R v Jordan: Getting Serious about Delay

By: Adryan J.W. Toth

"Timely justice is one of the hallmarks of a free and democratic society".[1]

I. INTRODUCTION

Delay in bringing criminal proceedings to an end seriously undermines public confidence in the administration of justice. In an effort to remedy deeply rooted systemic delay, the Supreme Court of Canada rendered its landmark decision in *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631 [*Jordan*].

Section 11(b) of the *Canadian Charter of Rights and Freedoms*[2] [*Charte*r] guarantees that "(a)ny person charged with an offence:… has the right to be tried within a reasonable time." *Jordan* provides us with a new framework by which courts are to assess delay issues. Moreover, the new framework, which imposes time limited presumptive ceilings of reasonableness, aims to motivate courts, counsel, governments, and all participants in our criminal justice system to get serious about delay.

For our purposes, this paper explores *Jordan* and some of the case law that has followed in an attempt to gain a better understanding of the implications that have arisen out of *Jordan*.

This paper is outlined as follows. Part II provides some important background information meant as context for the remaining three parts. Within Part II is a review of the concept of delay as well as the framework used to analyze delay pre-*Jordan*, known as the *Morin* framework.[3] Part III explores the Supreme Court of Canada's decision in *Jordan*, with particular focus on its new analytical framework. Part IV looks at some of the case law post-*Jordan*, all of which, it should be kept in mind, are still transitional cases.[4] Finally, Part V looks at some of the issues that have arisen post-*Jordan* as well as some issues that remain outstanding yet may be argued in the future.

---

[1] *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631 at para 1.
[2] *Canadian Charter of Rights and Freedoms*, Part 1 of *the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11.
[3] See generally *R v Morin*, [1992] 1 SCR 771.
[4] As is discussed more fully below, the shortest presumptive ceiling time wise is 18 months. *Jordan* was handed down on July 8, 2016, or just under 17 months prior to this paper being finalized, and so we are still not yet at a point where cases could exist without them being transitional in nature (i.e. cases that were in the system already when *Jordan* was handed down).

II. BACKGROUND OVERVIEW

i. The Concept of Unreasonable Delay

Unreasonable delay is a serious plague upon the administration of justice. It is, of course, practically impossible to fully rid our criminal justice system of all delay, but as the Supreme Court of Canada suggests in *Jordan*, it should be the aim of all participants in our justice system to minimize delay.

But what is about delay that is harmful? Why is delay an issue?

In our post-*Charter* criminal justice system, the Supreme Court of Canada has repeatedly articulated its view on how delay severely eats away at the fabric of the proper administration of justice (see e.g. *Jordan* at paras 1-4, 19-28; *R v Morin*, [1992] 1 SCR 771 at paras 21-25; *R v Askov*, [1990] 2 SCR 1199 at paras 75-81 *per* Cory J.; *R v* ; *Mills v R*, [1986] 1 SCR 863 at paras 188-204).

The majority opinion in *Jordan* was especially helpful in explaining the issues that flow from delay (at paras 19-28). It notes that timely trials help give meaning to the presumption of innocence and protect liberty and security of the person for accused individuals. Stress, anxiety, and stigma naturally fall upon accused individuals exposed to the criminal justice system and section 11(b) aims to mitigate these negative consequences. But it is not just accused individuals that are negatively impacted by delay. The majority notes that victims and their families can be devastated by criminal acts and that delay aggravates their suffering. In addition, delay can aggravate negative experiences of witnesses to crime. As memories fade over time, trial fairness also becomes undermined. Delay also impacts society as a whole. In the words of the majority, "(u)nreasonable delay leaves the innocent in limbo and the guilty unpunished, thereby offending the community's sense of justice" (at para 25). This can lead to public frustration and anger towards the criminal justice system, thereby undermining the public's confidence in the administration of justice.

Delay, then, is a systemic issue that can negatively impact all participants in the criminal justice system. The purpose of section 11(b) is to protect against all of these negative consequences. Since the passing of the *Charter*, our Supreme Court of Canada has attempted to articulate an analytical framework for determining when delay moved from tolerable to unreasonable. Since 1992, and prior to *Jordan* being handed down in 2016, for over 24 years delay was analyzed through a framework articulated in *R v Morin*, [1992] 1 SCR 771 [*Morin*]. We shall now explore that framework before moving on to consider *Jordan*.

ii. The '*Morin* Framework'

Prior to *Jordan*, section 11(b) issues were analyzed, retrospectively, through the *Morin* framework. At the time *Morin* was handed down, and as a result of a jurisdictional comparison approach used in *R v Askov*, [1990] 2 SCR 1199, thousands of cases were stayed all over the country.[5] The *Morin* framework was therefore adopted by the Court as an attempt to impose a more qualitative analysis upon questions of delay, with the hope that cases would no longer be stayed at such a dramatic rate.

The *Morin* framework required courts to consider four factors in determining whether a breach of s 11(b) had occurred:[6]

1) The total length of the delay;
2) Defence waived delay;
3) The reasons for the delay, including but not necessarily limited to:
    a. the inherent needs of the case;
    b. defence delay;
    c. Crown delay;
    d. institutional delay; and
4) Prejudice to the accused's interests in liberty, security of the person, and a fair trial.

Courts would first look at the total length of the delay to determine whether an inquiry into the delay was required. If the delay was long enough to warrant an inquiry, courts would then look deeper into the history of the case to determine how the delay should be attributed and how much delay in the context of a particular case was reasonable. Guidelines were imposed in respect to how much institutional delay was acceptable;[7] however, there was no hardline "[l]imitation period or fixed ceiling" (*Morin* at para 43). In the end, judges would balance all the factors to determine, on a case by case basis, whether the accused's section 11(b) right was infringed.

The *Morin* framework, however, came to be criticized by the majority in *Jordan* for giving rise to both doctrinal and practical problems. The majority stated that rather than helping remedy delay, the retrospective focused *Morin* framework actually had the effect of contributing "[t]o a culture of delay and complacency towards it" (at para 29).

---

[5] See generally *R v Askov*, [1990] 2 SCR 1199 (Sopinka J. for the majority in *Morin* at para 2 noted that after *Askov* was handed down, between October 22, 1990 and September 6, 1991, 47,000 charges had been stayed or withdrawn in Ontario alone).
[6] *Jordan, supra* note 1 at para 30.
[7] The Supreme Court of Canada stated in *Morin* at para 50 that, while no hardline limitation period could be imposed, 8-10 months of institutional delay was generally acceptable for provincial court cases, while 14-18 months was acceptable for cases tried in superior courts.

There were four shortcomings of the *Morin* framework noted by the majority at paras 29-45:

1) Its application was "highly unpredictable". Over the years, judicial interpretation of the framework exposed it as being endlessly flexible, resulting in it being very difficult to determine whether a breach actually occurred (at para 32).

2) It includes a notion of prejudice to the accused that was "confusing, hard to prove, and highly subjective". After the Court's decision in *R v Godin*, 2009 SCC 26, [2009] 2 SCR 3 confirmed that prejudice could be inferred from the length of the delay itself (as opposed to the accused needing to demonstrate actual prejudice – something that proved difficult to do), courts experienced difficulty in grappling with how to treat and balance inferred versus actual prejudice. The issues were compounded by the fact that prejudice played a key role in most cases, with proof of actual prejudice seeming necessary to tip the balance. Inconsistencies in the jurisprudence resulted (at paras 33-34 citing *R v Pidskalny*, 2013 SKCA 74, 299 CCC (3d) 396).

3) It is retrospective in nature, meaning analysis of delay only occurred after the delay had actually been incurred.[8] This backwards focused delay lens did little to inspire participants in the criminal justice system to take steps to prevent delay or to conform with any standards. It also frustrated judges who, in their after-the-fact reviews, were left hearing quibbling submissions as to delay attribution/justification (at paras 35-36).

4) It is unduly complex, requiring inefficient micro-counting of each step and/or event in the proceedings. Its complexity and endless flexibility allowed it to be applied in a way that tolerated increasing levels of delay (at para 37).

Whether or not these criticisms are appropriate is beyond the scope of this paper. Perhaps more importantly, whether or not the benefits of a more centrally focused case-by-case approach found in the *Morin* framework outweigh its shortcomings is beyond the scope of this paper. That said, in my view, the nature of the *Morin* framework did seem to lend its analysis to being, in its latter stages at least, a rather subjective exercise for the judge.[9]

[8] *Ibid* at para 35.
[9] Though one could counter this assessment with the comment that this is not unique when considering the nature of judging in general.

III. THE *JORDAN* FRAMEWORK

The *Jordan* framework aims to simplify section 11(b) applications (*Jordan* at para 51). No longer are courts asked, in a retroactive manner, to examine and balance numerous factors to determine if there was unreasonable delay in any one case. Instead, *Jordan* sets out a more intuitive, forward focused, and step based analysis.

The new framework takes total delay and subtracts from that delay any defence caused or defence waived delay to arrive at net delay. If net delay is above the applicable presumptive ceiling, then the delay is presumptively unreasonable.

Once delay is found to be presumptively unreasonable, the burden shifts to the Crown to rebut the presumption by establishing an exceptional circumstance. If the Crown can prove an exceptional circumstance, the associated time is deducted from net delay. If the remaining delay is still above the presumptive ceiling, then the delay is unreasonable and a stay of proceedings must follow.

i. The Presumptive Ceiling

The core of the new *Jordan* framework is the concept of delay ceilings whereby delay beyond the applicable ceiling is deemed to be presumptively unreasonable. For matters tried in provincial court without a preliminary hearing, the presumptive ceiling is 18 months. For matters tried in superior courts, or in provincial court with a preliminary hearing, the presumptive ceiling is 30 months (*Jordan* at paras 46, 49-59).

The Supreme Court of Canada decided to impose presumptive ceilings in order to help guide all actors in our criminal justice system in respect to delay (*Jordan* at para 50). The existence of presumptive ceilings allows the courts, the Crown, and the defence to better gauge the status of delay in any one case as it proceeds through the system.

The presumptive ceilings incorporate the delay guidelines regarding institutional delay outlined in *Morin*. They also reflect inherent time requirements for prosecuting the vast majority of criminal proceedings. In addition, the presumptive ceilings give recognition to prejudice in the sense that it is now recognized that once delay exceeds the presumptive ceiling, prejudice for any accused **does** exist.[10] For the public, presumptive ceilings broadcast clear limits as to delay in criminal proceedings, which increases confidence in the administration of justice (*Jordan* at paras 52-55).

[10] The Court stated in respect to delay beyond the presumptive ceilings that the existence of prejudice is not "a rebuttable presumption: once the ceiling is breached, an absence of actual prejudice cannot convert an unreasonable delay into a reasonable one" (*Jordan* at para 54).

Notably, the majority in *Jordan* hinted that the time limits imposed by the presumptive ceilings may need to be lowered in the future, suggesting that the current ceilings are generous in nature. 18 and 30 months respectively are considered to be "a long time to wait for justice". In the words of the majority:

> 57 There is little reason to be satisfied with a presumptive ceiling on trial delay set at 18 months for cases going to trial in the provincial court, and 30 months for cases going to trial in the superior court. This is a long time to wait for justice. But the ceiling reflects the realities we currently face. We may have to revisit these numbers and the considerations that inform them in the future.

ii. Calculating Net Delay

Net delay is calculated by taking total delay and then subtracting out defence caused and/or defence waived delay and any discrete events considered to be exceptional circumstances (see generally *Jordan* at paras 60-81). Total delay includes delay from the time the accused is charged up to the end, or the anticipated end, of trial (*Jordan* at para 49).

While not commented on in *Jordan*, the Supreme Court of Canada has previously held that appellate delay should not be counted in unreasonable delay calculations (see *R v Potvin*, [1993] 2 SCR 880). Accordingly, appellate delay is not to be included in the unreasonable delay calculations.

The concepts of defence caused and defence waived delay remain the same as they were under the pre-*Jordan* framework, only they are calculated earlier in the analysis.

Defence **waived** delay is relatively straight forward. It can be explicit or implicit, but regardless of which, it must be unequivocal (*Jordan* at para 61). As the Supreme Court of Canada stated in *Jordan* in respect to waiver:

> 63 …The accused must have full knowledge of his or her rights, as well as the effect waiver will have on those rights. However, as in the past, "[i]n considering the issue of 'waiver' in the context of s. 11(b), it must be remembered that it is not the right itself which is being waived, but merely the inclusion of specific periods in the overall assessment of reasonableness" (*R. v. Conway*, [1989] 1 S.C.R. 1659 (S.C.C.) , per L'Heureux-Dubé J., at p. 1686).

Defence **caused** delay involve actions taken by the defence that either solely and directly cause delay, or that are intentionally aimed at delaying the proceedings (*Jordan* at para 63). That said, legitimate actions taken by the defence in responding to the charges, such as time to review disclosure, prepare for trial, and bring legitimate applications, are not to be considered defence caused delay (*Jordan* at para 65).

In calculating net delay, courts and counsel need not worry themselves anymore with various categories of delay that were a part of the old *Morin* framework. Categories like institutional delay,

inherent delay, and Crown caused delay are no longer relevant as their time requirements are already included within the presumptive ceiling. As Elson J. noted in *R v Trinh*, 2016 SKQB 376 at para 18, 2016 CarswellSask 774 [*Trinh*]:

> 18 …outside of defence delay, a reviewing court need not concern itself with the other specific categories of delay that were a common feature of the *Morin* framework. In this respect, I refer to the categories of inherent delay, institutional delay and Crown delay, meaning delay that is particular to conduct, actions or inactions by the Crown. **These categories are now subsumed within the concept of delay in its general sense**, excluding defence delay.
>
> [Emphasis added]

After deducting all defence caused delay from total delay to arrive at net delay, courts must then compare the net delay to the applicable presumptive ceiling of reasonableness. If net delay exceeds the presumptive ceiling then the delay is presumed unreasonable.

iii. Exceptional Circumstances - Rebutting Presumptively Unreasonable Delay

Once an accused satisfies the court that the delay is presumptively unreasonable, the burden shifts to the Crown to try to justify the delay. There are two general types of exceptional circumstances: 1) discrete events; and 2) particularly complex cases (*Jordan* at paras 69-71).

Discrete events include things like medical or family emergencies on the part of the accused, counsel, the judge, or important witnesses (*Jordan* at para 72). They are events that are unexpected and outside the Crown's control (*Jordan* at para 69). They are events that are "reasonably unforeseen **or** reasonably unavoidable" and could not be reasonably remedied by Crown action (*Jordan* at para 69). A circumstance is not exceptional if the Crown fails to take reasonable steps to remedy it.

If the Crown is able to establish that there is a discrete exceptional event that caused some delay, then that period of delay (minus any failures from the Crown or justice system to mitigate the unforeseen event) is to be subtracted from the total delay (*Jordan* at para 75). If the remaining delay is still above the presumptive ceiling, then the Crown's attempt at rebutting the presumption fails and a stay of proceedings must be entered (*Jordan* at para 76).

The second type of exceptional circumstance targets cases that are particularly complex (*Jordan* at paras 77-79). These are cases where the nature of the evidence or the nature of the issues necessitates an **inordinate** amount of preparation and/or trial time (*Jordan* at para 77). In respect to evidence based cases, the typical "hallmarks" of such cases include "voluminous disclosure, a large number of witnesses, significant requirements for expert evidence, and charges covering a long period of time." (*Jordan* at para 77). In respect to cases with complex issues, they typically have "a large number of

charges and pre-trial applications; novel or complicated legal issues; and a large number of significant issues in dispute." (*Jordan* at paras 78)

If delay caused by exceptional circumstances is deducted from net delay, and the remaining delay is below the presumptive ceiling, then the presumption is rebutted and the burden shifts back to the accused to prove unreasonable delay. If, however, the delay remains above the presumptive ceiling, then the Crown fails to rebut the presumption and a stay must follow.

iv. Transitional Exceptional Circumstance

Finally, the Supreme Court of Canada held that the *Jordan* framework applies to cases already within the system. However, to help protect against the situation that occurred after the Supreme Court of Canada handed down the early unreasonable delay decision of *R v Askov*, [1990] 2 SCR 1199, where tens of thousands of criminal proceedings needed to be stayed, the Court built in a transitional exception test.

The transitional exception provides a means by which courts may assess the context of a matter to determine whether it is fair and reasonable in the circumstances to allow the prosecution to continue despite the presumptive ceiling being breached. Continued prosecution will be fair and reasonable when the Crown can prove that the parties were relying on the old *Morin* framework in moving the proceeding forward such that the presumption of unreasonable delay is suitably softened (*Jordan* at para 96).

In *R v Cody*, 2017 SCC 31 at para 70, the most recent decision from the Supreme Court of Canada on section 11(b),[11] the Court clarified that when considering the transitional circumstance exception for cases that were already in the system when *Jordan* was decided, courts must be mindful of factors such as prejudice to the accused and the seriousness of the offence. For cases occurring post-*Jordan*, these factors are addressed through the presumptive ceiling. However, for cases in the system pre-*Jordan*, these factors may have impacted how the parties moved the proceedings through the system and are therefore appropriate to consider in deciding whether a transitional exception should apply.

[11] Importantly, *Cody* was a unanimous decision of the Supreme Court of Canada that doubled down on the *Jordan* framework. Despite being invited by the Crown and various Attorney Generals to reconsider the holding in *Jordan* and alter the analytical framework, the Court was unanimous in upholding and reaffirming *Jordan*.

v. Delay Calculated Below the Presumptive Ceiling

While it will be rare,[12] *Jordan* allows for the possibility of a section 11(b) breach in circumstances where the net delay is below the presumptive ceiling of reasonableness. If the presumptive ceiling is not exceeded, a breach will nevertheless occur if the accused can show that:

1) S/he made a sustained effort to expedite the proceedings; and

2) The case took markedly longer than it reasonably should have (*Jordan* at paras 82-91).

In respect to the first element, the burden is on the defence to show that it "[a]ttempted to set the earliest possible hearing dates, was cooperative with and responsive to the Crown and the court, put the Crown on timely notice when delay was becoming a problem, and conducted all applications reasonably and expeditiously" (*Jordan* at para 85).

In respect to the second element, courts must consider various factors, including "[t]he complexity of the case, local considerations, and whether the Crown took reasonable steps to expedite the proceedings" (*Jordan* at para 87). Where the Crown has ensured that the matter proceeds expeditiously, the delay is not likely to be considered unreasonable (*Jordan* at para 90).

vi. The *Jordan* Framework Summarized

Instructively, the court in *R v Coulter*, 2016 ONCA 704, 32 CR (7th) 316, succinctly summarized the *Jordan* framework into the following eight considerations:

> 34 Calculate the **total delay**, which is the period from the charge to the actual or anticipated end of trial (Jordan, at para. 47).
>
> 35 Subtract **defence delay** from the total delay, which results in the "**Net Delay**" (Jordan, at para 66).
>
> 36 Compare the Net Delay to the presumptive ceiling (Jordan, at para. 66).
>
> 37 If the Net Delay exceeds the presumptive ceiling, it is presumptively unreasonable. To rebut the presumption, the Crown must establish the presence of **exceptional circumstances** (Jordan, para 47). If it cannot rebut the presumption, a stay will follow (Jordan, para

[12] At paragraph 83, the majority state that "(w)e expect says beneath the ceiling to be granted only in clear cases. As we have said, in setting the ceiling, we factored in the tolerance for reasonable institutional delay established in *Morin*, as well as the inherent needs and increased complexity of most cases."

47). In general, exceptional circumstances fall under two categories: **discrete events** and **particularly complex cases** (Jordan, para 71).

38 Subtract delay caused by discrete events from the Net Delay (leaving the "**Remaining Delay**") for the purpose of determining whether the presumptive ceiling has been reached (Jordan, para 75).

39 If the Remaining Delay exceeds the presumptive ceiling, the court must consider whether the case was particularly complex such that the time the case has taken is justified and the delay is reasonable (Jordan, at para 80).

40 If the **Remaining Delay falls below the presumptive ceiling**, the onus is on the defence to show that the delay is unreasonable (Jordan, para 48).

41 The new framework, including the presumptive ceiling, applies to cases already in the system when Jordan was released (the "**Transitional Cases**") (Jordan, para 96).

[Emphasis original].

IV. APPLICATION OF *JORDAN* FRAMEWORK – THE CASE LAW AND PRACTICAL ISSUES

All of the reported section 11(b) unreasonable delay applications to date that I was able to find are 'transitional cases' in the sense that they were already in the system at the time *Jordan* was handed down.[13] For your considerations, below are brief discussions of some of these cases.[14]

i. Supreme Court of Canada

a. *R v Cody*, 2017 SCC 31

If there was any doubt as to whether the *Jordan* framework was here to stay or whether the Supreme Court of Canada would balk at its ambitious new jurisprudence, those doubts were quelled with the handing down of *R v Cody*, 2017 SCC 31 [*Cody*]. Through *Cody*, the Supreme Court of Canada unanimously reaffirmed the *Jordan* decision and the *Jordan* framework.

In *Cody*, the accused was charged with two counts of possession of marijuana and cocaine for the purposes of trafficking, one count of possessing a prohibited weapon, and one count of possessing a

[13] At the time this paper was finalized, it was approximately 17 months since *Jordan* was handed down. Theoretically then, we are on the cusp of unreasonable delay applications being brought without the need to consider the transitional exception.

[14] I have not discussed all of the decisions post-*Jordan*. Instead, I have selected a number of decision from various courts that have issues I considered noteworthy (which is not to say others do not have noteworthy implications).

weapon when he was not supposed to (*Cody* at para 6). These were serious offences. The trial judge's decision pre-dated the release of the reasons in *Jordan*, and so the trial judge applied the *Morin* framework. The trial judge found that there was over 5 years of delay (60.5 months) and that there was 19 months of Crown attributed and institutional delay, exceeding the guidelines in *Morin*. The trial judge also found actual prejudice including mental distress, anxiety, and loss of employment due to strict bail conditions. In weighing the factors, the trial judge held that the accused's section 11(b) right was infringed and a stay of proceedings was entered. The Crown appealed.

While under reserve at the Newfoundland and Labrador Court of Appeal, *Jordan* was released. The majority of the Court of Appeal therefore applied the new *Jordan* framework to the issues and after finding a number of events to qualify as exceptional circumstances, held that the net delay was only 16 months, well below the presumptive ceiling. Accordingly, the Court of Appeal overturned the stay of proceedings and remitted the matter back for trial.

The Supreme Court of Canada overturned the Court of Appeal and reentered the stay of proceedings. The Court took the total delay of 60.5 months and subtracted 13 months of undisputed waived delay, leaving 47.5 months. The Court then subtracted a further 2.5 months of defence caused delay due to a change in counsel and a meritless recusal application.

Moving onto exceptional circumstances, 4.5 months was deducted due to delay caused by the accused's former counsel being appointed to the bench, leaving 39.5 months remaining.

There were three other periods of time, two relating to disclosure and one relating to an error in an agreed statement of facts, that if counted as exceptional would have brought the net delay below the presumptive ceiling. In respect to the first, the Crown argued that 3.5 months should be deducted because counsel for the accused refused to sign an undertaking regarding disclosure. The Court held, however, that the Crown failed to provide evidence that it took immediate steps to remedy the issue and therefore the circumstance did not meet the definition of exceptional.

In respect to the second, the Crown argued that 5 months should be deducted because a *McNeil* disclosure issue arose on the eve of the defence's *Charter* application. While the Court had sympathy for the Crown, it only deducted 2 months because 2 months after the issue arose, both defence counsel and the Crown were prepared to proceed, but could not due to there being systemic delay issues.

The third period of time related to an error in an agreed statement of facts that brought about a recusal application. While 2.5 months had already been deducted in this regard, the Crown argued that 5 additional months should be deducted as exceptional. While the Court acknowledged that a simple oversight might amount to an exceptional circumstance, the delay was a product of the pre-*Jordan* procedural failings. While the issue could have and should have been resolved in a day, 7.5 months of

delay resulted. In the end, the Court noted that regardless of whether this delay was counted as exceptional, the presumptive ceiling was still breached. The Court settled on 36.5 months of net delay, stating that the case was not particularly complex either.

The Court then went on to consider whether the transitional exception should apply, holding that it should not. The Court made clear that for transitional cases it must be *presumed* that that parties were relying on the state of the law prior to *Jordan*. The Court also clarified the relationship between the transitional exceptional circumstance and the *Morin* framework, with specific guidance as to how the seriousness of the offence and prejudice may be considered:

> 69 …The determination of whether delay in excess of the presumptive ceiling is justified on the basis of reliance on the law as it previously existed must be undertaken contextually and with due "sensitiv[ity] to the manner in which the previous framework was applied" (*Jordan*, at paras 96 and 98). Under the *Morin* framework, prejudice and seriousness of the offence "often played a decisive role in whether delay was unreasonable" (*Jordan*, at para 96). Additionally, some jurisdictions are plagued with significant and notorious institutional delays, which was considered under *Morin* as well (*Jordan*, at para 97; *Morin*, at pp. 799-800). For cases currently in the system, these considerations can inform whether any excess delay may be justified as reasonable (*Jordan*, at para 96).
>
> 70 It is important to clarify one aspect of these considerations. This Court's decision in *R. v. Williamson*, 2016 SCC 28, [2016] 1 S.C.R. 741 (S.C.C.), **should not** be read as discounting the important role that the seriousness of the offence and prejudice play under the transitional exceptional circumstance. The facts of *Williamson* were unusual, in that it involved a straightforward case and an accused person who made repeated efforts to expedite the proceedings, which efforts stood in contrast with the Crown's indifference (paras 26-29). Therefore, despite the seriousness of the offence and the absence of prejudice, the delay exceeding the ceiling could not be justified under the transitional exceptional circumstance. This highlights that the parties' general level of diligence may also be an important transitional consideration. But the bottom line is that all of these factors should be taken into consideration as appropriate in the circumstances.
>
> [emphasis added]

The Court in *Cody* ultimately imposed a stay of proceedings. The Court's reasoning in respect to exceptional circumstances shows that if the Crown is to be successful in proving an exceptional circumstance, it must bring forth evidence that it acted immediately and reasonably to rectify issues that arise that were unforeseeable.

It is also instructive to note the Court's discussion at paras 36-39 in respect to preventing delay. The Court once again stressed how important it is for all actors in our criminal justice system to remedy delay. The Court states that all participants share responsibility in proactively addressing and preventing issues of delay, and then goes on to suggest ways by which trial judges can be more interventionist to help transform delay plagued courtroom culture:

37 We reiterate the important role trial judges play in curtailing unnecessary delay and "changing courtroom culture" (Jordan, at para. 114). …

…

In scheduling, for example, a court may deny an adjournment request on the basis that it would result in unacceptably long delay, even where it would be deductible as defence delay.

38 In addition, trial judges should use their case management powers to minimize delay. For example, before permitting an application to proceed, a trial judge should consider whether it has a reasonable prospect of success. This may entail asking defence counsel to summarize the evidence it anticipates eliciting in the *voir dire* and, where that summary reveals no basis upon which the application could succeed, dismissing the application summarily (*R. v. Kutynec* (1992), 7 O.R. (3d) 277 (Ont. C.A.), at pp. 287-89; *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C. C.A.)). And, even where an application is permitted to proceed, a trial judge's screening function subsists: trial judges should not hesitate to summarily dismiss "applications and requests the moment it becomes apparent they are frivolous" (*Jordan*, at para 63). This screening function applies equally to Crown applications and requests. As a best practice, all counsel — Crown and defence — should take appropriate opportunities to ask trial judges to exercise such discretion.

39 Trial judges should also be active in suggesting ways to improve efficiency in the conduct of legitimate applications and motions, such as proceeding on a documentary record alone. This responsibility is shared with counsel.

ii. Select Saskatchewan Cases

a. *R v Smythe*, 2017 SKQB 86

The decision in *Smythe*, like in *Cody*, demonstrates the importance that Crown diligence plays in the exceptional circumstances analysis. If the Crown does not provide actual evidence of what steps it took to immediately address the discrete event, an exceptional circumstances cannot be made out. *Smythe* also confirms that barring something unusual (like a death or unexpected illness), Crown witnesses not showing up for trial does not amount to an exceptional circumstance.

The accused in *Smythe* was charged with six offences arising out of a motor vehicle accident. It took 59 months from the time the information was sworn to the end of trial. The Crown proceeded by indictment and so the presumptive ceiling was 30 months. Of the nearly 5 years of delay, the accused conceded that he was responsible for approximately 21 months. This resulted in net delay being 38 months, which was above the presumptive ceiling. Much of the delay resulted from the Crown twice adjourning scheduled trials.

To rebut the presumption, the Crown tried to argue that each time it adjourned a trial was a result of a discrete event. In respect to the first trial adjournment, the Crown argued it was a discrete event

because its key witness came forward with new relevant information sometime prior to trial. The defence did not consent to the adjournment and wanted to proceed forward, but the adjournment was granted anyways. The Court noted that while a witness recanting testimony in the middle of a trial resulting in the Crown needing to seek an adjournment may amount to an exceptional circumstance, this particular circumstance was not exceptional because: 1) the Crown did not provide evidence of when the witness came forward with the information (it certainly was not in the middle of trial) and/or what the information was; 2) the Crown did not explain how it attempted to mitigate the delay; 3) the defence did not consent to the adjournment and felt comfortable proceeding despite the late disclosure, which suggested that an adjournment was not necessary in the circumstances (*Smythe* at paras 34-35).

In respect to the second trial adjournment, the Crown argued it was a discrete event because it was unable to serve its key witness with a subpoena. The accused strongly resisted the adjournment request, but it was granted. The Crown suggested that the witness was attempting to avoid service. McMurtry J., however, refused to accept the Crown's argument noting that a witness not showing up for trial is not uncommon. She also noted that the Crown provided no evidence of the steps it took to serve the witness. (*Smythe* at paras 36-38).

Ultimately, the delay was found to be unreasonable and a stay was entered.

b. *R v McCullough*, 2017 SKQB 113

McCullough is an important decision that takes a position as to when the clock starts ticking for delay, holding that even if an Information has been formally laid, delay for the purposes of section 11(b) does not begin until the accused is actually arrested in relation to the Information.

In *McCullough*, an Information was laid on August 5, 2005 alleging sexual assault of a young girl. The accused, however, was not arrested until almost 10 years later on March 10, 2015. The trial was then scheduled for February 27, 2017. At the commencement of trial, the accused brought an application pursuant to, *inter alia*, section 11(b) of the *Charter*.

The Court rather quickly disposed of the section 11(b) *Charter* application, stating that delay in the case should only be counted from the time the accused was arrested. The Court noted that the actual time to bring the accused to trial after the arrest was only 24 months, well within the presumptive ceiling. The Court also noted that the police did everything they reasonable could have to locate the accused in that 10 year period even though they were unsuccessful. (see also *R v Moosomin*, 2017 SKQB 182 at

para 49 where time relating to a bench warrant for the arrest of one of the accused was not counted towards the delay).[15]

That said, see decisions such as *R v Nurse*, 2017 ONCJ 648 [*Nurse*] and the cases cited therein, including appellate authority. These cases clearly hold that the clock starts running once an Information is sworn. In my view, a more sound analytical approach within the *Jordan* framework would be the one suggested in *Nurse*, which is to analyze the delay between the laying of the Information and the arrest to determine whether it should constitute a discrete event.

c. *R v Mullen*, 2017 SKQB 237

In *Mullen*, the accused was charged with murder and after lengthy delays, offered a guilty plea on a bargain to manslaughter. The Court accepted the plea and set a sentencing hearing. Thereafter, *Jordan* was handed down and the accused argued his section 11(b) right was breached as a result of the new presumptive ceilings.

Mullen is an interesting case due to the fact that the Crown conceded that the delay in the case exceeded the 30 month ceiling, yet the Court held that because the accused did not provide any detail regarding the proceedings as they made their way towards trial and the reasons for any of the delay, the Court was unable to assess the transitional exception requirement. As a result, and because the burden was on the accused to establish on a balance of probabilities a *Charter* breach, the Court ultimately held that the accused did not establish a breach.

This case is a caution that accused individuals wishing to bring a section 11(b) *Charter* application must, as a threshold issue, provide enough detail to allow the judge to properly consider all stages of the *Jordan* framework. Even though the Crown may concede that the presumptive ceiling is breached, *Mullen* stands for the proposition that if an accused fails to provide the court with evidence of the proceedings and context for those proceedings, the application can still fail.

I query whether the circumstances of this case, namely that the accused already offered a guilty plea to a very serious offence, filtered into the application judge's analysis of the issues. In my view, if the Crown concedes a breach of the presumptive ceiling, *Jordan* states that the burden shifts to the Crown to establish an exceptional circumstance, of which a transitional exception is one. Therefore, in this case, I would argue that it was for the Crown to bring forward the context if it wished to rely on the transitional exception, and if it failed to do so, then a breach should have followed and a stay of proceedings should have been entered.

[15] There were three accused in *Moosomin*, and after assessing the delay the application judge held that all three fell below the presumptive ceiling of reasonableness. The application was therefore dismissed.

(Compare a similar, but not identical, issue in *R v Bialski*, 2017 SKQB 17, where the unreasonable delay issue was raised for the first time on appeal. Here, the Court refused to entertain the application due to the fact that there was not a proper evidentiary foundation for the issues rendering it inappropriate to decide for the first time on appeal).

d. *R v Pastuch*, 2017 SKQB 211

Pastuch is a case where there were both discrete events and complexity issues, thereby rendering presumptively unreasonable delay reasonable. Elson J. found there to be 34 months of net delay rendering the case presumptively unreasonable. He then went on to consider exceptional circumstances.

In respect to complexity, he noted that *Pastuch* was a fraud case involving 36 complainants, at least one expert witness, voluminous disclosure requiring months to review, a 9 week preliminary hearing (scheduled, but ultimately not held), and an approximate 3 month trial. Elson J. found these to be the "hallmarks" of complexity identified in *Jordan* that would render a delay above the presumptive ceiling as being reasonable.

In respect to discrete events, Elson J. found that Legal Aid Saskatchewan did not properly handle the case. While he held that this could not be counted as defence caused delay, in his view it was a discrete event because the Crown could not foresee that Legal Aid Saskatchewan would act in the manner it did. In addition, Elson J. held the Crown could not be faulted for not intervening due to the fact that our system of justice is an adversarial one, thereby creating boundaries for counsel. In the end, Elson J. deducted 6.5 months of delay to arrive at 27.5 months, which was below the presumptive ceiling.

e. *R v Trinh*, 2016 SKQB 376

Trinh was a drug case decided shortly after *Jordan* was handed down. It involved 42 months of net delay. A stay of proceedings was imposed.

Elson J. held that the process of waiver of a guilty plea to another jurisdiction is not an unknown or unforeseeable process for the Crown, and therefore the delay that results therefrom does not amount to an exceptional circumstance. In addition, the Crown tried to argue for a transitional exception on the basis of an alleged lack of prejudice to the accused, however Elson J. refused to apply the exception noting that there was prejudice and, in any event, he did not believe this type of prejudice based argument was open to the Crown in respect to the transitional exception framework.

(But see *Cody*, where the Supreme Court of Canada clarifies that prejudice issues can be considered at this stage of analysis, though the prejudice or absence thereof must relate to the parties reliance on the previous state of the law).

f. *R v Lemioer*, 2017 SKQB 106

Like *Trinh*, *Lemioer* is a section 11(b) case concerning an accused charged with serious drug offences (10 counts in total) and is a decision of Elson J. The case demonstrates, *inter alia*, that even if a case is complex such that a small amount of time over the presumptive ceiling could be justified, a lengthy delay beyond the presumptive ceiling might not be justified.

In *Lemioer*, the total delay was just shy of 49 months. 2 months of delay was found to be attributable to the accused due to a change in counsel, resulting in net delay being just shy of 47 months. In entering a stay of proceedings, Elson J. noted "(e)ven if I were to accept that the complexity of the case, with the volume of disclosed documents, the multiple accused and the 15 Crown witnesses, would justify a delay exceeding the presumptive ceiling, the delay involved in this case is simply too long."

g. *R v Keller*, 2016 SKQB 319

Keller was one of the first decisions from our Court of Queen's Bench that considered *Jordan*. *Keller* was an appeal by the Crown from a stay of proceedings entered under the *Morin* framework. Layh J., in applying both the *Morin* framework and the *Jordan* framework, upheld the decision to enter stay of proceedings.

Interestingly, *Keller* was a case where the delay was .5 months **below** the presumptive ceiling (net delay was 17.5 months). As such, it provides an example of a "clear case" where there is a breach of section 11(b) but not a breach of the presumptive ceiling. The Court noted that the case was not complex, requiring only a 1 day hearing and that therefore the case took markedly longer than what was reasonably required (at para 53). The Court also found that the accused attempted to expedite matters, although this obligation did not necessarily arise in the circumstances due to the fact that the proceedings ended prior to *Jordan* being handed down.

(Compare *R v McNab*, 2016 SKQB 333 where 26.5 months of delay in an aggravated assault case that was tried in the Court of Queen's Bench after a preliminary hearing case was found to not markedly exceed what was reasonable. In addition, there was no evidence of defence counsel trying to expedite matters).

h. *R v Boehmer*, 2017 SKQB 328

Boehmer stands for the proposition that an accused's decision to retain numerous different successive legal counsel resulting in delay can amount to an exceptional circumstance.

In *Boehmer*, the net delay was found to be 35.5 months. However, over the course of the proceedings, the accused engaged 4 different and successive legal counsel, leading to adjournments of the preliminary hearing and the trial date (as well as other delays). The Court stated:

> 31 …In my view, engaging four successive legal counsel is, in itself, an exceptional circumstance given the unexceptional nature of the charges. Axiomatically, processing a criminal charge when four successive lawyers have been retained, each having to be instructed by the accused, and each having to familiarize himself with the file an to accommodate new dates, militates against a speedy trial.

i. *R v Park*, 2016 SKPC 137

A nice contrasting case to *Boehmer* is *Park*. In *Park*, the accused took time to retain counsel and the Crown argued that much of this time should be defence caused delay. The Court, however, held that so long as attempts to retain counsel are legitimate, they should not be deemed defence caused delay. While the Court noted that in some circumstances an accused may purposely delay a proceeding by not giving best efforts to hire a lawyer, there was no evidence of that in this case (at para 37).

The accused was charged with various drinking and driving offences as well as a later charge of failure to appear. Both were summary matters. Net delay on the drinking and driving offences was just shy of 20 months and above the presumptive ceiling of 18 months. There were no exceptional circumstances.

iii. Select Case Law from Other Jurisdictions

a. *R v Mamouni*, 2017 ABCA 347

In *Marnouni*, a recent decision from the Alberta Court of Appeal decision, the Court held that when there is a lengthy delay in a trial judge preparing written reasons, and that delay is caused by the complexity of the evidence and counsel's arguments, this delay can constitute an exceptional circumstance.

Slatter J.A., however, would have went further, not counting this time period as delay at all. Slatter J.A. reasoned that delay should only be used to describe passages of time that exceed the amount of time that would be considered reasonable in the circumstances to bring a case to its conclusion (at para 74). In Slatter J.A.'s view, the time by which the trial judge took to render a decision in all the circumstances was reasonable. In my respectful view, Slatter J.A.'s reasoning here is largely semantics and at worst waters down the *Jordan* framework. Indeed, Slatter J.A.'s concurring opinion in general seems to be an attempt to morph the spirit and intent of *Jordan* by parsing words in the decision to allow courts ways around the stresses of presumptive ceilings.

b. *R v Kemp*, 2017 ONCA 703

In *Kemp*, the accused was convicted for possession and trafficking of narcotics.[16] He brought a section 11(b) application for a stay of proceedings under the *Morin* framework, which was dismissed. The matter proceeded and the accused was found guilty; however, prior to sentencing, *Jordan* was released and so the accused brought a second section 11(b) application, this time under the *Jordan* framework. This application was also dismissed and the accused appealed.

The Court of Appeal stated that even if the presumptive ceiling was exceeded and there were no exceptional circumstances, the transitional exception applied. The Court reasoned that since the transitional exception considers the parties' reliance on the law pre-*Jordan*, or in other words under the *Morin* framework, it would be very rare for a case found reasonable under *Morin* to be found unreasonable under *Jordan*.

Cases such as this, in my view, expose one of the fundamental issues with lower court approaches the transitional exception. The implication from this line of reasoning is that in analyzing the transitional exception, one is really just applying the *Morin* framework. However, had the Supreme Court of Canada intended for transitional cases to in the end be distilled down to a *Morin* analysis, it could have simply directed that cases already in the system apply the *Morin* framework. Of course, the Court did no such thing, suggesting that the transitional exception should not be an application of the *Morin* framework, but should instead add something of independent value to an analysis where the context is a finding of delay already rendered unreasonable under *Jordan*.

c. *R v Phan*, 2017 ONSC 1308

Phan is a superior court case out of Ontario where the accused was charged with murder. The delay in the case exceeded the presumptive ceiling by 1.5 months, so the Court needed to consider a transitional exception. The Court held that because the delay barely exceeded the presumptive ceiling, the Crown did not create any unnecessary delay, and the application for a stay arrived late in the proceedings thus demonstrating reliance on the previous state of the law, a transitional exception was appropriate.

Interestingly, after this *Jordan* analysis, the Court conducted a *Morin* analysis and held that it would have denied the application under *Morin* as well. Again, in my respectful view, this is an odd and improper way to approach delay issues even in transitional cases.

[16] *R v Kemp*, 2017 ONCA 703 at para 1.

d. *R v Ny*, 2016 ONSC 8031

Ny was a case where there were multiple co-accused alleged to have engaged in a large scale marijuana grow-op. After 3.5 years into the proceedings, two of the co-accuseds were severed. After four years of delay and the handing down of *Jordan*, the two severed co-accused brought applications alleging a breach of section 11(b). After attributing delay to the defence, there was still approximately 46 months of net delay.

The Crown attempted to justify the delay on the basis of complexity, noting issues that arise from there being multiple co-accuseds. However, and while the Court was careful to note that exceptional circumstances can arise from multiple co-accused situations, the Court rejected the argument, noting that the nearly 46 months of delay was simply too long in the circumstances (at para 44).

V. ADDITONAL IMPLICATIONS TO CONSIDER

Jordan has changed the way by which cases are moved through our criminal justice system and has, by intellectual force, placed increased demands on lawyers, judges, and governments in trying to mitigate delay. As discovered through a review of the above case law, courts are sifting through some of the delay issues in transitional cases. At the same time, judges and lawyers on the front lines are trying to find ways to handle the new pressures imposed by the presumptive ceilings in *Jordan*.

To conclude this paper, I want to review some of the administrative and practical changes currently occurring as well as raise, though not necessarily answer, some potential issues arising out of *Jordan*. In respect to the former, the information provided is mostly based on experience and anecdote. Each individual counsel may, and likely will, have different and/or additional experiences compared to those listed here.

i. Notable Practice Changes

Since *Jordan*, it appears that judges are more hands on in docket court, asking more questions of counsel and showing pause to adjournment requests, even on matters that are relatively new in the system. Since *Cody*, arguably judges have become even more interventionist, which is in line with the Supreme Court of Canada's directions.

Currently, the Provincial Court in Regina has implemented a file flagging system meant to inform a judge of when certain matters are becoming dated. When adjournments are requested on a matter that is flagged, judges will typically dig deeper into the reasons behind an adjournment and will suggest that delay be waived by defence counsel.

A matter does not need to be flagged before a judge will ask defence counsel to waive delay. Indeed, some judges will ask defence counsel whether she or he is willing to waive delay on matters that are relatively new to the system. A request to waive delay typically follows when counsel asks for an adjournment longer than two or three weeks. Judges do not like to give longer adjournments unless there is a clear reason for needing a longer adjournment (for e.g., if a piece of disclosure requested will not be ready until 5 or 6 weeks in the future, some judges will suggest a longer adjournment to prevent unnecessary appearances and help prevent clogging up the docket).

As far as a the culture of delay is concerned, some judges have expressed concern that, in the Regina jurisdiction, counsel use adjournment dates as a diary system, choosing to only review a matter the day before the scheduled appearance rather than working on the file throughout the adjournment period. A concern remains that *Jordan* has not changed this part of practice and that additional pressure is placed on the courts when this occurs.

At a government level, the Crown has begun issuing Crown Caution Letters. Without the need for an appearance, the Crown can send a letter to the accused indicating that although the Crown believes there are sufficient grounds to prosecute, a stay of proceedings will be entered. The letter operates as a warning and indicates that the Crown will keep a record of the proceedings so that if the accused is ever charged again, that record will be considered in determine whether to prosecute. I understand the letters are meant to typically be used early on in the process for more minor matters. This is one way by which the Crown can help reduce pressure within the system yet at the same time adequately address an alleged criminal offence.

ii. New Trial Delay

In the future, courts, including eventually the Supreme Court of Canada, are going to have to square the *Jordan* framework with cases where new trials are ordered after an appeal. *Jordan* is silent as to how new trial delay is to be considered.

There are some cases that have considered the issue of appellate delay in the post-*Jordan* era. Some of the cases note how appellate delay was treated pre-*Jordan* (see e.g. *R v Windibank*, 2017 ONSC 855 and the cases cited at note 40). Pre-*Jordan*, while there was some disagreement in the jurisprudence, the theory which gained the most traction is that new trial delay should be added onto the initial trial delay in considering section 11(b) applications (see e.g. *R v Barros*, 2014 ABCA 367 at paras 51-53, 584 AR 362).

There are also cases that are now squarely addressing the issue: *R v Ferstle*, 2017 ABPC 266; *R v Richard*, 2017 MBQB 11, 375 CRR (2d) 61; *R v Bowers*, 2017 NSPC 21; *Gakmakge v R*, 2017 QCCS 3279. These cases all suggest that the previous constitutional jurisprudence regarding section 11(b) and

appellate/new trial delay is not helpful now that we have presumptive ceilings under *Jordan*. The courts then hold that new trial delay should not be tacked onto the initial trial delay and instead go on to consider whether the delay in respect to the second trial was reasonable on its own.

That said, in my view, the analysis by these courts in respect to new trial delay is largely unprincipled and does not mirror the presumptive ceiling framework offered by *Jordan*. While not tacking on new trial delay may in the end be the sound solution, courts should look to find ways to use the same principles articulated in *Jordan* in a new trial analysis. Perhaps presumptive ceilings in respect to new trials will need to be set.

Or, perhaps, other courts will look to the pre-*Jordan* appellate delay jurisprudence to find a more principled approach to applying the *Jordan* framework to new trial delay. After all, I note again from *Jordan* that the Court sees the presumptive ceilings as the outer most bounds of reasonable, leaving open the possibility of shortening the timelines once the system adapts to the new pressures. As evident from *Cody*, the Court is not prepared to abandon its new ambitions to rid our criminal justice system of unreasonable delay. Amongst this backdrop, it would not be inconsistent for the Court to say that new trial delay should be tacked onto the initial delay. After all, all of the negative consequences that flow from delay are still present if there is a new trial ordered. Victim pain and suffering is still exacerbated. Witnesses' memories fade. Public confidence wanes. If the parties know that the presumptive ceiling exists throughout the lifetime of the prosecution, be it on an initial trial and/or a new trial, judges, prosecutors and the government may find themselves even more motivated to get serious about delay.

iii. Alternative Remedies?

As of a right now, a stay of proceedings is not only a remedy available to a Court upon a finding of unreasonable delay, it is the mandatory remedy. The theory as to why this is the case was first articulated by Lamer J. (as he then was) in *Mills* in dissent. Lamer J. reasoned that when there is unreasonable delay, the court actually loses jurisdiction and therefore a stay of proceedings must be entered.

Caldwell J.A. aptly summarized the law in this regard in *R v Pidskalny*, 2013 SKCA 74 at paras 49-50, 417 Sask R 124:

> 49 In the early days of *Charter* jurisprudence under s. 11(b), Lamer J. (as he then was) said a stay of proceedings is the minimum remedy which a court may impose when it has made a finding of unreasonable delay (*R. v. Mills* [1986] CarswellOnt 1716 (S.C.C.)], per Lamer J. (in dissent); see also: *R. v. Rahey*, where a majority of the Court held that a judicial stay is the appropriate remedy when there is a breach of s. 11(b); and see: *R. v. Steele*, 2012 ONCA 383, 288 C.C.C. (3d) 255 (Ont. C.A.), at paras. 30-33, and *R. v. W. (R.E.)*, 2011 NSCA 18, 268 C.C.C. (3d) 557 (N.S. C.A.), at para 75). The Crown has suggested that the word 'minimum' is used here merely as a method of

> characterization and is not necessarily the law; but, this is not so. **The law is clear: a stay of proceedings is the minimum remedy for a breach of s. 11(b) of the *Charter*.**
>
> 50 The theory which underpins this is that anytime there has been a breach of s. 11(b) of the *Charter* there has been a loss of jurisdiction (see: *R. v. Rahey*, *R. v. Mills*, *R. v. Steele*, and *R. v. Bennett* (1991), 3 O.R. (3d) 193 (Ont. C.A.), per Arbour J.A. (as she then was)). For the purposes of these reasons, I need not examine the merits of the theory at any length (others have done that); rather, I need only recognize that it is the theory currently accepted by the Supreme Court of Canada. **The theory plays out such that because there has been a loss of jurisdiction, the presiding court has no choice but to impose a stay of proceedings. This suggests that a stay of proceedings is not only the minimum remedy but it is the mandatory remedy whenever a court has made a finding of unreasonable delay in breach of s. 11(b) of the *Charter*.**
>
> [emphasis added; footnotes omitted]

In *Jordan*, however, the majority decision seemed to leave open the possibility of revisiting this issue in a future case. While a stay of proceedings was ultimately imposed in *Jordan*, in a footnote to paragraph 35, the majority expressly noted that it was not invited to reconsider the issue of whether a stay is the only remedy available, and therefore declined from doing so. In the future, however, this may be something that the Court is invited to consider and may result in other remedies being available (although the Court will need to develop a new theory that could support, or build upon the existing theory to support, alternative remedies).

That said, it is notable that the Court did not revisit the issue in its most recent decision of *Cody*, choosing instead to impose a stay of proceedings without further comment.

iv. The Issue of Waiver - Necessary Release Valve or Instrument Feeding Unreasonable Delay

In my view, there is a potential conflict that arises between the current pressures placed on defence counsel to waive delay and principles that underpin the purposes of section 11(b). At this time, it seems as though the major release valve in the post-*Jordan* criminal justice system, a system that is struggling to adapt to the timelines in *Jordan*, is the defence waiving delay. When pressure mounts, courts resort to asking the defence to waive delay and so does the Crown. Defence counsel too resorts to it, especially when in need of a longer adjournment. In turn, the phrase "defence will waive delay" is met with an almost palpable sigh of relief by the parties and the judiciary. Once the phrase is said, everyone seems content. The heavy *Jordan* pressure can be forgotten about for the time period waived.

That said, this waiver does nothing, in my respectful view, to uphold the underlying principles that inform the purposes of section 11(b). Indeed, it could be argued that it is antithetical to the purpose, especially amongst a system pressured by timelines meant to force all participants in the criminal justice system to get serious about delay, share responsibility in remedying delay, and work on ways to reduce delay.

An examination of the impact that defence waived delay has on participants in our criminal justice system will help illustrate the point. At its best, defence waiving delay might rid ourselves of concerns (at least in part) of the negative implications that delay has on the accused. Arguably, the accused cannot complain of the prejudice that flows to her or him that results from waived delay. This line, however, is not a bright one. After all, it is now acknowledged that prejudice actually exists as a result of delay. Prejudice is inferred from delay. But if defence counsel is to waive delay for practical reasons and/or because the Court or Crown demands as much to obtain an adjournment, does this somehow transform what would have been delay creating prejudice into some other kind of delay that no longer creates that same prejudice? Going further, does the delay not still have the negative impact on fair trial considerations?

Moving on to perhaps the easier argument, let us consider all the other negative implications the Supreme Court of Canada bemoaned in *Jordan* in relation to those who are not the accused. Do victims and their families enjoy any solace in the fact that the delay is characterized as waived delay? Is their pain and suffering not still aggravated by the delay? Is their trauma and sorrow not still exacerbated?

How about the public's confidence in the administration of justice. Is it not still undermined even though the delay is characterized as waived by the accused?

What about witnesses. Are their negative emotions in respect to the allegations not still aggravated by the delay? Do their memories not still fade over time?

In my respectful view, overuse and over-demanded defence waived delay is a practical implication of *Jordan* that is eroding the fundamental purposes and principles of the right to be tried within a reasonable time. Currently, it appears to be the quick release valve to fend off notions of unreasonable delay. But quick fixes are not what the Supreme Court of Canada demanded in *Jordan*. The Court demanded a cultural shift. And, in my view, the cultural shift envisioned by the Supreme Court of Canada is impeded by reliance on and resort to quick fixes.