

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

ALEXANDRA PISKUN

* * * * *

RULING ON APPLICATION

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BEFORE THE HONOURABLE MR. JUSTICE F. CLEMENTS
on May 2, 2008 at Brampton, Ontario

* * * * *

APPEARANCES:

S. Bauman

Prosecutor

B. Castlemore

Agent Representing Alexandra Piskun

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TRANSCRIPT ORDERED:

May 5, 2008

TRANSCRIPT COMPLETED:

June 18, 2008

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FRIDAY, MAY 2, 2008

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MS BAUMAN: We're here for two other matters, as I understand it, lines number 13, Andrea - Alexandra Piskun and line number 9, Jagdish Malhi. These are two matters, they're prosecution appeals. I was intending to argue the Alexandra Piskun today. I was surprised when I found the Jagdish Malhi matter on the docket because on the last date I was not in attendance. It was another prosecutor. I'd agreed with Mr. Greg Burd that this would be put over to June the 13th, and an hour set aside for argument. So I'm a little surprised that it's on the docket today. I spoke with...

THE COURT: Which one's that?

MS BAUMAN: That's Jagdish Malhi, line...

THE COURT: Right.

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MS BAUMAN: ...number 9. And I spoke with Sue, the trial coordinator ahead of time, and - and that time was set aside. She had a look at the endorsement on the last day. It looks like June the 13th was written and then crossed out to May the 2nd. I'm a little confused as to what happened. It was not my expectation that it would be put today. Mr. Burd is not here to explain what happened. So I'm asking that that matter be put over to June the 13th for argument, and that we just deal with the Piskun matter today.

THE COURT: Are you on this matter?

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MR. CASTLEMORE: Yes, Your Honour. I have prepared for this. I - I believe the Malhi matter was up on the 11th of April, and it was marked to be spoken to, to set a date. Mr. Burd, at that time, appeared and

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5 indicated that our office was already here on May 2nd
for the Piskun matter, which - which they're - they're
very similar matters. They're both Crown appeals on -
on 11(b) motions that - that were stayed. And so
it's my understanding that on that day of April 11th,
they were put to today, or - or the Malhi matter was
put to today, in any case.

10 THE COURT: Well, I was the one who adjourned it to
May the 2nd. It's not indicated - there's nothing on
the endorsement to indicate other than it just went
over to that date. That's all that's there. Are they
similar?

15 MS BAUMAN: They are.

THE COURT: What's the issue here on - on 11(b)? You
better - what's the issue?

MR. CASTLEMORE: It is a. ...

THE COURT: Crown, what's the issue? Why - why is -
why was Farnam wrong?

20 MS BAUMAN: I filed a factum on both of these matters.

THE COURT: I know, but just - you know, I - I -
there's so many 11(b)'s, come on. If - is it over
eight months old, nine months old?

MS BAUMAN: Yes.

25 THE COURT: And why should - why shouldn't the - the
rule in R. v. Morin and R. v. Sharma apply?

MS BAUMAN: The rule does apply. But they - it was
not applied in this matter by the justices.

THE COURT: Why? What did he say?

MS BAUMAN: Well, Your Honour, I....

30 THE COURT: Show me - show me where he's wrong.
Let's....

MS BAUMAN: I will be brief in my argument, but I

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would like to argue it.

THE COURT: No. I'd like to - you tell me why he's wrong. I mean, you know, let's -- show me in...

MR. CASTLEMORE: Just for my benefit, Your Honour, which one - if Ms...

THE COURT: We're dealing with Piskun.

MR. CASTLEMORE: ...Bauman could indicate - Piskun? Okay. Thank you.

THE COURT: Where in the - in the....

MS BAUMAN: I have one case that's been released from this court, which I think explains it very concisely. If I could just find that, please. The case that I've handed up is a case from this court, a decision of your brother Justice Andre.

THE COURT: Yeah.

MS BAUMAN: I think explains it as concisely and as quickly as I can.

THE COURT: Do you have it - is it in the - in this material?

MS BAUMAN: No. It's the one that I've just handed up.

THE COURT: Oh, did you.

MS BAUMAN: It was released after I filed my factum and brief of authorities. And there were a number of issues on appeal. And this one, the issue begins at page 4...

THE COURT: Thank you.

MS BAUMAN: ...paragraph number 13. And it's my respectful submission that the Justice of the Peace that stayed these charges, for different reasons, both got it wrong, and Justice Andre got it right. Justice Andre followed the case law in R. v. Morin, the

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Justice of the Peace did not.

5 THE COURT: Okay. Wait a minute. Let's go back to the facts in this case. He was charged - he was stopped on November the 8th, 2005.

MS BAUMAN: Okay. Which one are we dealing with?

THE COURT: Piskun.

MS BAUMAN: Yes.

10 THE COURT: So - and the same day he was served with an offence notice, so the time starts to run from that date. Do you agree or not?

MS BAUMAN: The total time, yes, but not the institutional delay.

15 THE COURT: No, no, no, no. The - the - the time for that date.

MS BAUMAN: The total delay, yes, but not the institutional delay.

20 THE COURT: No. But give me a second. Calanga (ph) from the Supreme Court of Canada decided that the period of time that you assess for purposes of delay is from the swearing of the information to the date of trial. Do you understand that?

MS BAUMAN: Yes, the total...

THE COURT: Okay.

MS BAUMAN: ...delay. Yes.

25 THE COURT: So the delay here is, effectively, the information is sworn, or the certificate, or offence notice is given on November the 5th, right?

MS BAUMAN: I believe it was November the 8th.

30 THE COURT: November the 8th, right. And the trial date's December the 12th, 2006, so it's over one year.

MS BAUMAN: Right.

THE COURT: Okay. So how much of - of the - and the

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trial date was set when, on November 18th?

5 MS BAUMAN: Yes. It's all set out at part 2 of my factum, all the dates are...

THE COURT: Yeah, I see that. So the institutional delay - the - was that the earliest trial date, December the 12th?

10 MS BAUMAN: As far as we know. That - it's set administratively.

THE COURT: So you're saying that from November the 18th, when they set the trial date, to December the 12th, which is in excess of 12 months is not unreasonable?

15 MS BAUMAN: That's correct.

THE COURT: On what basis?

MS BAUMAN: On the basis that the entire period is not institutional delay.

THE COURT: Why isn't it?

20 MS BAUMAN: Well, with the greatest of respect, Your Honour, the difficulty is there's a period of the neutral intake period which has not been taken...

THE COURT: Well, not the - but the trial date was set on November the 18th.

MS BAUMAN: That's correct.

25 THE COURT: Well, the intake period is before you set the trial date.

30 MS BAUMAN: No. Here's the problem. The - the neutral intake period cannot be - the institutional delay cannot begin to run on the date that the defendant decides to walk in with her notice of intention to appear. It doesn't begin on that day. According to the Supreme Court of Canada, R. v. Morin, it begins when the parties are ready for trial.

5 THE COURT: Yeah. That's November the 18th when you set the trial date.

MS BAUMAN: No. The parties are not ready....

THE COURT: No. You're absolutely wrong. Come on. Look. Forgive me. Look. When the parties under - if you read R. v. Morin...

10 MS BAUMAN: Yes.

THE COURT: ...and Justice Sopinka, with all due respect, when the parties are ready for trial is when they set the trial date.

MS BAUMAN: Well....

15 THE COURT: Otherwise, you don't set a trial date. You see, the - the intake period is the period from the date that the person is charged and the swearing of the information up to - and - and it has to be a reasonable intake period, depending on the complexity of the case, is - is that period of time that is reasonably necessary to allow the parties to do a number of things, retain counsel, retain an agent, prepare disclosure, make disclosure available, et cetera.

20
25 Once the parties are in a position to set a trial date, and they attend at the trial coordinator's office, if it's in the case of a provincial offence, or under the Criminal Code, it's from that date to the - to the first available trial date, or when the system is first available to accommodate the parties, that is the period of institutional delay.

30 MS BAUMAN: The difficulty....

THE COURT: Now - and show me a case that says otherwise, then I'll be happy to listen to you, but...

5 MS BAUMAN: The difficulty is that that's not what happens in a Part 1 matter.

THE COURT: Well...

MS BAUMAN: That's not what happens at all.

10 THE COURT: ...you say, on - on - on paragraphs - on November 18th a notice of trial was given the to defendant's agent and sent by mail to the defendant notifying the parties of a trial on December the - the 12th, 2006.

MS BAUMAN: Yes.

THE COURT: What am I - what am I missing?

15 MS BAUMAN: The parties are not ready for trial on the date that the dates are set in a Part 1 Provincial...

THE COURT: Why would...

MS BAUMAN: ...Offences Act matter.

THE COURT: ...you set a trial?

MS BAUMAN: Because that's what the Act requires you to do.

20 THE COURT: Yeah.

MS BAUMAN: But the parties are not ready for trial on that date. You can't be ready for that trial on that date...

THE COURT: No, but...

25 MS BAUMAN: ...because the Act doesn't allow you to have a trial.

30 THE COURT: No, but the - what you're missing is this stuff. You set a trial date on November the 18th for almost - well over a year down the road. If you don't set it on that date, then you're simply going to be setting it, you know, December or whenever you think you're ready for trial for another 11 or 12 months down the road. It's still institutional delay. And -

5 and where in Mr. Justice Andre's decision does it say that's not the case?

MS BAUMAN: Well, there's one that's very clear in my factum, which is R. v. Hussain, which - sorry, the brief of authorities, page the - page - at tab 13, Justice Casey from another court.

10 THE COURT: Right.

MS BAUMAN: Which talks about the - the - that the justice erred in failing to take into account the intake period.

THE COURT: Well, what's the intake period.

15 MR. CASTLEMORE: If I could just - which - where are we on this? On the - you're - you're dealing with - you're - you're addressing the R. v. Hussain matter?

MS BAUMAN: Yes.

THE COURT: I need to take a break.

MR. CASTLEMORE: Which page?

MS BAUMAN: I haven't cited a page.

20 MR. CASTLEMORE: Oh, okay. I'm sorry.

MS BAUMAN: Your Honour, if you could just give me one minute to explain...

THE COURT: Yeah.

25 MS BAUMAN:I will do that. Okay. Part 1 Provincial Offences Act matters are unique. They are the only matter in the entire justice system where matters are set for trial when the parties are not ready. The parties cannot be ready on the date that the matters are set for trial.

THE COURT: No, no, no, no.

30 MS BAUMAN: And here - and if I could just explain why. You get a ticket. You have 15 days, on the back of the ticket, to decide what to do. If you choose to

5 have a trial date, you walk in to a provincial offences matter, to - to the court across the street, hand in your notice of intention to appear.

10 In this matter, the defendant was given a trial date immediately. The parties are not ready for trial. There's no disclosure that's been received. There's no - not necessary that the defendant has counsel or an agent to be able to do that. You've got 15 days to file your notice of intention to appear. The intake period doesn't begin until after that.

15 What happens is, in this particular matter, the defendant hired an agent and walked into the provincial offence court and requested a trial. The agent, as I understand it, was given the notice of trial immediately, however, that was the only party that was notified of the trial on that day.

20 The Act requires that you send out a notice of trial to the defendant, as well as the prosecutor's office. It cannot be set the very next day for those particular reasons.

25 The Provincial Offences Act under the mailbox rules require that the notice of trial be received by the prosecutor's office and the defendant. It's deemed served on the seventh day after mailing, so you send the mail out. It's not - it's not deemed served on that day. It's not until seven days later that it's - that the notice is actually deemed served on the defendant and the prosecutor's office.

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5 The Provincial Offences Act requires that there be another week between receiving of the notice of trial and the - and the trial date. That is what the Act requires. It's very unique in that circumstances. You don't have...

THE COURT: Well, do you have...

10 MS BAUMAN: ...a first...

THE COURT: ...a case that says that that - that - that because of the provisions of that Act, that this is intake period?

15 MS BAUMAN: Yes. That's the case of R. v. Hussain that's found at - at tab number 3. In other words, even if the....

20 THE COURT: Well, I don't see - I don't - I'm reading Justice Casey's endorsement. First of all, it's an endorsement, but I - I don't see he says that. He - he - he says that the Justice of the Peace erred in finding a breach, because he didn't properly take into consideration the four criteria set out in R. v. Askov. And there was no specific - accepting the total delay of 11 months from the laying of the charge, the date of trial was sufficiently longer to require...

25 MS BAUMAN: But if you look at tab....

THE COURT: He's talking about a reasonable intake period of June 25th to August the 21st.

30 MS BAUMAN: Which in my submission, is reasonable. That's exactly what I'm asking for about - approximately...

THE COURT: But - but when do...

MS BAUMAN: ...two months.

THE COURT: ...you say you were ready for trial.

5 MR. CASTLEMORE: If I can assist, Your Honour. On the R. v. Hussain matter, that's how long it took the court to mail out the notice, from June 25th until the 21st of August. The 21st of August deemed the day...

THE COURT: Yeah.

MR. CASTLEMORE: ...that the notice went out.

THE COURT: Yeah.

10 MR. CASTLEMORE: And in this particular - it took almost two months for them to mail it out. And so the judge in this particular - Judge Casey indicated that that wasn't unreasonable. Except in - in the matter before you, that notice was given the same day. And I can also indicate that disclosure was received - basically the person was charged, asked for a trial, received a trial date and received disclosure within 22 days of the offence in the Piskun matter.

15 MS BAUMAN: After the trial date had already been set.

20 MR. CASTLEMORE: Within 22 days of the offence, retained an agent, requested a trial, received a trial date and received disclosure within 22 days of being charged, so how a two month intake period could possibly be contemplated when everything is done within 22 days.

25 THE COURT: Well, I - I'm looking at Justice Weiss' judgment which first, I mean, you have to demonstrate that she's wrong. This is what she says. She refers to R. v. Hussain, and she said:

30 "Even if I were to concede that two months is appropriate, I take it for the intake period, the prosecution will be given some time to deal with - to deal with all the paperwork, the

5 investigation, et cetera. I don't believe that
a 15 over speeding requires two months.
Certainly the time of the offence, the
certificate is filed. Once the charge is laid
the investigation part is over. It's a matter of
setting - matter of setting a trial date. And
that was done quickly.

10 Unfortunately, the trial, the earliest date
available was not for a considerable period of
time. Even were I to grant a two month neutral
period for this intake, we're still dealing with
more than 11 months. And clearly, R. v. Morin
are 8 to 10 months to bring a matter to trial.
15 And R. v. Askov suggests six to eight months, as
did Justice Sheppard in R. v. Mastrioni. (It's
actually Justice Durno it should be.)

20 To deal with the issue of what does the Charter
mean is something that I want to address. The
prosecution submits in this jurisdiction there
are too many Charter applications brought before
the court that do not address the true meaning of
the Charter. The Charter was enacted to ensure
the liberty and security of an individual as well
as the right to a fair trial. Since this is not
25 a criminal matter, and the defendant's liberty
and security are not in issue, the Charter does
not apply, apart from ensuring a fair trial. And
obviously if that were held today, then that
would be accomplished. While looking at the
interpretation of the Provincial Offences Act,
30 sections 2(1) and 2, it's clear to this court,
and although the Act was established to replace

5 a summary conviction procedure for the
prosecution is included in the provisions adopted
by reference to the Criminal Code of Canada, even
though wording may vary, substance and meaning do
not, when it comes to the provisions of the Code.
I find the Charter is as relevant to provincial
10 offences as criminal charges. The Charter
addresses the right of individuals and is limited
to serious matters. And section 11(b) requires
the defendant be tried within a reasonable time.

15 In considering local practices, I do not take
judicial notice of the higher volume of trials in
Peel compared to smaller jurisdictions, but
clearly the required judicial resources have not
kept pace, even though the province and city have
had nearly 20 years since Askov to rectify.

20 The prosecution says delay is measured from when
the defendant is ready for trial. When a
disclosure request is sent to the prosecution, as
in this case was done by Mr. Burd, the agent.
The defence maintains disclosure is not an issue
and appellant didn't - did what was expected of
25 her filing a notice of intention to appear,
requesting the earliest possible trial date
within the prescribed 15 days. And the court
agrees with this position."

30 THE COURT: I, I'm - where - where - where's she gone
wrong in here? Can you - can explain this to me.

MS BAUMAN: Your - Your Honour, I've explained
everything as best I could in my factum.

THE COURT: Yeah.

MS BAUMAN: I'm not sure if the court has taken the time to read that.

THE COURT: Well, I have. I've read...

MS BAUMAN: Okay.

THE COURT: ...I've read - and - and - and in particular I've read - and - and the facts, because these are the facts of which you've said to me I have to - to - to base my decision.

"SUMMARY OF FACTS: November 8th, 2005, the defendant Alexandra Piskun was stopped by Peel Regional Police. On that same day, she was served with an offence notice for an offence of speeding 95 kilometres per hour in an 80 kilometre zone. On November 14th, a certificate of offence was filed with the clerk of the Provincial Offences court at 5 Ray Lawson Boulevard in the City of Brampton. November 18th, 2005, the defendant filed a notice of intention to appear, signalling her intention to plead not guilty and have a trial in this matter. November 18th, 2005, a notice of trial was given to the defendant's agent and sent by mail to the defendant notifying the parties of the trial on December the 12th, 2006. On November the 8th, 2006, the defendant, through her agent, served the Attorney General of Ontario, the Attorney General of Canada, the court and the prosecutor's office with a notice of application of constitutional issue signifying her intention to bring an application for a stay under 24(1) of

the Canadian Charters of Rights. On December the 12th, 2006, prior to plea, the defendant successfully argued for a stay of proceedings. Her Worship, Justice of the Peace Weiss, granted the application and ordered that the charge against the defendant be stayed. On December 21st, the prosecution filed notice of appeal."

THE COURT: Now, what is it about those summary of facts that I should know that would lead me to conclude that the institutional delay in this case does not run from November 18th to December the 12th, 2006?

MS BAUMAN: Well, I think as I've already indicated with...

THE COURT: And - and...

MS BAUMAN: ...respect to the...

THE COURT: ...forget about Part 4, and all - all that - I mean, the person has a right under your Act to set a trial.

MS BAUMAN: Absolutely.

THE COURT: And it - it is statutorily required. It's - it's even more onerous than in the Criminal Code. You're required to set a trial date by the Act within a certain period of time. The person comes in and does that. This is a simple matter. This is a speeding case.

MS BAUMAN: Yes.

THE COURT: The disclosure in this is - is - is - is in existence at time of the offence, it's in existence. All that - all that has to be done is for the - for - for the - the police to provide sufficient

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resources to photocopy any notes, if they're required.
A defendant may not request disclosure.

MS BAUMAN: Yes.

THE COURT: They don't have to have disclosure.

MS BAUMAN: Right.

THE COURT: You can set a trial date and go without disclosure

MS BAUMAN: Right.

THE COURT: I think if - unless I'm misapprehending you, you misapprehend the idea of what - what the courts mean when they say "they're ready for trial". When - when - when counsel go to the trial coordinator's office on a Criminal Code matter to set a date for trial, it's - it's considered they're ready to proceed to trial. That - that - that - they don't want more disclosure. They don't want - they have all the disclosure they need. Everybody is in a position to do it. The - the investigation is complete. There's no ongoing investigation. There's no new material to be disclosed. And they're ready to set a trial date. That doesn't mean, of course, the date you go there, that you actually could be ready to proceed on that day.

MS BAUMAN: Right.

THE COURT: That means that you will be ready at some reasonable point in the future. You set the trial date some reasonable point in the future. Presumably, you set it within, or you attempt to set it within the guidelines set down in R. v. Sharma, which is eight to nine months for a reasonably straightforward, uncomplicated case. In fact, that guideline can be even lower according to Justice Hill in R. v

Misener...

MS BAUMAN: Right.

THE COURT: ...if the particular facts are - are - are - are not, you know, overly complicated. And - and - and, in fact, if there's prejudice or actual prejudice, you move the guidelines down.

MS BAUMAN: Absolutely.

THE COURT: So I'm - I'm trying to understand why it would be wrong to say the period of time from November the 8th of 2005 to December the 12th, 2006 is institutional delay.

MS BAUMAN: Because there's another party on the other side, who has not been notified of the trial...

THE COURT: When were...

MS BAUMAN: ...at all.

THE COURT: ...you notified?

MS BAUMAN: The prosecutor.

THE COURT: When was the prosecutor notified?

MS BAUMAN: The prosecutor's not notified until two weeks afterwards.

THE COURT: So two weeks. Let's take two weeks off. We'll take two weeks off.

MS BAUMAN: Okay.

THE COURT: You're still - you're still over a year.

MS BAUMAN: Then what we have to do is look at the words of Justice Doherty in the Omar Zadah case.

THE COURT: In what?

MS BAUMAN: In the - it's a case called Omar Zadah.

THE COURT: Yeah, and what's he say?

MS BAUMAN: It's the only case from the - either the court of - it's probably not surprising that people don't appeal their speeding convictions to the Supreme

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5 Court of Canada very often. But the only thing that we have from the Court of Appeal that deals specifically with Provincial Offences matters...

THE COURT: Yeah.

MS BAUMAN: ...is the - this is a denial of leave application.

10 THE COURT: Well, it's an endorsement again.

MS BAUMAN: Right. But it's Justice Doherty.

THE COURT: Well, but it's an endorsement. I don't know if....

MS BAUMAN: The only thing that we have - and I'd ask that the court look at the words of what he said.

15 MR. CASTLEMORE: Your - Your Worship - or pardon me. I'm sorry. Your Honour, as it should be. If I could just assist on the Omar....

THE COURT: Well, let her finish and then I'll...

MR. CASTLEMORE: Okay.

THE COURT: ...you know.

20 MR. CASTLEMORE: Okay. Thank you.

MS BAUMAN: Okay. So the situation is, Your Honour, that....

25 THE COURT: He says that - that you - well, you can see what he says. He says it's not presumptively unconstitutional beyond six months. That's all he's saying.

MS BAUMAN: Right.

THE COURT: Well, R. v. Morin doesn't say even that eight to nine months is - is fixed. It's not a mathematical, you know...

30 MS BAUMAN: Right.

THE COURT: ...precise...

MS BAUMAN: Um hmm.

THE COURT: ...fixed guideline.

MS BAUMAN: Um hmm.

THE COURT: It's only a guideline.

MS BAUMAN: Um hmm.

THE COURT: I'm trying - you - help me understand that if I take two weeks off from November the 18th - let's make it December the 1st that you receive notice. Let's make it, you know, with respect to - or even December the 12th, 2005, which is more than two weeks after the trial date's set. That makes it an even year from then until the - the trial's actually heard. Why isn't that institutional delay?

MS BAUMAN: Okay. I would ask that I just be given a moment to read...

THE COURT: Yeah.

MS BAUMAN: ...these cases. Okay?

THE COURT: Yeah.

MS BAUMAN: All I'm asking is for my opportunity to be heard. What Justice Doherty has said starting at - in Paragraph 3...

THE COURT: Um hmm.

MS BAUMAN: ...is he's talking about the guidelines in R. v. Morin and how they apply to a Part 1 Provincial Offences prosecution. And he said:

"The analysis of section 11(b) provided by R. v. Morin applies to P.O.A. prosecutions, which absolutely they do; to the extent that guidelines are helpful where section 11(b) claims are advanced and prosecutions under Part 1 of the P.O.A. R. v. Morin summary conviction guidelines should govern."

So that's the 8 to 10 month guideline.

"However, even those guidelines should not necessarily be strictly applied."

THE COURT: Right.

MS BAUMAN:

"It must be acknowledged that any stigma arising out of the delay in the trial of charges like speeding is virtually non-existent. In allocating finite resources, the state is entitled to give some priority to the speedy resolutions of more serious matters."

And what I explain in this is what I believe that Justice Doherty is saying, is that when you have a - one Justice of the Peace and you have a choice whether or not to send that Justice of the Peace to bail hearing, or if you want to keep them in a Part 1 Provincial Offences Act matter, the entire community would agree that he should go to the - the - the bail hearing, so the question is, the 8 to 10 months is just a guideline. At what point does that guideline apply?

THE COURT: Well, in this case, it didn't apply. This was 14 months. And he said, obviously, that was too long. What's - you know, so can you explain to me the difference between 12 and 14 for - for the purpose of your analysis in this case? What - what would - what would make 12 months a legitimate period?

MS BAUMAN: Because there was actual prejudice in the

5 Omar Zadah case. There was no actual prejudice in the case of - of Ms Piskun. There was - there was zero prejudice.

THE COURT: Where's it say that?

10 MS BAUMAN: And that's not what the justice found. And that's where - that's one of the errors that she made. And I've put that on my factum at - starting at Paragraph 44.

15 THE COURT: Okay. I - well, I - I appreciate you taking me to your factum. But what I need to know - what are the facts? I mean, somebody once very wisely told me, a mentor of mine, pay attention to the facts, the law will take care of itself. The facts are all important. Every case on an 11(b) is determined on its own unique set of facts.

MS BAUMAN: Yes.

20 THE COURT: And - and that, of course, is why - and you're correct that - that - that the guidelines, as articulated in - in R. v. Sharma and R. v. Morin are only guidelines. They're - they're, you know. They - they're - they're there to assist us in the analysis on a particular set of facts as to what would be an appropriate and reasonable period to bring a matter to trial. You say that there was no actual prejudice.

25 MS BAUMAN: Yes.

THE COURT: Show me where that is on the record?

MS BAUMAN: Page 4.

THE COURT: Of what?

MS BAUMAN: Of the factum. I'm sorry, of the...

30 THE COURT: No, but - but in...

MS BAUMAN: ...of the transcript.

THE COURT: ...in the evidence.

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MS BAUMAN: The transcript.

THE COURT: Where in the evidence?

MS BAUMAN: Page 4 of the transcript.

THE COURT: Page 4 of the transcript. Thank you.

MS BAUMAN: Starting at paragraph - line number 21 where the defendant took the stand to give evidence of alleged prejudice. In direct examination by her agent - I'm not sure if the court would like me to point out the lack of prejudice.

THE COURT: Well, I'm reading...

MS BAUMAN: Or if you...

THE COURT: ...the thing. I can...

MS BAUMAN: ...like to just....

THE COURT: ...read it almost as fast as you can....

MS BAUMAN: Yeah.

THE COURT: But if - I'm going to give you an opportunity to point out specifically what you say is an absence of prejudice. Yeah. Okay. Yes.

MS BAUMAN: Okay. The difficulty in this matter is that the court found some prejudice.

THE COURT: Right.

MS BAUMAN: All right. There was no prejudice. She said she got the ticket. She cried. She was worried that his - her insurance rates were...

THE COURT: Okay.

MS BAUMAN: ...going to go up.

THE COURT: Let me just stop you there. Assuming there's no actual prejudice, help me with this proposition. In R. v. Misener where Justice Hill says, inferred prejudice is - is - is irrefutable the longer the case goes on, so the longer it goes on beyond the guidelines of eight to nine months...

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MS BAUMAN: Um hmm.

THE COURT: ...you know, inferred...

MS BAUMAN: Um hmm..

THE COURT: ...prejudice becomes irrefutable, so there's certainly inferred prejudice here.

MS BAUMAN: No.

THE COURT: Yes, there is. Because there's always prejudice in - and prejudice that's associated with being charged. You see, that's - you've got to look at what - have you ever read R. v. Pusic?

MS BAUMAN: Pardon me?

THE COURT: Have you read R. v. Pusic?

MS BAUMAN: Yes.

THE COURT: Yeah. And you understand then, what Justice Hill said there about prejudice, the two types of prejudice. There's the prejudice that's associated with being charged.

MS BAUMAN: Yes.

THE COURT: Right. That's not the prejudice we're concerned about.

MS BAUMAN: right.

THE COURT: ...in the context of the guidelines.

MS BAUMAN: Yes.

THE COURT: But once you get outside the guidelines, that prejudice is normally associated with the fact of being charged. The - the prejudice that goes to security interests...

MS BAUMAN: Right.

THE COURT: ...and the prejudice that's associated with anxiety...

MS BAUMAN: Right.

THE COURT: ...becomes nearly irrefutable in terms of

5 inferred prejudice once you get outside those
guidelines where the case has gone on far too long
outside those guidelines, so you've got a case here
now of going three to four months outside of - of - of
- of the guidelines. And you're suggesting to me
there's no inferred prejudice?

10 MS BAUMAN: Yes. And can I explain why?

 THE COURT: Yeah.

 MS BAUMAN: That was a criminal case?

 THE COURT: Pardon?

 MS BAUMAN: That was a criminal case. Okay. I'm
going to explain. If you just...

15 THE COURT: Yeah, okay.

 MS BAUMAN: ...give me a moment, I'll explain the
difference.

 THE COURT: All right.

 MS BAUMAN: First of all, Ms Piskun led evidence on
her cross-examination that she had no difficulty
20 remembering the facts. Okay. So that wasn't in
issue.

 THE COURT: No difficulty...

 MS BAUMAN: The fresh memory...

 THE COURT: ...what?

 MS BAUMAN: ...was not difficult. That was not a
25 problem.

 THE COURT: Yeah.

 MS BAUMAN: Quite clearly, in R. v. Morin, the issues
that they were dealing with, as you suggested, the
security issues, which are quite clearly an analysis
that's similar to section 7, do not apply to a Part 1
Provincial Offences matter. They just don't apply.

30 THE COURT: What doesn't apply to a Part 1?

5 MS BAUMAN: Section 7 of the Charter. The two branches of the - of the beginning of section 7.

THE COURT: Life, liberty, the security of interests don't apply? Well security of interests do.

MS BAUMAN: That's the only one that does apply.

10 THE COURT: Well, and Justice Hill said, remember in R. v. Pusic, that it's as important as the liberty interests.

MS BAUMAN: But that was not a - that was not an issue in this particular case.

THE COURT: Well it's always an issue in 11(b) analysis.

15 MS BAUMAN: The difficulty, Your Honour in that this matter, the only penalty that the court imposes is a \$50 fine.

THE COURT: That goes to liberty interest, that doesn't go to security interest.

20 MS BAUMAN: There is no evidence, which is the - which is the defendant's motion, that that was an issue. There is no issue with respect to security. There - there is no issue on a speeding ticket. It just doesn't apply.

THE COURT: Okay. Yes, anything further?

25 MS BAUMAN: And that's quite clear.

THE COURT: Pardon?

30 MS BAUMAN: It's quite clear that it doesn't apply. And that's - it's explained in quite detail in my factum why - why the case law that's been laid in - by - in the criminal realm of R. v. Morin and everything that's come after that, has been mis-applied to Part 1, Provincial Offences Act matters. You've taken criminal principles and applied them to a speeding

ticket.

5 THE COURT: Well, where's the case that says that?

MS BAUMAN: The case before you, Your Honour.

10 THE COURT: No, but the - the - where is - where is -
where is the authority? I mean, are you relying on
what Doherty said in Omar Zadah as - as authority for
that proposition? Where he says even those - even
those guidelines however, should not necessarily be
strictly - it must be acknowledged that any stigma
arising out of the delay in the trial, charges like
speeding is virtually non-existent.

MS BAUMAN: Um hmm.

15 THE COURT: Yeah.

MS BAUMAN: I've explained it beginning at - at
Paragraph 13 of my factum.

THE COURT: Oh, my.

MS BAUMAN: That the court must look at the
legislative intent.

20 THE COURT: Yeah. How many people do you think would
be offended by the notion that you can't get a - a
trial date on a common speeding ticket within 12
months in this - in this community if they understood
and were well-informed about the principles?

25 MS BAUMAN: And I have to remind myself of the other
side. I wonder how many people would be offended if
they knew how many people were getting out of their
speeding tickets, continuing to speed on a daily
basis, based on a right that has been misapplied?

30 THE COURT: No. Well, then that's a question of lack
of resources. And that's exactly what R. v. Askov was
all about.

MS BAUMAN: Yes.

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THE COURT: And nobody's done anything about it.

MS BAUMAN: Yes. And in this matter, there's no prejudice, absolutely no prejudice.

THE COURT: Yeah.

MS BAUMAN: There was no prejudice testified to, but yet the justice managed to find some. This is a case where the Charter is being used as a sword against the prosecution, not as a shield. That's the problem.

THE COURT: Yes. 2:30 then.

MS BAUMAN: Thank you

* * * R E C E S S * * *

(1:00 p.m.)

U P O N R E S U M I N G:

(2:30 p.m.)

THE COURT: Good afternoon.

MS BAUMAN: Good afternoon.

THE COURT: Yes. Further submissions.

MS BAUMAN: Pardon me?

THE COURT: Do you have further submissions?

MS BAUMAN: Well, I think that my factum is pretty much explained the arguments that I've had. I don't have much further to say in oral argument. The only thing that I want to point out is that this is a, you know, Part 1 Provincial Offence matter...

THE COURT: Yes.

MS BAUMAN: ...today. Fridays are normally the part 1 Provincial Offences matters appeals. You've heard a number of appeals today where people have given various reasons for not appearing at trial, they were at work, they were sick. And those are the usual excuses that you probably hear, so it's difficult, in

5 the face of hearing all those excuses for the reasons why people fail to appear at trial to suddenly say, well, it's so obvious that there's inferred prejudice and that defendants are obviously anxious in awaiting trial. So that's...

THE COURT: Well, prejudice....

10 MS BAUMAN: ...the only thing that I wanted to say.

THE COURT: Well, except prejudice is an individual thing. I mean, I don't think I can infer from the fact that other people may not want to get to trial, that this person didn't. Can I? That's not logical, is it?

15 MS BAUMAN: Well, I don't think it's - it's possible to infer the type of prejudice on a 15 over speeding ticket that you can infer on any criminal offence.

20 THE COURT: Yeah. Well, you got an 18 year old who - who's - who's never been in any difficulty before, and the first thing she does when she gets the ticket is cries. You don't think she's feeling some - some - some degree of anxiety?

MS BAUMAN: About the ticket, yes...

THE COURT: Yeah.

MS BAUMAN: ...but not about the trial.

25 THE COURT: And that the longer it goes on it doesn't get more prolonged?

MS BAUMAN: I don't believe so.

THE COURT: Obviously. So she - she would - she would be happy if it went on for 24 months.

MS BAUMAN: I believe in...

30 THE COURT: It wouldn't...

MS BAUMAN: ...some cases....

THE COURT: ...matter. Yeah. And is there any

5 evidence on the - on the - on the record here that she was anxious to - to have this matter drag on for as long as possible?

MS BAUMAN: Was it....

THE COURT: Any evidence on the record before...

MS BAUMAN: No.

10 THE COURT: ...me that she was anxious to have this drag on for as long as possible?

MS BAUMAN: No, Your Honour.

THE COURT: Yeah. Thank you. Yes, counsel.

15 MR. CASTLEMORE: Well, Your Honour, I - I think Your Honour has pretty much summed up and - and - and brought up virtually everything that I would have added in - in way of response, if not infinitely more. The - I - I - I think the decision stands on its own. The four criteria, or four hurdles, as it were, were all considered by Her Worship Weiss. She gave a very intelligible, and in my submission, a proper decision as to the circumstances here in the face of a delay of almost 13 months, so the - the only - the only thing I - I - and I kind of indicated it earlier - was that seeking a two - a two month intake period has to be justified. Intake periods are not static time periods for every case, they are different on every case. And 20 in this case, I think I - I - and - and - and Your Honour actually pointed it out quite succinctly that notice of trial went out on the 18th day of November. And down at the bottom the tick - the tick box is sent by mail to defendant, one of them is given to prosecutor, given to agent. And Ms Bauman's saying that it takes some two weeks for the office on the 25 bottom floor to somehow get this piece of paper up to 30

the second floor at 5 Ray Lawson. It just doesn't seem reasonable.

THE COURT: Was that document in the material?

MR. CASTLEMORE: It's the notice at trial that would have been sent out. It's - oh, it, it's almost always attached - at the trial level, it's almost always attached to the information. But I'm assuming Your Honour had it because that's - that's where the 18th of November comes out, where the...

THE COURT: Yeah.

MR. CASTLEMORE: ...trial date was set.

THE COURT: Okay.

MR. CASTLEMORE: And if you notice on the bottom...

THE COURT: Yes. No, I see - I see it - I see it.

MR. CASTLEMORE: That's where it indicates....

THE COURT: Yes.

MR. CASTLEMORE: And so that's - that's my - my response to this...

THE COURT: All right.

MR. CASTLEMORE: It's somehow taking two weeks for a - a - a document that's printed on a printer on the bottom floor, taking two weeks to get to the second floor at 5...

THE COURT: Yeah.

MR. CASTLEMORE: ...Ray Lawson. And...

THE COURT: Right.

MR. CASTLEMORE: ...even if it does, that alone is unreasonable.

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RULING ON APPLICATION

CLEMENTS, J. (Orally):

This is an appeal pursuant to section 135 of the Provincial Offences Act filed on behalf of the prosecution.

The prosecution raises a number of issues with respect to the proceedings before Her Worship Justice H. Weiss on December the 12th, 2006.

In particular, the Crown submits that Justice Weiss' reasons for staying the proceedings for unreasonable delay pursuant to section 11(b) of the Canadian Charter of Rights and Freedoms was erroneous, that it was not reasonable, and was an error in law.

The prosecution further submits that there was not sufficient time attributed for a neutral intake period, that there was no prejudice to be inferred, and that there was no evidence of actual prejudice.

In the material filed by the prosecution, there is a summary of the history of these proceedings before the Ontario Court of Justice, and they are as follows.

On November the 8th, 2005, the defendant was stopped by the Peel Police and was given a ticket, or a notice of offence for speeding 95 kilometres per hour in an

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80 kilometre zone.

On November the 14th, 2005, a certificate of offence was filed with the Clerk of the Provincial Offences Court at 5 Ray Lawson Boulevard in the City of Brampton as is required under the legislation.

On November the 18th, the defendant filed a notice of intention to appear for her trial in this matter. A copy of that notice is attached to the documents before the court on this appeal.

That particular notice is necessary to trigger the setting of a trial date under the legislation and, indeed, a notice of trial, a copy of which is attached to the material, was issued on that same date, November the 18th, 2005, setting a trial date on the 12th of December, 2006, at 9:00 a.m.

Parenthetically, I note that from the examination of the respondent at trial, she was asked about whether or not the Clerk of the court at the time of the setting of the trial date asked for any input from her with respect to the date, and whether or not they asked her if she would like an earlier date than the one provided. Her uncontradicted response was no to both of those questions.

The portion of the notice of trial document that is for official use only indicates that this notice of trial was sent by mail to the defendant, that it was

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5 given to the prosecutor, and it was given to the agent, although to be fair about this, Ms Bauman, on behalf of the prosecution, says that they didn't receive notice in her office for approximately two weeks following the setting of this trial date. This was around the 1st of December 2006, or shortly thereafter.

10 On November the 8th, 2006, an application was filed for a stay of proceedings for unreasonable delay pursuant to section 11(b) of the Charter. On December the 12th, 2006, the matter was argued successfully before Justice Weiss, as I've indicated, and she stayed the proceedings.

15 The criteria to be applied in a section 11(b) application is set out in a Supreme Court of Canada judgment in R. v. Sharma.

20 They are, the length of the delay, waiver of time periods, reasons for the delay, including inherent time requirements, actions of the accused, actions of the Crown, limits on institutional resources, and other reasons for delay, and finally, prejudice to the accused person.

25 The individual right, which the section seeks to protect are the right to security of the person, the right to liberty, the right to a fair trial. As Justice Hill pointed out in R. v. Pusic [1996] O.J. No. 3329, 167, the rights to the security of the

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5 person are as jealously safeguarded as the rights to
the liberty of the person.

10 The entire time period between the laying of the
charge, or in this case, the filing of the certificate
of offence, and the completion of the trial must be
examined. The issue is the reasonableness of the
overall delay. The overall delay can only be assessed
in light of the reasons that explain the delay's
constituent part. The systemic delay clock starts to
to run from the time that this matter is ready to set
down for trial.

15 In this case, the matter was set down for trial on
November the 18th, 2005. On all the information
before me, the earliest available date upon which the
system could accommodate this matter was December the
20 12th, 2006, which is in excess of one year beyond the
date the matter was set for trial.

25 The prosecution has argued that there was not adequate
or appropriate time allowed for intake. That is the
period when the parties are preparing to put
themselves in a position, so that they can set a date
for trial.

30 I note in Justice Andre's decision, which was provided
to me by the prosecution, that Justice Andre made the
following observation at paragraph 12. And that
judgment is to be found at [2007] O.J. No. 4683:

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5 "I should note, however, that the Provincial Offences Act indicates that provincial matters such as Highway Traffic Act offences should ideally be dealt with very expeditiously. Indeed, the protocol for prosecutions set out in the Provincial Offences Act is premised on an assumption that these matters, which perhaps do not require complex administrative requirements of criminal matters, would ensure that these types of matters proceed rather expeditiously in the provincial courts."

10
15 There can be no doubt that what Justice Andre was alluding to was the fact that in a case such as this, there is very little time required for intake. This was an uncomplicated, straightforward speeding prosecution under the Highway Traffic Act involving, from what I can tell, the evidence of one, perhaps two police officers and the evidence of the defendant, if the defendant chose to give evidence.

20
25 The disclosure in a matter such as this would be minimal, and there was no issue, on the record raised before me, whether or not disclosure was an issue, whether it was requested, or whether the defendant decided to proceed to trial as soon as possible, irrespective of whether or not disclosure was available.

30 These types of offences, notwithstanding that they are not criminal in nature, require under the terms of the

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5 Act and I believe on the basis of the jurisprudence
that I have just read, that they be expedited. That
means that resources ought to be put in place to see
to it that the earliest possible trial dates are made
available and that trial dates be set within the
10 guidelines as outlined in R. v. Morin and R. v.
Sharma. In the Region of Peel, that is eight to nine
months. As

Justice Hill noted in R. v. Misener, it is generally
at the lower end of that range.

15 I am aware that that is only a set of guidelines and
that those yardsticks can move upwards or downwards,
depending on the circumstances of a particular case,
and depending on the degree of prejudice.

20 I was referred, as well, to the case of Omar Zadah.
That is O-M-A-R, Z-A-D-A-H, [2004] O.J. No. 2212, an
endorsement by Justice Doherty of the Ontario Court of
Appeal, dealing with a Crown appeal, where they sought
to have the stay of proceedings for 11(b) overturned.
That appeal was ultimately unsuccessful, and the stay
was upheld. The delay in that case was 14 months.

25 The noteworthy parts of this judgment or endorsement
is that Justice Doherty indicates and confirms that
what the Crown feared was not true, that the judgment
below was a precedent for establishing the six month
30 guideline, or that the delays beyond six months would
be treated as presumptively unconstitutional, and he
made short work of that argument. He confirmed that

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the R. v. Morin summary conviction guidelines should govern.

He then went on to articulate the obvious, which is that those guidelines are not to be strictly applied. He commented that it must be acknowledged that any stigma arising out of the delay in the trials like speeding is virtually non-existent. But he, nonetheless, refused to overturn the stay in that particular case where there was a delay of 14 months.

When considering the issue of prejudice in the context of 11(b), it is important to bear in mind that it is the duty of the prosecution to bring an accused person to trial.

In other words, the state and the prosecution apparatus are required to minimize the prejudice inherent in delays, in the disposition of criminal litigation, as well as litigation under the Provincial Offences Act. I find that that is confirmed by the passage I have already quoted from, Justice Andre's decision, where he indicates that matters under this Act should be moved, or proceeded with expeditiously.

There is, first of all, the prejudice which occurs from the fact of being charged and then prejudice caused by delay in bringing a case to trial. Everyone suffers prejudice as a result of being charged. However, absent delay beyond the guidelines, that is not generally the type of prejudice one is concerned

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5 with.

10 The focus is on the prejudice arising from prolonged delay. The inherent prejudice suffered by all accused persons waiting their trial can be inferred and no evidence is required to enable a judge to consider it. The longer the wait for trial, the more serious the inferred prejudice.

15 What was initially prejudice from being charged, such as shame, anxiety, may become prejudice caused by institutional delay due to delays beyond the guidelines. And for that proposition, one can refer to the Ontario Court of Appeal judgment in R. v. Kovacs-Tatar at Paragraph 33.

20 Prejudice may be negated, where there is evidence that the accused wanted to delay or avoid a trial on its merits.

25 As Justice Hill noted in R. v. Pusic, the inference of prejudice from a very long delay becomes nearly irrefutable. An unreasonable delay is virtually synonymous with prejudice to security interests. Those security interests involve the need to minimize the anxiety, concerns, and stigma inherent in exposure to pending proceedings.

30 In Justice Hill's words, they involve the over long subjection to the vexations and vicissitudes of pending criminal accusations which include

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5 stigmatization of the accused. Obviously, that does not have the same weight or import in a case under the Provincial Offences as Justice Doherty has noted.

10 However, it does not only deal with stigmatization. It deals with loss of privacy, stress, the anxiety resulting from a multitude of factors, including possible disruption of family, social life, and work, legal costs, uncertainty as the outcome and sanctions.

15 Those forms of prejudice, according to Justice Hill, cannot be disregarded nor minimized when assessing the reasonableness of delay. (See paragraph 167 of Pusic).

20 In this case, the defendant, who was 18, testified under oath with respect to the issue of prejudice and she was cross-examined. She indicated that the first thing she did when she got the ticket was that she cried. It is not insignificant that she was an 18 year old, who had recently obtained her licence. She owned her own vehicle and was providing her own insurance, and really did not know what to do at first, but she talked to her dad about it and then eventually sought out the services, very, very shortly thereafter of an agent.

30 This is the first time she had ever been involved with the law. She was worried, both for financial reasons and for psychological reasons about her insurance and what this may do to her insurance, if she were

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5 convicted of this matter. She was worried that she might not be accepted for insurance. Under cross-examination, she confirmed this was a very traumatic event for her.

10 The learned Justice of the Peace turned her mind to this issue, as she did to the other issues that are raised by the section 11(b) analysis. She was aware of the judgment in R. v. Hussain, and she referred to that judgment at Page 9 of her ruling.

15 R. v. Hussain is a judgment of this court by my brother Judge Casey, where he overruled the stay of proceedings imposed in that case, not because of the specific conclusion that the justice had come to in that case, that the delay was unreasonable, but because the justice had failed to consider the various factors set down in R. v. Morin. In referring to R. v. Kovacs-Tatar, he concluded that there has to be some aversion or some indication that the Justice of the Peace averted to the requirements of balancing the various interests that the section is designed to protect. I find that Justice of the Peace Weiss has, on balance, when you read her judgment.

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30 It is clear that she was aware of R. v. Askov, R. v. Morin and that she was aware of the need to balance the interests of proceeding to trial, the public interest in that, against the Charter rights of an individual to have her trial within a reasonable period of time. She was aware of the liberty, and

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5 security, and fair trial issues.

She was aware of the intake provisions. She was aware of the systemic or institutional delay aspects of the analysis. And, indeed, she was aware of the business about prejudice.

10 She concluded, on that issue, that there was not much actual prejudice, and described the prejudice as minimal, but she found that there was inferred prejudice based on anxiety, the potential repercussions with respect to a conviction for this young person. The delay, as I interpret her ruling, beyond the guidelines, gave rise to inferred prejudice to the extent that when she balanced the interests that the section is designed to protect against the interests of the individual in having a trial within a reasonable period of time, that this was, indeed, an unreasonable delay.

20 In my view, I do not find her conclusions to be unreasonable. I do not find her views to be an error in law, nor do I find that she misapprehended the record before her in coming to those conclusions. I am satisfied that she gave proper consideration to all the various factors that she was required to do so in the analysis. And I am not prepared to overturn her on this appeal.

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MR. CASTLEMORE: Thank you very much, Your - Your
Honour.

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FORM 2

CERTIFICATE OF TRANSCRIPT
EVIDENCE ACT, SUBSECTION 5(2)

I, Anne Pecaric certify that this document is a true and accurate transcript of the recording of R. v. Piskun in the Ontario Court of Justice held at 7755 Hurontario Street, Brampton, Ontario taken from Recording No. 194/08, which has been certified in Form 1.

DATE:

June 20, 2008

CERTIFIED COURT MONITOR:

Anne Pecaric