CRIMINAL COURT DELAY AND THE CHARTER: THE USE AND MISUSE OF SOCIAL FACTS IN JUDICIAL POLICY MAKING

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An important element of the Supreme Court of Canada's recent constitutional judgments on criminal court delay was the use of quantitative data and social facts. However, use of this evidence was deficient in significant and diverse ways. In the Askov case, the court went beyond the evidence submitted by the parties, gathered its own data, but failed to test its conclusions against the earlier evidence. Later, in the Morin case, the court placed too much reliance on the adversary process, accepting invalid evidence that undermined its conclusions. In both Askov and Morin, court processes led to ineffective or incorrect use of material that, properly used, could have improved both the results and the reasons in these cases.

La Cour suprême du Canada a fait de l'information quantitative et des faits sociaux des éléments importants des décisions constitutionnelles qu'elles a rendues récemment sur les longs délais dans un tribunal de juridiction criminelle. La façon dont elle les a utilisés apparaît cependant défectueuse à divers aspects importants. Dans l'affaire Askov, la cour, ne s'en tenant pas aux éléments de preuve soumis par les parties, est allée d'elle-même chercher son information mais n'a pas vérifié ses conclusions en les comparant aux éléments de preuve qui lui avaient été soumis. Plus tard, dans l'affaire Morin, la cour s'est trop appuyée sur le système contradictoire en acceptant des éléments de preuve non valables qui ont sapé ses conclusions. Aussi bien dans Askov que dans Morin, les méthodes employées par la cour ont fait que des éléments, qui auraient pu améliorer à la fois la décision et ses motifs, ont été employés inutilement ou de façon incorrecte.

Introduction

Section 11(b) of the Canadian Charter of Rights and Freedoms[1] provides that a person charged with an offence has the right to be tried within a reasonable time. In 1990, in considering this provision in *R.* v *Askov*,[2] the Supreme Court of Canada incorporated social facts - empirical data from social science research - into a major innovative decision. Scholars and critics of the court had long advocated the use of social facts as an aid in judicial decision-making, and

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As will be seen in the article, particularly at pages 7-13, I was involved in the decision in *R.* v. *Askov* in that an affidavit sworn by me was filed on behalf of two of the appellants. The affidavit was based on research done independently of and prior to the case. I received no payment in respect of the affidavit.

[1] Constitution Act, 1982, Part I (hereafter the Charter).

[2] [1990] 2 S.C.R. 1199, (1990), 74 D.L.R. (4th) 355.

the need had been accentuated since the advent of the Charter in 1982.[3] However, the Supreme Court, in its response to the evidence of serious court delay shown in *Askov*, and the lack of effective legislative and administrative action, went beyond the facts of that case, and beyond the data presented by both parties. The court enunciated a time standard or guideline based on quantitative data collected on its own initiative after oral argument and never submitted to either party for examination. *Askov* therefore established principles of law founded on an incomplete understanding of the material before it, a result that led to the unprecedented dismissal of tens of thousands of pending criminal charges.

In March 1992, in *R.* v. *Morin*,[4] the Supreme Court, in response to the impact of *Askov*, made errors in dealing with relevant quantitative data that were so fundamental and obvious that the legitimacy of the judgment was seriously weakened. When some of these errors were pointed out to the court in *R.* v. *Bennett*,[5] it refused to correct the record or even to address the appellant's argument. Yet, in spite of the difficulties that arose from the court's interventionist approach in *Askov*, the time standard developed in the case could have been implemented without the social turmoil and institutional costs, and need not have been revised.

The purpose of this article is to describe how the Supreme Court of Canada made policy on institutional (or "systemic") delay in criminal cases, and particularly how social facts played a role in that policy making process. It will argue that social science data played a key role in *Askov*, but were misused because the court failed to mobilize the adversary process effectively. It will then argue that social science data played a minor and ineffective role in *Morin* because the court's dependence on the adversary process prevented it from understanding and using data effectively. Finally, it will argue that the Supreme Court of Canada should develop processes that allow more effective use of social facts.

I. *R. v. Askov*

A. *The Legal Setting for Askov*

By the time *Askov* was argued in the Supreme Court of Canada in 1990, that court had already delivered five judgments applying and interpreting the guarantee in section 11(b) of the Charter. The court considered whether section 11(b) extended to pre-charge delay (it did not);[6] whether close to a year's delay

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[3] For two recent articles, see Katherine Swinton, What Do the Courts Want from the Social Sciences?, and John Hagan, Can Social Science Save Us? The Problems and Prospects of Social Science Evidence in Constitutional Litigation, in Robert J. Sharpe (ed.), Charter Litigation (1987). A useful overview of the U.S. Supreme Court is Paul L. Rosen, The Supreme Court and Social Science (1972).

[4] [1992] 1 S.C.R. 771, (1992), 71 C.C.C. (3d) 1.

[5] [1992] 2 S.C.R. 168.

[6] *R.* v. *Mills*, [1986] 1 S.C.R. 863, (1986), 29 D.L.R. (4th) 161; *R.* v. *Kalanj*, [1989] 1 S.C.R. 1594, (1989), 48 C.C.C. (3d) 459.

in delivering a reserved judgment violated the guarantee (it did);[7] whether long delays generated by an accused's assertion of his right to counsel of choice were grounds for dismissal under section 11(b) (they were not);[8] and whether a defendant waived his right to trial within a reasonable time by not requesting an early trial date (he did not).[9]

Askov's appeal was the first to put the question of institutional delay directly before the Supreme Court of Canada.[10] In *Askov*, thirty-four months elapsed from first appearance to dismissal of the case by a Brampton, Ontario, District Court judge. Of the thirty-four months, eleven were in Provincial Court prior to committal, and twenty-three were in District Court following committal. The eleven months in Provincial Court included two and one half months that the defence conceded were its responsibility (coordinating the schedules of counsel for each of the four accused). The Charter argument focused on the last twenty-three months, because that period exemplified institutional delay. The accused were committed for trial on September 21, 1984, the day their preliminary hearing ended in Provincial Court. They appeared in the Peel District Court in Brampton on October 1, 1984, to set a date for trial. They were given the earliest available date: October 15, 1985. When their 1985 trial date arrived, and their place on the list was still not reached by October 25, their case was put over for trial on the next available date: September 2, 1986. It was on that date that the accused successfully argued for a dismissal on the grounds that their constitutional right to a trial within a reasonable time had been breached. Over 700 days had elapsed from the time the case was first spoken to in the District Court, and none of the delay could be attributed to the prosecution or the defence.[11]

Institutional delay is the factor that most frequently and routinely slows down the time to disposition of criminal cases in Canada. By institutional delay is meant the elapsed time between charge and trial that cannot be directly attributed to action or inaction of either the crown or the accused. Depending upon the practices and organization of the particular court, this could include the length of time before the first available trial date, the time needed to reach cases higher up on the trial list, the time that elapses before a case is given a trial date or placed on a trial list, the amount of time necessary to process a legal aid application or prepare the transcript of a preliminary hearing, or the number of weeks or months before a circuit point is served by a judge of competent jurisdiction.

Prior to the enactment of the Charter, delay could result in dismissal only if the accused showed that an abuse of process had taken place. This required showing that the crown had singled out the particular case in question so that it

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[7] *R.* v. *Rahey*, [1987] 1 S.C.R. 588, (1987), 39 D.L.R. (4th) 481.

[8] *R.* v. *Conway*, [1989] 1 S.C.R. 1659, (1989), 70 C.R. (3d) 209, 49 C.C.C. (3d) 289.

[9] *R.* v. *Smith*, [1989] 2 S.C.R. 1120, (1989), 73 C.R. (3d) 1, 52 C.C.C. (3d) 97.

[10] The issue arose a few months earlier in *R.* v. *Stensrud*, [1989] 2 S.C.R. 1115, (1989), 52 C.C.C. (3d) 96, but that case was decided on other grounds in a brief oral decision.

[11] *R.* v. *Askov*, *supra*, footnote 2, at pp. 1204-1205 (S.C.R.), 368-369 (D.L.R.).

took longer than other cases normally took in that jurisdiction. Court processes or crown practices or legal aid procedures that resulted in substantial delays for cases in general were beyond the range of the common law doctrine of abuse of process.[12]

Thus the issue of institutional delay presented a typical choice problem under the Charter of Rights. To accept it as a basis for invoking section 11(b) would expand the meaning of previously established common law legal rights. It would mean an accused could go free through no fault of the prosecution. Conversely, to reject institutional delay as a factor could negate the plain language of the section. An accused could wait years for trial and have no remedy.

A violation of section 11(b) is of paramount importance because the accepted remedy, dismissal of the charges, is so substantial a sanction. No intermediate remedy, such as ordering an immediate start of the trial to avoid further delay, has been prescribed or allowed by the Supreme Court once a violation (whatever the magnitude) has occurred.[13] Thus the acceptance of institutional delay as a factor that leads to dismissal is not only important in principle, but also requires a means to define how much delay is acceptable or unacceptable.

While there was no agreement on where and how to draw the line, Ontario trial judges had before *Askov* granted an increasing number of section 11(b) applications in which institutional delay was a factor. In six of the slowest Provincial Court locations in Ontario, a total of 552 criminal charges were stayed in 1989.[14] The issue was therefore very much the focus of day-to-day decision-making in criminal courts well before any pronouncement by the Supreme Court of Canada.

By 1990, the court could choose from three approaches in defining the tolerable limits of institutional delay:

(1) A fixed standard spelling out an overall time limit in months, or time limits for particular segments of the trial process. These time standards could be subject to stated exceptions (for example, waiver by the accused, or tighter limits if the accused is in custody). This could be termed a legislative approach; it was found in an early proposal by the Law Reform Commission of Canada[15] and in Criminal Code amendments tabled in the federal parliament in spring

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[12] See *Jago* v. *District Court* (1989), 168 C.L.R. 23 (H.C. Aust.).

[13] La Forest J. had previously expressed concern about this point. See his separate reasons in *R.* v. *Rahey*, *supra*, footnote 7.

[14] Obtained from the affidavit of Richard F. Chaloner, Deputy Attorney General of Ontario, March 16, 1990, submitted to the Supreme Court of Canada in the case of *R.* v. *Askov* (hereafter cited as "Chaloner affidavit"). The figure was calculated from the table on the first page under Tab 5 ("Stays Due to Delay [charges]" for 1989). Note that the figures are for charges, not cases, and include no data for the first nine months of 1990. Incomplete data from 1988 show another 288 charges stayed in those six locations.

[15] Law Reform Commission of Canada, Criminal Procedure: Part I - Miscellaneous Amendments (1978), reprinted in Michael A. Code, Trial Within a Reasonable Time (1992), Appendix 1, pp. 135-142.

1984.[16] It parallels legislation and court rules in the United States, notably the federal Speedy Trial Act of 1974[17] that applies to criminal prosecutions in federal district courts.

(2) No explicit time standard, but an examination of whether the circumstances surrounding delay in an individual case justify dismissal. This is the approach taken by the United States Supreme Court in interpreting Bill of Rights guarantees of a "speedy trial" in the Sixth Amendment to the United States Constitution. In the definitive case, *Barker* v. *Wingo*,[18] the court upheld the conviction of an accused in a case that extended over five years, and commentators have concluded that this approach means constitutional guarantees have no practical impact on criminal court delay in the United States.[19]

(3) A flexible time standard developed by examining the elapsed time in comparable jurisdictions that are performing well. This approach was proposed by Lamer J. in his extensive but separate reasons in *Regina* v. *Mills*.[20] It promised to be a compromise between the rigidity and flexibility of the first two approaches.

B. *Research on Criminal Court Delay*

In 1988, quite apart from the *Askov* case, I received a grant from the Social Science and Humanities Research Council to conduct empirical research on the Canadian judicial system. The research proposal had as one of its chief objectives gathering data on the pace of litigation in Canadian trial courts that would allow comparison with the pace of litigation in the United States.

A survey form was adapted from measuring instruments first used by Thomas Church and others in an influential study of twenty-one United States trial courts.[21] Church's study included data on 1975 dispositions for both criminal felonies and civil personal injury cases drawn from metropolitan general jurisdiction (that is, superior) courts. With fewer resources, I elected to focus on criminal cases, in part because procedural rules and terminology were uniform across Canada in criminal but not in civil matters. An analysis of the pace of criminal cases would thus hold formal rules constant, so inter- or intraprovincial differences in pace would require nonlegal explanations.

Data gathering began in section 96[22] court locations in Ontario. While the section 96 courts dispose of only a small percentage of criminal matters, they handle all jury trials and all murder cases, and the lower volume of cases created

[16] Bill C-19, Criminal Law Reform Act, 1984, House of Commons, 32d Parl., 2d Sess., 32-33 Eliz. II, 1983-84.

[17] The provisions may be found in 18 U.S. Code 3161-74 (chap. 208).

[18] 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

[19] See, for example, Malcolm Feeley, Court Reform on Trial (1983), chap. 5.

[20] *Supra*, footnote 6, at pp. 935-936 (S.C.R.), 230-231 (D.L.R.).

[21] Thomas W. Church, Jr., *et al.*, Justice Delayed: The Pace of Litigation in Urban Trial Courts (1978).

[22] Constitution Act, 1867, s. 96. Reference is to superior, county and district courts. The county and district courts which still existed at the time of the study have since been merged into superior courts in all provinces.

fewer sampling problems than would have existed in the high volume Provincial Courts, where it would be difficult to separate summary conviction offences from indictable offences[23] - a step necessary to allow comparison with United States data that covered only felonies.[24] Another reason for focusing on section 96 courts was that the Court Reform Task Force in Ontario's Ministry of the Attorney General was embarking on delay reduction pilot projects in six backlogged Provincial Courts, and would already be gathering data on those courts.

Both the government's Court Reform Task Force and I used the expertise of American court consultant and researcher Barry Mahoney, then with the National Center for State Courts. Mahoney had directed a National Center project that replicated and extended Church's 1975 survey, examining the same metropolitan courts in 1985 and assessing changes in the pace of litigation.[25] Mahoney's survey instrument was adapted by the Task Force, and I met with ministry staff to review their plans.

Because my survey form was designed to obtain data from section 96 court files, it focused on two documents, the indictment and the information. Endorsements made on the information in Provincial Court documented the first stage of the process, and date stamps and endorsements on the indictment usually provided necessary documentation for the second stage. With only one exception,[26] both documents were available in the court office and there was no need to examine crown files. While this made the research process more efficient, it did mean that material available only in crown files (for example, the number of witnesses, estimates of trial length, and other measures of case complexity) was not gathered.

Data gathering began in the fall of 1988 in St. Catharines. It provided an initial test of the survey form, and quickly indicated the diverse character of criminal cases. The population served by the court registry was small enough that sampling was unnecessary, and the criminal trial coordinator maintained an excellent manual record system (a set of file cards) that recorded each disposition in the year it occurred. Thus researchers could be sure that every 1987 disposition was included in the data base, even if the case was committed to trial a year or more earlier than others. By the time the St. Catharines research was completed, data on all Supreme and District Court dispositions in 1985, 1986 and 1987 had been gathered.

The project then shifted to Toronto, where the District Court had disposed of some 3,000 cases in 1987. Only a portion of that large number of dispositions would be necessary or feasible to examine. Church and Mahoney had gathered

[23] At that time, the Provincial Court in Toronto's Old City Hall filed Criminal Code matters together with provincial offences.

[24] Felonies are roughly though not entirely comparable to indictable offences. Note also that the distinction between felonies and misdemeanors varies from state to state, since each state has its own set of criminal laws.

[25] Barry Mahoney, Changing Times in Trial Courts (1988).

[26] The files of the Supreme Court of Ontario in Toronto.

samples of 500 cases in their metropolitan courts, many of which had much larger criminal caseloads. Toronto's District Court had a unique asset for the pace of litigation research: information on criminal case dispositions was computerized by month of disposition. As a result, a representative sample of 500 Toronto cases were obtained by examining every sixth case on the printed monthly disposition lists.[27]

Toronto was virtually an obligatory site for research on the pace of litigation in Ontario. But what criteria were to be used to select additional sites? There was not enough funding to examine a representative cross-section of the 48 District Court locations, or even examine all the major urban courts. Mahoney urged a different strategy: examine two major court locations, one that you have reason to believe is among the slowest, and the other that you have reason to believe may be among the fastest. This way, despite a limited budget, it should be possible to see the range of variation within the province.

Earlier research for the federal Department of Justice persistently identified Brampton, Ontario, as one of the court locations in which trial dates were scheduled further in the future.[28] Conversely, the District Court in London, Ontario, had been identified as being more energetic and innovative in its efforts to reduce delay. Further conversations reinforced the reputations of these two courts, and they were chosen for examination.

Research in those two sites was more difficult than in St. Catharines and Toronto, because no manual or computerized disposition record was available. One could consult 1987 court lists in Brampton, but frequent adjournments meant that cases listed in 1987 may not have been disposed of until 1988 or 1989. The backlog in Brampton meant that index cards filed by the date the case was received in the District Court had to be examined for a number of previous years, to ensure that no case completed in 1987 was missed. On the positive side, both Brampton and London were large enough to provide a substantial data base - over 400 District Court dispositions for 1987 in each location - and small enough not to require the added complexity of drawing a sample.[29]

Since initial analysis of the Ontario data suggested that the pace of litigation in Ontario was slower than in most American jurisdictions studied by Church and Mahoney, it seemed essential to examine a faster section 96 court location in another province. By reputation, Montreal's Superior Court was considered particularly expeditious in handling criminal cases, but was excluded because

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[27] Even using this approach, analysis of the sample showed that it underrepresented jury trials.

[28] See C. Baar, Federal Speedy Trial Legislation: An Initial Impact Assessment, report submitted to the Department of Justice Canada, 1982; C. Baar, Time Limit Legislation in Criminal Cases: A Follow-Up Assessment, report submitted to the Department of Justice Canada, 1984. The 1984 report is included as Exhibit D of the affidavit of C. Baar, Jan. 16, 1990, submitted to the Supreme Court of Canada in the case of *R.* v. *Askov*, *supra*, footnote 2 (hereafter cited as "Baar affidavit").

[29] Sampling was made more difficult because the Ontario Ministry of the Attorney General Court Statistics Annual Reports of that period often double-counted District Court criminal dispositions.

the division of jurisdiction between the Superior Court and the Provincial Court (now the Cour du Québec) was different from that in Ontario or any other province.[30] Outside Quebec, New Brunswick's section 96 court, the Court of Queen's Bench, was considered perhaps the fastest in Canada. Given the smaller population, an effort was made to collect data from court locations in the province's three largest population centres: Fredericton, St. John and Moncton. In fact, the number of section 96 court criminal cases was lower than expected. All 1987 dispositions in the three centres, plus all 1988 cases in both Fredericton and Moncton, still totalled only eighty-eight.

Before grant funds were exhausted, the project had also collected all 1987 dispositions in Ottawa, adding a final large centre in Ontario and one that was in a different geographical region of the province from the other four. Finally, data were gathered in British Columbia for Vancouver, the largest court location, and suburban New Westminster, one of the province's two other large centres. The Vancouver area was picked because of my past familiarity with those courts. In British Columbia once again, no list of dispositions for 1987 was available. To save time going through trial lists, it was decided to gather data on the first 300 cases coming into the County and Supreme Courts in the two locations after January 1, 1987. Because the British Columbia data were not collected until the spring of 1989, action on all 600 cases in the sample had been completed.

C. *The Research and the Legal Issues Come Together*

Fortuitously, counsel for Askov learned about my research, and asked if I would swear an affidavit relating it to the *Askov* case.[31] The nine-page affidavit was sworn on January 16, 1990, two months before oral argument was scheduled in the Supreme Court. Along with it were a series of exhibits, including the full text of Church and Mahoney's books and over fifty pages of tables and explanatory notes[32] detailing the data collected on the pace of litigation in Ontario, New Brunswick and British Columbia.

The affidavit highlighted the "upper court" elapsed times in Canadian jurisdictions and in American courts examined by Mahoney in 1985, since it was the twenty-three month period in Brampton District Court that was the central issue in *Askov*. Comparison across jurisdictions showed that the average (median) upper court time in Brampton was longer than in any other locations in Canada or the United States for which comparable data were available. Furthermore, Askov's case took longer than over ninety per cent of the 1987 dispositions in Brampton, clearly establishing it as a particularly slow case in a particularly slow location.

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[30] Judge-alone trials following a preliminary hearing are held in the Cour du Québec, not in the Superior Court, so the section 96 court tries only jury cases. This difference was noted in Exhibit E of the Baar affidavit, *supra*, footnote 28 ("Explanatory Notes on Presentation and Collection of the Delay Data", p. 5; these notes may be found after the first 8 pages of tables).

[31] See Code, *op. cit.*, footnote 15, p. iv.

[32] Found in Exhibit E.

In late 1989, the crown in Ontario was also preparing an appeal to the Ontario Court of Appeal in *R.* v. *Morin*[33] in which an Oshawa court stayed a conviction for impaired driving that was not set for trial until fourteen and a half months after the arrest. While the time period was much shorter than in *Askov*, the case was a summary conviction matter in Provincial Court involving a single accused. The appeal was deemed important enough that the original three-judge Court of Appeal panel was augmented by two additional judges.

The crown argued that criminal court delay had been a major problem in Ontario, particularly in the Provincial Courts, and that the government was conscientiously making inroads through a myriad of initiatives, particularly the six delay reduction projects - one of which was in Oshawa. To support the argument, a twenty-four page affidavit with thirteen supporting exhibits was submitted by Richard F. Chaloner, Ontario's Deputy Attorney General, documenting these initiatives and including extensive statistical data on Provincial Court caseloads and disposition times. Included were data collected by ministry personnel using the survey forms developed after Barry Mahoney's meetings at the ministry in Toronto a year earlier.[34]

As it turned out, my affidavit and the Chaloner affidavit, prepared for quite different cases, came into direct contact with one another. First, the respondent accused in *Morin* filed my *Askov* affidavit in the Ontario Court of Appeal. The court's reasons for judgment referred to that affidavit,[35] but did not use the data it contained. Meanwhile, the Chaloner affidavit in *Morin* became the basis for a new, even longer, affidavit by Chaloner in *Askov*. Chaloner's *Askov* affidavit ran to twenty-six pages and sixteen exhibits, essentially containing verbatim the material in the *Morin* affidavit and adding a two-paragraph section on "The District Court of Ontario" and three exhibits of District Court data.[36]

While Chaloner's material on Provincial Courts was directly relevant to the appeal in *Morin*, it bore no such close relationship to the issues before the Supreme Court in *Askov*. The six delay reduction projects discussed at great length by Chaloner dealt only with Provincial Courts, not with section 96 courts. Furthermore, the District Court material was also not particularly helpful to the court. Exhibit 14 contained sixteen pages of District Court caseload figures, including data on the number of pending cases in each location, and the amount of time cases had been pending. However, the text of the affidavit provided no analysis or interpretation of the figures. Exhibit 15 contained 101 pages of raw data on courtroom utilization in each District Court in the province, and Exhibit 16 was a one-page summary of the total number of District Courtrooms occupied each day of the week in October 1985, again with no guidance for the court on how that information might be useful in addressing the issues in *Askov*. Just as my affidavit had no impact on the Court of Appeal panel in *Morin*, Chaloner's affidavit would be cited but not used by the Supreme Court in

[33] (1990), 76 C.R. (3d) 37, 55 C.C.C. (3d) 209.

[34] See Tab 2 of the Chaloner affidavit in *R.* v. *Askov*, *supra*, footnote 14.

[35] *R.* v. *Morin*, *supra*, footnote 33, pp. 41-42 (C.R.), 213-214 (C.C.C.).

[36] Tabs 14-16 of Chaloner affidavit, *supra*, footnote 14.

Askov.[37] Ironically, however, the Supreme Court's judgment in *Askov* took an approach that made Chaloner's material highly relevant, but the court was apparently not aware that this was so.

D. *Understanding the Judgment and Its Unexpected Impact*

On October 18, 1990, the Supreme Court unanimously ruled that Askov and his three co-accused were deprived of their right to trial within a reasonable time under section 11(b) of the Charter, and ordered the charges against them dismissed. The judgment had an unprecedented impact, particularly in Ontario, where 51,791 criminal charges were dismissed, stayed or withdrawn in the first thirteen months after the judgment, involving an estimated total of over 27,000 cases.[38] This would not have been expected from a reading of my affidavit, as the court itself said. Cory J., in the majority judgment (and with no disagreement on this point), concluded his reasons in this way:[39]

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

What had happened?

Fundamentally, the Supreme Court went beyond the facts in *Askov*, and beyond the material presented in both affidavits, to establish principles of law not necessary for the decision in the case, principles founded on incomplete and incorrect analysis of the material before it. The basic holding of the court - that institutional delay counts against the crown - is sound and important. It ensures the integrity of section 11(b) of the Charter, and provides a basis for developing criminal court practices that will better serve the public interest. But the court went further. Rather than simply concluding that twenty-three months from committal to trial exceeded a tolerable amount of institutional delay, Cory J. proceeded to spell out a far shorter number of months that "might be deemed to be the outside limit of what is reasonable".[40] That period, "in a range of some six to eight months between committal and trial"[41] was not stated with statutory precision, but it was still clear to the lawyers, judges and officials who read it. While a myriad of factors could be held to extend that figure, the court was

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[37] *R.* v. *Askov*, *supra*, footnote 2, at pp. 1236-1237 (S.C.R.), 392-393 (D.L.R.).

[38] The figure of 51,791 criminal charges covers the period between October 31, 1990, and November 30, 1991; thus dismissals in the first week after *Askov* are not included. During the subsequent 14 months (until January 31, 1993), an additional 382 charges were dismissed or stayed. These figures were provided by Grant Goldrich and Dorothy Gonsalves-Singh of the Caseflow Management Unit, Ontario Ministry of the Attorney General. The estimated number of cases is based on ministry officials' use of an average (mean) of 1.9 charges per case.

[39] *R.* v. *Askov*, *supra*, footnote 2, at pp. 1247 (S.C.R.), 401 (D.L.R.).

[40] *Ibid.*, at pp. 1240 (S.C.R.), 396 (D.L.R.).

[41] *Ibid.*

clearly saying that even a case with less than half the delay experienced in *Askov* was constitutionally suspect.

1. *The Factual Basis*

How did the court come up with the limit of six to eight months? Cory J.'s discussion of institutional delay referred to analysis in my affidavit, and the delay reduction programs described in the Chaloner affidavit. However, to generate the guideline of six to eight months, instead of using data from either affidavit, he examined data from Quebec. Statistics from Quebec, he argued "surely ... can and do provide a guide for comparison", even if "it should be argued that the statistics from New Brunswick cannot represent a basis for comparison".[42] He therefore presented figures from Superior Courts in Montreal, Longueuil and Terrebonne (St. Jerome). Montreal figures for the first half of 1990 showed an upper court time of 82.5 days, and only sixty days if cases in which the defence requested an adjournment or brought an interlocutory motion were excluded. Upper court time in Terrebonne was 91.5 days, and 90.5 in Longueuil. Cory J. then reached the six to eight month guideline by "more than doubling the longest waiting period to make every allowance for the special circumstances" in Brampton.[43]

The court's brief summary of the Montreal data raises more questions than it answers: what do these numbers represent? An average? If so, based on how many cases in each of the three locations? Was the "average" calculated using a mean, median or mode? The statistic chosen can yield quite different results, particularly if the total number of cases is small. How were the elapsed times dispersed? For example, how many cases took over six months to complete? Over eight months? It appears that longer cases all had delays attributable to actions of the accused, but this can only be inferred from the deletion of "exceptional cases" from the figures presented by the court. Yet it is unusual at best and misleading at worst for "exceptional cases" to be deleted from a data set in this way.

The key problem with the Montreal data is that they were never presented in court. Neither party presented current data from the province of Quebec, and Exhibit E of my affidavit stated explicitly that Quebec data might not be comparable to data from other provincial superior courts because of the province's unique division of criminal jurisdiction between superior and provincial courts.[44] The Montreal data cover "the 5 1/2 month period beginning January 8, 1990",[45] only one week before my affidavit was sworn, and thus extend well into June 1990 - three months after the March 23 oral argument. Therefore, it is clear that the Supreme Court of Canada must have obtained the Montreal data on its own initiative after oral argument. But when the Supreme

[42] *Ibid.*, at pp. 1239 (S.C.R.), 395 (D.L.R.).

[43] *Ibid.*, at pp. 1240 (S.C.R.), 396 (D.L.R.).

[44] See *supra*, footnote 30. The first written criticism of the Supreme Court's use of the Montreal data was in an article by Michael Crawford in the Law Times which drew on that reference. And see Code, *op. cit.*, footnote 15, p. 87.

[45] *R.* v. *Askov*, *supra*, footnote 2, at pp. 1239 (S.C.R.), 395 (D.L.R.).

Court of Canada took those figures and used them to generate a constitutional standard without giving the parties to the case - or any others with an interest in the outcome - an opportunity to analyze them, one should not be surprised when difficulties arise. Two are particularly noteworthy.

First, the size of the Quebec sample makes analysis problematic. Subsequent caseload data published in July 1991 by the Quebec Ministère de la Justice show the number of criminal jury cases filed in 1990 in the three centres to be 376 in Montreal (down from 424 in 1989 and 520 in 1988), sixty-five in Longueuil (compared with seventy and sixty-five in the two previous years), and fifty-five in Terrebonne (up from forty-nine and fifty).[46] Since Cory J.'s figures covered 5 1/2 months,[47] it is likely that his calculations of elapsed time came from only half the annual caseload in the three locations - fewer than thirty cases in Terrebonne and fewer than thirty-five cases in Longueuil, numbers too small to use for his purposes. Montreal's caseload was large enough to observe measurable patterns; interestingly, however, the caseload is not only much smaller than in Metropolitan Toronto's section 96 courts, but is substantially less than the criminal jury cases filed in Quebec City (615 in 1990, down slightly from 651 and 654 in the two previous years).

Second, there are difficulties associated with deriving a maximum allowable time from doubling what may be the average time. The effects of that approach depend upon how dispersed the distribution of times is. The fact that fifty per cent of a group of cases has been completed within ninety days does not indicate how many of the remaining half of the cases will take more than 180 days, any more than knowing that fifty per cent of the new cars sold in Canada last month cost less than $12,500 can show how many sold for over $25,000. In fact, distributions of the elapsed times of court cases are often skewed in a distinctive way - with a long "tail" in one direction.[48]

Thus two characteristics of the Supreme Court's work in *Askov* placed it in difficulty. First, by doing its own empirical research, the court missed the

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[46] Gouvernement du Québec, Ministère de la Justice, Direction générale des services judiciaires, Rapport d'activités 1990-1991, pp. 216-219.

[47] This time period is noted only in relation to the Montreal figures, but is inferred to apply to the other locations as well.

[48] The Supreme Court could have observed just such a phenomenon (or had it pointed out by counsel) in the very first table in Exhibit E of my affidavit. There the elapsed times for the Toronto District Court are set out - not just the median time (the number of days for the fiftieth case out of 100 to be completed), but also the number of days required for ten per cent, twenty-five per cent, seventy-five per cent and ninety per cent of the cases. Identical tables follow for the other four Ontario centres, the two British Columbia centres, and New Brunswick. The column labelled "upper court time" (from receipt of the information in the District Court until disposition) shows a median of 133, as cited by Cory J. in his reasons. It also shows in the line just above that it took 251 days for seventy-five per cent of the Toronto cases to proceed from arrival to disposition in the District Court. Since 251 days is over eight months, this means that over twenty-five per cent of the cases disposed of in Toronto in 1987 could have potentially been in jeopardy under the *Askov* guideline. Since Cory J. appeared to believe that Toronto was operating within an acceptable time period, one can conclude either that the six to eight month guideline was more flexible than lawyers and judges realized, or that the standard was established

critical review that an effective adversary process could have provided. Critics of the courts see the adversary process preventing consideration of social facts.[49] Here, in contrast, the Supreme Court made insufficient use of that process. Second, by devising its own formula (double the normal time in a fast urban jurisdiction), it developed a guideline without testing its impact.[50] Even so, the court could have enunciated its six-to-eight month guideline, which is not an unreasonable figure (and is generous in some respects, since it applies equally to in-custody accused and allows a total of sixteen months in the two courts), without the mass dismissals that ensued in Ontario. To do so, the court could simply have announced that its guideline would apply only to cases that entered the court system after the court delivered its judgment. The specific holding in *Askov* - that twenty-three months of institutional delay from committal to trial clearly exceeded limits allowed under section 11(b) - could have applied retroactively, with the more stringent guideline taking effect immediately, or in ninety or 180 days, but not retroactively. This approach had already been used, for example, to phase in French language statutes in Manitoba[51] and new cautions by police officers under section 10(b) of the Charter.[52] The approach was used a few months after *Askov* in *R.* v. *Swain*[53] dealing with criminal insanity and mental commitment. A prospective rather than retroactive holding would have still placed an enormous burden on the Ontario trial courts, and produced numerous dismissals, but not the tens of thousands that members of the Supreme Court clearly did not anticipate.

Presumably the court did not phase in its guideline because it did not anticipate the dismissals that would result from the six to eight month guideline. The basis for the court's misplaced optimism is not clear from the judgment, and a variety of explanations have been put forward. Three hypotheses will be considered here.

First, perhaps Cory J. did not have up-to-date information. Dubin C.J.O. suggested the following year in *R.* v. *Bennett*[54] that Cory J. relied on data from 1984. In fact, Cory J.'s reasons also cited the 1987 data. More telling, however, is the fact that even more current data were available, particularly for the Ontario

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without adequate examination and/or understanding of available empirical evidence on the pace of criminal litigation.

[49] See Donald Horowitz, The Courts and Social Policy (c. 1977).

[50] In oral argument, Askov's counsel argued for an eight-to-nine month standard, based on taking the London District Court data at the ninetieth percentile (six-and-one-half months) and then allowing some leeway as suggested in *Mills*. He also drew on the Saskatchewan experience with a nine-month rule; see Code, *op. cit.*, footnote 15, p. 35.

[51] *Reference re Language Rights under Manitoba Act, 1870*, [1985] 1 S.C.R. 721, (1985), 19 D.L.R. (4th) 1.

[52] *R.* v. *Brydges*, [1990] 1 S.C.R. 190, at p. 217, (1990), 46 C.R.R. 236, at p. 258.

[53] [1991] 1 S.C.R. 933, (1991), 63 C.C.C. (3d) 481.

[54] (1991), 6 C.R. (4th) 22, at pp. 46-47, 64 C.C.C. (3d) 444, at p. 453 (Ont. C.A.). The same argument was made by Marilyn L. Pilkington, Equipping Courts to Handle Constitutional Issues: The Adequacy of the Adversary System and Its Techniques of Proof, in Special Lectures of the Law Society of Upper Canada 1991: Applying the Law of Evidence (1992), p. 80.

Provincial Courts. The Chaloner affidavit included information as current as the fall of 1989 that signalled the serious and widespread impact of a six-to-eight month guideline. Furthermore, the post-1984 changes documented in Chaloner's affidavit were reemphasized in a supplementary factum submitted on behalf of the appellants Askov and Hussey. Paragraphs 12 to 14 explicitly contrast the 1984 data with the more recent data in Chaloner's affidavit. Paragraph 12 states that "it currently takes *at least* 10 months to obtain a Provincial Court trial date in all six" pilot courts[55] that were part of the Ontario "Delay Reduction Initiative" summarized at length by Cory J.[56] The same paragraph then draws the Supreme Court's attention to Tab 11 in Chaloner's affidavit, in which a telephone survey of forty-seven other Ontario Provincial Court locations shows that the time to trial "is over 6 months in at least 16 (and perhaps as many as 24) of those 47 locations. Thus it appears that over 40 percent of Ontario's Provincial Courts (22 out of 53) cannot provide trial dates within 6 months".[57] The supplementary factum's summary of the survey in Chaloner's affidavit then argues that the Ontario findings "provide a striking contrast with the findings reported in the 1984" federal Department of Justice study and show "that Ontario's Provincial Courts have substantially increased the time to trial since 1984".[58]

Since current information did show increased delays in Ontario Provincial Court, a second explanation for the court's misplaced optimism could be that its judgment in *Askov* was not intended to apply to Provincial Courts. However, the Chaloner affidavit and the supplementary factum also provided information on Ontario's District Courts that was not taken into account. In particular, the supplementary factum condensed twelve pages of data submitted by Chaloner on the age of pending District Court indictments into two tables.[59] The first showed that in 1988/89, 545 indictments had been pending over eighteen months in Metropolitan Toronto and 473 outside Toronto, a total of 1,018. The second table showed that in the same twelve-month period, a total of 1,515 indictments had been pending over twelve months (816 in Toronto and 699 outside). While it could have been that many of the cases pending over eighteen months were delayed for non-"institutional" reasons, dropping the maximum constitutionally allowable time from twenty-three months to eight months would surely have jeopardized many viable prosecutions. In Ontario, dropping the constitutional standard from eighteen to twelve months in District Court alone would have added 497 indictments (1,515 minus 1,018) to the pool of criminal cases potentially subject to dismissal.

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[55] Supplementary Factum of the Appellants Askov and Hussey, p. 8 (italics in original). (Hereafter cited: Supplementary Factum.) The document is undated, but was completed between the service of the Chaloner affidavit on March 16 and oral argument on March 23, 1990.

[56] *R.* v. *Askov*, *supra*, footnote 2, at pp. 1236-1237 (S.C.R.), 392-393 (D.L.R.).

[57] Supplementary Factum, *op. cit.*, footnote 55, p. 8.

[58] *Ibid.*, pp. 8, 9.

[59] Supplementary Factum, *ibid.*, pp. 14-15.

Thus a third and more plausible hypothesis is that once the six-to-eight month guideline was developed by the Supreme Court from the Montreal data, its impact was not tested against other data previously presented to the court. The court was aware of the supplementary factum, because Cory J.'s quotation from my 1984 study was very likely taken from the supplementary factum and not from Exhibit D of my affidavit.[60] However, while that material was cited in the historical section of the court's reasons, it was never taken into account at a later stage in the preparation of the judgment.

In summary, the Chaloner affidavit and the supplementary factum provided data that should have made the Supreme Court much more cautious in moving beyond the holding that twenty-three months of institutional delay in a section 96 court alone (here the Ontario District Court) violates section 11(b) of the Charter. If the court concluded that a guideline of six to eight months of institutional delay in a single trial court should apply in normal cases, as it sensibly could, and hoped to hold dismissals to a minimum, the data should have led to a decision applying the stricter standard only to cases not yet pending in the trial courts.

2. *The Ontario Response*

The six-to-eight month guideline promulgated in *Askov* thus produced thousands of withdrawals, stays and dismissals in Ontario because Ontario trial judges took the Supreme Court of Canada at its word. Uncomplicated cases that had waited more than eight months for a trial date were dismissed; in some locations, most of the cases on the calendar had already waited that long.

From October 22, 1990, to September 27, 1991, almost a year after the Supreme Court's decision in *Askov*, Ontario reported 48,656 criminal charges had been stayed, dismissed or withdrawn as a result of the decision.[61] Of the total, ninety-five per cent of the charges (46,167) were in the Provincial Division and only five per cent (2,489) in the General Division. Yet the General Division numbers are still high: over 1,000 section 96 court cases were held to violate *Askov*. Furthermore, while these dispositions were heaviest in the fall of 1990, even in the week of September 23-27, 1991, a full eleven months later, 145 Provincial Division charges and twenty-three General Division charges were "askoved". Brampton had the largest number in both divisions, with 8,459 Provincial and 1,098 General Division charges. Other Provincial Division centres were not far behind Brampton: Metro West (Etobicoke) had 7,420; Oshawa had 7,066; and Newmarket had 6,065. On the other hand, Brampton

[60] The quotation, in *R.* v. *Askov*, *supra*, footnote 2, at pp. 1235 (S.C.R.), 392 (D.L.R.), appeared verbatim at p. 9 of the supplementary factum, at the end of the paragraph contrasting the 1984 and 1989 findings.

[61] Material in this and the following two paragraphs derived from "Preliminary Data: Daily Report on Stays Due to Askov - September 27, 1991", photocopied. Similar reports were produced weekly in the Courts Administration Division, Ontario Ministry of the Attorney General, for just over one year following the Supreme Court of Canada's judgment.

General Division more than tripled any other General Division location, with Newmarket (363 charges) and Toronto (350 charges) well behind.

None of these numbers reflect action on the non-criminal charges in Ontario's Provincial Offences Court (primarily Highway Traffic Act cases and municipal by-law violations). Yet Ontario figures show that 63,918 Provincial Offences Act charges had been "askoved" by September 27, 1991.

While these figures are enormous by any calculation, they cannot be attributed entirely to *Askov*. Hundreds of charges were being dismissed for violation of section 11(b) before *Askov*.[62] And thousands of impaired driving charges would still have been dropped, because it is common practice in Ontario for police to lay two charges in impaired driving cases (one for impaired, the other for failing a breathalyser test), and drop one of the two when an accused is found guilty or pleads guilty to the other. Thus, of the 13,276 impaired driving charges that were "askoved" (representing twenty-seven per cent of all charges withdrawn, stayed or dismissed), as many as half would not have gone forward even without *Askov*. Finally, on the other side of the ledger, Ontario data showed that non-*Askov* dispositions in the same period covered over 431,000 criminal charges - ninety per cent of the criminal charges in Ontario trial courts.

What reinforced the actions of Ontario trial judges in the wake of *Askov* was the response of the Ontario government. Rather than fight the decision, or try to stickhandle around it, the government sought to adjust to it as quickly and effectively as possible. For some officials in the Ontario Ministry of the Attorney General who had sought reform and improvements in criminal case processing for years, this was a unique opportunity to seize the initiative while proponents of the *status quo* had lost their legitimacy. The fact that the decision came less than two months after a new provincial government took office meant that the government could not be blamed for the conditions that gave rise to the dismissals. The crisis atmosphere in the ministry allowed officials for the first time to set up a province-wide weekly reporting system that tracked dismissals by charge and location. "Red alert" reports were fed back to local courts showing cases in jeopardy of dismissal. Crown attorneys in many judicial districts began systematically screening and withdrawing long-pending charges prior to their dismissal in open court. "Floating" assistant crown attorneys were used in a number of multi-judge Provincial Courts on a daily basis to redistribute cases among courtrooms so that overbooking could increase and cases could still be reached on the assigned trial date.[63] By midwinter, Toronto's General Division judges reorganized their criminal case scheduling procedures, decentralizing the process to a set of five teams of judges, each team responsible for one of the municipality's four boroughs and the fifth for federal prosecutions - a design advocated for over a decade but never implemented. And more resources - millions of dollars and dozens of new judges and crown attorneys - were added to the criminal justice system.

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[62] See *supra*, footnote 14.

[63] This technique had been developed earlier in some of the pilot project courts, but was expanded and made more effective after *Askov*.

For court administration, the six-to-eight-month guideline became a useful monitoring device; since variations from judge to judge and court to court in applying the guideline could not be predicted accurately, the Ministry had to take the guideline literally. The Attorney General in the previous government was aware from the time of oral argument in *Askov* the preceding March that his ministry would lose the case, but no one anticipated that a specific time guideline would be enunciated by the Supreme Court. Evasive responses (for example, suspending all criminal court calendars in the province, advising defence counsel to schedule new dates they preferred, and declaring that those preferences constituted a waiver of their clients' section 11(b) rights) may have commanded attention prior to the change in government. However, after the judgment came down on October 18, these alternatives were either not considered or abandoned quickly. In summary, "bureaucratic politics" and partisan politics converged in Ontario to reinforce a more literal reading of the six-to-eight-month guideline and its strict application to both Provincial and General Divisions.

Thus the Supreme Court of Canada, in an effort to spur provincial governments into action and reduce court delay, evoked the response it desired in Ontario, but at a cost far higher than expected. The numerous dismissals in Ontario became a "public relations disaster"[64] for the judiciary throughout Canada; the court's enunciation of a constitutional standard for trial within a reasonable time had proven at least as embarrassing to the judiciary as to government.

II. *R. v. Morin: Compounding the Difficulties*

A. *Making New Law*

By late fall 1990, the problem for the Supreme Court of Canada was how to deal with the results of *Askov*. The court had to maintain an appearance of business as usual, and await another case that might allow a restatement or reexamination of its judgment.[65] The first opportunity came when *R.* v. *Morin*[66] was scheduled for argument at the end of June, 1991.

Morin had been scheduled for trial fourteen and one half months after the accused was arrested and charged - the first available trial date. The Ontario Court of Appeal[67] allowed the crown appeal, accepting the argument that section 11(b) should not be invoked during the post-Charter transition, and using the Chaloner affidavit submitted by the crown to support its judgment. A companion impaired driving case, *Regina* v. *Sharma*,[68] with over twelve months delay,

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[64] Lawyers Weekly, Sept. 6, 1991, quoting British Columbia Supreme Court Justice Stuart Leggatt.

[65] The immediate rash of dismissals in Ontario even led to a rumor that the court would release an unprecedented "clarification" of its judgment. No such statement was issued, nor has there even been any confirmation that such a strategy had been contemplated at any time.

[66] *Supra*, footnote 4.

[67] *Supra*, footnote 33.

[68] [1992] 1 S.C.R. 814, (1992), 71 C.C.C. (3d) 184.

also came to the Supreme Court from the Ontario Court of Appeal, and was scheduled for hearing along with *Morin*. Both cases were uncomplicated; the delay was purely institutional in nature. And because both cases involved summary conviction offences scheduled for trial in Provincial Court, the Supreme Court could address directly the Charter requirements applicable to cases tried in the country's high-volume criminal trial courts.

Sopinka J.'s judgment for the court in *Morin* reinforced some elements present in *Askov*.[69] But the judgment made a number of modifications that could render *Askov* a much less effective protection of either the rights of accused persons or the interests of society in expeditious criminal trials.

The most widely cited modification of *Askov* was the Supreme Court's extension of the six-to-eight-month guideline to eight to ten months in the Provincial Courts. However, what appears to be a two-month addition to allowable institutional delay was in fact much more. First, the court, citing Lamer J. in *R.* v. *Mills*,[70] allowed two months for "inherent time requirements" of the case - intake steps and counsel preparation. Second, the court applied "the upper range of the guideline" to reflect the rapid growth of the Provincial Court caseload in Oshawa. Third, the court concluded that the case for prejudice to the accused was so weak (in spite of Cory J.'s holding in *Askov* that a presumption of prejudice existed in criminal cases) that additional time could be allowed. As a result, the eight-to-ten month guideline enunciated by the court expanded into an allowable delay of fourteen and a half months. Thus Sopinka J.'s judgment, rather than clarifying *Askov*, created an approach allowing so much flexibility that a principled basis for judgment in individual cases may be largely absent.

B. *Misinterpreting Social Facts*

Equally if not even more striking were the difficulties displayed by the Supreme Court in interpreting social facts. The errors in *Morin* were quite different from those in *Askov*. They derived not from the court taking its own initiative, but in the court applying evidence submitted by counsel.

On the surface, social facts played a much less visible role in Sopinka J.'s majority judgment. Only four references were made to affidavit evidence. However, three of the references were erroneous, and two of those were used to support arguments central to the court's disposition of the case.

The second paragraph of the judgment correctly noted that "over 47,000 charges have been stayed or withdrawn in Ontario alone".[71] The reference was of course to criminal charges and excluded charges under provincial acts. The use of the word "alone" refers to the fact that no numbers were presented for the other nine provinces or the two territories. There is no indication that other provinces were invited to participate as intervenors, although the Attorney

[69] For example, a post-Charter transition period was strongly rejected; *R.* v. *Morin*, *supra*, footnote 4, at pp. 797-798 (S.C.R), 20-21 (C.C.C.).

[70] *Supra*, footnote 6.

[71] *R.* v. *Morin*, *supra*, footnote 4, at p. 779 (S.C.R.), 7 (C.C.C.).

General of Canada did present arguments focused on the question of alternative remedies. Nor is there any indication that data were sought from counsel about withdrawals, stays or dismissals in other jurisdictions. Thus the court in *Morin* modified a national constitutional standard to reflect the difficulties in a single province without considering the impact on other provinces. In fact, there is every indication that the number of "askoved" cases, in Provincial Courts as well as section 96 courts, was quite low outside Ontario, and nonexistent in at least some provinces.[72]

In subsequent discussion of institutional delay, the court referred to submissions about the appropriateness of using data from Montreal. The crown argued both in writing and orally that *Askov*'s reliance on Montreal as a comparable jurisdiction was "misleading", and the court agreed.[73] However, that conclusion was wrongly used by the court in *Morin*. The Montreal data were derived from the Quebec Superior Court, not from the Cour du Québec, that province's equivalent to the Provincial Courts. The crown's argument[74] was based on the fact that Montreal's Superior Court had a relatively small criminal caseload. Conversely, of course, the Cour du Québec's caseload may have been larger, and would certainly have been more diverse, since it includes judge-alone trials following a preliminary hearing, matters that presumably would take longer to complete. But no data on the pace of criminal litigation in the Cour du Québec were submitted to the court, even though estimates of delay in that court have been published annually for many years by the Quebec Ministry of Justice, the only province to do so.[75] Thus Sopinka J.'s conclusion that the Superior Court in Montreal was not a valid comparable jurisdiction should have led to questioning of the six-to-eight- month guideline in other section 96 courts, since the conclusion was not relevant to the validity of the guideline in Provincial Courts. Instead, Sopinka J. concluded that six to eight months was workable for section 96 courts, but not for provincial courts. What made it more workable, presumably, was that it had less impact there, producing fewer dismissals and less public outrage.

The court's third reference to social facts was its use of statistics to support allowing more time for cases to be dealt with in Provincial Courts. The key paragraph is as follows:[76]

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[72] In this respect, Cory J.'s concluding observation (in *R.* v. *Askov*, quoted, *supra*, the text at footnote 39) that "most regions of the country are operating within reasonable and acceptable time limits" was completely accurate.

[73] In *R.* v. *Morin*, *supra*, footnote 4, at pp. 797 (S.C.R.), 20 (C.C.C.), Sopinka J. wrote that "in *Askov* we were given statistics with respect to Montreal in an affidavit by Professor Baar", a statement that is obviously incorrect. Over five of the five-and-one-half months covered by the Montreal data fell after my affidavit was sworn.

[74] This argument was also made by Trainor J. in *R.* v. *Fortin*, (1990), 75 O.R. (2d) 733 (Ont. Gen. Div.).

[75] See Rapport d'activités 1990-1991, *op. cit.*, footnote 46, especially the summary p. 61, and the regional breakdowns pp. 310-311 for criminal matters in the Cour du Québec, and pp. 312-313 for delinquency matters in Youth Court.

[76] *R.* v. *Morin*, *supra*, footnote 4, at pp. 799 (S.C.R.), 21-22 (C.C.C.).

> A longer period of institutional delay for Provincial Courts is justified on the basis that not only do these courts dispose of the vast majority of cases, but that on average it takes more time to dispose of cases by reason of the demands placed on these courts. Statistics for 1987 submitted by the respondent show a median delay in New Brunswick of 152 days for Provincial Court and 72 days for upper courts. Delay in London, Ontario was shown to be 239 days in Provincial Court and 105 in upper courts; Toronto, St. Catharines and Ottawa showed delays of 315 to 349 days in Provincial Court and 133 to 144 days in upper courts; median delays in Brampton were 607 for Provincial Court and 423 for upper courts. Figures for Vancouver were similar to London and for New Westminster comparable to Toronto, St. Catharines and Ottawa.

This statement is wrong. The median times attributed to the Provincial Courts alone are in fact median "total times" from first appearance in Provincial Court until disposition in the upper court. This can easily be seen by quoting from my affidavit in *Askov*, which was apparently the source of the numbers submitted by the crown in *Morin* and quoted by Sopinka J.:[77]

> 8. The Tables found in Exhibit "E" show that New Brunswick is more expeditious than either British Columbia or Ontario, measuring both total time from first appearance in Provincial Court to final disposition in s. 96 Court, as well as measuring total time in s. 96 Court after the lodging of the indictment in the court. The median total time in New Brunswick was 152 days and the median upper court time was 72 days. Within Ontario, London was consistently the most expeditious of the five locations studied. It had a median total time of 239 days and median upper court time of 105 days. Toronto, Ottawa and St. Catharines were clustered close together with median total times between 315 and 349 days and median upper court times between 133 and 144 days. Median times in Vancouver, British Columbia, were somewhat faster than London, Ontario, while New Westminster, British Columbia, was comparable to Toronto, Ottawa and St. Catharines. By all measures used in the study, Brampton District Court was significantly slower than any other location studied: median total time was 607 days and median upper court time was 423 days ...

These same figures were used by Cory J. in his judgment in *Askov*. The seeds of the misinterpretation made by Sopinka J. might be attributable to that passage in Cory J.'s judgment in *Askov*,[78] but it is more likely that the error flows from the crown's factum. In "Respondent's Factum Appendix 'A' - Summary

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[77] Baar affidavit, *supra*, footnote 28, pp. 6-7.

[78] *R.* v. *Askov*, *supra*, footnote 2, at pp. 1238-1239 (S.C.R.), 394-395 (D.L.R.):

> The extent and gravity of the problem in Peel is brought home by reference to the comparative study done in 1987 by Professor Baar. The study illustrated that in Canada, New Brunswick and Quebec were best able to bring their cases to trial within the 30 to 90 day range. In terms of the time taken to completely dispose of a case from committal to disposition, the median total time in New Brunswick's lower courts (provincial courts) was 152 days. The median total time in upper court (s. 96 courts) was 72 days. By comparison, in Ontario the best district was London with a median total time of 239 days and the median upper court time of 105 days. Toronto, Ottawa and St. Catharines were all close together with median total times of between 315 and 349 days, and upper court times between 133 and 144 days.

Cory J.'s initial definition of the New Brunswick figures suggests that the misinterpretation arose here, even though the two succeeding sentences were essentially the same as the two sentences in the affidavit. The earlier misstatement of "total time" in New Brunswick, not relevant to the judgment in *Askov*, went unnoticed at the time, and the mistake grew in clarity and significance in Morin.

of Materials", there is a reference to the data that contained precisely the misinterpretation on which Sopinka J. relied:[79]

> 27. In 1987 Professor Baar did another comparative study of delay, limited to five districts in Ontario, with some comparative statistics from New Brunswick and British Columbia (para. 6). Totals were collected with respect to the "median total time" in each jurisdiction. This "median total time" figure is the figure where 50% of the cases took longer to complete and 50% of the cases were disposed of sooner (para. 9). The preliminary results of this "Criminal Court Delay" study showed that the median delay in the New Brunswick courts was some 152 days for Provincial Court and 72 days for the upper courts. In London, the most expeditious of the five Ontario jurisdictions studied, the median delay was 239 days in the Provincial Court and 105 days in the upper courts. Toronto, Ottawa and St. Catherines [sic] were "clustered close together" with median delays in the Provincial Court of between 315 and 349 days, and median delays in the upper courts of between 133 and 144 days. Brampton, the slowest of Ontario jurisdictions studied, had median delays in the Provincial Court of 607 days and in the upper courts of 423 days. The figures for Vancouver were comparable to London, and the figures for New Westminster were comparable to Toronto, Ottawa and St. Catherines (para. 8).

In short, the Supreme Court's judgment in *Morin* relied at a key point in its argument on an incorrect interpretation of the only available data on the pace of litigation in Provincial Courts. This error undermines the judgment, and opens it to reconsideration at the very point when the court apparently hoped to lay the section 11(b) controversy to rest.

What would have happened if the court had used the correct figures? To ask a preliminary question, what data were available to the court? On the twenty-sixth page of Exhibit E of my affidavit in *Askov* was a table, not highlighted in that case, showing Provincial Court elapsed times (from first appearance to committal) for those cases in the original sample of section 96 courts in ten cities in three provinces.[80]

The table originally appeared as follows:[81]

Cory J.'s reference to Quebec in the second sentence of the paragraph is most likely to have been derived from a reference to my 1984 study, at p. 4 of my affidavit.

[79] Respondent's Factum, *R.* v. *Morin*, Appendix "A" - Summary of Materials, p. 44. The parenthetical paragraph references are to the Baar affidavit in *Askov*, *supra*, footnote 28.

[80] That table has been highlighted in presentations to Provincial Court judges in Alberta and Newfoundland, and included in materials for the Caseflow Management Workshop of the National Judicial Institute.

[81] Ironically, while the crown submitted a copy of my *Askov* affidavit and supporting exhibits to the Supreme Court with its factum in *Morin*, it appears that in the process of reformatting and reproducing the affidavit materials, this table was omitted. Presumably, the omission was inadvertent, and perhaps a result of the fact that the pages of the original material in Exhibit E were not numbered. Even with that omission, however, information on Provincial Court elapsed times was available to the court in the first set of tables in Exhibit E, which show total times, upper court times, and Provincial Court times by section 96 court location.

CANADIAN PROVINCIAL COURTS
RANKED BY MEDIAN TIME
FROM FIRST APPEARANCE TO COMMITTAL

Location	Median (in days)	Third Quartile	90th Percentile	Number of cases
New Brunswick*	37	62	86	81
College Park (Toronto)	75	120	177	81
Main Street (Vancouver)	94	130	204	258
Surrey, B.C.	98	150	205	79
Old City Hall (Toronto)	102	141	206	244
Burnaby, B.C.	108	131	212	43
Langley, B.C.	112	169	295	42
London	122	168	251	431
Coquitlam, B.C.	140	180	222	53
North York	153	203	259	52
Brampton	160	230	317	427
Ottawa	167	222	268	567
St. Catharines	168	234	310	276
Scarborough	178	215	262	55
Etobicoke	206	258	358	66

*includes all Provincial Court locations feeding Fredericton, St. John and Moncton.

This table shows the median time in New Brunswick Provincial Courts was only thirty-seven days, and the median times in five British Columbia Provincial Courts were all lower than the section 96 courts to which those cases were committed for trial. The nine Ontario Provincial Court locations included some of which were faster and some of which were slower than the section 96 courts in their areas.

More important than the median times are the times by which three-fourths (seventy-five per cent) of the cases were completed. Scanning the column labelled "Third Quartile" shows that all but one Provincial Court location completed over three-fourths of its committals within eight months (240 days), suggesting that slower Provincial Court cases do not trail as far behind the average as do slower cases in the section 96 trial courts. Thus Sopinka J.'s reinforcement of his case for an eight-to-ten-month guideline in Provincial Courts is not supported by the evidence. If anything, available data suggest that Provincial Courts may be more expeditious than section 96 courts in handling criminal cases.

The figures from the table of Canadian Provincial Courts could also have been useful to the Supreme Court of Canada in *Morin* because they would have provided information to test other perceptions and assumptions of the judges.

For example, Sopinka J. emphasizes that Provincial Courts should reasonably be allowed more time from first appearance to disposition because of their case volume; "these courts dispose of the vast majority of cases", he points out.[82] Yet examination of the table above reveals that the fastest of five British Columbia Provincial Courts is the Main Street courthouse in downtown Vancouver, the largest in the province, and easily the two fastest of nine Ontario Provincial Courts are the two locations in downtown Toronto. While more information is necessary to see whether suburban Vancouver and Toronto Provincial Courts have a higher case volume per judge (or, more accurately, per assigned judge day), these figures clearly indicate that high volume *per se* is not correlated with increased delay.

A proper consideration of the Provincial Court figures would also point out the limits on their valid use. In *Morin*, the Supreme Court of Canada was setting a guideline for cases to be tried in Provincial Courts. The Provincial Court data in my affidavit in *Askov* dealt only with preliminary hearings, since the data were based on a sample of cases tried in section 96 courts. Thus the data are representative neither of cases like *Morin*, which proceeded by way of summary conviction, nor even of indictable offences in which the accused did not elect trial in a section 96 court.[83] Furthermore, Ontario Provincial Court delays had escalated so rapidly in the late 1980s that some figures in the above table were obviously out of date. The Brampton figures, for example, show that half the committals were completed within 160 days, and three-fourths within less than eight months. By 1990, in contrast, the Chaloner affidavit showed preliminary hearings dates were being given over twelve months ahead.[84]

The fourth and last reference to affidavit evidence in the court's *Morin* judgment came in its consideration of "the facts surrounding ... institutional delay" in Oshawa. "It must be remembered", wrote Sopinka J., "that this appeal arises from Ontario Provincial Court and arises from a region which has experienced significant growth in recent years".[85] He then includes data on the Provincial Court as a whole:[86]

> ... The Ontario Provincial Court disposes of approximately 95 per cent of criminal cases in Ontario. Evidence led by the Crown in this appeal shows that the caseload of this Provincial Court increased more than 125 per cent from 1985/86 to 1989/90. After several years in which the caseload was stable at 80,000 cases, the caseload of the Provincial Court in Ontario increased from 80,000 to 180,000 from 1985/86 to 1989/90. This rapid increase in caseload cannot, of course, always be predicted, nor can the government respond immediately to the inevitable strain on resources ...

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[82] *R.* v. *Morin*, *supra*, footnote 4, at pp. 799 (S.C.R.), 21-22 (C.C.C.).

[83] It should be noted that the practice in all three provinces at the time of the study was to schedule preliminary hearings in the same time and manner as Provincial Court trials, so the elapsed time figures reported above are in fact likely to be similar to those for other dispositions in those courts. But this supposition should be confirmed before the elapsed time figures for committals are used for a purpose they may not be able to serve.

[84] Chaloner affidavit, *supra*, footnote 14, Tab. 10, p. 2, indicates that it would take fifteen months (450 days) for half the cases to be completed.

[85] *R.* v. *Morin*, *supra*, footnote 4, at pp. 806 (S.C.R.), 27 (C.C.C.).

[86] *Ibid.*

Sopinka J. then shifts to an examination of Oshawa itself:[87]

> In the jurisdiction in which this case arose, the District of Durham, the increase in caseload from 1985/86 to 1990/91 was approximately 70 per cent in adult court and an astounding 143 per cent in youth court. This was only partially caused by a population increase of 40 per cent during the previous decades. Thus it is not surprising that the provision of institutional resources may have lagged somewhat behind the demand.

Simply taken on its face, this argument cannot justify special treatment of the Provincial Court in the District of Durham, since Sopinka J. reports a seventy per cent adult court increase there over six years, compared with a 125 per cent increase over five years for the province as a whole. On this measure, Oshawa's increase is far below the average for Ontario Provincial Courts; giving Oshawa special consideration based on the rapid growth in its "caseload" could justify stretching the constitutional guideline for trial within a reasonable time to its maximum limits throughout the province.

In fact, the provincial figures cited by the court are not "caseload" figures, which commonly refer to the number of cases entering a court within a fixed period of time (that is, monthly caseload, annual caseload). They apparently represent what in the vernacular is called "backlog" but is more properly termed "inventory" - the number of pending cases.[88] A number representing total pending cases has no meaning without information on the number of cases a court deals with in a particular period of time.[89] For example, if the Ontario Provincial Court completed 20,000 cases per month in 1985/86, it would have taken only four months to dispose of a pending inventory of 80,000 cases. If the system expanded its capacity to 30,000 cases per month in 1989/90, 180,000 cases would constitute a six month inventory; however, if capacity had remained the same, the province-wide inventory would have taken nine months to complete. "Backlog" is the number of pending cases that cannot be completed within a designated acceptable time period.[90] Thus, the figures that Sopinka J. uses to justify allowing more time in Oshawa not only fail to support this use as they are presented, but are also incorrect and misleading.[91]

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[87] *Ibid.*, at pp. 807 (S.C.R.), 27 (C.C.C.).

[88] For definitions of these terms, see Perry S. Millar and Carl Baar, Judicial Administration in Canada (1981), pp. 196-197.

[89] Note also that the figures used by Sopinka J. for "cases" were in fact figures for "charges". Thus his numbers may be perhaps twice as large as the correct figures would have been; see Code, *op. cit.*, footnote 15, p. 124.

[90] Interestingly, analysis by Ontario court officials after the decision in *Askov* attributed the large growth in pending cases not so much to a growth in caseload, but to the fact that impaired driving cases that before 1985 had been disposed of by plea of guilty in the early stages of the criminal court process were being set for trial now that accused persons faced a mandatory licence suspension once convicted. Large numbers of these cases would also ultimately be resolved by pleas of guilty, but only when the date of trial was reached. As a result, the number of cases pending would have increased at a much faster rate than the intake.

[91] To compound the confusion, the District of Durham's increases of 70% and 143%, derived from a separate affidavit, and referring again to charges rather than cases, do in fact refer to increased intake rather than increased inventory. Thus their use could with modifications lend empirical support to the argument for giving Oshawa special consideration. See Code, *op. cit.*, footnote 15, p. 124.

Morin provided not only a guideline built on a series of erroneous factual assumptions, but also a degree of flexibility that is unnecessary and unwise. By the time the Supreme Court decided *Morin*, the damage from *Askov* was already done, in the sense that large numbers of unforeseen dismissals had already occurred. Every Provincial Court system outside Ontario had successfully complied with *Askov*, and Ontario had substantially improved its performance. In January and February 1992, only forty-nine charges were stayed and fifteen dismissed in Ontario Provincial Court. From April 1992 - after the judgment in Morin - to the end of January 1993, 131 additional charges were stayed or dismissed, an average of thirteen per month.[92] The judgment in *Morin* thus had little immediate practical impact. Over the long term, however, it not only provides a longer time standard in Provincial Courts, but also gives more discretion to expand the standard in an uncomplicated case. It moves Charter jurisprudence on trial within a reasonable time closer to the largely unprincipled flexibility of American Sixth Amendment speedy trial jurisprudence. Given the absence of any legislative initiatives from either the federal government or parliament, this is a result that is neither in the public interest nor in the interest of accused persons.

C. *Misunderstanding Provincial Courts*

Morin also contains implicit assumptions about court structure and court operation that conflict with the policy assumptions of the Canadian Judicial Council. The Council, as well as the Canadian Bar Association, are on record in opposition to the creation of a "unified criminal court" which would in effect merge the Provincial Courts and the section 96 trial courts in each province.[93] One basis for the opposition is the notion that the Provincial Court is the focus for expeditious processing of the high volume of more routine criminal matters, while the section 96 trial court is available for fuller and more elaborate consideration of the most serious criminal matters. In the United States, the American Bar Association's time standards reflect this hierarchy of cases as well, recommending a shorter time for misdemeanour cases in intake courts than for felony cases in superior courts, and a shorter time still for violations.[94] The Supreme Court of Canada in *Morin* has turned that hierarchy on its head, providing accused persons with a more expeditious time standard in the section 96 trial court than in the Provincial Court. This may be a fair and just result, recognizing not only the growing proportion of indictable offences disposed of

[92] *Supra*, footnote 38.

[93] The Canadian Bar Association endorsed the recommendations of its Court Reform Task Force; see Court Reform in Canada (1991). Arguments for the unified criminal court may be found in Law Reform Commission of Canada, Working Paper 59: Toward a Unified Criminal Court (1989). See also Carl Baar, One Trial Court: Possibilities and Limitations (1991), ch. 8.

[94] And see the conclusion of Dickson J. in *R.* v. *Riddle*, [1980] 1 S.C.R. 380, at p. 399, (1979), 48 C.C.C. (2d) 365, at p. 380:

> It is the intent of the [Criminal] *Code* that summary conviction matters be disposed with despatch. No good purpose is served by introducing unwarranted complexities into what are, or should be, simple and straightforward and expeditious procedures.

in Provincial Courts, but also the importance and difficulty of Provincial Court work; it is, however, inconsistent with one of the underlying principles behind the maintenance of a two-level criminal trial court structure.

In fact, what the Supreme Court of Canada has acknowledged is that the Provincial Court has become an increasingly specialized criminal court. As a result, it could not rejuggle its priorities to comply with the new requirements that section 11(b) demanded under *Askov*. In contrast, section 96 courts tend to be dominated by civil litigation. Even if half of the sitting time in a particular section 96 court location is taken up with criminal trials, an influx of additional criminal cases could still be handled by reallocating judicial resources from the civil side. This was precisely the experience of Ontario trial courts after *Askov*.

But this reality cannot be a legitimate basis for altering the constitutional requirement for trial within a reasonable time under section 11(b). The flexibility needed to reallocate trial time is simply another "institutional resource" whose absence cannot be borne by accused persons awaiting trial. If flexibility is a problem in Provincial Courts, one might note for example the existence of statutory authority in some provinces (including Nova Scotia and British Columbia)[95] for section 96 judges to sit in Provincial Courts.

Ultimately, it appears that the Supreme Court of Canada used *Morin* to enunciate a time standard long enough, and with sufficient elasticity, to ensure that dismissals under section 11(b) would be increasingly unlikely to occur. Dismissals that began as a public embarrassment to government immediately after *Askov* had too soon become a public embarrassment to the judiciary, and *Morin* would remove that embarrassment. As so it did. Media coverage of the *Morin* judgment was not followed by weeks of additional critical coverage about the court system. But the Supreme Court may have exchanged public embarrassment for the criticism of professional colleagues aware that the court did not "get it right" the second time, and was willing to trim its definition of constitutional rights to fit practices that are more costly or difficult to change.[96]

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[95] See Baar, *op. cit.*, footnote 93, p. 76.

[96] The collegial reaction was illustrated by a verse penned under a pseudonym shortly after the release of *Morin*:

> The Numbers Game
> (Or How Many Months for a Stay)
> * * *
> Askov said that six to eight
> Were all the months accused must wait
> If there is any more delay
> The Court must then proclaim a stay
>
> Now in another case called Morin
> The Court Supreme declared it more in
> Line with months twixt eight and ten
> But notwithstanding there and then
> That very Court - and please don't laugh
> Allowed fourteen and then a half.
>
> S. Decisis

D. *Refusing to Reconsider*

In *R.* v. *Bennett*,[97] heard in June 1992, a five-judge panel declined the opportunity to deal further with social facts surrounding institutional delay and trial within a reasonable time. Bennett's counsel brought the *Morin* errors to the Supreme Court's attention in both written and oral submissions, emphasizing the confusion of total time and time in Provincial Court. Nonetheless, the appeal was dismissed from the bench, with Sopinka J. pronouncing the judgment in only four sentences.

The crown's factum did not acknowledge any responsibility for presenting incorrect information in *Morin*. Instead, it responded to Bennett's counsel by arguing that *Morin*'s authority "is, at present, simply not open to question".[98] Statistical analyses, the crown insisted, played a "very limited role":[99]

> ... [T]his Honourable Court has implicitly recognized that statistics are both complicated to assess, and notoriously susceptible to varied or uncertain interpretation.

Sopinka J. seemed to accept this line of argument in his brief oral judgment in *Bennett*, stating that "[w]e do not share the views of the appellant with respect to the emphasis placed on statistics".[100]

It would be especially unfortunate if the court accepts the crown's viewpoint as expressed in its factum in *Bennett*, and refuses to use relevant quantitative data. Yet events at the time of the *Bennett* decision indicate that the court is anxious to leave behind its experience with section 11(b) and institutional delay, and is equally unwilling to consider expert evidence and social facts of a non-quantitative nature. A young offender's appeal under section 11(b) was one of three other Ontario cases on institutional delay heard by the Supreme Court on June 1992. In that case,[101] expert affidavit evidence was submitted about special problems alleged to arise from delays in Youth Court matters. Yet that appeal, along with the other two, was also dismissed, with no reference to the expert evidence.

III. *Examining the Supreme Court's Activism: How Should an Interventionist Court Operate?*

The extent of judicial policy making in *Askov*, going well beyond the activism said to characterize American courts, reflects the distinctive situation in Canada, in contrast not only to the United States, but also to England and Australia. The Canadian situation directed the Supreme Court's judgment in *Askov* in two ways.

First, there had clearly been an abdication of legislative leadership from the federal government, with its responsibility for criminal law, as well as admin-

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[97] *Supra*, footnote 5.

[98] Respondent's factum in *R.* v. *Bennett*, Part III, p. 14, para. 38.

[99] *Ibid.*

[100] *R.* v. *Bennett*, *supra*, footnote 5, at p. 168.

[101] *R.* v. *J. (M.A.)*, [1992] 2 S.C.R. 166, (1992), 75 D.L.R. (3d) 128.

istrative leadership from provincial governments - or more particularly the government of Ontario, which for all its efforts had watched the number of pending cases and the length of processing time continue to grow. Federal legislation had been proposed in 1984 by the Liberal Government, prior to its electoral defeat in September. No other legislation to establish time limits had been proposed between June 1984 and October 1990. (Even more astonishing, no Criminal Code amendments were put forward during the period between *Askov* and *Morin*, nor has any been visible since *Morin*.)

In contrast, the United States Supreme Court can be passive; every jurisdiction in that country has some kind of legislation or court rules specifying time limits in criminal cases. Most jurisdictions have a 180-day limit for the total time in all courts for the most serious felonies. As a result, constitutional guidelines are largely moot and Supreme Court activity since *Barker* v. *Wingo*[102] has been negligible.[103] As a result, the extensive empirical research on the pace of criminal litigation in the United States for the past twenty years has never been examined by that country's highest court. The research has had a significant impact on the administrative side of trial court work, but has been absent from the stream of adjudication.

Secondly, Canada, like many other parliamentary systems, places responsibility for administration of the criminal courts squarely in the hands of government - the executive branch - rather than the judiciary. Therefore, the Supreme Court of Canada saw itself and its provincial counterparts with no responsibility for the condition of the criminal courts. While control over court administration in the United States has gradually shifted to the judiciary (usually the highest court of a state, or a council of judges in federal jurisdiction), Canadian judges have been prevented by provincial governments from taking a similar role. Under these conditions, it may be that the Supreme Court of Canada was more ready to call the responsible governments to account.

Yet other parliamentary systems, even without entrenched Charters of Rights, have time standards for criminal cases. England has precise uniform time limits authorized by statute. Interestingly, however, parliament delegated its standard-setting authority, so that time limits have been set by rules of court.[104] A similar pattern can be observed in Australia; the criminal rules of the South Australia District Court prescribe managerial guidelines that echo those of the American Bar Association. In contrast, not only does no legislation exist in Canada, but any time standards would almost certainly be incorporated directly into the Criminal Code by parliament, rather than made a subject of court rule making under section 482 of the Code.

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[102] *Supra*, footnote 18.

[103] *U.S.* v. *Loud Hawk*, 474 U.S. 302, 106 S. Ct. 648, 88 L. Ed. 2d 640 (1986), arose under the Sixth Amendment, with the majority (over three dissents) excluding delays during interlocutory appeals from constitutional protection.

[104] See discussion in Code, *op. cit.*, footnote 15, pp. 59-70. Legislation in 1985 shifted power from a rules committee to the government.

Given the Canadian situation, the Supreme Court was more likely to adopt an interventionist stance on section 11(b) of the Charter. However, the court should have done so through a process that allowed more effective consideration of social facts. It is possible to identify three strategic options that it could have pursued in the case, and compare them not only with the strategy pursued in *Askov*, but also with the overall result emerging from the larger process that began with *Askov* and continued with *Morin* and *Bennett*.

First, the court could have held, as it did, that the twenty-three month delay from committal to trial in *Askov* violated the Charter, and that institutional delay must count against the crown. At that point, rather than state how much delay is too much, it could have waited for later cases with shorter delays and evolved a standard incrementally, in keeping with the case-by-case approach associated with traditional common law decision making. The court would have avoided accusations of judicial legislation, but would also have created uncertainty about where a line should be drawn in the face of continuing parliamentary abstention.

Second, as suggested previously, the Supreme Court could have rendered precisely the judgment it did in *Askov*, but phased in its six-to-eight-month guideline. Failure to do so reflected a willingness to proceed on its own in an area where more guidance from the parties would have been beneficial.

The third option would have been preferable to either of these two (or the one actually taken by the court). To avoid the uncertainty of an incremental approach and the inaccuracy of a do-it-yourself approach, the court could have scheduled the *Askov* case for reargument, informing counsel that it wished to hear further argument on the length and nature of a standard for reasonable time, and inviting interveners to submit arguments as well. Counsel could have focused their submissions on that issue, other provinces might have chosen to intervene and present additional data, and the court could have sought clarification of its interpretation of previously submitted data. For example, data on "the pace of litigation" could have been reanalysed in terms of the court's focus on "time to trial", and data on the "first available trial date" could have been reexamined in terms of the actual date on which the trial begins.[105]

The use of the reargument procedure would have allowed the Supreme Court of Canada to display a substantial degree of judicial activism through a process appropriate to the task. While the possibility of a number of interveners may have led to fears that the reargument would take on the atmosphere of a parliamentary committee hearing, that process may in fact have been an entirely appropriate one if the court was undertaking to establish a national standard for

[105] The most famous use of this two-step approach in American constitutional law was in the school desegregation cases, *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and 349 U.S. 294 (1955). The United States Supreme Court decided in May 1954 that *de jure* school segregation was unconstitutional, but set for reargument the question of what remedy and standard it should prescribe for ending segregation. The Supreme Court of Canada has set cases for reargument, and has created special procedures for the introduction of extrinsic evidence, as Laskin C.J.C. did in the 1976 Anti-Inflation Reference.

institutional delay in criminal cases under the Charter of Rights.[106] The court would not deny that parliament has the authority to legislate a standard, but in the absence of legislation, the Supreme Court must develop its own workable procedures to spell out Charter requirements in a fair and rational manner.

Once *Askov* was decided, however, none of these three options was available to the Supreme Court of Canada. Perhaps therefore it was inevitable that a judgment in any future case would be an unsatisfying one. What made the *Morin* judgment doubly unsatisfying involved again both the process and the result. Recoiling from the problems raised by collecting and interpreting quantitative data, the court focused on legal issues, introducing social facts only to support an argument that had already been conceived and developed. As a result, however, the court was too passive - it failed to probe or question or test the erroneous social facts that it received from counsel and would later rely on to support its judgment.

Substantively, *Morin* has reduced section 11(b) to a less powerful Charter right and a less useful tool to reduce court delay, when it was no longer necessary or useful to moderate the impact of *Askov*. Yet in reflecting on the eventual outcome, an observer cannot help but conclude that guidelines in *Askov*, if they had been promulgated in stages or had followed reargument by counsel and interveners, would have been at least as strict as those enunciated by Cory J., and much less devastating in their immediate impact.

Conclusion

What lessons can we learn from the Supreme Court of Canada's difficulties in using social facts as an aid in deciding constitutional issues surrounding institutional delay in criminal trial courts? Assuming that the court and the law can benefit from using relevant and valid social science data, how can the court's processes be adapted to produce those benefits?

The first lesson, provided by *Askov*, is to make full use of the adversary process. The court undermines its own processes when it collects and considers social facts after oral argument, without providing an opportunity for those facts to be tested.

The second lesson, provided by *Morin*, is to avoid dependence on the adversary process. The adversary process, most agree, is a particularly effective process to test facts, yet here it allowed seriously flawed data (equating total processing time with Provincial Court time) to pass without scrutiny. Given the volume of information provided by the respondent, and the apparent inability or refusal of the appellant to examine and criticize the information, the court was not in a position to identify the errors and misinterpretations in the large appeal books. Yet later at the judgment-writing stage, the court would almost by definition need to take social facts out of context to use them to support its legal reasoning.

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[106] See Philip L. Bryden, Public Interest Intervention in the Courts (1987), 66 Can. Bar Rev. 490.

The adversary process in *Morin* not only failed as a mechanism to test facts submitted in advance of oral argument, but also failed as a mechanism to find facts. With all the information submitted in the appeal books, the small amount of available data on the pace of criminal cases in Provincial Court was either missing or difficult to find - and in any case was never given the analysis or interpretation that could have been helpful to the court both in crafting its reasons and in assessing the impact of its judgment.[107]

The limitations of the adversary process, and the problems that result from the courts' dependence on it, are most frequently considered in the context of the role of expert witnesses. Experts who give evidence, in person at trial or by affidavit or non-sworn submission on appeal, are often in a compromised position because, once retained by a party in litigation, their testimony is very likely to be incomplete. Therefore steps should be taken so that experts can be called upon directly by the court as well as by parties in a case. Experts designated by the court would not be compromised by service to one of the parties. At the same time, to reinforce the effective use of the adversary process, any information provided by a court-appointed expert should be available to all parties, and be subject to testing by all parties. Similar recommendations may be found in the growing literature on the use of statistical evidence in American courts.[108]

The third lesson, provided by both *Askov* and *Morin*, is directed not only to the Supreme Court or other courts hearing Charter issues, but also to those litigating Charter issues or representing Charter litigants. It is clear that extensive affidavit evidence or voluminous social science materials or quantitative data cannot be easily absorbed by a busy court. Therefore it is essential that counsel develop practices and consider guidelines to increase the effectiveness of social science evidence in general and quantitative data in particular. Presentations should be short and to the point. Counsel must explain precisely why material is relevant to the court. Submitting a body of undigested, unanalysed, unfocused information because it surely contains something of potential relevance does the court a disservice. Why is the material relevant? How is it linked to the specific issues in the case? Counsel have a special responsibility to focus information brought to the court, rather than amplify it.[109] In turn, the judges and their law clerks have a special responsibility to check information used in judgments.

At the same time, *Bennett* and the other section 11(b) cases disposed of so quickly in June 1992 are reminders that efforts of counsel that meet these criteria

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[107] Material from the Chaloner affidavit, *supra*, footnote 14, on pleas and trials in the six Ontario Provincial Court pilot projects could have been particularly useful.

[108] Morris H. DeGroot, Stephen E. Fienberg, and Joseph B. Kadane (eds.), Statistics and the Law (1986); Michael J. Saks and Charles H. Baron (eds.), The Use/Nonuse/Misuse of Applied Social Research in the Courts (1980).

[109] See Carl Baar and Ellen Baar, Diagnostic Adjudication in Appellate Courts: The Supreme Court of Canada and the Charter of Rights (1989), 27 Osgoode Hall Law Journal 1, at p. 19ff.

may still go unrewarded. The Supreme Court may simply decline to give those arguments full consideration. If it does so, however, the court risks losing the benefit of well-presented social facts at a time when it needs them more than ever before in its history. The lesson of *Askov*, *Morin* and *Bennett* is certainly not that the Supreme Court should ignore new constitutional issues such as institutional delay in criminal cases. If these cases teach us anything, it is that these issues are important and must be tackled effectively both by counsel and by the courts.