus évidente.

31 As was pointed out by Rosenberg J.A. in *McDonald* at p. 73, Parliament enacted the forerunner to s. 719(3) of the *Criminal Code* as part of the *Bail Reform Act*, R.S.C. 1970 (2nd Supp.), c. 2, for the very specific purpose of ensuring that the well-established practice of sentencing judges to give credit for time served while computing a sentence would be available even to reduce a sentence below the minimum fixed by law. During the second reading of what was then Bill C-218, *An Act to amend the provisions of the Criminal Code relating to the release from custody of accused persons before trial or pending appeal*, Justice Minister John Turner described Parliament's intention regarding what is now s. 719(3):

Comme l'a mentionné le juge Rosenberg dans l'arrêt *McDonald*, à la p. 73, le Parlement a édicté, dans la *Loi sur la réforme du cautionnement*, S.R.C. 1970 (2e suppl.), ch. 2, la disposition qui est devenue le par. 719(3) du *Code criminel* précisément pour faire en sorte que la pratique bien établie qu'appliquaient les juges déterminant la peine et qui consistait à prendre en compte la période passée sous garde par le délinquant dans le calcul de la durée de sa peine puisse même être utilisée pour réduire celle-ci en deçà du minimum fixé par la loi. Durant la deuxième lecture du projet de loi C-218, *Loi modifiant les dispositions du Code criminel relatives à la mise en liberté des prévenus avant le procès ou pendant l'appel*, le ministre de la Justice de l'époque, John Turner, a décrit ainsi l'intention du législateur relativement à la disposition qui est maintenant le par. 719(3):

> Generally speaking, the courts in deciding what sentence to impose on a person convicted of an offence take into account the time he has spent in custody awaiting trial. However, under the present Criminal Code, a sentence commences only when it is imposed, and the court's hands are tied in those cases where a minimum term of imprisonment must be imposed. In such cases, therefore, the court is bound to impose not less than the minimum sentence even though the convicted person may have been in custody awaiting trial for a period in excess of the minimum sentence. The new version of the bill would permit the court, in a proper case, to take this time into account in imposing sentence.
>
> (*House of Commons Debates*, 3rd Sess., 28th Parl., Vol. 3, February 5, 1971, at p. 3118.)

> [TRADUCTION] En général, les tribunaux, en décidant de la peine à imposer à un inculpé, tiennent compte de la période de détention en attendant le procès. Cependant, selon le Code criminel, actuellement, une peine ne commence à être purgée que lorsqu'elle est imposée et les tribunaux ont les mains liées dans les cas où une peine d'emprisonnement minimum doit être infligée. Dans ces cas, le tribunal ne peut pas imposer moins que la peine minimum, même si l'inculpé, en attendant son procès, a été détenu plus longtemps que la durée de la peine minimum. La nouvelle version du bill permettrait au tribunal, dans un cas approprié, de tenir compte de la période de détention en imposant une peine.
>
> (*Débats de la Chambre des communes*, 3e sess., 28 lég., vol. 3, 5 février 1971, à la p. 3118.)

Counsel for the respondent has directed this Court's attention to the remarks of then Justice Minister Allan Rock concerning Bill C-68, *An Act respecting firearms and other weapons*, during the House of Commons debates and before the Standing Committee on Justice and Legal Affairs. On these occasions, the Justice Minister articulated Parliament's intention that the new mandatory minimum sentences for firearms-related offences act as a strong deterrent to the use of guns in crime. See *House of Commons Debates*, Vol. 133, No. 154, 1st Sess., 35th Parl., February 16, 1995, at pp. 9706 *et seq.*; House of Commons, Standing Committee on Justice and Legal Affairs, *Evidence*, April 24, 1995, Meeting No. 105, and May 19, 1995, Meeting No. 147. However, when Parliament enacted s. 344(*a*) as part of the *Firearms Act* in 1995, Parliament did not also modify s. 719(3), to exempt this new minimum sentence from its application, any more than it modified the applicability of the provisions of the *Corrections and Conditional Release Act* to mandatory minimum sentences. For the courts to exempt s. 344(*a*) from the application of s. 719(3), enacted specifically to apply to mandatory minimum sentences, would therefore defeat the intention of Parliament.

L'avocat de l'intimée a attiré l'attention de notre Cour sur les remarques qu'a formulées, en 1995, le ministre de la Justice, Allan Rock, à propos du projet de loi C-68, *Loi concernant les armes à feu et certaines autres armes*, au cours des débats à la Chambre des communes ainsi que devant le Comité permanent de la justice et des questions juridiques. À ces occasions, le ministre de la Justice a indiqué que le législateur entendait que les nouvelles peines minimales obligatoires prescrites relativement aux infractions liées à l'usage des armes à feu jouent un rôle dissuasif important à l'égard de ces infractions. Voir *Débats de la Chambre des communes*, vol. 133, nº 154, 1re sess., 35e lég., 16 février 1995, aux pp. 9706 et suiv.; Chambre des communes, Comité permanent de la justice et des questions juridiques, *Témoignages*, 24 avril 1995, séance nº 105, et 19 mai 1995, séance nº 147. Cependant, lorsqu'il a édicté l'al. 344*a*), dans la *Loi sur les armes à feu* en 1995, le législateur n'a toutefois pas modifié le par. 719(3) pour soustraire à son application la nouvelle peine minimale établie par l'al. 344*a*), ni modifié l'applicabilité des dispositions de la *Loi sur le système correctionnel et la mise en liberté sous condition* aux peines minimales obligatoires. Si les tribunaux soustrayaient l'al. 344*a*) à l'application du par. 719(3), qui a été adopté précisément à l'égard des peines minimales obligatoires, ils se trouveraient à contrecarrer l'intention du législateur.

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All of the above suggests that if indeed s. 719(3) had to be interpreted such as to prevent credit being given for time served in detention prior to sentencing under a mandatory minimum offence, the result would be offensive both to rationality and to justice. Fortunately, as was admirably explained by Rosenberg J.A. in *McDonald*, *supra*, this result is avoided through the application of sound principles of statutory interpretation.

Tout ce qui précède tend à indiquer qu'il serait contraire à la rationalité et à la justice d'interpréter le par. 719(3) d'une manière qui aurait pour effet d'empêcher les tribunaux d'accorder aux délinquants déclarés coupables d'une infraction à l'égard de laquelle une peine minimale est prévue une réduction pour la période qu'ils ont purgée en détention présentencielle. Heureusement, comme l'a admirablement expliqué le juge Rosenberg de la Cour d'appel dans l'arrêt *McDonald*, précité, l'application de judicieux principes d'interprétation des lois permet d'éviter un tel résultat.

33

In his judgment, Rosenberg J.A. employed several well-established rules of statutory interpretation to conclude as he did, at p. 69, that s. 719(3) provides sentencing judges with a "substantive

À la page 69 de ses motifs, après avoir appliqué plusieurs règles d'interprétation législative bien établies, le juge Rosenberg a estimé que le par. 719(3) confère au juge qui détermine la peine

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power to count pre-sentence custody in fixing the length of the sentence". I agree with his analysis. In particular, I approve of his reference to the principle that provisions in penal statutes, when ambiguous, should be interpreted in a manner favourable to the accused (see *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 29, *per* Lamer C.J.); to the need to interpret legislation so as to avoid conflict between its internal provisions, to avoid absurd results by searching for internal coherence and consistency in the statute; and finally, where a provision is capable of more than one interpretation, to choose the interpretation which is consistent with the *Charter*: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078, *per* Lamer J. (as he then was). Without repeating Rosenberg J.A.'s analysis here, I wish to make a few observations.

B. *The Distinction Between Punishment and Sentence*

35 Rosenberg J.A. relied on the distinction between the meaning of the words "punishment" and "sentence", the former being used in s. 344(*a*) and the latter in s. 719(3). I set out the relevant provisions again, for ease of reference:

> **344.** Every person who commits robbery is guilty of an indictable offence and liable
>
> (*a*) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years;
>
> **719.** . . .
>
> (3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence. [Emphasis added.]

36 The distinction between "sentence" and "punishment" was developed by the Canadian Sentencing Commission in its 1987 report, *Sentencing Reform: A Canadian Approach*, at pp. 110 *et seq*. In summary, Rosenberg J.A. emphasized at pp. 76-78 that "sentencing" is a judicial determination of a legal sanction, in contrast to "punishment" which

le [TRADUCTION] «pouvoir substantiel de prendre en compte la période de détention présentencielle lorsqu'il fixe la durée de la peine». Je suis d'accord avec son analyse. Je souscris en particulier au renvoi qu'il fait aux principes suivants: les dispositions d'une loi pénale ambiguë doivent être interprétées en faveur de l'accusé (voir *R. c. McIntosh*, [1995] 1 R.C.S. 686, au par. 29, le juge en chef Lamer); il faut interpréter un texte de loi de façon à éviter toute contradiction entre ses dispositions et tout résultat absurde, en s'efforçant d'assurer la cohérence et la logique internes du texte; enfin, lorsqu'une disposition législative peut être interprétée de plus d'une façon, il faut retenir celle qui est compatible avec les droits et libertés garantis par la *Charte*: *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038, à la p. 1078, le juge Lamer (plus tard Juge en chef). Sans reprendre toute l'analyse du juge Rosenberg, j'aimerais tout de même faire quelques observations.

B. *La distinction entre les mots anglais «punishment» et «sentence»*

Le juge Rosenberg s'est fondé sur la distinction qui existe, sur le plan sémantique, entre les mots anglais «*punishment*» et «*sentence*», le premier étant utilisé à l'al. 344*a*) et le second au par. 719(3). Je reproduis les dispositions pertinentes pour en faciliter la consultation:

> **344.** Every person who commits robbery is guilty of an indictable offence and liable
>
> (*a*) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years;
>
> **719.** . . .
>
> (3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence. [Je souligne.]

C'est la Commission canadienne sur la détermination de la peine qui a établi la distinction entre ces mots dans le rapport qu'elle a produit en 1987 et qui s'intitule *Réformer la sentence: une approche canadienne*, aux pp. 121 et suiv. En résumé, le juge Rosenberg a souligné, aux pp. 76 à 78, que le «*sentencing*» est la détermination par le tribunal

is the actual infliction of the legal sanction. While this distinction is helpful, I do not think that it is fundamental to sustain the conclusion that s. 719(3) may be applied to s. 344(*a*). The French version does not employ a similar distinction in the language of the two sections. In French, the expression "*la peine*" is used interchangeably for "punishment" (s. 344(*a*)), for "sentencing" (marginal note to s. 718.2) and for "sentence" (i.e., ss. 718.2 and 719). However, the expression "punishment" which is used twice in s. 718.3(1), is referred to in French first as "*de peine*" and the second time, in the same sentence, as "*la punition*". What is fundamental is less the words chosen, in the French or English version, but the concepts that they carry. Again, for ease of reference, I set out some of these provisions:

344. Quiconque commet un vol qualifié est coupable d'un acte criminel passible:

a) s'il y a usage d'une arme à feu lors de la perpétration de l'infraction, de l'emprisonnement à perpétuité, la peine minimale étant de quatre ans . . .

718.3 (1) Lorsqu'une disposition prescrit différents degrés ou genres de peine à l'égard d'une infraction, la punition à infliger est, sous réserve des restrictions contenues dans la disposition, à la discrétion du tribunal qui condamne l'auteur de l'infraction.

719. . . .

(3) Pour fixer la peine à infliger à une personne déclarée coupable d'une infraction, le tribunal peut prendre en compte toute période que la personne a passée sous garde par suite de l'infraction. [Emphasis added.]

Overall, both versions lead to the same conclusion, since the French phrase in s. 719(3), "*[p]our fixer la peine*" places the emphasis on the sentencing judge's role of calculating the appropriate sentence, and in doing so, provides the discretion for considering the amount of time already spent in custody by the convicted offender in relation to the offence. Since these sections refer to "*la peine*", it seems logical to conclude that in determining "*la peine minimale*" it is acceptable to apply s. 719(3),

d'une sanction légale, alors que le mot «*punishment*» s'entend du fait même d'infliger cette sanction. Bien que cette distinction soit utile, elle n'est pas, selon moi, essentielle pour étayer la conclusion que le par. 719(3) peut être appliqué à l'al. 344*a*). Il n'y a pas, dans la version française, de distinction similaire dans le texte des deux articles. En français, l'expression «la peine» est utilisée indistinctement pour rendre «*punishment*» (al. 344*a*)), «*sentencing*» (note marginale de l'art. 718.2) et «*sentence*» (aux art. 718.2 et 719). Cependant, le mot «*punishment*» est utilisé à deux reprises au par. 718.3(1), où il est rendu, en français, par les expressions «de peine» dans le premier cas et «la punition», plus loin dans la même phrase. Ce n'est pas tant les mots utilisés dans les versions française et anglaise qui importent, mais plutôt les concepts qu'ils désignent. Une fois de plus, par souci de commodité, je reproduis certaines de ces dispositions:

344. Quiconque commet un vol qualifié est coupable d'un acte criminel passible:

a) s'il y a usage d'une arme à feu lors de la perpétration de l'infraction, de l'emprisonnement à perpétuité, la peine minimale étant de quatre ans . . .

718.3 (1) Lorsqu'une disposition prescrit différents degrés ou genres de peine à l'égard d'une infraction, la punition à infliger est, sous réserve des restrictions contenues dans la disposition, à la discrétion du tribunal qui condamne l'auteur de l'infraction.

719. . . .

(3) Pour fixer la peine à infliger à une personne déclarée coupable d'une infraction, le tribunal peut prendre en compte toute période que la personne a passée sous garde par suite de l'infraction. [Je souligne.]

37 En bout de ligne, les deux versions mènent à la même conclusion, étant donné que l'expression «[p]our fixer la peine» qui figure dans la version française du par. 719(3) met l'accent sur le rôle du juge, savoir le calcul de la peine d'emprisonnement appropriée et, ce faisant, lui accorde le pouvoir discrétionnaire de prendre en compte la période que la personne déclarée coupable a déjà passée sous garde relativement à l'infraction en cause. Or, comme le texte français de ces disposi-

since "*la peine minimale*" is merely a subset of "*la peine*" generally, and has not been excluded expressly from the operation of s. 719(3). No violence is done to the language of the *Code* when the sections are read together, in French or in English, and are understood to mean, as Parliament intended, that an offender will receive a minimum sentence of four years, to commence when it is imposed, and calculated with credit given for time served.

tions parlent de «la peine», il semble logique de déduire qu'il est acceptable d'appliquer le par. 719(3) pour déterminer «la peine minimale», puisque cette dernière n'est qu'une manifestation de la notion générale exprimée par les mots «la peine», et qu'elle n'a pas été expressément exclue du champ d'application du par. 719(3). On ne fait nullement violence au texte du *Code* en lisant ensemble ces dispositions, que ce soit en français ou en anglais, et en considérant qu'ils signifient, comme l'entendait le législateur, que le délinquant est condamné à une peine minimale de quatre ans d'emprisonnement qui commence la journée où elle lui est infligée et qui est calculée en portant à son actif la période qu'il a déjà passée sous garde.

C. *The Effect of Pre-sentencing Custody on the Legally Detained Accused*

C. *L'effet de la détention présentencielle sur l'accusé légalement détenu*

38 I have already commented on the usually harsh nature of pre-sentencing custody and referred to the frequent characterization of this detention as "dead time". Some further comments are required.

J'ai commenté plus tôt le caractère généralement pénible de la détention présentencielle et mentionné qu'on qualifiait fréquemment cette période de «temps mort». D'autres remarques s'imposent.

39 Counsel for the respondent urged this Court to consider the apparent fallacy of recognizing pre-sentencing custody as punishment, since it is commonly recognized that Canadian law does not punish innocent citizens. Rosenberg J.A. in *McDonald*, *supra*, at p. 77, noted that "accused persons are not denied bail to punish them before their guilt has been determined". He referred to this Court's decision in *R. v. Pearson*, [1992] 3 S.C.R. 665, at pp. 687-88, where Lamer C.J. held that the presumption of innocence as guaranteed by s. 11(*d*) of the *Charter* has "no application at the bail stage of the criminal process, where the guilt or innocence of the accused is not determined and where punishment is not imposed".

L'avocat de l'intimée a invité notre Cour à tenir compte de l'erreur manifeste que constitue le fait de considérer la détention présentencielle comme une peine, puisqu'il est généralement admis que le droit canadien ne punit pas les citoyens innocents. Dans *McDonald*, précité, à la p. 77, le juge Rosenberg a indiqué [TRADUCTION] «qu'on ne prive pas de la liberté sous caution les personnes accusées d'un crime pour les punir avant qu'elles aient été déclarées coupables». Il a fait état de l'arrêt *R. c. Pearson*, [1992] 3 R.C.S. 665, de notre Cour, dans lequel le juge en chef Lamer a conclu, aux pp. 687 et 688, que la présomption d'innocence garantie par l'al. 11*d*) de la *Charte* «n'est pas applicable à l'étape de la mise en liberté sous caution, étape du processus pénal à laquelle la culpabilité ou l'innocence du prévenu n'est pas déterminée et où aucune peine n'est imposée».

40 Counsel for the respondent also referred to this passage from *Pearson* to support the contention that pre-trial custody may not be considered as part of the offender's punishment. With respect, it is important to consider the broader context of

L'avocat de l'intimée a également invoqué cet extrait de l'arrêt *Pearson* pour étayer sa prétention que la détention avant le procès ne peut pas être considérée comme faisant partie de la peine infligée au délinquant. En toute déférence, j'estime

Lamer C.J.'s comments. At that point in the *Pearson* judgment (at pp. 687-88), Lamer C.J. was elaborating on the specific understanding of the s. 11(*d*) presumption of innocence in the trial context:

> Thus the effect of s. 11(*d*) is to create a procedural and evidentiary rule at trial that the prosecution must prove guilt beyond a reasonable doubt. This procedural and evidentiary rule has no application at the bail stage of the criminal process, where the guilt or innocence of the accused is not determined and where punishment is not imposed. Accordingly, s. 515(6)(*d*) does not violate s. 11(*d*). [Emphasis added.]

Looking at this larger context, one cannot conclude that Lamer C.J. was proposing that pre-sentencing custody could never be viewed as punishment or that it could not retroactively be treated as part of the punishment, as provided for by s. 719(3).

To maintain that pre-sentencing custody can never be deemed punishment following conviction because the legal system does not punish innocent people is an exercise in semantics that does not acknowledge the reality of pre-sentencing custody so carefully delineated by Laskin J.A., in *Rezaie*, *supra*, and by Gary Trotter in his text, *The Law of Bail in Canada* (2nd ed. 1999), at p. 37:

> Remand prisoners, as they are sometimes called, often spend their time awaiting trial in detention centres or local jails that are ill-suited to lengthy stays. As the Ouimet Report stressed, such institutions may restrict liberty more than many institutions which house the convicted. Due to overcrowding, inmate turnover and the problems of effectively implementing programs and recreation activities, serving time in such institutions can be quite onerous.

qu'il importe de tenir compte du contexte plus global des remarques du juge en chef Lamer. À cet endroit de ses motifs dans *Pearson* (aux pp. 687 et 688), le juge en chef Lamer donnait des explications sur l'effet particulier de la présomption d'innocence prévue à l'al. 11*d*) dans le cadre du procès:

> Ainsi, l'al. 11*d*) a pour effet de créer une règle de procédure et de preuve applicable au procès: le ministère public doit prouver la culpabilité hors de tout doute raisonnable. Cette règle de procédure et de preuve n'est pas applicable à l'étape de la mise en liberté sous caution, étape du processus pénal à laquelle la culpabilité ou l'innocence du prévenu n'est pas déterminée et où aucune peine n'est imposée. Par conséquent, l'al. 515(6)*d*) ne porte pas atteinte à l'al. 11*d*). [Je souligne.]

Eu égard à ce contexte plus global, on ne saurait conclure que le juge en chef Lamer affirmait que la détention présentencielle ne peut jamais être considérée comme une peine, ni qu'une telle détention ne peut rétroactivement être considérée comme faisant partie de celle-ci, comme le prévoit le par. 719(3).

41 Prétendre que la détention présentencielle ne peut jamais être réputée constituer une peine après la déclaration de culpabilité — parce que le système judiciaire ne punit pas des personnes innocentes — est un exercice de sémantique qui ne tient pas compte de la réalité de cette détention, si soigneusement décrite par le juge Laskin dans l'arrêt *Rezaie*, précité, et par Gary Trotter, dans son ouvrage intitulé *The Law of Bail in Canada* (2e éd. 1999), à la p. 37:

> [TRADUCTION] Souvent, les prévenus en détention provisoire, comme on les appelle parfois, attendent leur procès dans des centres de détention ou des prisons locales qui ne conviennent pas à de longs séjours. Comme on l'a souligné dans le rapport Ouimet, il arrive que dans de tels établissements la liberté des prévenus soit davantage restreinte que dans bon nombre d'établissements où sont incarcérées les personnes qui ont été déclarées coupables. L'entassement des prévenus, le renouvellement constant de la population carcérale et la difficulté de mettre efficacement en œuvre des programmes et des activités récréatives font qu'il peut s'avérer très pénible d'être détenu dans de tels établissements.

Therefore, while pre-trial detention is not intended as punishment when it is imposed, it is, in effect, deemed part of the punishment following the offender's conviction, by the operation of s. 719(3). The effect of deeming such detention punishment is not unlike the determination, discussed earlier in these reasons, that time spent lawfully at large while on parole is considered nonetheless a continuation of the offender's sentence of incarceration.

En conséquence, bien que la détention avant le procès ne se veuille pas une sanction lorsqu'elle est infligée, elle est, de fait, réputée faire partie de la peine après la déclaration de culpabilité du délinquant, par l'application du par. 719(3). Le fait d'assimiler ce type de détention à une peine n'est pas sans rappeler l'observation, analysée plus tôt dans les présents motifs, que le délinquant qui bénéficie d'une libération conditionnelle continue, tant qu'il a le droit d'être en liberté, de purger sa peine d'emprisonnement.

42 If this Court were to conclude that the discretion provided by s. 719(3) to consider pre-sentencing custody was not applicable to the mandatory minimum sentence of s. 344(*a*), it is certain that unjust sentences would result. First, courts would be placed in the difficult situation of delivering unequal treatment to similarly situated offenders: for examples, see *McDonald*, *supra*, at pp. 80-81. Secondly, because of the gravity of the offence and the concern for public safety, many persons charged under s. 344(*a*), even first time offenders, would often be remanded in custody while awaiting trial. Consequently, discrepancies in sentencing between least and worst offenders would increase, since the worst offender, whose sentence exceeded the minimum would benefit from pre-sentencing credit, while the first time offender whose sentence would be set at the minimum, would not receive credit for his or her pre-sentencing detention. An interpretation of s. 719(3) and s. 344(*a*) that would reward the worst offender and penalize the least offender is surely to be avoided.

Si notre Cour jugeait que le pouvoir discrétionnaire de prendre en compte la période de détention présentencielle conféré par le par. 719(3) ne s'applique pas à la peine minimale obligatoire prévue à l'al. 344*a*), des peines injustes ne manqueraient certainement pas d'en résulter. Premièrement, les tribunaux se trouveraient dans une situation difficile, car ils devraient réserver des traitements différents à des délinquants dans des situations similaires: pour des exemples de tels cas, voir l'arrêt *McDonald*, précité, aux pp. 80 et 81. Deuxièmement, il arriverait souvent que, en raison de la gravité de l'infraction en cause et par souci d'assurer la sécurité du public, des personnes accusées de l'infraction prévue à l'al. 344*a*) soient envoyées en détention jusqu'à leur procès, même s'il s'agit d'une première infraction. En conséquence, l'écart entre les peines infligées aux délinquants les moins dangereux et les plus dangereux s'accentuerait, puisque ces derniers, du fait qu'ils reçoivent des peines supérieures au minimum prévu, profiteraient d'une réduction de peine fondée sur la période de détention présentencielle, alors que les délinquants qui n'en sont qu'à leur première infraction et qui se voient infliger la peine minimale ne bénéficieraient pas de cette réduction. Il faut certes écarter toute interprétation du par. 719(3) et de l'al. 344*a*) qui aurait pour effet de profiter aux délinquants les plus dangereux et de pénaliser les délinquants les moins dangereux.

43 These examples of the absurd results we could expect from an exclusion of the application of s. 719(3) to mandatory minimum sentences, such as

Ces exemples de résultats absurdes auxquels serait susceptible de donner lieu l'exclusion de l'application du par. 719(3) aux peines minimales

that provided by s. 344(*a*), are further indication that Parliament intended these two sections to be interpreted harmoniously and consistently within the overall context of the criminal justice system's sentencing regime.

D. *Calculating the Amount of Credit for Pre-sentence Custody*

I see no advantage in detracting from the well-entrenched judicial discretion provided in s. 719(3) by endorsing a mechanical formula for crediting pre-sentencing custody. As we have re-affirmed in this decision, the goal of sentencing is to impose a just and fit sentence, responsive to the facts of the individual offender and the particular circumstances of the commission of the offence. I adopt the reasoning of Laskin J.A., *supra*, in *Rezaie*, *supra*, at p. 105, where he noted that:

> . . . provincial appellate courts have rejected a mathematical formula for crediting pre-trial custody, instead insisting that the amount of time to be credited should be determined on a case by case basis. . . . Although a fixed multiplier may be unwise, absent justification, sentencing judges should give some credit for time spent in custody before trial (and before sentencing). [Citations omitted.]

In the past, many judges have given more or less two months credit for each month spent in pre-sentencing detention. This is entirely appropriate even though a different ratio could also be applied, for example if the accused has been detained prior to trial in an institution where he or she has had full access to educational, vocational and rehabilitation programs. The often applied ratio of 2:1 reflects not only the harshness of the detention due to the absence of programs, which may be more severe in some cases than in others, but reflects also the fact that none of the remission mechanisms contained in the *Corrections and Conditional Release Act*

obligatoires, telle celle prévue à l'al. 344*a*), sont une autre indication du fait que le législateur entendait que ces deux articles soient interprétés de façon harmonieuse et cohérente dans le contexte général du régime de détermination de la peine du système de justice criminelle.

D. *Calcul de la réduction de peine pour détention présentencielle*

44 Je ne vois aucun avantage à porter atteinte au pouvoir discrétionnaire bien établi dont disposent les tribunaux en vertu du par. 719(3) en avalisant une formule mécanique de réduction de la peine pour tenir compte de la période de détention présentencielle. Comme nous le réaffirmons dans les présents motifs, l'objectif de la détermination de la peine est l'infliction d'une peine juste et appropriée, qui prend en compte la situation du délinquant et les circonstances particulières de la perpétration de l'infraction. Je fais mien le raisonnement suivant du juge Laskin de la Cour d'appel de l'Ontario, dans *Rezaie*, précité, à la p. 105:

> [TRADUCTION] . . . les cours d'appel provinciales ont rejeté l'application d'une formule mathématique de réduction de la peine pour tenir compte de la période de détention avant le procès, insistant plutôt sur le fait que la période à retrancher de la peine doit être déterminée au cas par cas [. . .] Bien qu'il ne soit peut-être pas judicieux d'adopter un multiplicateur fixe, le juge qui détermine la peine doit, à moins de justifier son abstention de le faire, accorder une certaine réduction de peine pour tenir compte de la période passée sous garde par le délinquant avant son procès (et le prononcé de sa peine). [Références omises.]

45 Dans le passé, nombre de juges ont retranché environ deux mois à la peine du délinquant pour chaque mois de détention présentencielle. Cette façon de faire est tout à fait convenable, quoiqu'un autre rapport puisse aussi être appliqué, par exemple si l'accusé a été détenu avant son procès dans un établissement où il avait pleinement accès à des programmes d'enseignement, de formation professionnelle ou de réadaptation. Le rapport de 2 pour 1 qui est souvent appliqué reflète non seulement la rigueur de la détention en raison de l'absence de programmes, rigueur qui peut être plus grande dans certains cas que dans d'autres, mais

apply to that period of detention. "Dead time" is "real" time. The credit cannot and need not be determined by a rigid formula and is thus best left to the sentencing judge, who remains in the best position to carefully weigh all the factors which go toward the determination of the appropriate sentence, including the decision to credit the offender for any time spent in pre-sentencing custody.

également le fait qu'aucun des mécanismes de réduction de la peine prévus par la *Loi sur le système correctionnel et la mise en liberté sous condition* ne s'applique à cette période de détention. Le «temps mort» est de la détention «concrète». Comme la période à retrancher ne peut ni ne doit être établie au moyen d'une formule rigide, il est par conséquent préférable de laisser au juge qui détermine la peine le soin de calculer cette période, car c'est encore lui qui est le mieux placé pour apprécier soigneusement tous les facteurs permettant d'arrêter la peine appropriée, y compris l'opportunité d'accorder une réduction pour la période de détention présentencielle.

V. Disposition of the Appeal

V. Le dispositif

46 I would allow the appeal and set aside the judgment of the Court of Appeal. I would reinstate the sentence imposed on the appellant by Grist J., who granted the appellant one year's credit for his seven months of pre-sentencing custody, and sentenced him under s. 344(*a*) to three and one-half years' imprisonment. The concurrent sentence of one year for possession of a restricted weapon would remain unaffected by these reasons.

J'accueillerais le pourvoi et j'annulerais la décision de la Cour d'appel. Je rétablirais la peine infligée à l'appelant par le juge Grist, qui avait retranché une année de celle-ci pour tenir compte de la période de sept mois et demi passée sous garde par l'appelant avant le prononcé de sa peine, et lui avait imposé une peine de trois ans et demi d'emprisonnement en vertu de l'al. 344*a*). Les présents motifs n'ont aucune incidence sur la peine concurrente d'un an d'emprisonnement infligée pour le chef de possession d'une arme à autorisation restreinte.

Appeal allowed.

Pourvoi accueilli.

Solicitor for the appellant: Harry G. Stevenson, Vancouver.

Procureur de l'appelant: Harry G. Stevenson, Vancouver.

Solicitor for the respondent: The Ministry of the Attorney General, Vancouver.

Procureur de l'intimée: Le ministère du Procureur général, Vancouver.

Solicitor for the intervener: The Ministry of the Attorney General, Toronto.

Procureur de l'intervenant: Le ministère du Procureur général, Toronto.

SUPREME COURT OF CANADA

CITATION: R. *v.* Jordan, 2016 SCC 27

APPEAL HEARD: October 7, 2015
JUDGMENT RENDERED: July 8, 2016
DOCKET: 36068

BETWEEN:

Barrett Richard Jordan
Appellant

and

Her Majesty the Queen
Respondent

- and -

Attorney General of Alberta,
British Columbia Civil Liberties Association and
Criminal Lawyers' Association (Ontario)
Interveners

CORAM: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 141)	Moldaver, Karakatsanis and Brown JJ. (Abella and Côté JJ. concurring)
REASONS CONCURRING IN THE RESULT: (paras. 142 to 303)	Cromwell J. (McLachlin C.J. and Wagner and Gascon JJ. concurring)

R. *v.* JORDAN

Barrett Richard Jordan *Appellant*

v.

Her Majesty the Queen *Respondent*

and

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British Columbia Civil Liberties Association and
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Indexed as: R. *v.* Jordan

2016 SCC 27

File No.: 36068.

2015: October 7; 2016: July 8.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Right to be tried within reasonable time — Delay of more than four years between charges and end of trial — Whether accused's right to be tried within reasonable time under s. 11(b) of Canadian Charter of Rights and Freedoms infringed — New framework for applying s. 11(b).

J was charged in December 2008 for his role in a dial-a-dope operation. His trial ended in February 2013. J brought an application under s. 11(*b*) of the *Canadian Charter of Rights and Freedoms*, seeking a stay of proceedings due to the delay. In dismissing the application, the trial judge applied the framework set out in *R. v. Morin*, [1992] 1 S.C.R. 771. Ultimately, J was convicted. The Court of Appeal dismissed the appeal.

Held: The appeal should be allowed, the convictions set aside and a stay of proceedings entered.

Per Abella, **Moldaver**, **Karakatsanis**, Côté and **Brown** JJ.: The delay was unreasonable and J's s. 11(*b*) *Charter* right was infringed. The *Morin* framework for applying s. 11(*b*) has given rise to both doctrinal and practical problems, contributing to a culture of delay and complacency towards it. Doctrinally, the *Morin* framework is too unpredictable, too confusing, and too complex. It has itself become a burden on already over-burdened trial courts. From a practical perspective, the *Morin* framework's after-the-fact rationalization of delay does not encourage

participants in the justice system to take preventative measures to address inefficient practices and resourcing problems.

A new framework is therefore required for applying s. 11(*b*). This framework is intended to focus the s. 11(*b*) analysis on the issues that matter and encourage all participants in the criminal justice system to cooperate in achieving reasonably prompt justice, with a view to fulfilling s. 11(*b*)'s important objectives.

At the heart of this new framework is a presumptive ceiling beyond which delay — from the charge to the actual or anticipated end of trial — is presumed to be unreasonable, unless exceptional circumstances justify it. The presumptive ceiling is 18 months for cases tried in the provincial court, and 30 months for cases in the superior court (or cases tried in the provincial court after a preliminary inquiry). Delay attributable to or waived by the defence does not count towards the presumptive ceiling.

Once the presumptive ceiling is exceeded, the burden is on the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. If the Crown cannot do so, a stay will follow. Exceptional circumstances lie outside the Crown's control in that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) they cannot reasonably be remedied.

It is obviously impossible to identify in advance all circumstances that may qualify as exceptional for the purposes of adjudicating a s. 11(*b*) application.

Ultimately, the determination of whether circumstances are exceptional will depend on the trial judge's good sense and experience. The list is not closed. However, in general, exceptional circumstances fall under two categories: discrete events and particularly complex cases.

If the exceptional circumstance relates to a discrete event (such as, for example, an illness or unexpected event at trial), the delay reasonably attributable to that event is subtracted from the total delay. If the exceptional circumstance arises from the case's complexity, the delay is reasonable and no further analysis is required.

An exceptional circumstance is the only basis upon which the Crown can discharge its burden to justify a delay that exceeds the ceiling. The seriousness or gravity of the offence cannot be relied on, nor can chronic institutional delay. Most significantly, the absence of prejudice can in no circumstances be used to justify delays after the presumptive ceiling is breached. Once so much time has elapsed, only circumstances that are genuinely outside the Crown's control and ability to remedy may furnish a sufficient excuse for the prolonged delay.

Below the presumptive ceiling, however, the burden is on the defence to show that the delay is unreasonable. To do so, the defence must establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, and (2) the case took markedly longer than it reasonably should have. Absent these

two factors, the s. 11(*b*) application must fail. Stays beneath the presumptive ceiling should only be granted in clear cases.

As to the first factor, while the defence might not be able to resolve the Crown's or the trial court's challenges, it falls to the defence to show that it attempted to set the earliest possible hearing dates, was cooperative with and responsive to the Crown and the court, put the Crown on timely notice when delay was becoming a problem, and conducted all applications (including the s. 11(*b*) application) reasonably and expeditiously. At the same time, trial judges should not take this opportunity, with the benefit of hindsight, to question every decision made by the defence. The defence is required to act reasonably, not perfectly.

Turning to the second factor, the defence must show that the time the case has taken markedly exceeds the reasonable time requirements of the case. These requirements derive from a variety of factors, including the complexity of the case and local considerations. Determining the time the case reasonably should have taken is not a matter of precise calculation, as has been the practice under the *Morin* framework.

For cases currently in the system, a contextual application of the new framework is required to avoid repeating the post-*Askov* situation, where tens of thousands of charges were stayed as a result of the abrupt change in the law. Therefore, for those cases, the new framework applies, subject to two qualifications. First, for cases in which the delay exceeds the ceiling, a transitional exceptional

circumstance may arise where the charges were brought prior to the release of this decision. This transitional exceptional circumstance will apply when the Crown satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed. This requires a contextual assessment, sensitive to the manner in which the previous framework was applied, and the fact that the parties' behaviour cannot be judged strictly, against a standard of which they had no notice.

The second qualification applies to cases currently in the system in which the total delay (minus defence delay) falls below the ceiling. For these cases, the two criteria — defence initiative and whether the time the case has taken markedly exceeds what was reasonably required — must also be applied contextually, sensitive to the parties' reliance on the previous state of the law. Specifically, the defence need not demonstrate having taken initiative to expedite matters for the period of delay preceding this decision. Since defence initiative was not expressly required by the *Morin* framework, it would be unfair to require it for the period of time before the release of this decision. Further, if the delay was occasioned by an institutional delay that was, before this decision was released, reasonably acceptable in the relevant jurisdiction under the *Morin* framework, that institutional delay will be a component of the reasonable time requirements of the case for cases currently in the system.

In this case, the total delay between the charges and the end of trial was 49.5 months. As the trial judge found, four months of this delay were waived by J

when he changed counsel shortly before the trial was set to begin, necessitating an adjournment. In addition, one and a half months of the delay were caused solely by J for the adjournment of the preliminary inquiry because his counsel was unavailable for closing submissions on the last day. This leaves a remaining delay of 44 months, an amount that vastly exceeds the presumptive ceiling of 30 months in the superior court. The Crown has failed to discharge its burden of demonstrating that the delay of 44 months (excluding defence delay) was reasonable. While the case against J may have been moderately complex given the amount of evidence and the number of co-accused, it was not so exceptionally complex that it would justify such a delay.

Nor does the transitional exceptional circumstance justify the delay in this case. Since J's charges were brought prior to the release of this decision, the Crown was operating without notice of the new framework within a jurisdiction with some systemic delay issues. But a total delay of 44 months (excluding defence delay), of which the vast majority was either Crown or institutional delay, in an ordinary dial-a-dope trafficking prosecution is simply unreasonable regardless of the framework under which the Crown was operating. Therefore, it cannot be said that the Crown's reliance on the previous state of the law was reasonable. While the Crown did make some efforts to bring the matter to trial more quickly, these efforts were too little and too late. And the systemic delay problems that existed at the time cannot justify the delay either. Much of the institutional delay could have been avoided had the Crown proceeded on the basis of a more reasonable plan by more

accurately estimating the amount of time needed to present its case. To the extent that the trial judge held that this delay was reasonable, he erred.

All the parties were operating within the culture of complacency towards delay that has pervaded the criminal justice system in recent years. Broader structural and procedural changes, in addition to day-to-day efforts, are required to maintain the public's confidence by delivering justice in a timely manner. Ultimately, all participants in the justice system must work in concert to achieve speedier trials. After all, everyone stands to benefit from these efforts. Timely trials are possible. More than that, they are constitutionally required.

Per McLachlin C.J. and **Cromwell**, Wagner and Gascon JJ.: This Court's jurisprudence for dealing with alleged breaches of s. 11(*b*) of the *Canadian Charter of Rights and Freedoms* over the last 30 years supplies a clear answer to this appeal. Striking out in the completely new direction adopted by the majority is unnecessary. A reasonable time for trial under s. 11(*b*) cannot and should not be defined by numerical ceilings, as the majority concludes.

The right to be tried in a reasonable time is multi-factored, fact-sensitive, and case-specific; its application to specific cases is unavoidably complex. The relevant factors and general approach set out in *R. v. Morin*, [1992] 1 S.C.R. 771, respond to these complexities. With modest adjustments to make the analysis more straightforward and with some additional clarification, a revised *Morin* framework will continue to ensure that the constitutional right of accused persons to be tried in a

reasonable time is defined and applied in a way that appropriately balances the many relevant considerations. In order to do so, the *Morin* considerations should be regrouped under four main analytical steps.

First, the accused must establish that there is a basis for the s. 11(*b*) inquiry. The court should look to the overall period between the charge and the completion of the trial to determine whether its length merits further inquiry.

Second, the court must determine on an objective basis what would be a reasonable time for the disposition of a case like the one under review — that is, how long a case of this nature should reasonably take. The objective standard of reasonableness has two components: institutional delay and inherent time requirements of the case. Both of these periods of time are to be determined objectively. The acceptable period of institutional delay is the period that is reasonably required for the court to be ready to hear the case once the parties are ready to proceed, and is determined in accordance with the administrative guidelines for institutional delay set out by this Court in *Morin*: eight to ten months before the provincial courts and six to eight months before the superior courts. These guidelines set some rough limits on the point at which inadequacy of state resources will be accepted as an excuse. The guidelines should not be understood as precluding allowance for any sudden and temporary strain on resources that cause a temporary congestion in the courts. The inherent time requirements of a case, on the other hand, represent the period of time that is reasonably required for the parties to be ready to

proceed and to conclude the trial for a case similar in nature to the one before the court, and are to be determined on the basis of judicial experience, supplemented by submissions of counsel and evidence. In estimating a reasonable time period, the court should also take into account the liberty interests of the accused.

Third, the court must consider how much of the actual delay in the case counts against the state. This is done by subtracting the periods attributable to the defence, including any waived time periods, from the overall period of delay. When the accused consents to a date for trial offered by the court or to an adjournment sought by the Crown, that consent, without more, does not amount to waiver. The onus is on the Crown to demonstrate that this period is waived, that is, that the accused's conduct reveals something more than mere acquiescence in the inevitable, and that it meets the high bar of being clear, unequivocal, and informed acceptance. Delay resulting from unreasonable actions solely attributable to the accused must also be subtracted from the period for which the state is responsible, such as last-minute changes in counsel or adjournments flowing from a lack of diligence. It is also necessary to subtract from the actual delay any periods that, although not fairly attributable to the defence, are nonetheless not fairly counted against the state, including unavoidable delays due to inclement weather or illness of a trial participant.

Fourth, the court must determine whether the actual period of time that fairly counts against the state exceeds the reasonable time by more than can be justified on any acceptable basis. Where the actual time exceeds what would have

been reasonable for a case of that nature, the result will be a finding of unreasonable delay unless the Crown can show that the delay was justified. Even substantial excess delay may be justified and therefore reasonable where, for example, there is a particularly strong societal interest in the prosecution proceeding on its merits, or where the delay results from temporary and extraordinary pressures on counsel or the court system. However, it does not follow that in these conditions the excess period is invariably justified. The accused still may be able to demonstrate actual prejudice. Although actual prejudice need not be proved to find an infringement of s. 11(*b*), its presence would make unreasonable (in the particular circumstances of the case) a delay that might otherwise be objectively viewed as reasonable. As a result, justification may be found to be lacking.

Under this revised *Morin* framework, any delay in excess of the reasonable time requirements and any actual prejudice arising from the overall delay must be evaluated in light of societal interests: on one hand, fair treatment and prompt trial of accused persons and, on the other, determination of cases on their merits. If there are exceptionally strong societal interests in the prosecution of a case against an accused which substantially outweigh the societal interest and the interest of the accused person in prompt trials, these can serve as an acceptable basis upon which exceeding the inherent and institutional requirements of a case can be justified.

This approach is a slight reorientation of the *Morin* framework because the focus is more explicitly on the period of delay which exceeds what would have been reasonable. But there is no change in principle.

Applying these four steps of the revised *Morin* framework in this case, J's constitutional right to be tried within a reasonable time was violated. The 49.5-month delay from the charges to the end of the scheduled trial date is sufficient to trigger an inquiry into whether the delay is unreasonable. There were 10.5 months of inherent delay and 18 months of institutional delay. These findings make it appropriate to conclude that the reasonable time requirements for a case of this nature were 28.5 months. The case in fact took 49.5 months. The difference is 21 months. Of that, 4 months are attributable to the defence. The rest — a period of 17 months — counts against the state. In other words, this case took almost a year and a half longer than what would be a reasonable period to prosecute a case of this nature. This is not a close case. The time to the end of trial greatly exceeds what would be a reasonable time to prosecute a similar case. While there are societal interests in the trial on the merits of the serious drug crimes alleged against J, these cannot make reasonable the grossly excessive time that it took society to bring him to trial.

In contrast, the majority's new framework is not an appropriate approach to interpreting and applying the s. 11(*b*) right, for several reasons. First, the new approach reduces reasonableness to numerical ceilings. Reasonableness cannot be judicially defined with precision or captured by a number. As well, the majority's

judicially created ceilings largely uncouple the right to be tried within a reasonable time from the bedrock constitutional requirement of reasonableness, which is the core of the right.

Moreover, this approach unjustifiably diminishes the right to be tried within a reasonable time. When the elapsed time is below the ceiling, an accused would have to show not only that the case took markedly longer than it reasonably should have but also that he or she took meaningful steps that demonstrate a sustained effort to expedite the proceedings. This requirement has no bearing on whether the delay was unreasonable.

The majority's approach also exceeds the proper role of the Court. Creating fixed or presumptive ceilings is a task better left to legislatures. The ceilings place new limits on the exercise of the s. 11(*b*) right to a trial within a reasonable time for reasons of administrative efficiency that have nothing to do with whether the delay in a given case was or was not excessive. This is inconsistent with the judicial role.

As well, the ceilings have no support in the record in this case. What evidence there is in the record suggests that it would be unwise to establish these sorts of ceilings. For the vast majority of cases, the ceilings are so high that they risk being meaningless. They are unlikely to address the culture of delay that is said to exist and are more likely to feed such a culture.

The majority's approach also risks negative consequences for the administration of justice. The presumptive ceilings are unlikely to improve the pace at which the vast majority of cases move through the system. As well, if this new framework were applied immediately, the majority's transitional provisions will not avoid the risk of thousands of judicial stays.

Moreover, the increased simplicity which is said to flow from the majority's new framework is likely illusory. Even if creating ceilings were an appropriate task for the courts and even if there were an appropriate evidentiary basis for them, there is little reason to think these ceilings would avoid the complexities inherent in deciding whether a particular delay is unreasonable. The majority's framework simply moves the complexities of the analysis to a new location: deciding whether to rebut the presumption that a delay is unreasonable if it exceeds the ceiling in particular cases.

Ultimately, the majority's new framework casts aside three decades of the Court's jurisprudence when no participant in the appeal called for such a wholesale change, has not been the subject of adversarial scrutiny or debate, and risks thousands of judicial stays. In short, the new framework is wrong in principle and unwise in practice.

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Eric V. Gottardi and *Tony C. Paisana*, for the appellant.

Croft Michaelson, Q.C., and *Peter R. LaPrairie*, for the respondent.

Jolaine Antonio, for the intervener the Attorney General of Alberta.

Tim A. Dickson and *Martin Twigg*, for the intervener the British Columbia Civil Liberties Association.

Frank Addario and *Erin Dann*, for the intervener the Criminal Lawyers' Association (Ontario).

The judgment of Abella, Moldaver, Karakatsanis, Côté and Brown JJ. was delivered by

MOLDAVER, KARAKATSANIS AND BROWN JJ. —

I. Introduction

[1] Timely justice is one of the hallmarks of a free and democratic society. In the criminal law context, it takes on special significance. Section 11(*b*) of the *Canadian Charter of Rights and Freedoms* attests to this, in that it guarantees the right of accused persons "to be tried within a reasonable time".

[2] Moreover, the Canadian public expects their criminal justice system to bring accused persons to trial expeditiously. As the months following a criminal charge become years, everyone suffers. Accused persons remain in a state of uncertainty, often in pre-trial detention. Victims and their families who, in many cases, have suffered tragic losses cannot move forward with their lives. And the public, whose interest is served by promptly bringing those charged with criminal offences to trial, is justifiably frustrated by watching years pass before a trial occurs.

[3] An efficient criminal justice system is therefore of utmost importance. The ability to provide fair trials within a reasonable time is an indicator of the health and proper functioning of the system itself. The stakes are indisputably high.

[4] Our system, however, has come to tolerate excessive delays. The circumstances in this appeal are illustrative. Notwithstanding a delay of over four years in bringing a drug case of modest complexity to trial, both the trial judge and the Court of Appeal were of the view that the appellant was tried within a reasonable time. Their analyses are reflective of doctrinal and practical difficulties plaguing the

current analytical framework governing s. 11(*b*). These difficulties have fostered a culture of complacency within the system towards delay.

[5] A change of direction is therefore required. Below, we set out a new framework for applying s. 11(*b*). At the centre of this new framework is a presumptive ceiling on the time it should take to bring an accused person to trial: 18 months for cases going to trial in the provincial court, and 30 months for cases going to trial in the superior court. Of course, given the contextual nature of reasonableness, the framework accounts for case-specific factors both above and below the presumptive ceiling. This framework is intended to focus the s. 11(*b*) analysis on the issues that matter and encourage all participants in the criminal justice system to cooperate in achieving reasonably prompt justice, with a view to fulfilling s. 11(*b*)'s important objectives.

[6] Applying this new framework, including its transitional features, we conclude that the appellant was not brought to trial within a reasonable time. We would allow the appeal, set aside his convictions and direct a stay of proceedings.

II. Facts

[7] The appellant, Mr. Jordan, was arrested in December 2008 following an RCMP investigation into a "dial-a-dope" operation in Langley and Surrey, British Columbia. He was eventually charged with nine other co-accused on a 14-count information alleging various offences relating to possession and trafficking. Mr.

Jordan remained in custody until February 2009, when he was released under strict house arrest and other restrictive bail conditions.

[8] The 10 co-accused made numerous appearances through the early months of 2009 as they obtained counsel, made their elections, and coordinated schedules. By May 2009, all counsel had agreed that the preliminary inquiry would require approximately four days, and it was eventually set for May 13, 14, 17 and 18, 2010. Several of the co-accused entered guilty pleas or were severed from the information. By the time the preliminary inquiry commenced, there were five co-accused left on the information, including Mr. Jordan.

[9] At the preliminary inquiry, it quickly became apparent that the initial time estimate of four days was too low. Crown counsel advised the preliminary inquiry judge that the Crown would be able to present all of the evidence against the four co-accused, but that the Crown would require significantly more court time to present the "mountain of evidence" it had in respect of Mr. Jordan. The parties sought and obtained continuation dates throughout 2010 and into 2011. In May 2011, Mr. Jordan (along with two co-accused) was committed to stand trial on all 14 counts. The preliminary inquiry — which ended up taking nine days of court time — had taken a full year to complete. It was now two and a half years since Mr. Jordan had been charged.

[10] Following committal, the matter moved to the British Columbia Supreme Court. Crown counsel estimated that six weeks would be required for trial, and the

trial was set for the first available six-week block — in September 2012. A new Crown counsel took over the file in July 2011, and wrote to Mr. Jordan's counsel advising of her estimate that only two to three weeks would be needed to present the Crown's case, and offering to seek earlier trial dates. Mr. Jordan's counsel did not respond to this offer. Later, in December 2011, one of the remaining two co-accused was severed from the information. Only Mr. Jordan and one co-accused remained.

[11] As Mr. Jordan awaited trial, his liberty was restricted. He spent two months in custody following his arrest in December 2008, which was followed by close to four years of restrictive bail conditions. However, in July 2011, Mr. Jordan was convicted of prior drug charges and was sentenced to a 15-month conditional sentence order ("CSO"), which he served until October 2012. The conditions of the CSO were similar to the bail conditions Mr. Jordan was under for the charges at issue in this appeal. Therefore, for 15 months of the delay, Mr. Jordan's liberty was restricted by both the bail conditions and the CSO.

[12] At the start of his trial in September 2012, Mr. Jordan brought an application for a stay of proceedings alleging a breach of his s. 11(*b*) right to be tried within a reasonable time. This application was dismissed. The trial was adjourned, and it eventually concluded in February 2013 with his conviction on five drug-related offences. The total delay from Mr. Jordan's charges to the conclusion of the trial was 49.5 months.

III. Judgments Below

A. *British Columbia Supreme Court, 2012 BCSC 1735*

[13] The trial judge found that the delay in bringing this matter to trial was not unreasonable, and declined to enter a stay of proceedings. In concluding there was no s. 11(*b*) breach, he applied the framework from this Court's decision in *R. v. Morin*, [1992] 1 S.C.R. 771, including the guidelines set out in it for how much institutional delay is generally tolerable.

[14] The trial judge found that the inherent time requirements for this case were 10.5 months. He also found that, of the total delay, four months (incurred when Mr. Jordan changed counsel and requested an adjournment of his trial) were attributable to the defence, and two months were attributable to the Crown.

[15] The bulk of the delay — 32.5 months — was attributable to institutional delay, of which 19 months occurred at the Provincial Court and 13.5 months occurred at the B.C. Supreme Court. This was, as the trial judge noted, well outside the *Morin* guidelines for tolerable institutional delay of eight to ten months in the provincial court, and six to eight months in the superior court. However, the trial judge held that institutional delay should be given less weight than Crown delay in the final balancing.

[16] The trial judge then considered the issue of prejudice. He reasoned that if the institutional delay had been within the *Morin* guidelines, the trial would have concluded by May 2011. Most of the additional delay coincided with the term of Mr.

Jordan's CSO. The trial judge therefore found that Mr. Jordan's liberty interest was not significantly prejudiced by the delay. While Mr. Jordan's security of the person was affected, any prejudice was minimized by the fact that he was facing other outstanding charges for much of the delay. Finally, he found no prejudice to Mr. Jordan's right to make full answer and defence because the Crown's case did not depend on the memory of witnesses.

[17] The trial judge balanced all of the factors and concluded that Mr. Jordan's s. 11(*b*) right had not been infringed, due primarily to the fact that Mr. Jordan did not suffer significant prejudice.

B. *British Columbia Court of Appeal, 2014 BCCA 241, 357 B.C.A.C. 137*

[18] Mr. Jordan appealed. He argued that the trial judge erred in his assessment of prejudice and gave inadequate weight to the excessive institutional delay. The Court of Appeal found that the trial judge did not err in his attribution of the delay, or in his weighing of the institutional delay. Further, the trial judge's determination on prejudice was a finding of fact that was entitled to deference. Finally, the trial judge did not err by declining to infer prejudice based on the length of the delay alone. The appeal was dismissed.

IV. Analysis

A. *The Right to Be Tried Within a Reasonable Time Is Important to Individuals and Society as a Whole*

[19] As we have said, the right to be tried within a reasonable time is central to the administration of Canada's system of criminal justice. It finds expression in the familiar maxim: "Justice delayed is justice denied." An unreasonable delay denies justice to the accused, victims and their families, and the public as a whole.

[20] Trials within a reasonable time are an essential part of our criminal justice system's commitment to treating presumptively innocent accused persons in a manner that protects their interests in liberty, security of the person, and a fair trial. Liberty is engaged because a timely trial means an accused person will spend as little time as possible held in pre-trial custody or living in the community under release conditions. Security of the person is impacted because a long-delayed trial means prolonging the stress, anxiety, and stigma an accused may suffer. Fair trial interests are affected because the longer a trial is delayed, the more likely it is that some accused will be prejudiced in mounting a defence, owing to faded memories, unavailability of witnesses, or lost or degraded evidence.

[21] At the same time, we recognize that some accused persons who are in fact guilty of their charges are content to see their trials delayed for as long as possible. Indeed, there are incentives for them to remain passive in the face of delay. Accused persons may seek to avoid responsibility for their crimes by embracing delay, in the hope that the case against them will fall apart or they will obtain a stay

of proceedings. This operates to the detriment of the public and of the system of justice as a whole. Section 11(*b*) was not intended to be a sword to frustrate the ends of justice (*Morin*, at pp. 801-2).

[22] Of course, the interests protected by s. 11(*b*) extend beyond those of accused persons. Timely trials impact other people who play a role in and are affected by criminal trials, as well as the public's confidence in the administration of justice.

[23] Victims of crime and their families may be devastated by criminal acts and therefore have a special interest in timely trials (*R. v. Askov*, [1990] 2 S.C.R. 1199, at pp. 1220-21). Delay aggravates victims' suffering, preventing them from moving on with their lives.

[24] Timely trials allow victims and witnesses to make the best possible contribution to the trial, and minimize the "worry and frustration [they experience] until they have given their testimony" (*Askov*, at p. 1220). Repeated delays interrupt their personal, employment or business activities, creating inconvenience that may present a disincentive to their participation.

[25] Last but certainly not least, timely trials are important to maintaining overall public confidence in the administration of justice. As McLachlin J. (as she then was) put it in *Morin*, "delays are of consequence not only to the accused, but may affect the public interest in the prompt and fair administration of justice" (p. 810). Crime is of serious concern to all members of the community. Unreasonable

delay leaves the innocent in limbo and the guilty unpunished, thereby offending the community's sense of justice (see *Askov*, at p. 1220). Failure "to deal fairly, quickly and efficiently with criminal trials inevitably leads to the community's frustration with the judicial system and eventually to a feeling of contempt for court procedures" (p. 1221).

[26] Extended delays undermine public confidence in the system. And public confidence is essential to the survival of the system itself, as "a fair and balanced criminal justice system simply cannot exist without the support of the community" (*Askov*, at p. 1221).

[27] Canadians therefore rightly expect a system that can deliver quality justice in a reasonably efficient and timely manner. Fairness and timeliness are sometimes thought to be in mutual tension, but this is not so. As D. Geoffrey Cowper, Q.C., wrote in a report commissioned by the British Columbia Justice Reform Initiative:

> . . . the widely perceived conflict between justice and efficiency goals is not based in reason or sound analysis. The real experience of the system is that both must be pursued in order for each to be realised: they are, in practice, interdependent.
>
> (*A Criminal Justice System for the 21st Century* (2012), at p. 75)

[28] In short, timely trials further the interests of justice. They ensure that the system functions in a fair and efficient manner; tolerating trials after long delays does

not. Swift, predictable justice, "the most powerful deterrent of crime" is seriously undermined and in some cases rendered illusory by delayed trials (McLachlin C.J., "The Challenges We Face", remarks to the Empire Club of Canada, published in (2007), 40 *U.B.C. L. Rev*. 819, at p. 825).

B. *Problems With the Current Framework*

[29] While this Court has always recognized the importance of the right to a trial within a reasonable time, in our view, developments since *Morin* demonstrate that the system has lost its way. The framework set out in *Morin* has given rise to both doctrinal and practical problems, contributing to a culture of delay and complacency towards it.

[30] The *Morin* framework requires courts to balance four factors in determining whether a breach of s. 11(*b*) has occurred: (1) the length of the delay; (2) defence waiver; (3) the reasons for the delay, including the inherent needs of the case, defence delay, Crown delay, institutional delay, and other reasons for delay; and (4) prejudice to the accused's interests in liberty, security of the person, and a fair trial. Prejudice can be either actual or inferred from the length of the delay. Institutional delay in particular is assessed against a set of guidelines developed by this Court in *Morin*: eight to ten months in the provincial court, and a further six to eight months after committal for trial in the superior court. The *Morin* guidelines reflect the fact that resources are finite and there must accordingly be some tolerance for institutional

delay. Institutional delay within or close to the guidelines has generally been considered to be reasonable.

[31] This framework suffers from a number of related doctrinal shortcomings.

[32] First, its application is highly unpredictable. It has been interpreted so as to permit endless flexibility, making it difficult to determine whether a breach has occurred. The absence of a consistent standard has turned s. 11(*b*) into something of a dice roll, and has led to the proliferation of lengthy and often complex s. 11(*b*) applications, thereby further burdening the system.

[33] Second, as the parties and interveners point out, the treatment of prejudice has become one of the most fraught areas in the s. 11(*b*) jurisprudence: it is confusing, hard to prove, and highly subjective. As to the confusion prejudice has caused, courts have struggled to distinguish between "actual" and "inferred" prejudice. And attempts to draw this distinction have led to apparent inconsistencies, such as that prejudice might be inferred even when the evidence shows that the accused suffered no actual prejudice. Further, actual prejudice can be quite difficult to establish, particularly prejudice to security of the person or fair trial interests. Courts have also found that "it may not always be easy" to distinguish between prejudice stemming from the delay versus the charge itself (*R. v. Pidskalny*, 2013 SKCA 74, 299 C.C.C. (3d) 396, at para. 43). And even if sufficient evidence is adduced, the interpretation of that evidence is a highly subjective enterprise.

[34] Despite this confusion, prejudice has, as this case demonstrates, become an important if not determinative factor. Long delays are considered "reasonable" if the accused is unable to demonstrate significant actual prejudice to his or her protected interests. This is a problem because the accused's and the public's interests in a trial within a reasonable time does not necessarily turn on how much suffering an accused has endured. Delayed trials may also cause prejudice to the administration of justice.

[35] Third, the *Morin* framework requires a retrospective inquiry, since the analysis of delay arises only after the delay has been incurred. Courts and parties are operating within a framework that is designed not to prevent delay, but only to redress (or not redress) it. As a consequence, they are not motivated to manage "each case in advance to achieve *future compliance* with consistent standards" (M. A. Code, *Trial Within a Reasonable Time* (1992), at p. 117 (emphasis in original)). Courts are instead left to pick up the pieces once the delay has transpired. This after-the-fact review of past delay is understandably frustrating for trial judges, who have only one remedial tool at their disposal — a stay of proceedings. It is therefore unsurprising that courts have occasionally strained in applying the *Morin* framework to avoid a stay.[1]

[36] The retrospective analysis required by *Morin* also encourages parties to quibble over rationalizations for vast periods of pre-trial delay. Here, for example, the

[1] We were not invited to revisit the question of remedy. Accordingly, we refrain from doing so.

Crown argues that the trial judge erred in characterizing most of the delay as Crown or institutional delay. Had he assessed it properly, the argument goes, he would have attributed only five to eight months as Crown or institutional delay, as opposed to 34.5 months. Competing after-the-fact explanations allow for potentially limitless variations in permissible delay. As the intervener the Criminal Lawyers' Association (Ontario) submits: "Boundless flexibility is incompatible with the concept of a *Charter* right and has proved to serve witnesses, victims, defendants and the justice system's reputation poorly" (I.F., at para. 12).

[37] Finally, the *Morin* framework is unduly complex. The minute accounting it requires might fairly be considered the bane of every trial judge's existence. Although Cromwell J. warned in *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3, that courts must avoid failing to see the forest for the trees (para. 18), courts and litigants have often done just that. Each day of the proceedings from charge to trial is argued about, accounted for, and explained away. This micro-counting is inefficient, relies on judicial "guesstimations", and has been applied in a way that allows for tolerance of ever-increasing delay.

[38] In sum, from a doctrinal perspective, the s. 11(*b*) framework is too unpredictable, too confusing, and too complex. It has itself become a burden on already over-burdened trial courts.

[39] These doctrinal problems have contributed to problems in practice.

[40] As we have observed, a culture of complacency towards delay has emerged in the criminal justice system (see, e.g., Alberta Justice and Solicitor General, Criminal Justice Division, "Injecting a Sense of Urgency: A new approach to delivering justice in serious and violent criminal cases", report by G. Lepp (April 2013) (online), at p. 17; Cowper, at p. 4; P. J. LeSage and M. Code, *Report of the Review of Large and Complex Criminal Case Procedures* (2008), at p. 15; Canada, Department of Justice, "The Final Report on Early Case Consideration of the Steering Committee on Justice Efficiencies and Access to the Justice System" (2006) (online), at pp. 5-6). Unnecessary procedures and adjournments, inefficient practices, and inadequate institutional resources are accepted as the norm and give rise to ever-increasing delay. This culture of delay "causes great harm to public confidence in the justice system" (LeSage and Code, at p. 16). It "rewards the wrong behaviour, frustrates the well-intentioned, makes frequent users of the system cynical and disillusioned, and frustrates the rehabilitative goals of the system" (Cowper, at p. 48).

[41] The *Morin* framework does not address this culture of complacency. Delay is condemned or rationalized at the back end. As a result, participants in the justice system — police, Crown counsel, defence counsel, courts, provincial legislatures, and Parliament — are not encouraged to take preventative measures to address inefficient practices and resourcing problems. Some courts, with the cooperation of counsel, have undertaken commendable efforts to change courtroom culture, maximize efficiency, and minimize delay, thereby showing that it is possible

to do better. Some legislative changes and government initiatives have also been taken. In many cases, however, much remains to be done.

[42] Aggravating the tolerance for delay is the increased complexity of pre-trial and trial processes since *Morin*. New offences, procedures, obligations on the Crown and police, and legal tests have emerged. Many of them put a premium on fairness, reasonableness, and a fact-specific analysis. They take time. They also take up judges, courtrooms, and other resources.

[43] Complexity is sometimes unavoidable in order to achieve fairness or ensure that the state lives up to its constitutional obligations. But the quality of justice does not always increase proportionally to the length and complexity of a trial. Unnecessary procedural steps and inefficient advocacy have the opposite effect, weighing down the entire system. A criminal proceeding does not take place in a vacuum. Each procedural step or motion that is improperly taken, or takes longer than it should, along with each charge that should not have been laid or pursued, deprives other worthy litigants of timely access to the courts.

[44] The intervener Attorney General of Alberta submits that a change in courtroom culture is needed. This submission echoes former Chief Justice Lamer's two decades-old call for participants in the justice system to "find ways to retain a fair process . . . that can achieve practical results in a reasonable time and at reasonable expense" ("The Role of Judges", remarks to the Empire Club of Canada, 1995 (online)).

[45] We agree. And, along with other participants in the justice system, this Court has a role to play in changing courtroom culture and facilitating a more efficient criminal justice system, thereby protecting the right to trial within a reasonable time. We accept Mr. Jordan's invitation — which was echoed by the Criminal Lawyers' Association (Ontario), the British Columbia Civil Liberties Association, and Mr. Williamson in the companion appeal of *R. v. Williamson*, 2016 SCC 28 — to revise the s. 11(*b*) analysis. While departing from a precedent of this Court "is a step not to be lightly undertaken" (*Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at para. 56), as we have explained, "there are compelling reasons to do so" (*R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 44).

V. A New Framework for Section 11(*b*) Applications

A. *Summary*

[46] At the heart of the new framework is a ceiling beyond which delay is presumptively unreasonable. The presumptive ceiling is set at 18 months for cases going to trial in the provincial court, and at 30 months for cases going to trial in the superior court (or cases going to trial in the provincial court after a preliminary inquiry).

[47] If the total delay from the charge to the actual or anticipated end of trial (minus defence delay) *exceeds* the ceiling, then the delay is presumptively

unreasonable. To rebut this presumption, the Crown must establish the presence of exceptional circumstances. If it cannot, the delay is unreasonable and a stay will follow.

[48] If the total delay from the charge to the actual or anticipated end of trial (minus defence delay or a period of delay attributable to exceptional circumstances) falls *below* the presumptive ceiling, then the onus is on the defence to show that the delay is unreasonable. To do so, the defence must establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, *and* (2) the case took markedly longer than it reasonably should have. We expect stays beneath the ceiling to be rare, and limited to clear cases.

B. *The Presumptive Ceiling*

[49] The most important feature of the new framework is that it sets a ceiling beyond which delay is presumptively unreasonable. For cases going to trial in the provincial court, the presumptive ceiling is 18 months from the charge to the actual or anticipated end of trial. For cases going to trial in the superior court, the presumptive ceiling is 30 months from the charge to the actual or anticipated end of trial.[2] We note the 30-month ceiling would also apply to cases going to trial in the provincial court

[2] This Court has held that s. 11(*b*) applies to sentencing proceedings (*R. v. MacDougall*, [1998] 3 S.C.R. 45). Some sentencing proceedings require significant time, for example, dangerous offender applications or situations in which expert reports are required, or extensive evidence is tendered. The issue of delay in sentencing, however, is not before us, and we make no comment about how this ceiling should apply to s. 11(*b*) applications brought after a conviction is entered, or whether additional time should be added to the ceiling in such cases.

after a preliminary inquiry.[3] As we will discuss, defence-waived or -caused delay does not count in calculating whether the presumptive ceiling has been reached — that is, such delay is to be discounted.

[50] A presumptive ceiling is required in order to give meaningful direction to the state on its constitutional obligations and to those who play an important role in ensuring that the trial concludes within a reasonable time: court administration, the police, Crown prosecutors, accused persons and their counsel, and judges. It is also intended to provide some assurance to accused persons, to victims and their families, to witnesses, and to the public that s. 11(*b*) is not a hollow promise.

[51] While the presumptive ceiling will enhance analytical simplicity and foster constructive incentives, it is not the end of the exercise: as we will explain in greater detail, compelling case-specific factors remain relevant to assessing the reasonableness of a period of delay both above and below the ceiling. Obviously, reasonableness cannot be captured by a number alone, which is why the new framework is not solely a function of time. Contrary to what our colleague Cromwell J. asserts, we do not depart from the concept of reasonableness; we simply adopt a different view of how reasonableness should be assessed.

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[3] While most proceedings with a preliminary inquiry are eventually tried in the superior court, this is not always the case. For example, a case may go to trial in the provincial court after a preliminary inquiry if the province in which the trial takes place offers this as an option (such as Quebec), or if the accused re-elects a trial in the provincial court following a preliminary inquiry. In either case, the 30-month ceiling would apply.

[52] In setting the presumptive ceiling, we were guided by a number of considerations. First, it takes as a starting point the *Morin* guidelines.[4] In *Morin*, this Court set eight to ten months as a guide for institutional delay in the provincial court, and an additional six to eight months as a guide for institutional delay in the superior court following an accused's committal for trial. Thus, under *Morin*, a total of 14 to 18 months was the measure for proceedings involving both the provincial court and the superior court.

[53] Second, the presumptive ceiling also reflects additional time to account for the other factors that can reasonably contribute to the time it takes to prosecute a case. These factors include the inherent time requirements of the case and the increased complexity of criminal cases since *Morin*. In this way, the ceiling takes into account the significant role that process now plays in our criminal justice system.

[54] Third, although prejudice will no longer play an explicit role in the s. 11(*b*) analysis, it informs the setting of the presumptive ceiling. Once the ceiling is breached, we presume that accused persons will have suffered prejudice to their *Charter*-protected liberty, security of the person, and fair trial interests. As this Court wrote in *Morin*, "prejudice to the accused can be inferred from prolonged delay" (p. 801; see also *Godin*, at para. 37). This is not, we stress, a rebuttable presumption:

[4] We note that the appellant and some of the interveners submitted that the *Morin* guidelines were intended to apply to the *entire period* of delay, rather than just the segment of delay caused by a shortfall of institutional resources. This is incorrect. The only reasonable reading of this Court's decisions in *Askov*, *Morin*, and *Godin* is that the guidelines were intended to apply only to institutional delay, not the entire period of delay.

once the ceiling is breached, an absence of actual prejudice cannot convert an unreasonable delay into a reasonable one.

[55] Fourth, the presumptive ceiling has an important public interest component. The clarity and assurance it provides will build public confidence in the administration of justice.

[56] We also make this observation about the presumptive ceiling. It is not an aspirational target. Rather, it is the point at which delay becomes presumptively unreasonable. The public should expect that most cases can and should be resolved before reaching the ceiling. For this reason, as we will explain, the Crown bears the onus of justifying delays that exceed the ceiling. It is also for this reason that an accused may in clear cases still demonstrate that his or her right to be tried within a reasonable time has been infringed, even before the ceiling has been breached.

[57] There is little reason to be satisfied with a presumptive ceiling on trial delay set at 18 months for cases going to trial in the provincial court, and 30 months for cases going to trial in the superior court. This is a long time to wait for justice. But the ceiling reflects the realities we currently face. We may have to revisit these numbers and the considerations that inform them in the future.

[58] Our colleague Cromwell J. misapprehends the effect of the presumptive ceiling, asserting that this framework "reduces reasonableness to two numerical ceilings" (para. 254). As we will explain in greater detail, this is clearly not so. The

presumptive ceiling marks the point at which the burden shifts from the defence to prove that the delay was unreasonable, to the Crown to justify the length of time the case has taken. As our colleague acknowledges, pursuant to our framework, "the judge must look at the circumstances of the particular case at hand" in assessing the reasonableness of a delay (para. 301).

[59] We now turn to discussing the various case-specific factors that must be accounted for both above and below the presumptive ceiling.

C. *Accounting for Defence Delay*

[60] Application of this framework, as under the *Morin* framework, begins with calculating the total delay from the charge to the actual or anticipated end of trial. Once that is determined, delay attributable to the defence must be subtracted. The defence should not be allowed to benefit from its own delay-causing conduct. As Sopinka J. wrote in *Morin*: "The purpose of s. 11(*b*) is to expedite trials and minimize prejudice and not to avoid trials on the merits" (p. 802).

[61] Defence delay has two components. The first is delay waived by the defence (*Askov*, at pp. 1228-29; *Morin*, at pp. 790-91). Waiver can be explicit or implicit, but in either case, it must be clear and unequivocal. The accused must have full knowledge of his or her rights, as well as the effect waiver will have on those rights. However, as in the past, "[i]n considering the issue of 'waiver' in the context of s. 11(*b*), it must be remembered that it is not the right itself which is being waived,

but merely the inclusion of specific periods in the overall assessment of reasonableness" (*R. v. Conway*, [1989] 1 S.C.R. 1659, per L'Heureux-Dubé J., at p. 1686).

[62] Accused persons sometimes, either before or during their preliminary hearing, wish to re-elect from a superior court trial to a provincial court trial for legitimate reasons. To do so, the Crown's consent must be obtained (*Criminal Code*, R.S.C. 1985, c. C-46, s. 561). Of course, it would generally be open to the Crown to ask the accused to waive the delay stemming from the re-election as a condition of its consent.

[63] The second component of defence delay is delay caused solely by the conduct of the defence. This kind of defence delay comprises "those situations where the accused's acts either directly caused the delay . . . or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial" (*Askov*, at pp. 1227-28). Deliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests, are the most straightforward examples of defence delay. Trial judges should generally dismiss such applications and requests the moment it becomes apparent they are frivolous.

[64] As another example, the defence will have directly caused the delay if the court and the Crown are ready to proceed, but the defence is not. The period of delay resulting from that unavailability will be attributed to the defence. However, periods of time during which the court and the Crown are unavailable will not constitute

defence delay, even if defence counsel is also unavailable. This should discourage unnecessary inquiries into defence counsel availability at each appearance. Beyond defence unavailability, it will of course be open to trial judges to find that other defence actions or conduct have caused delay (see, e.g., *R. v. Elliott* (2003), 114 C.R.R. (2d) 1 (Ont. C.A.), at paras. 175-82).

[65] To be clear, defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay. For example, the defence must be allowed preparation time, even where the court and the Crown are ready to proceed. In addition, defence applications and requests that are not frivolous will also generally not count against the defence. We have already accounted for procedural requirements in setting the ceiling. And such a deduction would run contrary to the accused's right to make full answer and defence. While this is by no means an exact science, first instance judges are uniquely positioned to gauge the legitimacy of defence actions.

[66] To summarize, as a first step, total delay must be calculated, and defence delay must be deducted. Defence delay comprises delays waived by the defence, and delays caused solely or directly by the defence's conduct. Defence actions legitimately taken to respond to the charges do not constitute defence delay.

[67] The next step of the analysis depends upon whether the remaining delay — that is, the delay which was not caused by the defence — is *above* or *below* the presumptive ceiling.

D. *Above the Ceiling — Presumptively Unreasonable Delay*

[68] Delay (minus defence delay) that exceeds the ceiling is presumptively unreasonable. The Crown may rebut this presumption by showing that the delay is reasonable because of the presence of exceptional circumstances.

Exceptional Circumstances

[69] Exceptional circumstances lie *outside the Crown's control* in the sense that (1) they are reasonably unforeseen *or* reasonably unavoidable, *and* (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise. So long as they meet this definition, they will be considered exceptional. They need not meet a further hurdle of being rare or entirely uncommon.

[70] It is not enough for the Crown, once the ceiling is breached, to point to a past difficulty. It must also show that it took reasonable available steps to avoid and address the problem *before* the delay exceeded the ceiling. This might include prompt resort to case management processes to seek the assistance of the court, or seeking assistance from the defence to streamline evidence or issues for trial or to coordinate pre-trial applications, or resorting to any other appropriate procedural means. The Crown, we emphasize, is not required to show that the steps it took were ultimately successful — rather, just that it took reasonable steps in an attempt to avoid the delay.

[71] It is obviously impossible to identify in advance all circumstances that may qualify as "exceptional" for the purposes of adjudicating a s. 11(*b*) application. Ultimately, the determination of whether circumstances are "exceptional" will depend on the trial judge's good sense and experience. The list is not closed. However, in general, exceptional circumstances fall under two categories: discrete events and particularly complex cases.

[72] Commencing with the former, by way of illustration, it is to be expected that medical or family emergencies (whether on the part of the accused, important witnesses, counsel or the trial judge) would generally qualify. Cases with an international dimension, such as cases requiring the extradition of an accused from a foreign jurisdiction, may also meet the definition.

[73] Discrete, exceptional events that arise at trial may also qualify and require some elaboration. Trials are not well-oiled machines. Unforeseeable or unavoidable developments can cause cases to quickly go awry, leading to delay. For example, a complainant might unexpectedly recant while testifying, requiring the Crown to change its case. In addition, if the trial goes longer than reasonably expected — even where the parties have made a good faith effort to establish realistic time estimates — then it is likely the delay was unavoidable and may therefore amount to an exceptional circumstance.

[74] Trial judges should be alive to the practical realities of trials, especially when the trial was scheduled to conclude below the ceiling but, in the end, exceeded

it. In such cases, the focus should be on whether the Crown made reasonable efforts to respond and to conclude the trial under the ceiling. Trial judges should also bear in mind that when an issue arises at trial close to the ceiling, it will be more difficult for the Crown and the court to respond with a timely solution. For this reason, it is likely that unforeseeable or unavoidable delays occurring during trials that are scheduled to wrap up close to the ceiling will qualify as presenting exceptional circumstances.

[75] The period of delay caused by any discrete exceptional events must be subtracted from the total period of delay for the purpose of determining whether the ceiling has been exceeded. Of course, the Crown must always be prepared to mitigate the delay resulting from a discrete exceptional circumstance. So too must the justice system. Within reason, the Crown and the justice system should be capable of prioritizing cases that have faltered due to unforeseen events (see *R. v. Vassell*, 2016 SCC 26). Thus, any portion of the delay that the Crown and the system could reasonably have mitigated may not be subtracted (i.e., it may not be appropriate to subtract the entire period of delay occasioned by discrete exceptional events).

[76] If the remaining delay falls below the ceiling, the accused may still demonstrate in clear cases that the delay is unreasonable as outlined below. If, however, the remaining delay exceeds the ceiling, the delay is unreasonable and a stay of proceedings must be entered.

[77] As indicated, exceptional circumstances also cover a second category, namely, cases that are particularly complex. This too requires elaboration.

Particularly complex cases are cases that, because of the nature of the *evidence* or the nature of the *issues*, require an inordinate amount of trial or preparation time such that the delay is justified. As for the nature of the evidence, hallmarks of particularly complex cases include voluminous disclosure, a large number of witnesses, significant requirements for expert evidence, and charges covering a long period of time. Particularly complex cases arising from the nature of the issues may be characterized by, among other things, a large number of charges and pre-trial applications; novel or complicated legal issues; and a large number of significant issues in dispute. Proceeding jointly against multiple co-accused, so long as it is in the interest of justice to do so, may also impact the complexity of the case.

[78] A typical murder trial will not usually be sufficiently complex to comprise an exceptional circumstance. However, if an inordinate amount of trial or preparation time is needed as a result of the nature of the evidence or the issues such that the time the case has taken is justified, the complexity of the case will qualify as presenting an exceptional circumstance.

[79] It bears reiterating that such determinations fall well within the trial judge's expertise. And, of course, the trial judge will also want to consider whether the Crown, having initiated what could reasonably be expected to be a complex prosecution, developed and followed a concrete plan to minimize the delay occasioned by such complexity (*R. v. Auclair*, 2014 SCC 6, [2014] 1 S.C.R. 83, at para. 2). Where it has failed to do so, the Crown will not be able to show exceptional

circumstances, because it will not be able to show that the circumstances were outside its control. In a similar vein, and for the same reason, the Crown may wish to consider whether multiple charges for the same conduct, or trying multiple co-accused together, will unduly complicate a proceeding. While the court plays no supervisory role for such decisions, Crown counsel must be alive to the fact that any delay resulting from their prosecutorial discretion must conform to the accused's s. 11(*b*) right (see, e.g., *Vassell*). As this Court said in *R. v. Rodgerson*, 2015 SCC 38, [2015] 2 S.C.R. 760:

> Certainly, it is within the Crown's discretion to prosecute charges where the evidence would permit a reasonable jury to convict. However, some semblance of a cost-benefit analysis would serve the justice system well. Where the additional or heightened charges are marginal, and pursuing them would necessitate a substantially more complex trial process and jury charge, the Crown should carefully consider whether the public interest would be better served by either declining to prosecute the marginal charges from the outset or deciding not to pursue them once the evidence at trial is complete. [para. 45]

[80] Where the trial judge finds that the case was particularly complex such that the time the case has taken is justified, the delay is reasonable and no stay will issue. No further analysis is required.

[81] To be clear, the presence of exceptional circumstances is *the only basis* upon which the Crown can discharge its burden to justify a delay that exceeds the ceiling. As discussed, an exceptional circumstance can arise from a discrete event (such as an illness, extradition proceeding, or unexpected event at trial) or from a case's complexity. The seriousness or gravity of the offence cannot be relied on,

although the more complex cases will often be those involving serious charges, such as terrorism, organized crime, and gang-related activity. Nor can chronic institutional delay be relied upon. Perhaps most significantly, the absence of prejudice can in no circumstances be used to justify delays after the ceiling is breached. Once so much time has elapsed, only circumstances that are genuinely outside the Crown's control and ability to remedy may furnish a sufficient excuse for the prolonged delay.

E. *Below the Presumptive Ceiling*

[82] A delay may be unreasonable even if it falls below the presumptive ceiling. If the total delay from the charge to the actual or anticipated end of trial (minus defence delay and delay attributable to exceptional circumstances that are discrete in nature) is less than 18 months for cases going to trial in the provincial court, or 30 months for cases going to trial in the superior court, then the defence bears the onus to show that the delay is unreasonable. To do so, the defence must establish two things: (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings; *and* (2) the case took markedly longer than it reasonably should have. Absent these two factors, the s. 11(*b*) application must fail.

[83] We expect stays beneath the ceiling to be granted only in clear cases. As we have said, in setting the ceiling, we factored in the tolerance for reasonable institutional delay established in *Morin*, as well as the inherent needs and the increased complexity of most cases.

(1) Defence Initiative — Meaningful and Sustained Steps

[84] To discharge its onus where delay falls below the ceiling, the defence must demonstrate that it took meaningful, sustained steps to expedite the proceedings. "Action or non-action by the accused which is inconsistent with a desire for a timely trial is something that the court must consider" (*Morin*, at p. 802). Here, the trial judge should consider what the defence could have done, and what it actually did, to get the case heard as quickly as possible. Substance matters, not form.

[85] To satisfy this criterion, it is not enough for the defence to make token efforts such as to simply put on the record that it wanted an earlier trial date. Since the defence benefits from a strong presumption in favour of a stay once the ceiling is exceeded, it is incumbent on the defence, in order to justify a stay below the ceiling, to demonstrate having taken meaningful and sustained steps to be tried quickly. While the defence might not be able to resolve the Crown's or the trial court's challenges, it falls to the defence to show that it attempted to set the earliest possible hearing dates, was cooperative with and responsive to the Crown and the court, put the Crown on timely notice when delay was becoming a problem, and conducted all applications (including the s. 11(*b*) application) reasonably and expeditiously. At the same time, trial judges should not take this opportunity, with the benefit of hindsight, to question every decision made by the defence. The defence is required to act reasonably, not perfectly.

[86] Our colleague Cromwell J. criticizes this requirement as diminishing the right to be tried within a reasonable time. We respectfully disagree. First, this Court already considers defence conduct in assessing s. 11(*b*) applications. And the level of diligence displayed by the accused is relevant in the context of other *Charter* rights as well, like the s. 10(*b*) right to counsel (*R. v. Tremblay*, [1987] 2 S.C.R. 435, at p. 439). Second, as mentioned, the requirement of defence initiative below the ceiling is a corollary to the Crown's justificatory burden above the ceiling. Third, this requirement reflects the practical reality that a level of cooperation between the parties is necessary in planning and conducting a trial. Encouraging the defence to be part of the solution will have positive ramifications not only for individual cases but for the entire justice system, thereby enhancing — rather than diminishing — timely justice.

(2) Reasonable Time Requirements of the Case — Time Markedly Exceeded

[87] Next, the defence must show that the time the case has taken markedly exceeds the reasonable time requirements of the case. The reasonable time requirements of a case derive from a variety of factors, including the complexity of the case, local considerations, and whether the Crown took reasonable steps to expedite the proceedings.

[88] The reasonable time requirements of the case will increase proportionally to a case's complexity. As Sopinka J. wrote in *Morin*: "All other factors being equal,

the more complicated a case, the longer it will take counsel to prepare for trial and for the trial to be conducted once it begins" (pp. 791-92).

[89] In considering the reasonable time requirements of the case, trial judges should also employ the knowledge they have of their own jurisdiction, including how long a case of that nature typically takes to get to trial in light of the relevant local and systemic circumstances.

[90] Where the Crown has done its part to ensure that the matter proceeds expeditiously — including genuinely responding to defence efforts, seeking opportunities to streamline the issues and evidence, and adapting to evolving circumstances as the case progresses — it is unlikely that the reasonable time requirements of the case will have been markedly exceeded. As with assessing the conduct of the defence, trial judges should not hold the Crown to a standard of perfection.

[91] Determining whether the time the case has taken markedly exceeds what was reasonably required is not a matter of precise calculation. Trial judges should not parse each day or month, as has been the common practice since *Morin*, to determine whether each step was reasonably required. Instead, trial judges should step back from the minutiae and adopt a bird's-eye view of the case. All this said, this determination is a question of fact falling well within the expertise of the trial judge (*Morin*, per Sopinka J., at pp. 791-92).

F. *Applying the New Framework to Cases Already in the System*

[92] When this Court released its decision in *Askov*, tens of thousands of charges were stayed in Ontario alone as a result of the abrupt change in the law. Such swift and drastic consequences risk undermining the integrity of the administration of justice.

[93] We recognize that this new framework is a departure from the law that was applied to s. 11(*b*) applications in the past. A judicial change in the law is presumed to operate retroactively and apply to past conduct (*Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429, at para. 84). Slightly more relaxed rules apply to judicial changes to the interpretation of constitutional provisions (para. 88). Transition periods, suspended declarations of invalidity, and purely prospective remedies are part of the discretionary remedial framework of our constitutional law (paras. 88-92; *R. v. Brydges*, [1990] 1 S.C.R. 190, at pp. 217-18; *R. v. Feeney*, [1997] 2 S.C.R. 117).

[94] Here, there are a variety of reasons to apply the framework contextually and flexibly for cases currently in the system, one being that it is not fair to strictly judge participants in the criminal justice system against standards of which they had no notice. Further, this new framework creates incentives for both the Crown and the defence to expedite criminal cases. However, in jurisdictions where prolonged delays are the norm, it will take time for these incentives to shift the culture. As well, the administration of justice cannot tolerate a recurrence of what transpired after the

release of *Askov*, and this contextual application of the framework is intended to ensure that the post-*Askov* situation is not repeated.

[95] The new framework, including the presumptive ceiling, applies to cases currently in the system, subject to two qualifications.

[96] First, for cases in which the delay *exceeds* the ceiling, a transitional exceptional circumstance may arise where the charges were brought prior to the release of this decision. This transitional exceptional circumstance will apply when the Crown satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed. This requires a contextual assessment, sensitive to the manner in which the previous framework was applied, and the fact that the parties' behaviour cannot be judged strictly, against a standard of which they had no notice. For example, prejudice and the seriousness of the offence often played a decisive role in whether delay was unreasonable under the previous framework. For cases currently in the system, these considerations can therefore inform whether the parties' reliance on the previous state of the law was reasonable. Of course, if the parties have had time following the release of this decision to correct their behaviour, and the system has had some time to adapt, the trial judge should take this into account.

[97] Moreover, the delay may exceed the ceiling because the case is of moderate complexity in a jurisdiction with significant institutional delay problems. Judges in jurisdictions plagued by lengthy, persistent, and notorious institutional

delays should account for this reality, as Crown counsel's behaviour is constrained by systemic delay issues. Parliament, the legislatures, and Crown counsel need time to respond to this decision, and stays of proceedings cannot be granted *en masse* simply because problems with institutional delay currently exist. As we have said, the administration of justice cannot countenance a recurrence of *Askov*. This transitional exceptional circumstance recognizes that change takes time, and institutional delay — even if it is significant — will not automatically result in a stay of proceedings.

[98] On the other hand, the s. 11(*b*) rights of all accused persons cannot be held in abeyance while the system works to respond to this new framework. Section 11(*b*) breaches will still be found and stays of proceedings will still be entered for cases currently in the system. For example, if the delay in a simple case vastly exceeds the ceiling because of repeated mistakes or missteps by the Crown, the delay might be unreasonable even though the parties were operating under the previous framework. The analysis must always be contextual. We rely on the good sense of trial judges to determine the reasonableness of the delay in the circumstances of each case.

[99] The second qualification applies to cases currently in the system in which the total delay (minus defence delay) falls *below* the ceiling. For these cases, the two criteria — defence initiative and whether the time the case has taken markedly exceeds what was reasonably required — must also be applied contextually, sensitive to the parties' reliance on the previous state of the law. Specifically, the defence need

not demonstrate having taken initiative to expedite matters for the period of delay preceding this decision. Since defence initiative was not expressly required by the *Morin* framework, it would be unfair to require it for the period of time before the release of this decision. However, in close cases, any defence initiative during that time would assist the defence in showing that the delay markedly exceeds what was reasonably required. The trial judge must also still consider action or inaction by the accused that may be inconsistent with a desire for a timely trial (*Morin*, at p. 802).

[100] Further, if the delay was occasioned by an institutional delay that was reasonably acceptable in the relevant jurisdiction under the *Morin* framework before this decision was released, that institutional delay will be a component of the reasonable time requirements of the case for cases currently in the system.

[101] We note that given the level of institutional delay tolerated under the previous approach, a stay of proceedings below the ceiling will be even more difficult to obtain for cases currently in the system. We also emphasize that for cases in which the charge is brought shortly after the release of this decision, the reasonable time requirements of the case must reflect this high level of tolerance for institutional delay in particular localities.

[102] Ultimately, for most cases that are already in the system, the release of this decision should not automatically transform what would previously have been considered a reasonable delay into an unreasonable one. Change takes time. In his

dissenting opinion in *Mills v. The Queen*, [1986] 1 S.C.R. 863, Lamer J. (as he then was) was alive to this concern and his comments are apposite here:

> This case is the first to have presented this Court with the opportunity of establishing appropriate guidelines for the application of s. 11(*b*). The full scope of the section, and the nature of the obligation it has imposed upon the government and the courts has remained uncertain for the period prior to the rendering of this judgment.
>
> Given this uncertainty and the terminative nature of the remedy for a violation of the section, i.e., a stay of proceedings, I am of the view that a transitional approach is appropriate, and indeed necessary, to enable the courts and the governments to properly discharge their burden under s. 11(*b*). This is not to say that different criteria ought to apply during the transitional period, that is, the period prior to the rendering of this judgment, but rather that the behaviour of the accused and the authorities must be evaluated in its proper context. In other words, it would be inaccurate to give effect to behaviour which occurred prior to this judgment against a standard the parameters of which were unknown to all. [Emphasis added; p. 948.]

[103] We echo Lamer J.'s remarks. For cases already in the system, the presumptive ceiling still applies; however, "the behaviour of the accused and the authorities" — which is an important consideration in the new framework — "must be evaluated in its proper context" (*Mills*, at p. 948). The reasonableness of a period of time to prosecute a case takes its colour from the surrounding circumstances. Reliance on the law as it then stood is one such circumstance.

[104] We disagree with Cromwell J. that our framework's allowance for present realities somehow creates a *Charter* amnesty. For cases currently in the system, the s. 11(*b*) right will receive no less protection than it does now. The point is that, on an ongoing basis, our framework has the potential to effect positive change

within the justice system, rather than succumb to the culture of complacency we have described.

G. *Concluding Comments on the New Framework*

[105] The new framework for s. 11(*b*) can be summarized as follows:

- There is a ceiling beyond which delay becomes presumptively unreasonable. The presumptive ceiling is 18 months for cases tried in the provincial court, and 30 months for cases in the superior court (or cases tried in the provincial court after a preliminary inquiry). Defence delay does not count towards the presumptive ceiling.

- **Once the presumptive ceiling is exceeded**, the burden shifts to the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. Exceptional circumstances lie outside the Crown's control in that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) they cannot reasonably be remedied. If the exceptional circumstance relates to a discrete event, the delay reasonably attributable to that event is subtracted. If the exceptional circumstance arises from the case's complexity, the delay is reasonable.

- **Below the presumptive ceiling**, in clear cases, the defence may show that the delay is unreasonable. To do so, the defence must establish two things: (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings; and (2) the case took markedly longer than it reasonably should have.

- **For cases currently in the system**, the framework must be applied flexibly and contextually, with due sensitivity to the parties' reliance on the previous state of the law.

[106] As part of the process of developing this framework, we conducted a qualitative review of nearly every reported s. 11(*b*) appellate decision from the past 10 years, and many decisions from trial courts. These cases assisted in developing the

definition of exceptional circumstances, as they highlighted the types of circumstances that judges have found to justify prolonged delays. By reading these cases with the new framework in mind, we were able to get a rough sense of how the new framework would have played out in some past cases. Indeed, we note that in the seminal case of *Askov*, the delay was in the range of 30 months, as it was in *Godin* some 19 years later, and in both cases, this Court found the delays to be unreasonable.

[107] It is also clear from this case law review that the ceiling will not permit the parties or the courts to operate business as usual. The ceiling is designed to encourage conduct and the allocation of resources that promote timely trials. The jurisprudence from the past decade demonstrates that the current approach to s. 11(*b*) does not encourage good behaviour. Finger pointing is more common than problem solving. This body of decisions makes it clear that the incentives inherent in the status quo fall short in the ways we have described.

[108] We acknowledge that this new framework represents a significant shift from past practice. First, its standpoint is prospective. Participants in the criminal justice system will know, *in advance*, the bounds of reasonableness so proactive measures can be taken to remedy any delay. And the public will more clearly understand what it means to hold a trial within a reasonable time. Enhanced clarity and predictability befits a *Charter* right of such fundamental importance to our criminal justice system.

[109] Second, the new framework resolves the difficulties surrounding the concept of prejudice. Instead of being an express analytical factor, the concept of prejudice underpins the entire framework. Prejudice is accounted for in the creation of the ceiling. It also has a strong relationship with defence initiative, in that we can expect accused persons who are truly prejudiced to be proactive in moving the matter along.

[110] Prejudice has been one of the most fraught areas of s. 11(*b*) jurisprudence for over two decades. Understanding prejudice as informing the setting of the ceiling, rather than treating prejudice as an express analytical factor, also better recognizes that, as we have said, prolonged delays cause prejudice to not just specific accused persons, but also victims, witnesses, and the system of justice as a whole.

[111] Third, the new framework reduces, although does not eliminate, the need to engage in complicated micro-counting. While judges will still have to determine defence delay, the inquiry beneath the ceiling into whether the case took markedly longer than it reasonably should have replaces the micro-counting process with a global assessment. This inquiry need only arise if the accused has taken meaningful and sustained steps to expedite matters. And above the ceiling, a s. 11(*b*) analysis is triggered only where the Crown seeks to rely on exceptional circumstances. A framework that is simpler to apply is itself of value: ". . . we must remind ourselves that the best test will be relatively easy to apply; otherwise, stay applications

themselves will contribute to the already heavy load on trial judges and compound the problem of delay" (*Morin*, per McLachlin J., at p. 810).

[112] In addition, the new framework will help facilitate a much-needed shift in culture. In creating incentives for both sides, it seeks to enhance accountability by fostering proactive, preventative problem solving. From the Crown's perspective, the framework clarifies the content of the Crown's ever-present constitutional obligation to bring the accused to trial within a reasonable time. Above the ceiling, the Crown will only be able to discharge its burden if it can show that it should not be held accountable for the circumstances which caused the ceiling to be breached because they were genuinely outside its control. Crown counsel will be motivated to act proactively throughout the proceedings to preserve its ability to justify a delay that exceeds the ceiling, should the need arise. Below the ceiling, a diligent, proactive Crown will be a strong indication that the case did not take markedly longer than reasonably necessary.

[113] The new framework also encourages the defence to be part of the solution. If an accused brings a s. 11(*b*) application when the total delay (minus defence delay and delay attributable to exceptional circumstances that are discrete in nature) falls below the ceiling, the defence must demonstrate that it took meaningful and sustained steps to expedite the proceedings as a prerequisite to a stay. Further, the deduction of defence delay from total delay as a starting point in the analysis clearly

indicates that the defence cannot benefit from its own delay-causing action or inaction.

[114] The new framework makes courts more accountable, too. Absent exceptional circumstances, the ceiling limits the extent to which judges can tolerate delays before a stay must be imposed. Indeed, courts are important players in changing courtroom culture. Many courts have developed robust case management and trial scheduling processes, focussing attention on possible sources of delay (such as pre-trial applications or unrealistic estimates of trial length) and thereby seeking to avoid or minimize unnecessary delay. Some courts, however, have not.

[115] As we have said, this Court also has a role to play. On many occasions, this Court has established detailed guidelines and minimum requirements to give meaningful content to constitutional rights in the criminal law context (see, e.g., *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, at para. 83; *Lavallee*, *Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at para. 49; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401, at paras. 53-56). Section 11(*b*) has received its content in much the same way. Cromwell J.'s framework, like ours, and like *Morin* and *Askov*, is entirely judicially created. And, like ours, and like *Morin* and *Askov*, it relies heavily on numerical guidelines (with such guidelines acting as guideposts, not absolute limitation periods). Our approach is entirely consistent with the judicial role.

[116] Ultimately, all participants in the justice system must work in concert to achieve speedier trials. After all, everyone stands to benefit from these efforts. As Sharpe J.A. wrote in *R. v. Omar*, 2007 ONCA 117, 84 O.R. (3d) 493:

> The judicial system, like all other public institutions, has limited resources at its disposal, as do the litigants and legal aid. . . . It is in the interest of all constituencies — those accused of crimes, the police, Crown counsel, defence counsel, and judges both at trial and on appeal — to make the most of the limited resources at our disposal. [para. 32]

[117] Sharpe J.A.'s reference to finite resources is an important point. We are aware that resource issues are rarely far below the surface of most s. 11(*b*) applications. By encouraging all justice system participants to be more proactive, some resource issues will naturally be resolved because parties will be encouraged to eliminate or avoid inefficient practices. At the same time, the new framework implicates the sufficiency of resources by reminding legislators and ministers that unreasonable delay in bringing accused persons to trial is not merely contrary to the public interest: it is constitutionally impermissible, and will be treated as such.

VI. Application to This Case

[118] Having established the new framework for s. 11(*b*), we now turn to the case before us.

[119] The first step in determining whether Mr. Jordan's s. 11(*b*) right was infringed is to determine the total delay between the charges and the end of trial. In this case, the total delay was 49.5 months.

[120] Turning to the first case-specific factor that must be accounted for, the next step is to determine whether any of that delay was waived or caused solely by the defence. We see no reason to interfere with the trial judge's finding that four months of this delay were waived by Mr. Jordan when he changed counsel shortly before the trial was set to begin, necessitating an adjournment.

[121] The more difficult assessment is whether any of the remaining delay was caused solely by the action or inaction of the defence. The Crown argues that the trial judge erred by failing to attribute significant periods of delay to the defence, and that the defence was equally culpable in the delay in bringing this matter to trial. The Crown cited several examples: the defence consented to numerous adjournments; defence counsel initially suggested the four-day estimate for the preliminary inquiry; defence counsel's unavailability resulted in the preliminary inquiry not being completed as scheduled in December 2010; defence counsel failed to respond to the Crown's offer in July 2011 of an earlier trial; and there was no evidence that defence counsel would have been available for trial earlier than June 2012.

[122] While these instances that the Crown points to are symptomatic of the systemic complacency towards delay that we have described, most of them are not attributable solely to the defence. The Crown and defence both share responsibility

for the preliminary inquiry underestimation. Similarly, responsibility for the delay resulting from consent adjournments and to the defence's failure to respond to the Crown's offer of a shorter trial time in July 2011 should not be borne solely by the defence. These adjournments were part of the legitimate procedural requirements of the case, and it does not appear from the record that any occurred when the Crown and court were otherwise ready to proceed. Further, there was no evidence that, had the defence responded to the Crown's offer of an earlier trial, the Crown and the court would have been able to accommodate an earlier date. Rather, the only evidence before the trial judge was that the earliest available trial dates were in September 2012.

[123] The defence should, however, bear responsibility for the delay resulting from the adjournment of the preliminary inquiry necessitated by defence counsel's unavailability for closing submissions on December 22, 2010, the last day scheduled for the preliminary inquiry. We would only attribute one and a half months of that delay to the defence, however, given the evidence that Crown counsel was unable to attend at the first available continuation date for the preliminary inquiry of February 3, 2011.

[124] In total then, four months of delay were waived by the defence and one and a half months of delay were caused solely by the defence. This leaves a remaining delay of 44 months, an amount that vastly exceeds the presumptive ceiling

of 30 months in the superior court. The burden is therefore on the Crown to demonstrate that the delay is reasonable in light of exceptional circumstances.

[125] There is nothing in the record to indicate that any discrete, exceptional circumstances arose. And although particularly complex cases may present an exceptional circumstance, this is not one of those cases. In terms of the legal issues, while Mr. Jordan was initially charged along with nine other co-accused, this number quickly dropped as the case progressed. At the time of trial, only one co-accused remained on the indictment with Mr. Jordan. Further, none of the alleged offences involved novel or complex points of law. Relatively few pre-trial applications were scheduled. In short, the legal issues in Mr. Jordan's case were not particularly complex.

[126] As for the evidence, it was substantial but it was relatively straightforward. It consisted of surveillance evidence by police officers, undercover buys by police officers, a small amount of expert evidence regarding how dial-a-dope operations are conducted, and a search warrant for Mr. Jordan's apartment. There was nothing particularly complex about this evidence.

[127] In the end, while the case against Mr. Jordan may have been moderately complex given the amount of evidence and the number of co-accused, it was not so exceptionally complex that it would justify a delay of 44 months (excluding defence delay).

[128] However, since Mr. Jordan's charges were brought prior to the release of this decision, we must also consider whether the transitional exceptional circumstance justifies the delay. In our view, it does not. We recognize that the Crown was operating without notice of this change in the law within a jurisdiction with some systemic delay issues. But a total delay of 44 months (excluding defence delay), of which the vast majority was either Crown or institutional delay, in an ordinary dial-a-dope trafficking prosecution is simply unreasonable regardless of the framework under which the Crown was operating. Therefore, it cannot be said that the Crown's reliance on the previous state of the law was reasonable.

[129] We note that a good portion of the delay resulted from the inaccurate assessment of the time required for the preliminary inquiry, and in particular, the Crown's failure to communicate with the parties with a view to tying down the evidence that it needed to call at the preliminary inquiry. A similar problem occurred with the trial. While the fault for the delay in bringing this matter to trial certainly did not lie solely with Crown counsel, it is equally clear that the Crown prosecutors assigned to the case did not have a solid plan for bringing the matter to trial within a reasonable time. The Crown was aware of potential s. 11(*b*) issues as early as December 2010, yet it took few steps to expedite the matter. Instead, the Crown was content to rely on an overly large estimate of trial time without attempting to streamline the issues or consider severing the co-accused from the indictment.

[130] The Crown did make a good faith effort to bring the matter to trial more quickly in light of the s. 11(*b*) issue when Crown counsel wrote to defence counsel in July 2011 with a revised estimate of the length of the Crown's case. But by this point, approximately 31 months had already elapsed from the date of Mr. Jordan's charges. This is a substantial length of time to wait before making efforts to expedite the matter. At this point, the scheduled trial was still more than a year away.

[131] While the Crown did make some efforts to bring the matter to trial more quickly, these efforts were too little and too late. The previous state of the law cannot reasonably support the Crown's conduct. And the systemic delay problems that existed in the Surrey Provincial Court at the time cannot justify the delay either. As discussed, much of the institutional delay could have been avoided had the Crown proceeded on the basis of a more reasonable plan.

[132] To the extent that the trial judge held that this delay was reasonable under the *Morin* framework, he erred. Citing the Court of Appeal's decision in *R. v. Ghavami*, 2010 BCCA 126, 253 C.C.C. (3d) 74, at para. 52, he incorrectly held that institutional delay is entitled to less weight than delay within the Crown's control. The parties agree that this was in error.

[133] It follows that the delay was unreasonable and Mr. Jordan's s. 11(*b*) right was infringed.

VII. Conclusion

[134] The right to a trial within a reasonable time has aptly been described as "discipline for the justice system", in that it may cause "discomfort in the short term but [it will bring] achievement in the long term" (Code, at pp. 133-34).

[135] In this case, the system was undisciplined. It failed. Mr. Jordan's s. 11(*b*) right was breached when it took 49.5 months to bring him to trial. All the parties were operating within the culture of complacency towards delay that has pervaded the criminal justice system in recent years. There is simply no reasonable explanation for why the matter took as long as it did. The appeal must be allowed, the convictions set aside and a stay of proceedings entered.

[136] We agree with Cromwell J. that our differences of opinion are indeed fundamental. In our view, given the considerable doctrinal and practical problems confronting the *Morin* approach, further minor refinements to the model are incapable of responding to the challenges facing timely justice in this country.

[137] Real change will require the efforts and coordination of all participants in the criminal justice system.[5]

[138] For Crown counsel, this means making reasonable and responsible decisions regarding who to prosecute and for what, delivering on their disclosure obligations promptly with the cooperation of police, creating plans for complex prosecutions, and using court time efficiently. It may also require enhanced Crown

[5] See, for example, some of the recommendations contained in LeSage and Code.

discretion for resolving individual cases. For defence counsel, this means actively advancing their clients' right to a trial within a reasonable time, collaborating with Crown counsel when appropriate and, like Crown counsel, using court time efficiently. Both parties should focus on making reasonable admissions, streamlining the evidence, and anticipating issues that need to be resolved in advance.

[139] For the courts, this means implementing more efficient procedures, including scheduling practices. Trial courts may wish to review their case management regimes to ensure that they provide the tools for parties to collaborate and conduct cases efficiently. Trial judges should make reasonable efforts to control and manage the conduct of trials. Appellate courts must support these efforts by affording deference to case management choices made by courts below. All courts, including this Court, must be mindful of the impact of their decisions on the conduct of trials.

[140] For provincial legislatures and Parliament, this may mean taking a fresh look at rules, procedures, and other areas of the criminal law to ensure that they are more conducive to timely justice and that the criminal process focusses on what is truly necessary to a fair trial. Legal Aid has a role to play in securing the participation of experienced defence counsel, particularly for long, complex trials. And Parliament may wish to consider the value of preliminary inquiries in light of expanded disclosure obligations. Government will also need to consider whether the criminal justice system (and any initiatives aimed at reducing delay) is adequately resourced.

[141] Thus, broader structural and procedural changes, in addition to day-to-day efforts, are required to maintain the public's confidence by delivering justice in a timely manner. Timely trials are possible. More than that, they are constitutionally required.

The reasons of McLachlin C.J. and Cromwell, Wagner and Gascon JJ. were delivered by

CROMWELL J. —

I. Introduction

A. *Overview*

[142] Every person charged with an offence in Canada has a constitutional right to be tried within a reasonable time: *Canadian Charter of Rights and Freedoms*, s. 11(*b*). The right has ancient origins and finds expression across legal systems. In the Great Charter of 1215 (the *Magna Carta*) the King promised that "[t]o no one will we . . . delay right or justice": clause 40. The *International Covenant on Civil and Political Rights* (1966), Can. T.S. 1976 No. 47, calls for trial "without undue delay": art. 14(3)(c). A right of this nature is also found in the United States, New Zealand, Australia, India, South Africa, the Caribbean, the United Kingdom, Ireland, and in the European Union, among others: see Justice C. Hill and J. Tatum, "Re-Chartering an Old Course Rather Than Staying Anew in Remedying Unreasonable Delay under the

Charter" (paper presented at the Crown Defence Conference) (September 2012) (online), at p. 59.

[143] This Court over the last 30 years has developed a sophisticated jurisprudence for dealing with allegations of s. 11(*b*) breaches: see *Mills v. The Queen*, [1986] 1 S.C.R. 863; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. Conway*, [1989] 1 S.C.R. 1659; *R. v. Smith*, [1989] 2 S.C.R. 1120; *R. v. Askov*, [1990] 2 S.C.R. 1199; *R. v. Morin*, [1992] 1 S.C.R. 771; and *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3. The framework developed in this jurisprudence, which is most fully set out in *Morin,* identifies the many considerations that should be taken into account in order to determine whether the time to try a particular criminal case is reasonable.

[144] Determining reasonableness requires a court to balance a number of factors, including the length of the delay; waiver of any time periods by the accused; the reasons for the delay, including the time requirements for the case; the actions of the parties; limitations on institutional resources; and prejudice to the person charged. It is necessary to consider these factors on a case-by-case basis: the answer to the question of whether an accused is tried within a reasonable time is inherently case-specific.

[145] There is much wisdom, based on accumulated experience, in the Court's jurisprudence about unreasonable delay. But the Court has made adjustments over time and has been clear that further adjustments will likely need to be made in the future. As Sopinka J. wrote in *Morin*: "Embarking as we did on uncharted waters it is

not surprising that the course we steered has required, and may require in the future, some alteration in its direction to accord with experience" (p. 784). To be sure, some issues that need clarification have arisen in the case law and this appeal provides an opportunity to provide such clarification. But the orientation of our jurisprudence to case-specific determinations of reasonableness is sound. With modest adjustments to make the analysis more straightforward and with some additional clarification, that approach will continue to ensure that the constitutional right of accused persons to be tried in a reasonable time is defined and applied in a way that appropriately balances the many relevant considerations.

[146] My reasons on this appeal and those of my colleagues, Justices Moldaver, Karakatsanis, and Brown, present contrasting visions of how our s. 11(*b*) jurisprudence should develop.

[147] My colleagues would define reasonableness by assigning a number of months of delay — "ceiling[s]" (para. 5) — that will be taken to be reasonable unless the accused establishes not only that the case took markedly longer that it reasonably should have, but also that he or she took meaningful steps that demonstrate a sustained effort to expedite the proceedings. As I see it, this is not an appropriate approach to interpreting and applying the s. 11(*b*) right for several reasons. First, reasonableness cannot be captured by a number; the ceilings substitute a right for "trial under the ceiling[s]" (para. 74) for the constitutional right to be tried within a reasonable time. Second, creating these types of ceilings is a task better left to

legislation. Third, the ceilings are not supported by the record or by my colleagues' analysis of the last 10 years of s. 11(*b*) jurisprudence and have not been the subject of adversarial debate. Fourth, there is a serious risk that the introduction of these ceilings will put thousands of cases at risk of being judicially stayed. Fifth, the ceilings are unlikely to achieve the simplicity that is claimed for them. Finally, setting aside 30 years of jurisprudence and striking out in this new direction is unnecessary. My colleagues easily conclude that our existing jurisprudence supplies a clear answer to this appeal: paras. 125 and 128. I agree with them that it does: the appeal must be allowed and a stay of proceedings entered.

[148] In contrast, my view is that a reasonable time for trial under s. 11(*b*) cannot and should not be defined by numerical ceilings. The accumulated wisdom of the past 30 years of jurisprudence, modestly clarified, provides a workable framework to determine whether the right to be tried in a reasonable time has been breached in a particular case.

B. *The Nature of the Section 11(b) Right*

[149] The right to be tried within a reasonable time is easy to state and understand: people charged with offences should be tried within a reasonable time. Determining whether the right has been breached in a specific case, however, may be far from straightforward. The right is by its very nature fact-sensitive and case-specific. There are several reasons for this.

[150] First, the term "delay" is not entirely apt. While delay has a pejorative connotation, delay, in the sense of the passage of time, is inherent in any legal proceeding. In fact, some delay may be desirable. As stated by Lamer J., dissenting but not at this point, with Dickson C.J. concurring, undue haste itself can make a trial unfair: see *Mills*, at p. 941. Therefore, delay only becomes problematic when it is unreasonable.

[151] Second, unreasonableness is not conducive to being captured by a set of rules: a reasonable time for the disposition of one case may be entirely unreasonable for another. Reasonableness is an inherently contextual concept, the application of which depends on the particular circumstances of each case. This makes it difficult and in fact unwise to try to establish the reasonable time requirements of a case by a numerical guideline. Inevitably, the ceiling will be too high for some cases and too low for others. More fundamentally, a fixed guideline is inconsistent with the notion of reasonableness in the context of the infinitely varied situations that arise in real cases.

[152] Third, the *Charter* protects only against state action. Even if a case took too long to be dealt with, there will only be a breach of the right if that unreasonable delay counts against the state. And so it follows that the focus is not on unreasonable delay in general, but on unreasonable delay that properly counts against the state. We must therefore attribute responsibility for the delay that has occurred and only factor

in the delay which can fairly be counted against the state in deciding whether the *Charter* right has been infringed.

[153] Finally, s. 11(*b*) implicates several distinct interests, both individual and societal. Excessive delay implicates the liberty, security, and fair trial interests of persons charged, as well as society's interest in the prompt disposition of criminal matters and in having criminal matters determined on their merits: *Morin*, at p. 786. Historically, the liberty interest was the focus: *Mills*, at p. 918, per Lamer J.; *Rahey*, at p. 642, per La Forest J., concurring.

[154] More recently, the "overlong subjection to the vexations and vicissitudes of a pending criminal accusation" — the stigmatization, loss of privacy, stress and anxiety of those awaiting trial — has been recognized as implicating the security of the person charged: *Rahey*, at p. 605, per Lamer J., quoting A. G. Amsterdam, "Speedy Criminal Trial: Rights and Remedies" (1975), 27 *Stan. L. Rev*. 525, at p. 533; see also *Mills*, at pp. 919-20. As Cory J. for the majority put it in *Askov*, at p. 1219:

> There could be no greater frustration imaginable for innocent persons charged with an offence than to be denied the opportunity of demonstrating their innocence for an unconscionable time as a result of unreasonable delays in their trial. The time awaiting trial must be exquisite agony for accused persons and their immediate family.

[155] A third interest protected by s. 11(*b*) is the accused's interest in mounting a full and fair defence. As Sopinka J. said in *Morin*, the "right to a fair trial is

protected [by s. 11(*b*)] by attempting to ensure that proceedings take place while evidence is available and fresh": p. 786. When delay is present, "justice may be denied. Witnesses forget, witnesses disappear. The quality of evidence may deteriorate": *Morin*, at p. 810, per McLachlin J., concurring. Delay "can prejudice the ability of the defendant to lead evidence, cross-examine witnesses, or otherwise to raise a defence": *Godin*, at para. 30.

[156] Finally, the right to be tried within a reasonable time has a societal dimension: see e.g. *Askov*, at p. 1219, per Cory J. But societal interests do not all point in the same direction. On one hand, the wider community has an interest in "ensuring that those who transgress the law are brought to trial and dealt with according to the law" (pp. 1219-20) and in "preventing an accused from using the [s. 11(*b*)] guarantee as a means of escaping trial": p. 1227. On the other hand, there is a broad societal interest in ensuring that individuals on trial are "treated fairly and justly": p. 1220. The community benefits "by the quick resolution of the case either by reintegrating into society the accused found to be innocent or if found guilty by dealing with the accused according to the law" and witnesses and victims benefit from a prompt resolution of a criminal matter: *ibid.*

[157] While the right to be tried within a reasonable time implicates all of these interests, it is important to recognize that it is a free-standing right. As Martin J.A. put it in *R. v. Beason* (1983), 36 C.R. (3d) 73 (Ont. C.A.), at p. 96, cited with approval in *Morin*, at p. 786: "Trials held within a reasonable time have an intrinsic value." As

such, actual impairment of the various interests protected by s. 11(*b*) "need not be proven by the accused to render the section operative": *Conway*, at p. 1694, per Lamer J.; see also *Mills*, at p. 926, per Lamer J. The proper approach is to "recognize that prejudice underlies the right, while recognizing at the same time that actual proven prejudice need not be, indeed, is not, relevant to establishing a violation of s. 11(*b*)": *Mills*, at p. 926, per Lamer J.

[158] To sum up, the right to be tried in a reasonable time is multi-factored, fact-sensitive, and case-specific. Like other broadly expressed constitutional guarantees, its application to specific cases is unavoidably complex. Our experience to date suggests that the relevant factors and general approach set out in *Morin* respond to these complexities. However, experience also suggests that the way in which *Morin* has come to be applied is unduly complicated and that aspects of the relevant factors require clarification. This can be done without losing the case-specific focus on whether a particular case has been or will be tried within a reasonable time.

II. The Analytical Framework

[159] The purpose of carrying out the s. 11(*b*) analysis is to decide whether the length of time to try the case which counts against the state is "substantially longer than can be justified on any acceptable basis": *Smith*, at p. 1138. If so, the delay is unreasonable and in breach of s. 11(*b*).

[160] The *Morin* framework identifies and describes the many factors that are relevant to whether a delay is reasonable or unreasonable. But one of the limitations of the framework is that it provides little assistance as to how these various factors are to be weighed in order to reach a final conclusion. In order to simplify and clarify this analysis, it will be helpful to regroup the *Morin* considerations under four main analytical steps, which may be framed as questions to guide a court when confronted with a s. 11(*b*) claim. Doing so will make what is being considered and why more apparent, without losing the necessarily case-specific focus of the reasonableness inquiry. The questions are:

1. Is an unreasonable delay inquiry justified?
2. What is a reasonable time for the disposition of a case like this one?
3. How much of the delay that actually occurred counts against the state?
4. Was the delay that counts against the state unreasonable?

[161] This framework, along with elaboration of the relevant considerations, will clarify questions that have arisen in this case, namely: whether different periods of delay receive different weighting in the analysis; what is meant by "waiver" by the accused; and what is the role of prejudice in the analysis.

[162] I will now turn to a brief elaboration of each of these four analytical steps.

A. *Is an Unreasonable Delay Inquiry Justified?*

[163] The accused must establish as a threshold matter that there is a basis for the *Charter* inquiry. The court should look to the overall period between the charge and the completion of the trial to determine whether its length is such that it merits further inquiry. As stated by McLachlin J. (as she then was) in her concurring opinion in *Morin*, this determination can be made by referring to "'norms' representing the time reasonably taken to bring the offence charged to the point of trial in all the circumstances": p. 811. If there is no reasonable basis to think that the delay in question is excessive, the accused's s. 11(b) claim fails and the inquiry stops at this stage.

B. *What Would Be a Reasonable Time for Disposition of a Case of This nature?*

[164] This second analytical step is to determine on an objective basis what would be a reasonable time for the trial of a case like the one under review. The objective standard of reasonableness has two components: institutional delay and inherent time requirements of the case. The period of institutional delay is the period that is reasonably required for the court to be ready to hear the case (including interlocutory motions) once the parties are ready to proceed. The reasonable inherent time requirements of the case represent the period of time that is reasonably required for the parties to be ready to proceed and to conclude the trial for a case similar in nature to the one before the court.

[165] Both of these periods of time are to be determined objectively. The acceptable period of institutional delay is determined in accordance with the administrative guidelines for institutional delay set out by this Court in *Morin*: eight to ten months before the provincial courts and six to eight months before the superior courts (see *Morin*, at pp. 798-99). The inherent time requirements of a case, on the other hand, are to be determined on the basis of judicial experience, supplemented by submissions of counsel and evidence in relation to the reasonable time requirements of a case of a similar nature to the one before the court. As I will describe below, these two elements must be distinguished in the s. 11(*b*) analysis.

(1) Institutional Delay

[166] Institutional delay is the period of time that results from the inadequacy of institutional resources. The period of institutional delay "starts to run when the parties are ready for trial but the system cannot accommodate them": *Morin*, at pp. 794-95. At this stage of the objective analysis, the court will determine an acceptable period of time for the court to be available to hear the case once the parties are ready to proceed.

(a) *The Morin Administrative Guidelines Are Appropriate for Determining Institutional Delay*

[167] As stated in *Morin*, "[i]nstitutional delay is the most common source of delay and the most difficult to reconcile with the dictates of s. 11(*b*) of the *Charter*":

p. 794. The difficulty arises because we do not live in a "Utopia" in which there is always fully adequate funding, personnel, and facilities in order to administer criminal matters: p. 795. The courts must account for both the fact that the state does not have unlimited funds to attribute to the administration of the criminal justice system and the fact that an accused has a fundamental *Charter* right to be tried within a reasonable time: *ibid.*

[168] The period of institutional delay is generally not case-specific, unlike the inherent time requirements of a particular case. Institutional delay is therefore more amenable to generalization based on evidence than is the element of the reasonable inherent time requirements of particular types of cases. Moreover, institutional delay is largely the result of government choices about how to allocate resources. Accordingly, the courts "cannot simply accede to the government's allocation of resources and tailor the period of permissible delay accordingly": *Morin*, at p. 795.

[169] The *Morin* administrative guidelines, namely eight to ten months for trials in provincial courts and six to eight months for trials before the superior courts, were established on the basis of extensive statistical and expert evidence. There is no basis in the record in this case to revise them and I would therefore confirm these guidelines as appropriate for determining reasonable institutional delay.

(b) *Determining Institutional Delay*

[170] I would add two comments about determining institutional delay using the *Morin* administrative guidelines.

[171] First, in determining where a particular case should fit within the range established by the *Morin* guidelines, the court should consider whether the accused is in remand custody pending trial or subject to stringent bail conditions in identifying a reasonable period of institutional delay for a particular type of case. The period of reasonable institutional delay should generally be at the lower end of the range in these circumstances because these types of cases should receive higher priority by the courts. This period might even be shortened below the range described in the guidelines. As Sopinka J. put it *Morin*:

> If an accused is in custody or, while not in custody, subject to restrictive bail terms or conditions or otherwise experiences substantial prejudice, the period of acceptable institutional delay may be shortened to reflect the court's concern. [p. 798]

[172] Second, the guidelines should not be understood as precluding allowance for any "sudden and temporary strain on resources" that cause a temporary congestion in the courts: *Morin*, at p. 797. As I discuss at the final step of the analysis, even a properly resourced system will occasionally buckle under an unusually heavy onslaught of work.

(2) <u>The Inherent Time Requirements of the Case</u>

(a) *Introduction*

[173] The inherent time requirements of a case include the time periods that are reasonably necessary to conclude the proceedings for a case similar in nature to the one before the court. In *Morin*, Sopinka J. described some of the inherent time requirements of the case as including the time required "in processing the charge, retention of counsel, applications for bail and other pre-trial procedures" along with "police and administration paperwork, disclosure, etc.": pp. 791-92. Separate consideration of these inherent time requirements is essential given the almost infinitely variable circumstances of particular cases.

[174] As Lamer J. described in *Mills*, the inquiry into the inherent time requirements of a case will necessarily require judges to "rely heavily upon their practical experience and good sense": p. 932. Judges should "undertake an objective assessment of the delay which may be required in the circumstances of the case": *ibid*. This inquiry is "wholly objective" (p. 931):

> . . . the court must fix an objective and realistic time period for the preparation of the type of case which is at bar. It must determine the period which would normally be required, taking into account the number of charges, the number of accused, the complexity and volume and similar objective elements, for the preparation and completion of the case". . . . [Emphasis added; p. 932.]

In the end, we must rely on the good sense and experience of trial judges to determine what would constitute a reasonable period of time required for a particular type of case.

[175] The inherent time requirements of a case are to be determined objectively on a case-by-case basis.

(b) *Determining the Inherent Time Requirements*

[176] The elements to be considered are the amounts of time reasonably required in processing the charge, retaining counsel, applying for bail, completing police and administration paperwork, making disclosure, dealing with pre-trial applications, preparing for and arguing the preliminary inquiry and/or the trial, and trying a case similar in the nature to the one before the court. Included are such things as the time reasonably required to reschedule after a mistrial, the time to resolve legal issues, the time to convene a judicial pre-trial, and a reasonable time to try the case: see e.g. Hill and Tatum, at pp. 14-15.

[177] If a case is more complex, the estimate of the reasonable time period required to dispose of the case will be higher. Given the type of case before the court, it may be expected that there will be more pre-trial motions, or particular types of motions. Most s. 11(*b*) applications are considered after the fact, and any incidental proceedings to a trial could help guide this analysis. However, courts should avoid *ex post facto* analysis focusing on whether certain motions in the case before them

were unreasonably or unnecessarily taken. The objective nature of this inquiry involves an analysis of the type of case before the court, and all the motions and other pre-trial procedures that could reasonably be expected in such a case.

[178] One example is a case involving a large amount of disclosure, where it could reasonably be expected that such disclosure would lengthen the inherent time requirements to try the case. However, disclosure may be a major factor contributing to delay and should be approached on the basis that the Crown has a duty to make disclosure fully, but also promptly. And defence counsel must not engage in unnecessary fishing expeditions. The reasonable estimation of the objective inherent time requirements of a case must assume both prompt disclosure and the absence of unnecessary fishing expeditions.

[179] Also included in the inherent time requirements of a case is the time required for counsel, both Crown and defence, to be available and to prepare the case: see *Morin*, at p. 791. In *Morin*, Sopinka J. noted that the courts must take account of the fact that "counsel for the prosecution and the defence cannot be expected to devote their time exclusively to one case": p. 792. Or, as I put it in *Godin*, s. 11(*b*) does not require counsel to "hold themselves in a state of perpetual availability": para. 23. The court should estimate the reasonable amount of time required for Crown and defence counsel to prepare and to make themselves available in the type of case before them. This estimation is objective, and does not include an analysis of the

record which may demonstrate that counsel was available before or after this estimated time period.

[180] *Morin* provides an example of how this may be done. Sopinka J. specifically found that "[a]n additional period for inherent time requirements must be allowed" for the post-preliminary inquiry "second stage": p. 793. He further inferred, absent concrete evidence to the contrary, that counsel would have required two months to make themselves prepared and available for trial and for the matter to be heard, leaving the other 12 months to institutional delay: pp. 804-6. Similarly, in *R. v. Sharma*, [1992] 1 S.C.R. 814, at pp. 825-26, Sopinka J. estimated three months of inherent time requirements in the 12-month period from the set date appearance to the trial date.

[181] Finally, in estimating a reasonable time period for the inherent time requirements of a case, the court should also take into account the liberty interests of the accused. If an accused is in custody or under stringent conditions of release, such as house arrest, counsel and the court system should accord his or her case priority over those of accused persons subject to less onerous conditions pending trial.

(c) *Do the Periods of Institutional Delay and Inherent Time Requirements Overlap??*

[182] The question has arisen of whether the periods of institutional delay (i.e. the time for the court to be ready to hear the matter) and inherent delay (i.e. the time

reasonably required for the parties to be ready to proceed and to conclude the trial for a case similar in nature to the one before the court) overlap. On occasion, the elements of institutional and inherent requirements have been intermingled in the application of the s. 11(*b*) framework such as in considering periods of time during which both counsel and the court are unavailable: see e.g. C. Ruby, "Trial Within a Reasonable Time Under Section 11(b): The Ontario Court of Appeal Disconnects from the Supreme Court" (2013), 2 C.R. 7th 91, at p. 94, citing *Morin*, at p. 793. The short answer to this question of overlap, however, is that, on the objective determination of how much time the case should reasonably take, the two periods are distinct.

[183] The reasonable inherent time requirements are concerned with identifying a reasonable period to get a case similar in nature to the one before the court ready for trial and to complete the trial. The inherent time requirements are not determined, for instance, with reference to the actual availability of particular counsel and court, but rather they are determined by an objective estimation. The other element, the acceptable period of institutional delay, is the amount of time reasonably required for the court to be ready to hear the case once the parties are ready to proceed. This is expressed with reference to the *Morin* guidelines. These guidelines do not relate to inherent time requirements; they reflect only the acceptable period of *institutional delay*.

(3) Conclusion on Objectively Reasonable Time Requirements

[184] To sum up, in assessing a claim under s. 11(*b*), the courts must first determine the reasonable time requirements, objectively viewed, for the type of case before them. Simply put, the courts must determine how long the case should reasonably take (or have taken). This consists, first, of the length of time required for that type of case to be prepared, heard, and decided (i.e. the case's inherent time requirements). The second element is the additional time required for the court to be available to hear the parties beyond the point at which they should be prepared to proceed (i.e. the period of institutional delay). This period of institutional delay is assessed by applying the administrative guidelines developed in *Askov* and *Morin*: eight to ten months in provincial court and six to eight months in superior court. These guidelines set some rough limits on the point at which inadequacy of state resources will be accepted as an excuse for excessive delay.

C. *How Much of the Delay That Actually Occurred Counts Against the State?*

[185] Having addressed the objective elements of the analysis — the reasonable institutional delay and the reasonable inherent time requirements of the case — the judge moves on to compare those objectively reasonable time periods against the time actually taken in the case before the court, to determine whether the overall delay is reasonable. Delay in excess of the objectively required time may be reasonable if it is not attributable to the state. As mentioned at the outset, s. 11(*b*) protects only against unreasonable delay attributable to the state. The period fairly attributable to the state excludes any time period fairly attributable to the accused — including "waiver" —

and any extraordinary and unavoidable delays that should not be counted against the state. The main task at this step of the analysis is to identify any portion of the actual elapsed time that should not count against the state.

(1) Delay Attributable to the Accused

[186] Delay attributable to the accused includes any period "waived" by the accused, and other delays attributable to the accused.

(a) *Waiver*

[187] The concept of "waiver" by the accused in the s. 11(*b*) context has given rise to some confusion and this case provides an opportunity to bring further clarity to that issue.

[188] First, the language of "waiver" in this context may be misleading. As stated by this Court in *Conway*, when the courts speak of "waiver" in the context of s. 11(*b*), "it is not the right itself which is being waived but merely the inclusion of specific periods in the overall assessment of reasonableness": p. 1686. This means that periods of time to which the accused has or is deemed to have agreed will not count towards any determination of unreasonable delay.

[189] Second, there is admittedly some lack of clarity in our jurisprudence as to whether the accused's consent to an adjournment sought by the Crown constitutes

"waiver" of the resulting delay. In *Smith*, this Court created a rebuttable inference of waiver if defence consents to a future trial date. This proposition was qualified, however, by the point that "inaction or acquiescence on the part of the accused, short of waiver" does not result in a forfeiture of an accused's s. 11(*b*) rights: *Smith*, at p. 1136. In *Morin*, Sopinka J. explained that the accused's consent to a trial date "can give rise to an inference of waiver", but this is not the case "if consent to a date amounts to mere acquiescence in the inevitable": p. 790. This Court, albeit in very short decisions, upheld this approach in *R. v. Brassard*, [1993] 4 S.C.R. 287, at p. 287, and *R. v. Nuosci*, [1993] 4 S.C.R. 283, at p. 284, stating that consent to a future date *will* be characterized as waiver in the absence of evidence that it is acquiescence.

[190] A rebuttable inference of waiver from the accused's consent to an adjournment does not sit well with the settled law that waiver must be clear, unequivocal and must be established by the Crown: see e.g. *Askov* at p. 1232. As noted in *Morin*, the waiver must be done "with full knowledge of the rights the procedure was enacted to protect and of the effect that waiver will have on those rights", and that such a test is "stringent": p. 790.

[191] I conclude that, when the accused consents to a date for trial offered by the court or to an adjournment sought by the Crown, that consent, without more, does not amount to waiver. The onus is on the Crown to demonstrate that this period is waived, that is, that the accused's conduct reveals something more than "mere acquiescence in the inevitable," and that it meets the high bar of being clear,

unequivocal, and informed acceptance that the period of time will not count against the state.

(b) *Other Delay Attributable to the Accused*

[192] All steps that are reasonably necessary to make full answer and defence are properly part of the inherent time requirements of the case and do not count against either the Crown or the accused. However, delay resulting from unreasonable actions solely attributable to the accused must be subtracted from the period for which the state is responsible.

[193] Unreasonable actions by the accused may take diverse forms, such as last-minute changes in counsel or adjournments flowing from a lack of diligence (e.g. failure to pursue or review disclosure in a timely way; pursuit of unnecessary information; failure to attend court appearances or to give timely notice of intended *Charter* applications, particularly during case scheduling; unreasonable rejection of earlier dates for preliminary hearing, trial or other court appearances (see Hill and Tatum, at pp. 17-18); and in a lack of sufficient effort to accommodate dates available to the court and the prosecution). It is obvious that delays caused by attempts to obstruct the course of the trial, that amount to "deliberate and calculated tactic[s] employed to delay the trial", or other vexatious or bad faith conduct by the accused, cannot count against the state: *Askov*, at p. 1228.

[194] The question of whether the actions of the accused were unreasonable must be viewed through the lens of reasonable conduct of counsel and the accused at the time the judgments had to be made, not with the benefit of hindsight. The accused must not be penalized for taking all reasonable steps to make full answer and defence even if, with the benefit of hindsight, they were not particularly fruitful.

(2) Extraordinary and Unavoidable Delays That Should Not Count Against the State

[195] It is also necessary to subtract from the actual delay any periods that, although not fairly attributable to the defence, are nonetheless not fairly counted against the state. Such time periods could include unavoidable delays due to inclement weather or illness of a trial participant.

D. *Was the Delay That Counts Against the State Unreasonable?*

[196] At this point in the analysis, the judge has determined the reasonable time a case ought to have taken, and the period of time that fairly counts against the state that it actually took. The next and final step is to determine whether this actual period of time exceeds the reasonable time by more than can be justified on any acceptable basis. This approach is a slight reorientation of the *Morin* framework because the focus is more explicitly on the period of delay which exceeds what would have been reasonable. But there is no change in principle.

(1) Can the Delay Beyond What Would Have Been Reasonable Be Justified?

[197] Determining whether the actual delay was longer than what would have been reasonable is a simple matter of arithmetic. However, qualifying the extent of that excess delay as justified or not requires evaluation. As stated in *Morin*, at p. 787: "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 judicial determination.

[198] Where the actual time exceeds what would have been reasonable for a case of that nature, the result will be a finding of unreasonable delay unless the Crown can show that the delay was justified having regard to the length of the excess delay balanced against certain other factors described below. The point at which the amount of time beyond what would have been a reasonable delay becomes unreasonable cannot be described with precision. We can say, however, that where the delay exceeds what would have been reasonable, justification is required and, as the length of the excess delay increases, justification will be more difficult. Even substantial excess delay may be justified and therefore reasonable where, for example, there is a particularly strong societal interest in the prosecution proceeding on its merits, or where the delay results from temporary and extraordinary pressures on counsel or the court system. However, it does not follow that in these conditions the excess period is invariably justified. As I will discuss, given proof of actual

prejudice to the accused or of abusive or negligent conduct on the part of the Crown which contributed to the delay, justification may be found to be lacking.

[199] The focus must remain on the fundamental question at this point in the analysis: whether the amount of excess delay can be "justified on any acceptable basis" (*Smith*, at p. 1138).

(2) The Role of Prejudice in the Analysis

[200] The role of prejudice in the unreasonable delay analysis has become unduly complicated. The jurisprudence has distinguished between inferred and actual prejudice and, in some cases, it appears that it has been almost impossible to succeed on an unreasonable delay claim without proof of either type of prejudice.

[201] I would clarify the role of prejudice in the following ways.

[202] First, I would affirm the statements in previous cases to the effect that actual prejudice is not necessary to establish a breach of s. 11(*b*): see e.g. *Mills*, at p. 926, per Lamer J.; *Askov*, at p. 1232, per Cory J. The question is whether the delay is unreasonable, not whether an unreasonable delay has, in addition to being unreasonable, caused identifiable and actual prejudice.

[203] Second, and as explained earlier, actual prejudice to the liberty interests of the accused, notably being detained in custody or subject to very restrictive bail

conditions pending trial, is taken into account in deciding what a reasonable time for trial would be. Prejudice of this nature during the period of reasonable delay need not be considered again in the final assessment of whether the delay is unreasonable.

[204] Third, prejudice to an accused's security and fair trial interests in the general sense — such as stress and stigma or the erosion of evidence — is already considered in this revised framework. Defining the reasonable time requirements of a case recognizes that delay beyond this point will cause such stress and erosion of fair trial interests, regardless of any evidence the Crown may bring to the contrary. Prejudice to these interests during the period of reasonable delay need not be explicitly considered as a separate factor in this final inquiry, and the court should not consider evidence on any vague, general effect that the delay may have had on the security or fair trial interests of the accused.

[205] Fourth, specific examples of actual prejudice to an accused's security and fair trial rights, such as the loss of employment or death of a witness (this, of course, is not an exhaustive list) are properly considered at the final stage of the analysis.

[206] Lastly, the absence of actual prejudice cannot make reasonable what would otherwise be an unreasonable delay. Actual prejudice need not be proved to find an infringement of s. 11(*b*) and its absence cannot be used to excuse otherwise unreasonable delay. However, even if the excess delay does not exceed the objectively determined reasonable time requirements of a case of that nature, the accused still may be able to demonstrate actual prejudice, thus making unreasonable

(in the particular circumstances of the case) a delay that might otherwise be objectively viewed as reasonable.

(3) Extraordinary Reasons for the Delay

[207] Exceptional cases may arise which merit further consideration of the various reasons for the delay at this final stage of the inquiry.

[208] In most cases, the elements of delay apart from delay attributable to the accused will be given equal weight, contrary to the approach in *R. v. Ghavami*, 2010 BCCA 126, 253 C.C.C. (3d) 74, at para. 52. Specifically, institutional delay and other delay that is counted against the state are generally given equal weight. Abusive or grossly negligent Crown conduct causing delay counts more heavily against the state in determining whether the excessive delay may be justified on any acceptable basis. Such conduct not only undermines the accused's rights, but is contrary to society's interest in an effective and fair justice system.

[209] Conversely, institutional delay that is attributable to exceptional and temporary conditions in the justice system may be excused or given somewhat less weight against the state in the overall balancing and may in some cases justify excusing what would otherwise be excessive delay. This should generally be done, however, only if the state has made reasonable efforts to alleviate those conditions: *Askov*, at p. 1242.

(4) Are There Especially Strong Societal Interests in the Prosecution on the Merits of the Case?

[210] As discussed above, s. 11(*b*) encompasses "a community or societal interest", to "see that the justice system works fairly, efficiently and with reasonable dispatch": *Askov*, at pp. 1219 and 1221. This societal interest supports prompt disposition of criminal cases. However, there is also a societal interest in "ensuring that those who transgress the law are brought to trial": pp. 1219-20. Societal interests must be considered "in conjunction" with the interests of the accused in the interpretation of s. 11(*b*): p. 1222.

[211] In McLachlin J.'s concurring opinion in *Morin*, she held that the societal interests in bringing the accused to trial should be considered in the determination of s. 11(*b*) claims: the "true issue at stake" in a s. 11(*b*) analysis is the "determination of where the line should be drawn between conflicting interests", i.e. those of the accused and those of society (p. 809). Whether a delay becomes unreasonable, on the spectrum of delays apparent in criminal proceedings, must be determined by an analysis in which the interests of society in bringing those accused of crimes to trial are balanced against the rights of the person accused of a crime: pp. 809-10. To this I would add the societal interest in prompt disposition of criminal matters.

[212] I agree with this balancing approach. Under the revised framework I propose, the delay in excess of the reasonable time requirements of the case and any actual prejudice arising from the overall delay must be evaluated in light of societal

interests: on one hand, fair treatment *and* prompt trial of accused persons and, on the other, determination of cases on their merits. As noted by Cory J. in *Askov*, more serious offences will carry commensurately stronger societal demands that the accused be brought to trial: p. 1226. These interests, however, are in effect factored into the determination of what would be a reasonable time for the disposition of a case like this one. But if there are exceptionally strong societal interests in the prosecution of a case against an accused which substantially outweigh the societal interest and the interest of the accused person in prompt trials, these can serve as an "acceptable basis" upon which exceeding the inherent and institutional requirements of a case can be justified.

E. *Summary of the Analytical Framework*

[213] If the accused first establishes a basis that justifies a s. 11(*b*) inquiry, the court must then undertake an objective inquiry to determine what would be the reasonable time requirements to dispose of a case similar in nature to the one before the court (the inherent time requirements) and how long it would reasonably take the court to hear it once the parties are ready for hearing (the institutional delay).

[214] Next, the court must consider how much of the actual delay in the case counts against the state. This is done by subtracting the periods attributable to the defence, including any waived time periods, from the overall period of delay from charge to trial.

[215] Finally, the court must consider whether and to what extent the actual delay exceeds the reasonable time requirements of a case, and whether this can be "justified on any acceptable basis". If the actual delay that counts against the state is longer than the reasonable time requirements of a case, then the delay will generally be considered unreasonable. The converse is also the case. However, there may be countervailing considerations, such as the presence of actual prejudice, exceptionally strong societal interests, or exceptional circumstances such as Crown misconduct or exceptional and temporary conditions affecting the justice system. These may either shorten or lengthen the period that would otherwise be unreasonable delay.

[216] This straightforward framework does not attempt to gloss over the inherent complexity of determining what delays are unreasonable. It merely clarifies where the various relevant considerations fit into the analysis and how they relate to each other. It also simplifies the analysis of prejudice and makes clear that, as a general rule, institutional and Crown delay should be given equal weight. It retains the focus on the circumstances of the particular case and builds on the accumulated experience found in 30 years of this Court's jurisprudence.

III. Application

[217] Although, as noted, this appeal would also be allowed applying the existing *Morin* analysis, it will be useful by way of illustration to analyze it under the modified framework that I have just described.

A. *Facts*

[218] In 2008, the RCMP conducted a single, straightforward undercover investigation into a "dial-a-dope" operation involving the sale of drugs out of the Langley and Surrey areas of British Columbia. Undercover police officers purchased cocaine six times over seven months, calling a number associated with Mr. Jordan. On December 17, 2008, the police executed a search warrant, seizing 42.3 grams of heroin and just under 1.5 kilograms of cocaine and crack cocaine from the apartment that Mr. Jordan and his then-girlfriend, Ms. Kristina Gaudet, shared. On December 17, 2008, the police arrested Mr. Jordan and Ms. Gaudet. Mr. Jordan was charged with possession for the purposes of trafficking on December 18, and Ms. Gaudet was charged on February 20, 2009.

[219] From December 18, 2008 to February 16, 2009, Mr. Jordan was in custody. He was released on February 16, on strict conditions, including house arrest. During this time, the Crown swore additional and amended informations. Ultimately, 10 accused were charged. Mr. Jordan, as the main target of the investigation and prosecution, faced six charges.

[220] The accused elected to be tried in British Columbia Supreme Court. Crown and defence counsel agreed upon a preliminary hearing. For 24 months, the preliminary hearing process was held before the Provincial Court; it took another 16 months to obtain a Supreme Court trial date for the two remaining accused.

B. *Judicial History*

(1) British Columbia Supreme Court, 2012 BCSC 1735

[221] Verhoeven J. of the British Columbia Supreme Court dismissed Mr. Jordan's s. 11(*b*) motion. He reached the following conclusions with respect to the total time to the end of the trial:

- Total length of delay: 49.5 months
- Inherent requirements: 10.5 months
- Crown delay: 2 months
- Institutional delay: 32.5 months
- Accused delay: 4 months

[222] Some of the delay present in this case was due to an underestimation of the time required to conduct the preliminary inquiry. While the Crown argued that the subsequent delay should be attributable to the defence, the trial judge ultimately attributed it as institutional delay, citing a lack of evidence supporting the Crown's claims.

[223] The trial judge ultimately concluded that the accused only waived four months of the delay, due to a last-minute change in counsel. He rejected the Crown's arguments that the delay before the superior court was waived. The Crown relied

upon a letter it sent to defence counsel, asking whether the latter would be interested in an earlier trial date based upon a three-week (as opposed to a six-week) trial estimation. Defence counsel did not respond to this letter, and there was no evidence as to the reason behind this. The trial judge found that this did not amount to clear and unequivocal waiver.

[224] The trial judge estimated eight months of inherent time requirements before the provincial court (five months of intake requirements, two months for scheduling and preparation, and one month for the hearing and decision), and two and a half months before the superior court (two months to accommodate counsel scheduling, two weeks for the trial itself).

[225] The trial judge found that no time was attributable to the accused, but that the Crown was responsible for two months due to unavailability to continue the preliminary inquiry.

[226] The trial judge concluded that there was 19 months of institutional delay before the provincial court, noting the evidence supporting the shortage of institutional resources in those courts in British Columbia. He further concluded that there was 13.5 months of institutional delay before the superior court.

[227] The trial judge then considered both actual prejudice and inferred prejudice. He concluded that the accused was not greatly prejudiced with respect to any of his liberty or fair trial interests but that he did suffer some prejudice to his

security interests in the form of stress and worry. However, he held that the prior charges against Mr. Jordan "substantially reduc[e] the degree of prejudice" that would otherwise be assigned to Mr. Jordan's security interests: para. 124 (CanLII).

[228] The trial judge concluded that the delay present in Mr. Jordan's case "substantially exceeded" the guidelines: para. 138. However, the delay was not unreasonable given the seriousness of the offences charged, the lack of substantial prejudice against the accused, and by attributing reduced weight to institutional delay.

(2) British Columbia Court of Appeal, 2014 BCCA 241, 357 B.C.A.C. 137

[229] The British Columbia Court of Appeal dismissed Mr. Jordan's appeal.

[230] Stromberg-Stein J.A. agreed with the facts laid out by the trial judge. She also confirmed that the "application judge identified and applied the correct legal authorities and principles": para. 13.

[231] On the first ground of appeal, Mr. Jordan argued that the judge should have used the full 34.5 months of delay in his s. 11(*b*) analysis, instead of the 17 months outside of the *Morin* guidelines. However, the court concluded that the application judge correctly assessed the delay period.

[232] Next, Mr. Jordan argued that the trial judge erred in attaching less weight to institutional delay. Stromberg-Stein J.A. found that the judge's assessment of 34.5

months as institutional delay was not based on a proper evidentiary record. However, this assessment was favourable to Mr. Jordan, and she declined to interfere with Verhoeven J.'s weighing of the institutional delay in comparison to other factors.

[233] Finally, Mr. Jordan claimed that the trial judge erred in his assessment of prejudice: by using the wrong quantum of delay and by failing to make a meaningful finding of inferred prejudice. The application judge found that Mr. Jordan experienced "some degree" of prejudice, but not a "substantial" degree of prejudice: C.A. reasons, at para. 46. This finding of fact is reviewable on a standard of palpable and overriding error. The Court of Appeal found that the trial judge's assessment did not rise to this degree. The court affirmed the trial judge's findings regarding actual prejudice, and held that the judge was "alive to the possibility of inferring prejudice" and did, in fact, infer some degree of prejudice from the delay: para. 51.

C. *Analysis*

[234] Applying the analytical framework from *Morin* as elaborated and clarified above, I conclude that Mr. Jordan's appeal should be allowed and the charges against him stayed because his constitutional right to be tried within a reasonable time was violated in this case. I will briefly consider the four steps in the analytic framework.

(1) Is an Unreasonable Delay Inquiry Justified?

[235] I agree with the trial judge that the 49.5-month delay from the charges to the end of the scheduled trial date is sufficient to trigger an inquiry into whether the delay is unreasonable.

(2) What Is a Reasonable Time for the Disposition of a Case Like This One?

(a) *Inherent Time Requirements*

[236] The trial judge identified the periods of inherent delay present in the case as being 10.5 months. While the trial judge did not approach this on a purely objective basis, I nonetheless find no reason to interfere with this assessment as representing the reasonable inherent time requirements of a case of this nature, even treating this case as involving an in-custody accused or an accused subject to very restrictive bail conditions.

(b) *Institutional Delay*

[237] This case proceeded through the Provincial Court and the Supreme Court of British Columbia. Under the *Morin* administrative guidelines, the reasonable institutional delays for both levels of court total between 14 and 18 months. Although it is debatable whether accepting the upper end of the range is appropriate in a case of this nature, for the purposes of my analysis I will proceed on the basis that 18 months of institutional delay would be reasonable.

[238] It follows that a reasonable period for the disposition of this case was 28.5 months.

(3) How Much of the Delay That Actually Occurred Counts Against the State?

[239] We know that this case took 49.5 months in total. To determine the amount of delay that counts against the state we must subtract any period attributable to the defence and any period of unusual or unforeseen delay not fairly counted against the Crown.

(a) *Delay Attributable to the Defence*

[240] The Crown's main argument is that the trial judge erred in categorizing so much of the delay as institutional. The Crown makes multiple submissions regarding the categorization of delay between the charge to the arraignment hearing, from the arraignment hearing to the preliminary inquiry, of the adjournments of the preliminary inquiry, and in setting the six-week trial. For many of these submissions, the Crown argues that various periods should be considered "waiver" or conduct otherwise attributable to the defence.

[241] As stated above, for any period to be considered waived by the defence, the defence must have so indicated in clear and unequivocal terms. The trial judge noted that Mr. Jordan agreed that four months of the delay was "waived" because it

resulted from his last-minute change in counsel. However, I see no reason to attribute any other period as being "waived" by Mr. Jordan. Moreover, I see no reason to classify any other period as being fairly attributable to Mr. Jordan.

(b) *Exceptional or Unavoidable Delay*

[242] No such delay is present here.

(4) Was the Delay That Counts Against the State Unreasonable?

[243] As discussed earlier, the reasonable time requirements for a case of this nature were 28.5 months. The case in fact took 49.5 months. The difference is 21 months. Of that, 4 months are attributable to the defence. The rest — a period of 17 months — counts against the state. In other words, this case took almost a year and a half longer than what would be a reasonable period to prosecute a case of this nature.

[244] This is not a close case. The time to the end of trial greatly exceeds what would be a reasonable time to prosecute a case of this nature. While there are societal interests in the trial on the merits of the serious drug crimes alleged against Mr. Jordan, these cannot make reasonable the grossly excessive time that it took society to bring him to trial.

D. *Other Issues Raised*

[245] The parties raised a number of other issues, explicitly or implicitly, to which I will briefly respond.

(1) Should some delay where the courts are unavailable be classified as inherent requirements if defence counsel is also unavailable?

[246] The inherent requirements of a case are determined objectively and when this is done as described earlier in my reasons, there is no overlap between the inherent requirements and institutional delay.

(2) Should institutional delay be accorded "less weight" in determining the overall reasonableness of the delay?

[247] Under the revised framework, institutional delay is not given less weight than other delay that counts against the state.

(3) Does the accused's consent to an adjournment or later trial date constitute "waiver"?

[248] The onus is on the Crown to demonstrate that, when an accused agrees to an adjournment initiated by the Crown or to a trial date, it amounts to "waiver" and not "mere acquiescence in the inevitable".

(4) Should inherent requirements be subtracted from the final quantum of delay when assessing the overall reasonableness of the delay?

[249] Inherent requirements are not "subtracted" but are rather considered along with institutional delay in deciding what period of delay would be reasonable for a case of this nature.

(5) Can the constitutionally tolerable length of institutional delay be extended if the accused did not suffer "substantial" or "significant" prejudice?

[250] As explained earlier, the answer is no: proof of actual prejudice is not required to find unreasonable delay.

(6) Did the trial judge err in finding that the accused only suffered "some" and not "substantial" prejudice?

[251] I see no reason to interfere with the trial judge's reasons to this effect.

(7) Did the trial judge err when categorizing the delays in this case, specifically in attributing so much of the delay to Crown and institutional delay?

[252] I see no reason to interfere with the trial judge's classification of delay in this case.

E. *Conclusion*

[253] I would allow the appeal and would stay the charges against Mr. Jordan.

IV. The Approach of Justices Moldaver, Karakatsanis, and Brown

[254] It will by now be obvious that I fundamentally disagree with the approach proposed by my colleagues. It is, in my respectful view, both unwarranted and unwise. The proposed approach reduces reasonableness to two numerical ceilings. But doing so uncouples the right to be tried within a reasonable time from the Constitution's text and purpose in a way that is difficult to square with our jurisprudence; exceeds the proper role of the Court by creating time periods which appear to have no basis or rationale in the evidence before the Court; and risks negative consequences for the administration of justice. Based on the limited evidence in the record, the presumptive time periods proposed by my colleagues are unlikely to improve the pace at which the vast majority of cases move through the system while risking judicial stays for potentially thousands of cases. Moreover, the increased simplicity which is said to flow from this approach is likely illusory. The complexity inherent in determining unreasonable delay has been moved into deciding whether to "rebut" the presumption that a delay is unreasonable if it exceeds the ceiling in particular cases: para. 47.

A. *Reasonableness Cannot be Captured by a Number*

[255] One of the themes that appears throughout the Court's jurisprudence on the right to be tried within a reasonable time is that reasonableness cannot be judicially defined with precision or captured by a number. The proposed ceilings are deeply inconsistent with this constant in our jurisprudence.

[256] In *Mills*, where this Court first considered the scope of s. 11(*b*), Lamer J. wrote that a "reasonable" time to trial cannot be determined with reference to specific numbers:

> Reasonableness is an elusive concept which cannot be juridically defined with precision and certainty. Under s. 11(*b*), however, as we are dealing with reasonableness as regards the passage of time, we have the advantage of being able to refer to precise stages of proceedings and events.
>
> This is not to say that reasonableness can be predetermined with precision. That would be "falling victim to the tyranny of numbers". But the advantage to be found when dealing with time is that reasonableness can be determined with the help of the precision surrounding the happening of certain events, e.g. arraignment, the preliminary inquiry, the trial, and the time elapsed between. [p. 923]

[257] In *Conway*, L'Heureux-Dubé J. wrote for the majority that the "protection afforded by s. 11(*b*) of the *Charter* is not expressed in absolute terms" and that "the right to a speedy trial 'is necessarily relative. It is consistent with delays and depends upon circumstances'": p. 1672, quoting *Beavers v. Haubert*, 198 U.S. 77 (1905), at p. 87.

[258] In *Smith*, Sopinka J. for the Court elaborated on this point:

> The question is, at what point does the delay become unreasonable? If this were simply a function of time, the matter could be easily resolved. Indeed a sliding scale of times could be developed with respect to specified offences which could be adjusted because of the special circumstances of the case. But it is not simply a function of time, but of time and several other factors. What those basic factors are is not the subject of disagreement. [p. 1131]

[259] In *Askov* and *Morin*, this Court again reiterated the importance of the balancing test in determining reasonable delay. In fact, in *Morin*, this Court specifically declined to create an administrative guideline for the "inherent" or "intake" time requirements of a case, noting the "significant variation between some categories of offences": p. 792. Sopinka J. wrote that as "the number and complexity of [intake requirements of a case] increase, so does the amount of delay that is reasonable": *ibid.*

[260] Thus, the Court has said on several occasions that reasonable inherent time requirements for cases do not lend themselves to the creation of administrative guidelines.

[261] Moreover, a judicially fixed ceiling for overall case disposition is at odds with jurisprudence arising from every other jurisdiction with a speedy trial guarantee of which I am aware. In *Trial Within a Reasonable Time* (1992), Michael A. Code wrote that "[i]t is generally foreign to the U.S. speedy trial jurisprudence to establish numerical standards of any kind": p. 119. The presence of time limitations, whether

judicial or statutory, are virtually unheard of in European jurisdictions. In *Can excessive length of proceedings be remedied?* (2007), the Venice Commission polled a number of jurisdictions ranging from Albania to the former Yugoslav Republic of Macedonia, all of which replied in the negative to the questions as to whether there was a deadline or fixed time frame in which the competent authorities need rule on a criminal matter: Section II (pp. 65-322). Statutory timelines are, of course, an entirely different matter and I will have more to say about them in a moment.

[262] There is no parallel between the administrative guidelines for institutional delay adopted in *Askov* and *Morin* and the ceilings for overall delay proposed in my colleagues' reasons. As I have explained, institutional delay is concerned with how long one should have to wait for the court to be ready to hear the case. This is not a question that depends to any significant extent on the particular circumstances of the case. It is mainly a question of resources. It is quintessentially a judicial function under the Constitution to set some clear limits on the point at which the state's plea of inadequate resources must give way to the constitutionally guaranteed right to be tried within a reasonable time. The administrative guidelines in *Askov* and *Morin* serve the reasonableness analysis by defining when state-provided court services should reasonably be available. Unlike the proposed ceilings, the administrative guidelines do not attempt to define what would be a reasonable time for trying all cases in all circumstances. Moreover, the administrative guidelines were intended to be generous and established "neither a limitation period nor a fixed ceiling on delay": *Morin*, pp. 795–96.

[263] The proposed judicially created "ceilings" largely uncouple the right to be tried within a reasonable time from the concept of reasonableness which is the core of the right. The bedrock constitutional requirement of reasonableness in each particular case is replaced with a fixed ceiling and is thus converted into a requirement to comply with a judicially legislated metric. This is inconsistent with the purpose of the right, which after all, is to guarantee trial within a reasonable time. Reducing "reasonableness" to a judicially created ceiling, which applies regardless of context, does not achieve this purpose.

[264] Moreover, this approach unjustifiably diminishes the right to be tried within a reasonable time. As I see it, a case is not tried within a reasonable time if it has taken "markedly longer than it reasonably should have" (para. 48) to be tried. Other than in very unusual circumstances, that is what an accused has to show to establish a breach of s. 11(*b*) of the *Charter*. But that is not enough under the proposed framework. When the elapsed time is below the ceiling, an accused would have to show not only that the case took "markedly longer" than it reasonably should have but also that he or she "took meaningful steps that demonstrate a sustained effort to expedite the proceedings": para. 48. This requirement has no bearing on whether the time to trial was unreasonable. It is, in effect, a judicially created diminishment of a constitutional right, and one for which there is no justification. I see no basis in the constitutional text or the jurisprudence for imposing this burden on an accused person.

[265] My colleagues' "qualitative review of nearly every reported s. 11(*b*) appellate decision from the past 10 years, and many decisions from trial courts" (para. 106) suggests that my concerns on this score are not theoretical. That examination shows that our superior courts found unreasonable delay in 20 percent of the cases where the delay was at or under the 30-month ceiling. The percentage is about the same for the provincial court cases at or under the ceiling. But under the proposed framework, none of these cases could be stayed absent proof by the accused that they had attempted to actively expedite the process. Imposing this burden is contrary to the Court's holding in *Askov* that "it is the responsibility of the Crown to bring the accused to trial" and that "any inquiry into the conduct of the accused should in no way absolve the Crown from its responsibility to bring the accused to trial": p. 1227.

[266] The proposed approach in effect substitutes a right to be "tried under the ceiling" for a right to be tried within a reasonable time. In doing so, it unjustifiably diminishes the right guaranteed by the *Charter* and sets aside a central teaching of our s. 11(*b*) jurisprudence — that reasonableness cannot be captured by a number.

B. *Creating Presumptive Ceilings for Reasonableness Is a Legislative, Not a Judicial Task*

[267] Creating fixed or presumptive ceilings is a task better left to legislatures. If such ceilings are to be created, Parliament should do so. As Lamer J. stated in *Mills*: "There is no magic moment beyond which a violation will be deemed to have

occurred, and this Court should refrain from legislating same" (p. 942; see also *Conway*, at p. 1697 (concurring)).

[268] Prof. P. W. Hogg's *Constitutional Law of Canada* (5th ed. Supp.) notes that a number of commentators have advocated that Parliament enact fixed time limits for trials: s. 52.5. The Law Reform Commission in *Trial Within a Reasonable Time: A Working Paper Prepared for the Law Reform Commission of Canada* (1994) ("*Working Paper*") pointed to a number of considerations that weigh in favour of legislative standards, instead of judicially imposed ceilings: pp. 5-6.

[269] First, courts do not, and should not, function as legislatures. As the *Working Paper* put it:

> The courts have been given a greatly expanded role with the *Charter*, but their essential function has not changed. They do not function as legislating bodies; their principal task is adjudicating conflicts brought before them. Rather, it is the role of Parliament to advance and enhance constitutional rights through legislative standards which the *Charter*, by its very nature, can provide only in general terms. As Chief Justice Dickson stated in *Hunter v. Southam Inc.* [,[1984] 2 S.C.R. 146, at p. 169]:
>
> > While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. [p. 5]

[270] The *Working Paper* also pointed out that legislative timelines can be more easily changed:

> Another advantage of statutory rules or internal court goals is that they can more easily be adjusted and fine-tuned: constitutional standards, in contrast, are difficult to amend. This will be particularly valuable in the case of the right to a trial within a reasonable time. [p. 6]

[271] In addition, the *Working Paper* noted that legislation can more comprehensively address the root causes of delay:

> In addition, statutory provisions are not restricted to establishing time-limits. A *Charter* decision can do little beyond setting a maximum allowable delay and providing a remedy when it is exceeded. While this approach may be satisfactory from the perspective of the individual accused, it does not address the societal interest. Statutory provisions, on the other hand, can address the underlying causes of delay, rather than merely responding to failures to meet the standard. [p. 6]

[272] Creating presumptive, fixed ceilings is a matter for Parliament, not for this Court, in my respectful view.

[273] My colleagues write, and I agree, that giving meaningful content to constitutional rights is entirely consistent with the judicial role: para. 115. But that is not what the proposed ceilings do. The proposed ceilings do not so much define the content of the s. 11(*b*) right to a trial within a reasonable time as place new limits on the exercise of that right for reasons of administrative efficiency that have nothing to do with whether the delay in a given case was or was not excessive. In my respectful view, this is inconsistent with the judicial role.

C. *The Proposed Presumptive Ceilings Are Not Supported by the Record*

[274] The proposed ceilings have no support in the record that was placed before the Court in this case. The Court did not hear argument about the impact of imposing them, which remains unknown.

[275] Moreover, the ceilings appear to be illogical. The ceilings accept the *Morin* guidelines for institutional delay: 8 to 10 months in provincial courts and 14 to 18 months in cases involving a preliminary hearing and a trial: para. 52. This means that the proposed ceilings allow 8 to 10 months for the inherent time requirements of the case in provincial courts, which seems long, while allowing only marginally more inherent time requirements (12 to 16 months) for cases — generally significantly more complex cases — that involve a preliminary inquiry and a trial. As well, under the ceilings, the seriousness or gravity of the offence cannot be relied on to discharge the onus which the ceilings impose: para. 81. Yet under the transitional scheme, this remains a relevant factor: para. 96. The illogical result is that serious offences are more likely to be stayed under the ceilings than under the transitional scheme.

[276] What evidence there is in the record suggests that it would be unwise to establish these sorts of ceilings. For the vast majority of cases, the ceilings are so high that they risk being meaningless. They are unlikely to address the culture of delay that is said to exist. If anything, such high ceilings are more likely to feed such a culture rather than eliminate it.

[277] Consider the statistical information that we have in the record which is from the Provincial Court of British Columbia. It suggests that the proposed ceiling

for the provincial courts is too high to be of any use in encouraging more expeditious justice in the vast majority of cases.

[278] The proposed ceiling is set for 18 months in provincial courts. But the median time to disposition of matters in the Provincial Court of British Columbia was 95 days in 2011-2012, with the average being 259 days, both well below the proposed ceiling: B.C. Justice Reform Initiative, *A Criminal Justice System for the 21st Century* (2012), at p. 30. Of course, these statistics relate to all matters, the vast majority of which (about 95%) are disposed of without trial: p. 33. The time to trial varies widely by court location with the time to the commencement of trial for a two-day case varying in the Provincial Court from 12 to 16 months: p. 34. (I note that this period does not include the period from intake until a trial date is set and measures only to the beginning, not the end of the trial: "Justice Delayed: A Report of the Provincial Court of British Columbia Concerning Judicial Resources" (September 2010) (online), at p. 21.) But there is not much here to lead one to think that the ceilings will do anything to improve the timeliness of the vast majority of criminal cases in the Provincial Court. And, as I will discuss shortly, the ceilings put a small percentage of the total caseload, but a large number of long cases, at serious risk of judicial stay.

[279] The "qualitative review" conducted by Justices Moldaver, Karakatsanis, and Brown "assisted in developing the definition of exceptional circumstances" and provided "a rough sense of how the new framework would have played out in some

past cases": para 106. This examination has not been the subject of adversarial scrutiny or debate, and how it "assisted" in developing the definition of exceptional circumstances is unstated. In any case, the examination as I have reviewed it suggests that the proposed ceilings are unrealistic and that their implementation risks large numbers of judicial stays.

[280] What does this examination tell us about the appropriateness of the ceilings? Consider first the superior court cases over the past 10 years in which stays were granted. The average "net" delay was about 44 months, with the median "net" delay being about 37 months. This provides no support for a ceiling of 30 months for superior court cases. The examination is no more supportive in relation to the provincial courts. Looking at provincial court cases in which stays were granted, the average "net" delay was about 27 months and the median was 24.5 months (I have excluded Quebec from this calculation because of the distinctive jurisdiction of the Court of Québec). Once again, my colleagues' examination of the cases fails to support the proposed ceiling of 18 months for provincial court cases.

[281] Developing the proposed ceilings in the absence of evidence and submissions by counsel contrasts with the Court's development of the administrative guidelines for institutional delay in *Askov* and *Morin*. In those cases, the Court had the benefit of extensive evidence including statistical information from comparable jurisdictions and expert opinion: *Morin*, at p. 797. The record in *Morin* included four volumes of evidence, largely consisting of evidence from three experts with exhibits

on the issue of institutional delay across various jurisdictions in Canada — in fact, two volumes of the record were exclusively devoted to such information**.** This record contained evidence from a solicitor in the region of Durham, the region at issue in *Morin*, who was a member of the trial delay reduction committee in the region. His evidence included statistical information and information about the efforts made to reduce delay in the region. Furthermore, the record included extensive evidence from Professor Baar, who "has written and consulted extensively on court administration in general and case flow management in particular in Canada, the United States and other jurisdictions": *R. v. Morin* (1990), 55 C.C.C. (3d) 209 (Ont. C.A.), at p. 213. This extensive record enabled the Court to analyze the respective caseloads of provincial courts and superior courts, the increase in caseload in particular regions (including in Durham), reasons for the growth in this caseload, and the abilities of various courts to handle the increasing caseload: see *Morin* (S.C.C.), at pp. 798-99. The broad range set out in the administrative guidelines in *Morin* (eight to ten months in provincial court; six to eight months from committal to trial) was derived from the considerable mass of evidence then before the Court.

D. *There Is a Significant Risk of Negative Consequences*

[282] My colleagues acknowledge that, if their new framework were applied immediately, there is a risk of thousands of cases being off-side the new ceilings and being judicially stayed as a result: para. 98. There are worrying signs in the limited record that we do have that large numbers of cases (although not a large percentage of

the total cases dealt with by the courts) would be at risk if the presumptive ceilings were applied.

[283] The record indicates that, in the British Columbia Provincial Court, as of March 31, 2010, there were over 2,000 adult criminal cases pending for over 18 months. As of 2011, this represented 13 percent of the caseload of the Provincial Court. As of 2012, 4 percent of pending cases in the Provincial Court had been in the system for more than two years: "Justice Delayed", at p. 23; B.C. Justice Reform Initiative, at p. 35. Thus the limited record that we do have suggests that the proposed ceiling of 18 months in provincial courts, if applied now, would put thousands of prosecutions in the Provincial Court at serious risk of being judicially stayed. Dramatic improvements for the group of cases at the top end of the delays would be required to avoid thousands of judicial stays under the proposed ceilings.

[284] The examination of the case law undertaken by my colleagues increases rather than diminishes this concern. As I noted earlier, the average time for stays in superior courts, based on that analysis, is about 44 months, with the median being about 37 months. This time period significantly exceeds the proposed 30-month ceiling. If these figures can be relied on, they suggest that the proposed ceilings would require unrealistic and improbable improvement in case processing times to avoid many judicial stays.

[285] The transitional regime which my colleagues propose is intended to avoid the problems that would arise from immediate application of the presumptive

ceilings. In my view, these transitional provisions will not avoid the risk of thousands of judicial stays of proceedings.

[286] Although my colleagues maintain that different criteria should not apply during the transitional period, they in fact establish different criteria for transitional cases. To take only one example, there will be a "transitional exceptional circumstance" if the parties reasonably relied on the law as it previously existed and have not had time "to correct their behaviour": para. 96. In other words, the ceilings do not apply to some transitional cases.

[287] The basic problem with this is that transitional provisions create a *Charter* amnesty. What is unreasonable according to the Constitution is treated as if it were reasonable. The justification for this is that parties require time to correct their behaviour following the release of this decision. However, this sort of *Charter* amnesty is contrary to our s. 11(*b*) jurisprudence.

[288] *Morin* ruled against transitional provisions in s. 11(*b*) cases and explained why purporting to set up a parallel system of rules to govern existing cases is wrong in principle. Sopinka J. for the majority wrote, at pp. 797-98:

> . . . the Court of Appeal purported to apply a transitional period to accommodate the situation in Durham. While a transitional period may have been appropriate immediately after the *Charter* came into effect, it is not appropriate any longer. This Court so held in *Askov*. The use of a transitional period implies a fixed period during which unreasonable delay will be tolerated while the system adjusts to a new set of rules. It

> imposes a general moratorium on certain *Charter* rights. For this reason and quite apart from the statement in *Askov* that the transitional period had ended, I would not find it appropriate in this case. It appears to me undesirable to impose a moratorium on *Charter* rights every time a region of the country experiences unusual strain on its resources. It is preferable to simply treat this as one factor in the overall decision as to whether a particular delay is unreasonable. [Emphasis added.]

[289] In my opinion, this teaching is both authoritative and sensible. I would continue to apply it.

[290] Moreover, my colleagues indicate that the proposed transitional exception applies to problems of institutional delay. But it is hard to see how this can be justified by the need to give parties an opportunity to correct their behaviour. The guidelines for reasonable institutional delay were established (at the very latest) in *Morin*, almost a quarter of a century ago. Twenty-four years is long enough for parties to modify their behaviour to comply. No transitional arrangements for institutional delay can now be justified.

[291] My colleagues write that the "contextual application of the [new] framework is intended to ensure that the post-*Askov* situation [in which tens of thousands of charges were stayed in Ontario alone] is not repeated": para. 94. In other words, the hope is that the presumptive ceilings that are unrealistic now will become realistic in the fairly near future. But there is no basis in the record or in logical reasoning to suppose that these ceilings, if dramatically unrealistic now, will become less unrealistic with the passage of time. In my respectful view, this Court should not impose on the criminal justice system the risk that thousands of prosecutions will be

judicially stayed. Doing so is especially regrettable when it is done, as is proposed here, in a virtual factual vacuum, with no opportunity for submissions about either the wisdom of this approach or the accuracy of the assumptions on which it is based.

[292] My colleagues maintain that there is a "culture of complacency towards delay" (para. 40) that has emerged in the criminal justice system, which is not addressed by the *Morin* framework. They argue that their revised approach to s. 11(*b*) is warranted, given that under the current framework "participants in the justice system . . . are not encouraged to take preventative measures to address inefficient practices and resourcing problems": para. 41. But, contrary to these broad and unsupported generalizations, even the limited record before the Court indicates that the problem of excessive delay has been the focus of extensive attention by the British Columbia Provincial Court and by the governments of British Columbia, Alberta, Newfoundland and Labrador, and Ontario. The most recent statistics in the record indicate that the situation is, if anything, getting better, not worse: see "The Semi-Annual Time to Trial Report of the Provincial Court of British Columbia to March 31, 2015" (online), at p. 5.

[293] Imposing judicially created ceilings as an aspect of our s. 11(*b*) jurisprudence presents risks. If we are to take these risks through the imposition of ceilings or other time limits, these limits should be created by legislation and informed by facts.

E. *The Promised Simplicity of the Ceilings Is Likely Illusory*

[294] Even if creating ceilings were an appropriate task for the courts and even if there were an appropriate evidentiary basis for them, there is little reason to think these presumptive ceilings would avoid the complexities inherent in deciding whether a particular delay is unreasonable in all of the circumstances.

[295] We can look to the experience of other jurisdictions. It appears that even fixed limitation periods set by legislatures have not succeeded in avoiding complexity. Various states in the United States have created statutory time limitation periods dealing with overall delay in criminal proceedings. At the federal level, there is the *Speedy Trial Act of 1974*, 18 U.S.C. § 3161, and there are similar provisions in many states: W. R. LaFave et al., *Criminal Procedure* (5th ed. 2009), pp. 892-93. These provisions create time limitations, but also include a number of contingencies to account for the plethora of different circumstances under which criminal cases may arise: pp. 895-97. In short, to be workable, the legislated limits inevitably require that a number of factors be balanced and considered in determining whether any case or charge should be dismissed: p. 897. But these contingencies and this balancing simply give rise to the sort of litigation that the limits were supposed to avoid: see S. Hopwood, "The Not So Speedy Trial Act" (2014), 89 *Wash. L. Rev*. 709, at p. 715.

[296] Turning to the proposed scheme, it seems to me that rather than avoiding complexity, it simply moves the complexities of the analysis to a new location.

[297] I turn first to cases in which the delay exceeds the presumptive ceiling. Departure from the ceiling may be required by a variety of circumstances: "discrete

exceptional events" (para. 75), including delay caused by unexpected recantation by a complainant and other unforeseen trial delays; delay resulting from a case's particular "complexity" (para. 77); and whether particular periods of delay could reasonably have been mitigated. It is hard to see how this framework is likely to bring greater simplicity to the analysis.

[298] The same applies to the burden on the defence in cases which fall below the ceilings. Under the proposed framework, the defence has the burden to show, first, that the time required to dispose of the case "markedly exceeds the reasonable time requirements of the case": para. 87. In order to consider a defence attempt to discharge this burden, the court will have to consider a variety of factors, including "the complexity of the case, local considerations, and whether the Crown took reasonable steps to expedite the proceedings": *ibid.* These factors largely mirror the test under the existing jurisprudence.

[299] The defence must also show that it took "meaningful, sustained steps to expedite the proceedings": para. 84. The defence must show that "it attempted to set the earliest possible hearing dates, was cooperative with and responsive to the Crown and the court, put the Crown on timely notice when delay was becoming a problem, and conducted all applications . . . reasonably": para. 85. I have already explained why I think it is inappropriate to impose this burden. But putting that aside, the need for these inquiries increases rather than reduces the complexity of the analysis mandated by the existing jurisprudence.

[300] Finally, consider the proposed transitional provisions. It is unexplained how the Crown will be able to satisfy the court that "the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed" in the relevant jurisdiction, let alone how it will be shown that "the parties have [or have not] had time following the release of this decision to correct their behaviour": para. 96. Little imagination is needed to see the ballooning evidentiary implications of these elements of the scheme. Also, it seems that for transitional cases below the ceiling, unlike cases subject to the new template, the defence does not have to prove having taken initiative to expedite matters in the period preceding this decision in order to make out a case of unreasonable delay. But doing so will assist the defence claim of unreasonable delay. The result is that even in transitional cases, the parties will be parsing the record to show how the defence did, or did not, try to move things along.

[301] These considerations suggest that the proposed presumptive ceilings will do little to simplify the task of determining whether the delay in a particular case violates the accused's right to be tried within a reasonable time. In one way or the other, the judge must look at the circumstances of the particular case at hand.

F. *Conclusion*

[302] I am not convinced that this Court should impose the scheme proposed by my colleagues. It diminishes *Charter* rights. It casts aside three decades of the Court's jurisprudence when no participant in the appeal called for such a wholesale change —

and this in the context of a case in which all of us agree that the result is clear under the existing jurisprudence. It has not been the subject of adversarial scrutiny or debate. The record does not support the particular ceilings selected. Nor, so far as I can tell, does the Court-conducted examination of reported cases. And it risks repetition of the *Askov* aftermath in which thousands of prosecutions were judicially stayed. In short, the proposed scheme is, in my respectful view, wrong in principle and unwise in practice.

V. Disposition

[303] I would allow the appeal and enter a stay of proceedings.

Appeal allowed.

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Solicitor for the respondent: Public Prosecution Service of Canada, Vancouver.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Calgary.

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Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Addario Law Group, Toronto.